

ONTARIO COURT OF JUSTICE

IN THE MATTER OF an appeal under subsection 135(1) of
the *Provincial Offences Act*, [R.S.O. 1990, c. P.33](#), as
amended;

B E T W E E N :

HER MAJESTY THE QUEEN

Respondent

— AND —

SADIKIN BUDISANTOSO

Appellant

Before Justice Bruce G. Thomas

Heard on November 1, 2005

Reasons for Judgment released on November 10, 2005

Alfred Creed for the prosecution
Kerlan McLean agent for the defendant Sadikin Budisantoso

On appeal from a conviction at trial by Justice of the Peace E. Babcock on June 22, 2005.

THOMAS, J.:

Facts

The appellant appeals from conviction for the offence of Careless Driving, contrary to s. 130 of the Highway Traffic Act.

At trial, the prosecution evidence amounted to the testimony of O.P.P. Constable J. Remillard who testified that at approximately 3:44 P.M. on January 12, 2005 he was operating his police vehicle eastbound on Highway 401 in a dense fog. To his surprise, he was passed by two vehicles travelling at a high rate of speed and he pursued. He recorded a speed of 140 km/hour and then the vehicle directly in front of him pulled

over, into the slow lane. Once this had taken place, it seemed clear to the officer that the first vehicle was travelling even faster as it had disappeared from view. Wanting to intercept the faster lead vehicle now out of sight, he carried on until he saw the back of the vehicle. This vehicle had been out of his view for as much as 25 seconds.

Cst. Remillard says he paced this vehicle for less than 10 seconds and was certain it was travelling at 140 km per hour. It is clear from his evidence that he wanted to terminate this pursuit in the fog as quickly as possible, and he pulled the vehicle over with the use of his emergency lights. The constable then charged the appellant with careless driving based upon a combination of speed and weather conditions.

The police constable at trial admitted that he possessed no notes of the incident and was relying upon his memory. He candidly offered that he would not as of the trial date have been able to recollect the make of the appellant's vehicle, let alone the license plate number, if it was not for his review of the certificate of offence.

The appellant testified and stated that he was returning to his home in Brampton from Ohio. He stated the time he believed he crossed the border and how long he had been driving. It was his position that he was travelling at 115 km per hour with his cruise control on and that the fog was really only light with visibility 300 – 400 metres.

Grounds of Appeal

The appellant argues four grounds of appeal.

1. That the certificate of offence is incomplete and irregular on its face in that it incorrectly includes \$5.00 in costs as part of the set fine, and that as a result, the certificate must be quashed. This issue was not raised at trial, and considerations of amendment, if appropriate, were never argued.
2. That the Justice of the Peace applied the wrong test to the appellant's trial motion for a non-suit.
3. That the evidence of the officer was unreliable due to his absence of notes, and further, that the weight of the evidence did not allow for a conviction either on the issue of identification of the vehicle or as to its ultimate speed.

4. That the reasons for judgment at trial did not allow for the appellant to understand why he was convicted at trial and particularly why his evidence was rejected thereby offending the principles set out in *R. v. Sheppard* 2002 SCC 26 (CanLII), (2002) 1 S.C.R. 869 (S.C.C.).

Analysis

Ground 1 - Certificate of Offence

It is clear that as of June 15, 2005 the consolidated schedule of set fines was amended by the Office of the Chief Justice, to remove the \$5.00 costs amount from the set fine.

This change, however for number of reasons mentioned below, does not affect the validity of this certificate of offence. Firstly, the date of the offence in this case is January 12, 2005, six months before any amendment direction from the Chief Justice. Secondly, the total amount payable on the certificate is accurate no matter where the costs should fall, allowing for no confusion or prejudice to the appellant particularly considering the third point, which is that this matter proceeded to trial. The appellant Budisantoso's argument therefore, is quite different from those cases considering the issues of a certificate's completeness pursuant to the operation of s. 9.1 of the *Provincial Offences Act*.

And fourth, and finally, even if this offence had taken place on June 16, 2005, I agree with the reasons of Mr. Justice Griffin in *R. v. Maguire*, October 18, 2005 ONCJ 440 (Ont. C.J.) where he found the certificate complete and regular on its face despite the inclusion of the \$5.00 amount for costs in the set fine box of the certificate of offence.

The first ground of this appeal must therefore fail.

Ground 2 - The Non-Suit

The Justice of the Peace in her ruling on the defendant's motion found that there was sufficient evidence before her "to require the defense to give evidence". While this court agrees that the test applied at trial may have been inappropriately fashioned, nonetheless, the evidence presented by the prosecution through Constable Remillard was more than sufficient, if he were believed, to allow a jury properly instructed to return a verdict of guilt.

Therefore finding that the appropriate result was achieved and no wrong visited upon the appellant, this ground of appeal is dismissed.

Ground 3 - Unreasonable Verdict/Unsupported by the Evidence

This is the most troublesome ground for the Respondent. The investigating officer possesses no notes from this incident. Reasonably, he maintains at the scene on a 400 series highway in a dense fog, he chose not to make notes and later he candidly admits he simply forgot.

Constable Remillard maintained at trial that he was certain the vehicle he stopped, the driver of which he charged, was the same vehicle that passed him at a high rate of speed. But, he acknowledged that although he undoubtedly had reasons for that conclusion at the time, he was totally unable to articulate what those reasons were at trial. The officer, to his credit, acknowledged that the only description he had for the vehicle came from his review of the charging document prior to trial. He offered that he didn't know whether the vehicle was a mini-van or a car.

The Justice of the Peace at trial stated in her reasons that she accepted the recollection of the police officer, but on the issue of the identity of a vehicle he lost for up to 25 seconds in a dense fog, there really was no officer recollection.

Further, on the point of the speed of the appellant's vehicle, Constable Remillard stated that he paced the pursued vehicle for a period of less than 10 seconds and was content that it was travelling 140 km per hour. He agreed that under normal conditions he would pace for two kilometres, but in this case due to the conditions he did not. In the face of that evidence, the appellant's evidence was that he was locked on cruise control at 115 km per hour. It was clear from her reasons, the Justice of the Peace disbelieved the appellant for the reasons she gave, but this Court is unable to establish the same level of confidence in the officer's conclusions. In the absence of any notes and with an inability by the officer to articulate the reasons for his conclusions, I find the officer's evidence, while honestly delivered, nonetheless unreliable. It is essential if the Crown is to attach liability in this case, that it prove the appellant was the operator of the vehicle that passed the officer at a high rate of speed and that the vehicle subsequently paced was the same vehicle. I am not content that the conclusion is supportable on the evidence, particularly considering the evidentiary burden placed upon the Crown. I come to that conclusion acknowledging that the trial justice of the peace had the benefit of seeing the witnesses and hearing the evidence.

Ground 4 - Reasons for Judgment

While it is unnecessary for me to approach this ground considering my earlier reasons, it should be noted that the trial Justice of the Peace provides more than adequate reasons for judgment. It is true that she did not embark upon a traditional R. v. W.D. approach to the credibility analysis as urged by the appellant, but she nonetheless articulated the pathway to her conclusions. She chose to disbelieve the appellant, and it is difficult to believe from the reading of her reasons that he would not know why. She reviewed the evidence in detail, and resolved for her purposes the conflicting testimony. I would not have disturbed the conviction on this ground.

Conclusion

However, for the reasons set out above, I allow this appeal set aside the conviction and substitute a verdict of acquittal.

Released: November 10, 2005

Signed: Justice Bruce G. Thomas