

PROVINCIAL OFFENCES COURT

HER MAJESTY THE QUEEN

against

RICHARD BEZINA

APPEAL APPLICATION PROCEEDINGS

BEFORE HIS HONOUR T. WILDER
on August 3, 1990, at BRAMPTON, Ontario

APPEARANCES:

C. Syme, Ms.

Counsel for the Crown

S. Parker, Esq.

Agent appearing for the defendant

ONTARIO COURT (PROVINCIAL DIVISION)

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Friday
August 31, 1990

MS. SYMS: 30 and 31, Richard Bezina.

MR. PARKER: Yes. Good morning, Your Honour. My name is Parker, initial, S. I appear as agent on behalf of the appellant who is absent today.

THE COURT: Yes. All right. This would be the matter of the accident and the fail to report it.

MR. PARKER: That's correct, Your Honour. There are several issues that I must bring to Your Honour's attention. Firstly, page four at line eight, where the officer is giving evidence in-chief. "Upon information received it was determined that Richard Bezina, the defendant before the court had the vehicle." I would submit with respect to that, it is hear-say evidence. It should have never have been admitted.

THE COURT: Well, that doesn't go to the proof that he was the owner of the vehicle, but certainly there was a follow-up investigation in which Mr. Bezina in fact, acknowledged that he was the operator.

MR. PARKER: Correct. However, in accordance with R. vs. Farrin, that identification, in the absence of any other identification of who was driving at the time, should have been subject to a voir dire, regardless of whether the statement that was subsequently the subject of a voir dire--the statement of the circumstances, that should have come after a voir dire or be included in a voir dire as to the identification of the driver--as to who was the driver at the time.

THE COURT: Which part should have been subject to a voir dire, did you say?

MR. PARKER: The aspect establishing that, who was the driver of the vehicle at the time.

In accordance--sorry, I'm going to have to hand you copies in a moment. There was a proceeding before His Honour Judge Langdon in this courtroom on December the 14th of 1987, indicating that, where the only evidence as to who the driver was--only admissible evidence, would have come from a confession or statement from the defendant or accused; and that is a form of confession, although it may be highly inconvenient, it has to be answered after a voir dire. There is no exception to that principle. I have a copy of that matter. I believe my friend is familiar with that...

MS. SYMS: But, I don't understand how it could--it would be admissible anyways. The Crown's submission is, that information requires the officer's reason for a probable grounds...

THE COURT: Yes.

MS. SYMS: ...He's gathering information, then goes and approaches the accused himself. There had been no question of a voir dire at this point because the officer gets the information, not from the accused, but from the accused's brother and it's hearsay, but hearsay is admissible when it is going to the issue of reasonable and probable grounds.

THE COURT: That is exactly correct and there is also a second issue. When there is an accident, the officer has an obligation to obtain particulars for the registrar.

5 MR. PARKER: That is correct, and His Honour Judge Langdon makes reference to that in the process of that very particular appeal. But once it may have been made an order for the officer to establish who had the vehicle, the fact that it was introduced into evidence, I would still submit, to be improper. It would be in order for the officer to say, "Upon information received, I later interviewed Richard Bezina."

10 THE COURT: Well, he gets information as to who is the driver which creates reasonable and probable grounds and as a result of receiving that information, which he interceded, he does something. Now, where do you say the voir dire-- direct me to the transcript at what point you say a voir dire should have been required.

15 MR. PARKER: Well, he re-attends--in that same paragraph, on page 40, re-attends the address on Claypine Rise and the officers evidence is at that point, Richard Bezina identified himself with a valid Ontario Driver's Licence.

20 THE COURT: What page are you referring to?

MR. PARKER: Page four.

THE COURT: Page four.

25 MR. PARKER: It is the officer saying that Mr. Bezina was standing at the front door, waving a licence in the air and presented it to the officer as soon as he came in. How was it presented? How was the identification achieved? There is no evidence of that. He just says he identified himself. As a result of what?

30 THE COURT: All it says there is, he identified

himself. He did something--where...

MR. PARKER: But I would submit that, that...

THE COURT: ...where does it say that, at this stage, if he was asking questions which should have given rise to a voir dire? I am, perhaps, missing something.

MR. PARKER: I would submit, that what is missing, is the...

THE COURT: If you go to the police station and give an officer some information, why does he have to warn you at that time?

MR. PARKER: It depends on what the information is.

THE COURT: And, what law do you rely on in that statement?

MR. PARKER: If the--as the Farria case, in that Judge Langdon indicated, if the information as to, or the identification as to the driver, is purely from the statement of the accused, then that is subject to a voir dire, regardless of the requirements under the Highway Traffic Act for reporting purposes.

Anyway, to continue on from that issue, Your Honour. That aspect concerning the actual careless driving, the officer--sorry, carrying on from the officer's evidence. His Worship asked a question of the officer, which I would submit does not come under the--clarifying a particular point, at page 17, line 30: "You talk about the damage. You said, 'extensive'. Could you put a dollar figure on it?" It would be my submission since no estimate came, in chief examination or

cross examination, then that was not for the Justice to ask for a value of any particular damage. The defendant then testifies, and in cross examination, which is at page--first of all, at page 26, the prosecutor cross-exams the defendant concerning consumption of alcohol. And, that is the first mention made, the officer has not made any mention of any consumption of alcohol at all. That's to keep in mine at this stage, Your Honour. And, at the bottom of page 28, at line 28, because the evidence of Mr. Bezina is that, he fell asleep or dozed off at that crucial point when--and as a result of that, the car left the road. He is cross examined and was asked, "Was there any signs of fatigue or yawning?", and he responded, "No. To be honest with you, it happened suddenly. Everything happened fast, really fast." Now we are at the top of page 29: "You had no prior warning then?" "No." "That you were falling asleep?" "I just dozed off."

Now, in His Worship's ruling at page 30, at line 25, His Worship made reference to the fact: "And, of course, we all know that the charge of careless driving must be proven beyond a reasonable doubt by the Crown."

And at page 31, he makes reference to something about the officer--line 20: "He went off duty of course, at six." Where His Worship achieved that statement, doesn't appear anywhere in anyone's evidence. Then at page 32,

Line 24:

"I think that the Crown has proved a prima facie case." When previously, he is indicating that, of course, that the Crown must prove beyond a reasonable doubt.

An agent for the defendant, at the time, Mr. Nevons, asked for some clarification from His Worship, concerning the fact that sleepiness is not a defense to careless driving. His Worship then responded:

"I'm saying that he may have fallen asleep, and I'm taking--there is an inference that, because of the alcohol he consumed at the party, that it put him to sleep." And further on at page--the same page, at line 13:

"I'm satisfied that the Crown has made out a prima facie case." And then he goes on...

THE COURT: What page are you referring to now?

MR. PARKER: Page 33. I would submit, that the Justice was in error, when effected in law, concerning his comment that, taking an inference because of the alcohol that he supposedly consumed. I don't have a full reading of the

case, but there is an extract headnote of a matter of Regina vs. Masters, from a research memorandum.

THE COURT: Perhaps you can deal with this though; The accused admits he fell asleep.

MR. PARKER: Yes.

THE COURT: So, does it really matter of what the cause of falling asleep is?

MR. PARKER: Well, it--yes, it could be because--there is a case of Regina vs. Verma, from Alberta

Court of Queen's Bench. It involved a charge of dangerous driving. However, upon the headnote it was held that the appeal's were allowed in part

...

THE COURT: Which case are you referring to now?

MR. PARKER: Regina vs. Verma. V-E-R-M-A.

THE COURT: Do you have that case with you?

MR. PARKER: I have a copy--one copy left. If you will excuse my hi-liting. That is cited at, 9-Motor Vehicle Reports, page 150. Literally, if the headnote says that, "Unless there is some evidence to show that there was some warning of fatigue or tiredness, that the fact that the person fell asleep or dozed off, does not make it dangerous driving." And, I would submit therefore, that the same principle should apply to a charge of careless driving. And, there is clear evidence, in fact by cross-examination by the prosecutor, that the defendant had no warning at the time. And, apart from that aspect concerning the inference as to the consumption of alcohol, the principle in Regina vs. Masters is that, although there was mention of the consumption of alcohol by the accused, the Crown offered no evidence to suggest a connection between the alcohol consumption and the resulting accident. The court stated that, if there was such a connection, it ought to have been proved. And, if there was no connection, no record should have been made for the accused "drinking", and the appeal was allowed from the conviction of the careless driving on that basis--partly

on that basis. And, His Worship made reference to consumption of alcohol when there was nothing in the evidence of the Crown's case to make any connection.

The appeal, basically, Your Worship would be-- Your Honour, I beg your pardon--centred around the careless driving conviction rather than the failing to report, and as such would ask you to find, that in course of the issues that have been brought to your attention, supported by the cases for your perusal, I would ask you to overturn the conviction at this point.

Thank you very much.

THE COURT: Can I hear from the Crown.

MS. SYMS: I still don't understand what the objection was with the officer indicating that the person whom he spoke with, on page 4, when he re-attends, identified himself as Richard Bezina with a valid driver's licence. The officer is not indicating that he identified himself as the driver, he is just telling the court, "the person who I spoke with, proved to me that they were this person because they produced their driver's licence." There is no reason why that should have been subject to a voir dire. With respect to the Justice of the Peace asking for a dollar figure on damages, I don't believe the issue of damages is particularly relevant and it would have no bearing on the outcome.

THE COURT: Except, isn't there a financial criteria with respect to an obligation to report?

MS. SYMS: Other than that, it is clear that...

THE COURT: Although, there was evidence that there was some damage done to the public property, and this creates an obligation to report, in any event, no matter what the damage is.

MS. SYMS: But clearly the \$8,000. isn't being used by the Justice of the Peace to make any inference as to force of the collision or anything like that. He is not making any improper use of the damage. It is the Crown's submission, quite clearly the accused is subject to full cross-examination and that can include what he was doing that night and whether or not he had consumed alcohol. It doesn't have to be first addressed in the Crown's case, but indeed it is hard to see how it could be, when the officer doesn't have any dealings with the accused until the next day, some time after the incident. My concern, sir, is with respect to His Worship's ruling when he makes reference to a prima facie case. He quite clearly indicates that the burden is on the Crown and the burden is proof beyond a reasonable doubt. My concern is, what effect, if any, he has been subsequent in reference to have satisfied the Crown has made out a prima facie case, whether it has been...

THE COURT: What does prima facie case mean though?

MS. SYMS: Mis-directed himself in law.

THE COURT: Doesn't that mean, on the balance of probabilities? Isn't that a prima facie case?

MS. SYMS: That's correct. That there is some evidence in respect of all the essential elements.

THE COURT: But, that is far from beyond a reasonable doubt.

MS. SYMS: That's correct, and that is my concern. Does the--his referring to prima facie case at that point, has he mis-directed himself with the burden or is he just--was it a slip of the tongue? There is no way of knowing. Yet he knows what the burden is. Is that what he means to apply or does he mean to apply a prima facie case?

I would suggest to Your Honour, that his ultimate finding of guilt is supported by the evidence that he had before him and I would ask Your Honour to find that there is no mis-carriage of justice.

THE COURT: I am going to reserve--I am going to review the transcripts again, especially the items that have been referred to me by agent and counsel, and I will hold my decision down until later in the morning. I am going to take a recess at this stage. After the recess I propose to give my decision in the criminal matter and then I propose to review the transcripts of this, after that time, so I won't be giving a decision in this matter until after the lunch hour--until after two o'clock.

REPORTER'S NOTE: The morning recess is taken at this time, then other matters are dealt with. Upon resuming after the luncheon recess, at 2:06 p.m., one matter is dealt with and then the court returns to the matter of Richard Bezina, approximately 2:30 p.m.

MR. SYMS: 30 and 31, Richard Bezina.

MR. PARKER: Good afternoon, Your Honour.

RULING

WOLDER, P.C.J. (Orally):

Yes. Now, does either party want to make any further submissions before I rule on the matter?

MS. SYMS: No, Your Honour.

I have considered the transcript and the evidence, and the submissions made by counsel and by agent. Dealing first with the issue of the voir dire. I cannot accept the submission made on behalf of the accused, that any statements he made were not voluntarily made and there should have been a voir dire. It is clear, on page four of the transcript--the evidence on page four says:

"Still on July the 15th, 1989, at 10:45 p.m., I re-attended at 4200 Claypine Rise, Mississauga. Richard Bezina identified himself with a valid Ontario Driver's Licence, B2996-65506-60915, Class "G" for Ontario."

Then at that stage, it doesn't say he is a driver. All he knows is that he is speaking to a person called, Richard Bezina, and that's all he knows. Then at that stage, he goes on. He says: "I subsequently informed Mr. Bezina, it was his right"--and then the court deals with a voir dire. On page five it stated:

"And Mr. Bezina acknowledges to me, that he received them"--it says, "A caution was given to Mr. Bezina, and Mr. Bezina acknowledges to me that he received them." I don't think we need to go any further on the voir dire. The statement was voluntary. So, there was a waiver at that time--expressed waiver, at the statement, from the time that Richard Bezina identified himself as Richard

Bezina, and all that statement was voluntary.

5 That waiver was never retracted at any stage and
I find that all of the evidence that was given
after that time, did not require a voir dire and
was acknowledged and admitted to be voluntary; and
it is too late at the time of appeal, to try to
retract that. However, there is a more serious
10 issue, and that's the issue of whether the facts--
the evidence before the court--on the evidence
before the court, the Justice of the Peace could
reasonably come to the conclusion that the conduct
did constitute careless driving. I have reviewed
the note of the case on Martens, reported in 1980,
Ontario District Court, Criminal, submitted to me
15 by agent, and also the case of Regina and Verma,
decision of the Alberta Court of Queen's Bench,
reported at 9 Motor Vehicle Reports at page 150.
The issue the court has to determine is, under the
facts of this case, as the falling asleep by the
accused, is that sufficient for the court to find
20 that he was driving carelessly. For that purpose,
I reviewed all the evidence that is on the issue
with respect to his falling asleep. First, on page
14 of the transcript, in the evidence of Constable
Foster, in his cross examination:

25 Question: "Didn't indicate that he had been
nodding off or anything of that nature, prior to
actually falling asleep, did he?"

Answer: "Only that he was tired at the party."

Then at line 23:

30 Question: "That he was tired? That he admitted
that he fell asleep?"

Answer: "Yes. And, having due regard for the friend offering to drive and his refusal, and that's from his own admission, I based a carelessness--well, well, that's a driving charge." (sic) So, it is clear at that stage, that the officer, in his own mind, based a careless driving charge strictly on the fact that the accused fell asleep and the fact that he refused an offer from his friend to drive him home.

Turning to page 22 of the transcript, in the examination in-chief of the accused, at approximately line 22, the accused states:

"Yeah, I did feel tired and my friend did offer to drive, but I figured I was so close to home, I mean I didn't--I didn't really feel I'd fall asleep, and I dropped him off; and a minute later, that was it."

Question: "So, this person had been in your car then?"

Answer: "Yes. I fell asleep as soon as I had dropped him off."

Then continuing on, on page 28 in the cross-examination, approximately line 15, the accused answers:

"Sure, I felt tired. I wanted to go to sleep." And, on line 28:

Question: "Was there any kind of signs of fatigue or yawning?"

Answer: "No. To be honest with you, it happened suddenly. Everything happened fast, really fast."

Then on top of page 29:

Question: "You had no prior warning then?"

Answer: "No."

Question: "You were falling asleep?"

Answer: "I just dozed off."

5 The Justice, in his decision, relies on Ontario Court of Appeal decision in Maioty, which refers to where there is an accident, which is inconsistent with any explanation such as, could raise a reasonable doubt that the accused could be found guilty of careless driving. But, the Justice, perhaps, fails to appreciate, in this case, that there was an explanation given by the accused. The explanation in fact was, that he fell asleep, without any prior warning. Now, that explanation could create a reasonable doubt. So, that decision would appear not to apply in this case. The Justice states on page 32, at approximately line 18:

10 "I don't think going to sleep is an offence to careless driving, especially after his own admission that he had been drinking for four hours."

20 This gets us into the whole drinking issue. Obviously the Justice of the Peace places great weight on the accused statement--his own statement that he had consumed some alcohol. It is my view that the Justice, unfortunately, mis-directed himself, by placing this emphasis on the drinking, because there was no evidence as to whether there was any connection between any drinking and the falling asleep. And, the Justice says on page 33, at approximately line 23:

25 "I think under the careless driving charge, I

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think the Crown has proved a prima facie case."

Then on page 33 at the top, the court says:

"I am saying that he may have fallen asleep and I am taking there is an inference, that because of the alcohol he consumed at the party, that it put him to sleep."

With the greatest respect, I am to view that the Justice was not entitled to draw that inference, and that the only evidence before the court, is the fact that, the accused fell asleep without any prior warning. The only evidence of some prior suggestion, is that he was tired. But, it is the view of this court that, just because a person is tired, does not necessarily mean that the person expects that they are going to fall asleep behind the wheel. So, the finding of this court, in fact there was an explanation given by the accused, which created reasonable doubt that the learner Justice mis-directed himself with respect to that explanation and with respect to the evidence.

And, on all of the evidence of this case, I am of the view that the court could come to no other conclusion, but that the case had not been proven beyond a reasonable doubt, and under the circumstances, I am going to allow the appeal and I am going to over-turn the conviction. I will order that any penalty that has been paid to be returned to the accused.

MR PARKER: Thank you very much.

THIS IS TO CERTIFY that the
foregoing is a true and accurate
transcription of my recordings,
to the best of my skill and ability.

B. Schaefer
B. Schaefer
Court Reporter