

Case Name:

R. v. Bonnick

**IN THE MATTER OF an appeal under subsection 116(2)(a) of the
Provincial Offences Act, R.S.O. 1990, c. P.33, as amended**

Between

**Her Majesty the Queen, appellant, and
Leo Bonnick, respondent**

[2003] O.J. No. 4297

45 M.V.R. (4th) 129

59 W.C.B. (2d) 261

Court File No. York Region (Newmarket) 65380965-90

Ontario Court of Justice

Lampkin J.

Heard: April 10, 2003.

Judgment: August 28, 2003.

(54 paras.)

Trials -- Summary convictions -- Evidence -- Identification -- Trials -- Directed verdict -- Appeals.

Appeal by the Crown from Bonnick's acquittal on a directed verdict. Bonnick was charged with failing to stop at a red light. At his trial, the police officer stated that Bonnick identified himself as the driver of a dump truck involved in an accident. No voir dire was held to determine whether Bonnick's statement to the officer was voluntary. The Justice of the Peace found that a voir dire was required, that there was insufficient evidence that Bonnick drove the vehicle, and acquitted him. The Crown argued that no voir dire was necessary given that this was a Provincial Offences Act offence. Alternatively, it argued that there was sufficient evidence regarding identity for the Justice of the Peace to put Bonnick to his election whether to call evidence. When he was questioning a civilian witness, Bonnick said that he drove a dump truck. The witness agreed with him. Similar exchanges took place with other witnesses. No other dump truck was involved in the accident.

HELD: Appeal allowed. A new trial was ordered. A voir dire was necessary in these circumstances to determine whether the statement made by Bonnick was voluntary. However, there was sufficient evidence of identity without the officer's testimony to have called on Bonnick to elect whether he wanted to testify.

Statutes, Regulations and Rules Cited:

Highway Traffic Act, s. 144(18).

Provincial Offences Act, R.S.O. 1990, c. P.33, s. 116(2)(a).

Appeal From:

On appeal from the acquittal by Justice of the Peace His Worship P. Solomon on the 29th day of May 2002.

Counsel:

Hans J. Saamen, for the appellant.

Greg Burd, for the respondent.

1 LAMPKIN J.:-- The defendant Leo Bonnick was acquitted on a directed verdict of having committed the offence of failing to stop at a red light on August 22, 2001, at Highway 7 at Cosburn Street in the Town of Markham contrary to section 144(18) of the Highway Traffic Act.

2 The stated purpose of this appeal is to consider whether the strict rules with respect to the necessity of holding a voir dire to determine the issue of the voluntariness of a statement by a defendant to a person in authority as required in criminal cases should apply to provincial offences and to develop laws for provincial offences slightly different from criminal cases.

3 In the alternative Counsel for the Appellant submits that there was sufficient evidence for the Justice of the Peace to put the defendant to his election whether to call evidence or not.

FACTUAL BACKGROUND

4 Highway 7 at its intersection with Cosburn Street in the Town of Markham is a four-lane highway running east to west. There are two eastbound lanes and two westbound lanes. There is also a left turn lane in each direction. Cosburn Street runs south off Highway 7. It has one northbound lane and one southbound lane. Albert Street runs north off Highway 7 directly opposite Cosburn Street. It also has one northbound lane and one southbound lane. The intersection is controlled by traffic lights.

5 About 1:15 p.m. on August 22, 2001, Theresa Mak was operating her green Toyota Corolla motor vehicle northbound on Cosburn Street. She stopped at the red light at the intersection with Highway 7. There was a Nissan motor vehicle a bit ahead of her to the left. When the light turned green, the car to her left turned and went on its way. Ms. Mak hesitated a bit before going north. As soon as she started off, her car was hit. Although she said in chief that she did not recall too much after she was hit, she said that the car that hit her was a big white one.

6 During cross-examination, the learned Justice of the Peace asked her if she had seen a dump truck. She answered as follows: "I see something white. I didn't see that. I see something white - big white but I - not really know what's that. Something white".

7 Lynne Freeman was operating a grey Mercury Marquis motor vehicle northbound on Cosburn Street at its intersection with Highway 7. She was waiting for the light to turn green. When the light turned green, the car in the left hand turn lane turned and went on its way. The lady in front of her hesitated and took a while to go. Ms. Freeman, who was turning right, said to herself: "Come on, lady, the gas pedal's on the right".

8 Finally the woman ahead moved off. Ms. Freeman started to make her right hand turn. Suddenly she heard the sound of a motor vehicle eastbound on Highway 7 applying its brakes. Ms. Freeman stopped. The light facing her was green for her to go. She saw a dump truck eastbound on Highway 7 smash into the car that was ahead of her. She had seen the dump truck before it had reached the intersection.

9 Terry O'Loane was westbound on Highway 7 in a grey Nissan Maxima motor vehicle in the left or passing lane. When he was about 200 yards from the intersection at Cosburn Street, the light turned red. He pulled up to the intersection and stopped at the red light. There were no motor vehicles ahead of him. There was a motorcycle to his right.

10 As he waited for the light to change, Mr. O'Loane turned to put some papers in his rear seat. A few seconds later he heard a crash. He turned around and saw a dump truck that had collided with a Toyota motor vehicle coming at him with the Toyota on its front bumper.

11 He did not see the colour of the light at the time of the collision. He estimated that he had been at the red light between 20 and 30 seconds before the collision. He was not paying attention to what was going on in the eastbound lanes.

12 Mr. O'Loane accelerated to get out of the way but was still struck by the Toyota motor vehicle. He stopped in the intersection about 20 feet away and the dump truck and Toyota motor vehicle stopped about where he had been waiting for the light in the left or passing lane. It appeared to Mr. O'Loane that the dump truck had struck the Toyota motor vehicle in the area of the driver's door.

13 Josephine Wannop was stopped at the red light at Albert Street at its intersection with Highway 7. Albert Street is the continuation of Cosburn Street north of Highway 7. She was southbound and intended to turn left onto Highway 7. When the light turned green, she was waiting on a northbound vehicle to proceed before making her left hand turn.

14 All of a sudden she saw a huge dump truck flying from the west going east on Highway 7. She first saw the dump truck when it was about two lengths before the light. She felt the truck should have been slowing down because it is a long yellow light. She thought to herself: "My God, he's not gonna stop". Then there was a collision. The truck hit the car and dragged it along the highway. She is quite sure the truck went through the red light.

15 Constable Andrew Lo arrived at the scene of the accident at 1:19 p.m. He observed a white International dump truck that had come to rest at the northeast side of the intersection. A silver four-door Nissan Maxima was also in the north east corner just to the north of the dump truck. This was obviously Mr. O'Loane's car. The green Toyota Corolla car, Ms. Mak's car, was in the left westbound lane of Highway 7 just east of the intersection.

16 The dump truck was facing in an easterly direction. The Nissan Maxima was facing a westerly direction. The Toyota Corolla was facing a northwesterly direction. There was damage to the front of the dump truck with green paint on the bumper. The Nissan Maxima was damaged in the centre on the driver's side. The Toyota Corolla sustained damage to the complete left side.

17 At 3:27 p.m. Constable Lo made a visual inspection of the traffic signals at the intersection. He observed that when the eastbound and westbound signals were green, the northbound traffic signal was red. He also observed that when the northbound traffic signals were green, the west-bound and eastbound traffic signals were red. He further observed that when the eastbound and westbound traffic signals turned from green to amber to red, there was approximately a three second delay before the northbound signals turned green. And further that when the northbound signals turned from green to amber to red, there was also approximately a three second delay before the eastbound and westbound signals turned green. At no time were the northbound and eastbound/westbound traffic signals green at the same time. Constable Lo made these observations through several cycles from the southwest corner of the intersection.

18 When asked in chief whether he made a demand for identification of the driver of the white dump truck, Constable Lo answered as follows:

"Yes, I did. The driver of the dump truck identified himself with a valid Ontario driver's licence as a Leo Bonnick, with an address in Richmond Hill. He was operating the 2001 International dump truck".

19 No voir dire was held requiring the prosecution to prove beyond a reasonable doubt that the statement made by Mr. Bonnick to Constable Lo was voluntary.

20 Mr. Bonnick was not represented by Counsel. At the close of the case for the Prosecution, the matter was put over to another date for continuation. At the continuation Mr. G. Burd appeared for Mr. Bonnick. He brought a motion for a directed verdict on the basis that since no voir dire was held with respect to the voluntariness of any statement allegedly made by Mr. Bonnick to Constable Lo, the evidence of the officer to the effect that Mr. Bonnick had identified himself as the driver of the truck was inadmissible.

21 The Justice of the Peace granted the motion. He ruled that the transcripts of the trial provided no evidence by the four civilian witnesses of the identification of the operator of the dump truck. Relying on *R. v. Roti*, an unreported judgment of His Honour Mr. Justice Zimmerman released June 25th, 1992; *R. v. Faria*, an unreported judgment of His Honour Mr. Justice Langdon released on December 14th, 1987; *R. v. Rolph*, [2002] O.J. No. 3591, a judgment of His Honour Mr. Justice Carr released July 18th, 2002; and *R. v. Fex* (1973), 12 C.C.C. (2d) 239 [appeal dismissed, 1 O.R. (2d) 280, 14 C.C.C. (2d) 188], the Justice of the Peace ruled that the evidence of Constable Lo with respect to the statement made by Mr. Bonnick was inadmissible.

SUBMISSIONS

22 Counsel for the Appellant submits that provincial offences are civil in nature and traditional principles of criminal law have but limited application. He submits that provincial offences should be treated as civil claims in which a voir dire is not required for a statement made to a person in authority to be admissible. He submits that the purpose of the Provincial Offences Act (POA) is to provide a speedy, efficient and convenient method of dealing with offences under the POA, free of the technicalities surrounding criminal matters. In the alternative, Counsel for the Appellant submits

that the failure to hold a voir dire is not determinative of admissibility and that the circumstances must be considered whether the statement is admissible, absent a voir dire. He submits that the circumstances in the case at bar are such that voluntariness and the identity of the driver were not in issue. Counsel for the Appellant submits further that the Court should adopt a modified procedure concerning the issue of voluntariness in provincial offences cases and proposes that the Court apply the following procedure in these matters:

1. If the Defendant gives a statement to an officer at the scene of an accident, the onus should be on the Defendant to raise the issue of voluntariness. If the Defendant does not raise the issue of voluntariness, the Court may still raise the need for a voir dire on its own. If a voir dire is requested by the Defendant or directed by the Court, then a voir dire must be held.
2. If a voir dire is not requested by the Defendant and a voir dire is not required by the Court, the statement would be presumed to be voluntary.

He relies on a number of authorities.

23 Counsel for the Appellant also submits, in the event that the officer's evidence as to the identity of the driver is inadmissible, that there was sufficient evidence to find that the Respondent was the driver of the dump truck.

24 Not surprisingly, Mr. Burd, Agent for the Respondent, submits that provincial offences are quasi criminal and are more criminal than civil in nature. He submits that the Court should apply the same requirement to admit statements made by Defendants to persons in authority as in criminal cases. That is to say, the Prosecution must be required to prove beyond a reasonable doubt that such statements were voluntary, and absent the waiver of a voir dire by the Defence, such statements may only be admitted after the holding of a voir dire. He submits that the Justice of the Peace was correct in dismissing the charge because without the identification evidence of the officer, properly ruled inadmissible without a voir dire, there was no evidence to identify the Respondent as the driver of the dump truck.

DISPOSITION

25 In the landmark case of *R. v. City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353, Dickson, J., as he then was, speaking for the Supreme Court of Canada, made the following opening remarks at p. 357:

In the present appeal the Court is concerned with offences variously referred to as "statutory", "public welfare", "regulatory", "absolute liability", or "strict liability", which are not criminal in any real sense, but are prohibited in the public interest: *Sherras v. De Rutzen*, [1895] 1 Q.B. 918. Although enforced as penal laws through the utilization of the machinery of the criminal law, the offences are in substance of a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application. They relate to such everyday matters as traffic infractions, sales of impure food, violations of liquor laws and the like.

26 Counsel for the Appellant also relied on *Re Abitibi Paper Company Limited and The Queen* (1979), 47 C.C.C. (2d) 487, where Jessup, J.A., of the Ontario Court of Appeal made the following comment at p. 494:

In any event it is clear that in *Rourke* and in *R. v. Osborn* (1970), 1 C.C.C. (2d) 482, Pigeon, J., was speaking of the jurisdiction of the Courts only in criminal law matters except to the extent that the same rule, if it exists in criminal law, must apply in civil law. The present charges are laid for breaches of provincial statutes and hence are matters of civil law.

27 However I am not sure that the other members of the Court endorsed Mr. Justice Jessup's view that breaches of provincial statutes are matters of civil law. Arnup J.A. gave separate reasons stating in part as follows at p. 496:

I have had the benefit of reading a draft of the reasons of Jessup, J.A., in this appeal, and adopt his statement of the facts. Like him, I am of the view that this prosecution must not be allowed to proceed. Since my initial approach varies somewhat from his, I write these brief reasons of my own.

I do not agree that this appeal requires us to determine the ratio of *Rourke v. The Queen* (1977), 35 C.C.C. (2d) 129. This prosecution is for breach of two provincial statutes, violation of which is declared to be an offence. It is not a "criminal proceeding". While the prosecution is taking place in the Provincial Court (Criminal Division), it is not taking place in a "court of criminal jurisdiction" as Pigeon, J., uses that term in giving the majority judgment in *Rourke*.

28 After concluding with some lack of certainty that a Provincial Judge having jurisdiction to try a charge alleging an offence against a provincial statute also has inherent jurisdiction to stay the proceedings if they constitute an abuse of process, Mr. Justice Arnup had this to say:

In my view, the power to order a stay of civil proceedings must extend, as a matter of principle and logic, to every Court having jurisdiction to hear the relevant proceeding.

29 Madam Justice Wilson, the third member of the panel in *Re Abitibi* gave very short reasons in which she did not appear to embrace the comment of Mr. Justice Jessup. She agreed that the charges couldn't be allowed to proceed and concurred in the views of Mr. Justice Arnup in the last two paragraphs of his reasons as to the proper disposition of the applications brought before the Divisional Court.

30 On the other hand the Agent for the Respondent relies on the recent authority of *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575; 159 C.C.C. (3d) 321, where Chief Justice McLachlin, speaking for the Supreme Court of Canada, had this to say at para. 78:

The function of a provincial court operating under the POA is to try provincial offences. While the majority of these offences involve minor regulatory infractions, they also concern important matters like environmental protection and, as here, workplace health and safety. These offences carry penalties ranging from

significant fines to terms of imprisonment. The public and penal nature of such prosecutions suggests they are more criminal than civil in nature: see W.D. Drinkwater and J.D. Ewart, *Ontario Provincial Offences Procedure* (1980), at pp. 4-7. Provincial offences courts are, for practical purposes, quasi-criminal courts, determining guilt and innocence and imposing commensurate criminal penalties.

31 I have therefore two views of the Supreme Court of Canada on the nature of provincial offences which appear to conflict with each other. The one expressed in 1978 through Mr. Justice Dickson that provincial offences are in substance of a civil nature. The other expressed through Chief Justice McLachlin in 2001 to the effect that they are more criminal than civil. It is true that the later authority was a decision based on the jurisdiction of the Provincial Offences Court to grant a Charter remedy but the statement is a clear pronouncement of the function of the Provincial Offences Court. I note in passing that nowhere in her judgment did the Chief Justice refer to *City of Sault Ste. Marie*, supra, decided some four years before the enactment of the Charter, but she could not have failed to know about the decision. I must therefore decide for myself which of the two authorities I must follow.

32 There is no magic in the word 'quasi'. For those of us blessed with a background in Latin, it is an adverb which means: as if; just as; as good as; practically'. Thus 'quasi-criminal' literally means 'practically criminal'.

33 There was a time in the not too distant past when matters that are purely civil were deemed to be quasi-criminal. Thus an action for divorce based on the matrimonial offence of adultery, at the time known as an action for criminal conversation, was of a quasi-criminal nature and required proof beyond a reasonable doubt, as in criminal cases. Thus we have as recent as 1947, in *Ginesi v. Ginesi* [1947] 2 All E.R. 438, Hodson, J., as he then was, said in the Probate, Divorce and Admiralty Division of the English High Court:

It might be desirable if I were to say at once what I mean by the standard of proof in this class of case. It is a matter of history that in matrimonial cases, adultery having been described as a quasi-criminal offence, the standard of proof is a high one, and if authority is required it is to be found in the language used by Lord Merriman, in *Churchman v. Churchman* ([1945] 2 All E.R. 195): "The same strict proof is required in a case of a matrimonial offence as is required in connection with criminal offences properly so-called".

34 On appeal [[1948] 1 All E.R. 373] Tucker L.J., with whom the other members of the Court agreed, endorsed that view of Hodson, J., with the following words at p. 374:

I am satisfied that the position was correctly stated by Hodson, J., when he said that adultery must be proved with the same degree of strictness as is required for proof of a criminal offence. Adultery was regarded by the ecclesiastical courts as a quasi-criminal offence and it must be proved with the same strictness as is required in a criminal case. That means that it must be proved beyond all reasonable doubt to the satisfaction of the tribunal of fact.

35 It appears that it was not until 1950 that this approach was criticised and doubted. In *Gower v. Gower*, [1950] 1 All E.R. 804, Denning, L.J., as he then was, had this to say at p. 805, *inter alia*:

I do not think that this court is irrevocably committed to the view that a charge of adultery must be regarded as a criminal charge, to be proved beyond all reasonable doubt. I can well understand the judge applying that standard because of what was said in *Ginesi v. Ginesi* but I would like to point out several things in regard to that case. First it was not fully argued, because counsel conceded that the standard of proof of adultery was the same as it was in a criminal case. Secondly, the decision of the House of Lords in *Mordaunt v. Moncreiffe* [(1874), L.R. 2 Sc. & Div. 374] was not cited. It was there decided that a suit for divorce is a civil and not a criminal matter, and that the analogies and precedents of criminal law have no authority in the divorce court. This strikes at the root of *Ginesi v. Ginesi* which appears to have proceeded on the supposed criminal or quasi-criminal character of adultery.

Lord Denning pointed out three further grounds of criticism of the view that divorce based on adultery was quasi-criminal requiring proof beyond a reasonable doubt but I need go no further.

36 Ontario followed the law in England with respect to the quasi-criminal nature of matrimonial matters up to the early 1950's. On May 19, 1950, Mr. Justice Barlow of the High Court of Justice dismissed two undefended divorce actions alleging adultery against the defendants relying *inter alia* on *Churchman and Ginesi*, *supra*. See *Robertson v. Robertson and Wright*, [1950] O.J. No. 171, [1950] O.W.N. 497; and *George v. George and Logie* [1950] O.W.N. 762 (note). It appears that the appeal in *George*, judgment in which was delivered on October 5, 1950, [1950] O.R. 787, was the first case in Ontario to rule that the standard of proof in divorce actions was the civil standard and not the standard in criminal cases. Roach, J.A., speaking for the Ontario Court of Appeal, relied, *inter alia*, on the comments of Lord Denning in *Gower*, *supra*, in which he had delivered judgment on March 7, 1950.

37 With that introduction, I turn to examine the nature of provincial offences, *vis-à-vis* true criminal offences as opposed to civil matters. Both parties readily agree, and I endorse that view based on the authorities, that provincial offences are quasi-criminal in nature.

38 Provincial offences under Parts 1 and 11 of the POA are commenced by the service and filing of a certificate of offence by a Provincial Offences Officer who is either a police officer or a person designated by a Minister of the Crown as a provincial offences officer for the purposes of the Act. Proceedings under Part 11 are commenced by the laying of an information. Although a provincial offences officer usually swears the information, any person who has reasonable and probable grounds to believe that a provincial offence has been committed, may lay an information in the prescribed form and under oath. Where an arrest is authorized by statute and the justice is satisfied on evidence that it is in the public interest to do so, he may issue a warrant for the arrest of the defendant. The Prosecutor in provincial offences is either the Attorney General or where the Attorney General does not intervene, the person who issues the certificate or lays the information. Many of the offences are prosecuted in the name of "Her Majesty The Queen", as the present proceedings were, or in the name of an arm or agency of the state such as the Ministry of the Environment or of Labour, or in cases where the Government has delegated the necessary authority, in the name of a Municipality. The penalties range from suspended sentences with probation, to fines, to incarceration. Any fine imposed goes into the public coffers, whether of the State or of a Municipality. The wrong is considered to have been committed against the state or an arm thereof, not against the per-

sons whose water has been polluted or against the worker who has been injured, even though such persons may have civil claims for damages against the wrongdoer.

39 Criminal offences are commenced by the preferring of an indictment, usually by the Attorney General, or by the laying of an information. An information may be laid by anyone who has reasonable and probable grounds to believe that a criminal offence has been committed. As in the case of provincial offences, the prosecutor is either the Attorney General, or where the Attorney General does not intervene, the person who institutes proceedings. Where a private individual has laid the information, the Attorney General may intervene and carry on the prosecution or enter a stay or withdraw the proceedings. There are somewhat wider powers to issue warrants of arrest in criminal matters than in provincial offences. The penalties range from a discharge with or without probation (if the discharge is absolute), to a suspended sentence, a fine, a conditional sentence and finally incarceration. Any fine that is imposed against a convicted person is payable to the State. The wrong is considered to have been committed against the State, not against the individual who may have been assaulted or who has been defrauded, even though such persons may have a right of action against the wrongdoer.

40 Civil proceedings are commenced by writ or statement of claim or petition or some such proceeding. Only the person who is wronged, be he an individual or corporate body or the state, may commence such proceedings. No arrests against defendants in civil matters are issued. The sanctions are damages payable to the successful party, or an order for specific performance ordering the one party to honour a contract, or an injunction ordering one party to do or refrain from doing certain deeds or some other civil remedy. No fine is payable to the state. No one is put on probation. No one goes to jail. Only the plaintiff or petitioner, as the case may be, has the authority to put an end to the proceedings by withdrawing them.

41 The standard of proof is also different. As pointed out above, in an earlier age in the case of matrimonial offences based on adultery formerly held to be quasi-criminal, the standard of proof in quasi-criminal offences is proof beyond a reasonable doubt. That same standard obtains in true criminal proceedings. The standard of proof in civil proceedings is lower. It is on a balance of probabilities.

42 This brief analysis drives me to the conclusion that provincial offences are more of a criminal nature than a civil nature as was held in *974649 Ontario Inc.*, *supra*. Further Messrs. Drinkwater and Ewart in their authoritative treatise *Ontario Provincial Offences Procedure* (1980) at pp. 3 to 7, convincingly point out on other grounds, that provincial offences are more of a criminal than a civil nature.

43 Having said that, in my opinion, once the spectre of incarceration, the heaviest penalty known to our law, hangs over the head of a defendant, as it does in offences prosecuted under Part 111 of the POA, then statements made by defendants to persons in authority must be proved to have been made voluntarily. They are admissible only on consent or after having being ruled voluntary following a voir dire. I recognize that incarceration is not a penalty provided for in offences prosecuted under Parts 1 and 11, but in my opinion it would be inappropriate and cumbersome to require voir dires in Part 111 offences and to dispense with the requirement for offences under Parts 1 and 11. They are all provincial offences and should be subject to the same rules of evidence.

44 Counsel for the Appellant also submitted that a voir dire was not necessary in this case because of the circumstances under which the statement was made. He relied on cases which so hold.

However opinion on that issue is divided. In *Erven v. The Queen* (1978), 44 C.C.C. (2d) 76, Dickson J., as he then was, speaking for four of the nine Justices in the Supreme Court of Canada, said at p. 97:

In my opinion, it is always necessary to hold a voir dire to determine the voluntariness of a statement made by an accused out of Court to a person in authority.

Pratte J., for three of the nine Justices, said at p. 102:

... a request for a voir dire should not be denied save in rare cases, where, for instance, the request would be clearly frivolous or would constitute a demonstrable abuse of process.

Ritchie J. speaking for himself and Martland J., said at pp. 82-83:

... the sole purpose of a voir dire is to determine whether the statement sought to be introduced against the accused was made voluntarily and ... the necessity for holding such an inquiry is to be determined by the circumstances under which the statement is made.

45 Counsel for the Appellant submits that the Court should craft a new guideline in provincial offences for the admissibility of statements made to persons in authority. He points to *Ares v. Venner* [1970] S.C.R. 608, *R. v. Khan* (1990) 59 C.C.C. (3d) 92, and *R. v. K.G.B.*, [1993] 1 S.C.R. 740, where the Supreme Court of Canada changed the law of evidence with respect to the admissibility of hearsay evidence. Suffice it to say that the hearsay rule was created around 1700 and was the product of the adversary system because it was considered unfair to permit one party to introduce evidence unless the other could cross-examine. [See Glanville Williams: *Proof of Guilt*, (3rd Ed.)]. It was regarded as an absolute rule. It became rigid and inflexible. Judges devised exceptions to the rule. Unless the proffered evidence could fit into one of the exceptions, which came to be known as 'pigeon-holes', it was ruled inadmissible, irrespective of how compelling the evidence was. It was in that context that the Supreme Court of Canada in *Ares v. Venner*, taking the lead from the dissenting opinions of Lord Pearce and Lord Donovan in the House of Lords in *Myers v. D.P.P.* [1965] A.C. 1001, amended the judge-made rule governing the admissibility of hearsay evidence, rather than wait for Parliament and ten Provincial legislatures to do so. *Khan* and *K.G.B.*, *supra*, coming 20 and 23 years respectively after *Ares*, have now set the rule on a firm basis, without doing away with the former exceptions.

46 By contrast the rule with respect to holding a voir dire to determine voluntariness of the statement of a person in authority is a simple rule. It may sometimes not be readily apparent who is a person in authority, but there can be no doubt that a police officer in uniform clearly is. I would not venture to change the rule for provincial offences.

47 The first ground of appeal therefore fails.

48 I am of the opinion however that the second ground of appeal succeeds. There is sufficient evidence on the record, absent proof of identity through Constable Lo, to have called on the Defendant to elect whether he wanted to testify or not. The case was dismissed on a directed verdict. The standard of proof at this stage is on a balance of probabilities. Before acquitting the Defendant, the Justice of the Peace was required to ask himself: "Is there admissible evidence which could, if it

were believed, result in a conviction?" United States of America v. Sheppard [1977] 2 S.C.R. 1067; 30 C.C.C. (2d) 424. In my opinion there was.

49 Theresa Mak was the first witness called by the Prosecution. At the commencement of her cross-examination by Mr. Bonnick, the following exchange took place:

LEO BONNICK: Q. What colour of the light when you drove off?

A. It was green. When I drove - I - I - I was on Cosburn and ...

THE COURT: No, that's okay. You answered the question.

A. Yeah.

LEO BONNICK: Q. And you didn't see that that dump truck was - I - I drove a dump truck.

A. Yeah.

On the face of it Mr. Bonnick said that he drove a dump truck and Ms. Mak agreed with him. There is no evidence of any other dump truck being involved in the accident or even in the area at the time.

50 Terry O'Loane was the next witness called by the Prosecution. During his examination-in-chief, he was asked the following question and gave the following answer:

Q. So you heard a crash. You said a dump truck ...

A. Yes. Mr. Bonnick's dump truck had - it collided with the - with the car, the Toyota, and they were coming across kind of kitty-corner angle but across the intersection towards me.

Under cross-examination by Mr. Bonnick, Mr. O'Loane was asked the following questions and gave the following answers:

Q. ... did I ask you what was the colour of the light? You were there and I came out of my truck.

A. Umhm.

Q. You say you don't know you - you were in your gloves [sic] compartment.

A. That's right.

Again Mr. Bonnick speaks of coming out of his truck. And this was after he had been told by the Justice of the Peace at the commencement of the cross-examination of Ms. Mak and of Mr. O'Loane to ask questions and not to make statements.

51 Finally during the cross-examination of Josephine Wannop by Mr. Bonnick, the following exchange occurred:

THE COURT: Well, sir, you're making a statement which the witness did not say. So be careful here.

LEO BONNICK: Q. What ...

A. I - I go through that intersection ten or 20 times a day and we make sure we stop before - and make sure that the light is green before we enter, and I turned my head, and it had been yellow, and I saw you coming, and this lady was coming from the south, turning - coming up my way and you didn't slow down. Just went bang.

Q. How far from the intersection were you at the time?

A. I was right at the light.

52 There is evidence, which if believed, that the dump truck operated by Mr. Bonnick went through the red light.

53 In the circumstances the appeal will be allowed and a new trial ordered.

54 I would like to extend to Counsel for the Appellant and to the Agent for the Respondent my appreciation for their assistance in this matter.

LAMPKIN J.

cp/e/nc/qw/qlrme/qlkjg/qlmjb/qlkjg

---- End of Request ----

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Time Of Request: Wednesday, February 01, 2012 16:56:24