ONTARIO COURT OF JUSTICE

PROVINCIAL DIVISION

HER MAJESTY THE QUEEN

V

CHRISTINA JAMES

****

A P P E A L P R O C E E D I N G S

****

BEFORE THE HONOURABLE MR. JUSTICE, J.D. WAKE

ON FRIDAY, FEBRUARY 24, 2006 AT BRAMPTON, ONTARIO

****

OFFENCE: Vehicle Operated Without Insurance

****

APPEARANCES:

P. John, Ms. — Provincial Prosecutor

F. Jubrattan, Mr. — Agent for Ms. James

ONTARIO COURT OF JUSTICE

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WITNESSES:	Exam. In-Ch.	Cr-Exam.	Re-Exam.
No witnesses			

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Transcript Ordered:	March 10/06
Order Received by Reporter:	March 16/06
Transcript Required By:	April 1/06
Transcript Completed:	March 27/06
Parties Notified:	April 4/06

FRIDAY, FEBRUARY 24, 2006

MS. JOHN: And I think that just leaves the Christina James matter Your Honour and that is on the appeal docket. Number four on the appeals, Christina James.

MR. JUBRATTAN: And for the record, Your Honour, it's Jubrattan, initial F., agent for Ms. Christina James who is not before us here today.

THE COURT: Sorry, what did we do with Castro matter?

ANOTHER MATTER DISCUSSED AT THIS TIME

U P O N R E S U M I N G :

THE COURT: Christina James, yes. What is this one all about?

SUBMISSIONS BY MR. JUBRATTAN:

The Christina James matter, Your Honour, is a matter of permit motor vehicle to be operated without insurance. There was a trial conducted and the defendant did testify however it would be my respectful submission that the Crown's case failed in several areas and the learned Justice of the Peace did err in law. It would be my opinion that the trier of fact erred in her ruling by not giving sufficient reasons as to the verdict and in turn, determine reasons for judgment by reversing the onus of burden of proof.

I'd also submit that the Crown has not proven a prima facie case by providing any evidence of the element of permission at any time within the trial. If I can take Your Honour back to page five, line four through six.

THE COURT: Page five. Yes.

MR. JUBRATTAN: It's quite clear that the issue - and the Crown is quite clear of the issue. Permission is the only issue to be put forth before Her Justice of the Peace. Yet in - her learned Justice of the Peace, Nadkarni's reasons for judgment, this matter in her opinion comes down to the onus of due diligence being on the part of the defendant.

THE COURT: Sorry, it says Justice of the Peace Opalinski.

MR. JUBRATTAN: Actually I think that's a clerical error. This matter was. . . .

THE COURT: You're right. On the front it is Nadkarni and they. . . .

MR. JUBRATTAN: And I believe the judgment was on the same date by the same Justice of the Peace, but it's probably a clerical error if I'm correct. If my friend concedes to that.

THE COURT: It doesn't matter.

MR. JUBRATTAN: If I can direct Your Honour to page 13, line 26 to 32.

THE COURT: Page 13. Yes.

MR. JUBRATTAN: And this is where the justice addresses the due diligence. Due - and I'll just read from the transcript. "Due diligence is one of the things that could be accepted but this is not

due diligence. Due diligence, you cannot just throw up your hands and say, well the keys were there and I never told him and he must not - and he must not take the keys. But the keys were there for all intent and purpose."

In the transcripts Ms. James has stated several times that her father is not and has never taken the vehicle without her permission and without her actually handing him the keys personally and this can be found on page ten, line 30 through 32 where the defendant states that she has to authorize her father before he borrows the vehicle.

Again on page 12, lines 22 to 25, she states again that she has to give permission before her father can even operate the vehicle.

Again veering off of the issue of permission. In fact the learned Justice of the Peace, Your Honour addresses the only issue of the. . . .

THE COURT: Just a sec. Yes.

MR. JUBRATTAN: It's my submission that the Justice of the Peace only addresses the act of due diligence on the part of the appellant which in a sense reverses the onus of burden of proof to the defendant.

Certainly, Your Honour, with respect to the evidence of permission, after careful review of the transcripts I found there to be no evidence of permission. As stated on page six, line 22 through 25, defendant verifies that she did not give permission for anyone to operate the vehicle.

THE COURT: Sorry?

MR. JUBRATTAN: Page six, line 22 through 25, Your

Honour.
THE COURT: Page six. Line 22 to 25.
MR. JUBRATTAN: During questioning she states quite clearly in her answer. The question is: At any time did you ever give permission to him to take the keys, use vehicle or you know, at any time you wish you might be able to borrow the vehicle and she says, no I didn't. Again on page ten, lines 30 through 32. Again she supports the fact that - that this was the first time that he actually came and just took the vehicle. She also states that she has to authorize him before she - he actually borrows the vehicle, meaning the father. Again in support of the same issue on page 11, line seven. The defendant states, her father is not to operate. . .
THE COURT: Page what?
MR. JUBRATTAN: Page 11.
THE COURT: Yes.
MR. JUBRATTAN: Line seven. She indicates that the father is not a regular operator of the vehicle. And again to reiterate on page 12 through - lines 20 through to 25, again she states that she has to give permission for him to operate the vehicle.
My respectful submissions Your Honour, is I think the defendant has made it quite clear and concise that she did not authorize or give permission to her father to operate the vehicle and so it would be my final submission, but there's no evidence of permission by the defendant nor is there any evidence produced by a Crown that would substantiate that the operator of the vehicle in question did have permission to operate that vehicle on that

date. There were no statements presented at the trial level by any witness. There was no viva voce evidence given by the operator of the vehicle in question and there was no statement or admission by the defendant herself that she gave any permission at any time to operate the vehicle on the date in question.

Thank you, Your Honour. Subject to any questions that you may have.

THE COURT: Crown. Ms. John.

SUBMISSIONS BY MS. JOHN:

The Justice of the Peace - it is a strict liability offence Your Honour and that's where the diligence, the due diligence defence has come into play.

When you look at the cross-examination of Ms. James and that cross-examination starts at page nine, line 12 and this is where Ms. James is indicating a set of keys were left in the kitchen. Okay and you said the keys were. . . .

THE COURT: Sorry. Where are you?

MS. JOHN: Page nine.

THE COURT: Page nine.

MS. JOHN: Line 11. And you said the keys were left in the kitchen, the keys in my house, in the kitchen in those, you know, the key racks. And how long was - prior February 16, how long was the vehicle not insured? I'm not sure. Then she went on to say a couple of months. Then if you go down to line 25. Prior to February 16th had your father driven that vehicle before? Yes he did. He was the one that

got the car in the first place. So he would drive the vehicle. He had it. Yeah, he had it before. Would it be on a regular occasion? No, because he got it for me. Then you go on to line ten.

THE COURT: You mean page ten?

MS. JOHN: Page ten. Was the vehicle insured when it - did you drive it to work when it was insured? Yes. How often would your father drive it? During the week or weekends. Did he have an extra set of keys? There were - there was a cup of keys. I think the garage, because he got it from at work, they had keys. When you removed the insurance did you ever inform your father that there was no insurance on the vehicle. He couldn't drive the vehicle. Well I didn't tell him. I didn't figure that he would be coming to my house and just taking the car. Like that was the only vehicle I had at the time so if I wasn't driving it there must be a reason why I wasn't driving it.

On one hand she's asking the Court to - she's asking the Court to assume because she wasn't driving the car, her father should make that assumption that there was no insurance on the vehicle.

And again my question to her was, line 20. Well if he wasn't coming to your house often he would - how would he know that you were not driving the car. Because it was - how would he know that I wasn't driving it? Exactly. Well he would know because he would see the car there, it wasn't in the garage, it was in the driveway. And then continues. . . .

THE COURT: She said that was the first time he actually. . .

MS. JOHN: Time he took it.

THE COURT: . . .just took the car.

MS. JOHN: Yeah, the time she used to have it before it was insured. I gave it to him. I said okay. And then when you look at page 11, line 20. A question I posed to her. Well should you not relay that information to him? Well me and him don't live together. Me and him don't talk on a regular basis - basis. Most of the time when he even goes there to see my aunt I don't even know. Like we hardly talk, we hardly see each other. So I didn't think I had to go out of my way to call him and tell him. Furthermore I don't have a number for him. And then my - again my question to her was, at line 25 again. Even at that, did you not think it was prudent when you removed the insurance from the vehicle - could you close the door - oh - to remove the keys from the garage or take the keys that your father had from him or remove the keys from the kitchen knowing that he drove the car. Line 30, her response. Well because there was more than one car - there was more than one car that was in the house. Like sometimes I had to put the car in the garage so the keys were just there. Question on page 12. So you didn't take the keys from him, you didn't remove the keys from the garage or in the kitchen - from the kitchen, they was just - there on the kitchen. Thank you.

So you have a situation where the father has a set of keys and the defendant removed the insurance from the vehicle knowing that the father had drove the car on a regular basis. Now the excerpts I went

through, the transcripts the defendant was aware that her father had a set of keys and he was driving the vehicle. Her answers were inconsistent to her evidence with respect to the permission. At one point she's indicating, well I removed the insurance. I don't have to tell him. There's no way I've contacted him and we don't see each other on a regular basis. But yet still she's saying, I never really give him permission. That's when the Justice of the Peace indicated it's a defence of due diligence. The defendant has not met that onus of due diligence. I think the defendant has to go a bit more than just saying, well I left the keys there. I didn't think I had to tell him there was no insurance. She has to make that effort Your Honour when there's no insurance on the vehicle. She has to make the effort of taking the keys from him or at least notifying him that there is no insurance, he shouldn't be driving the car.
I would respectfully submit Your Honour that the due diligence defence has not been met and the conviction was rightfully entered. Those are my submissions.
MR. JUBRATTAN: Could I just make a couple of comments Your Honour.
THE COURT: Yes.

REPLY SUBMISSIONS BY MR. JUBRATTAN:

My friend read a couple of excerpts from the transcript but didn't complete. On page ten she started reading from - page ten, line nine, but

d. di't complete the very last line of that answer where she asked the defendant specifically if you're sure if the father has keys and says right at the very last line, I'm not sure if he had keys. So that's a pretty big assumption to assume that the father had keys when there is no evidence that he had keys. She stated that there were keys in the garage and she stated that she had a set of keys and there were a set of keys in the kitchen and that was because there was two vehicles at that residence that had to moved back and forth from the garage. Again, Your Worship, my understanding was that the issue to be addressed at this trial was permission and not due diligence. I think what we're referring to is an inferred permission on the part of the defendant and the father doesn't reside there. They don't speak very often. If he was involved in her life at one point, he certainly is not involved anymore. I think on page seven, line eight, she goes on to mention that they talk. We may - we talk maybe once every three weeks if that, when he feels like calling. So they don't even really converse. The only time they converse is if she's at work on the weekends and at that time he would ask her permission to borrow the vehicle and she would actually hand him the keys. She's also stated as Your Honour's noted, that this was the first time that her father had actually just come and taken the vehicle without her permission. And again on page 11, line seven, she states, he didn't drive it regularly.

After re-examination, Your Honour, on page 12, line

22. I asked the defendant again, would he have to ask your permission before borrowing it on the weekends or did he just come and take the keys? No, he had to ask me.
And again, Your Honour, I would submit that there was no permission by the defendant. There was no statements by the operator of the vehicle nor was he subpoenaed to the trial to give that evidence by viva voce evidence and my respectful submission is, asking that the appeal be granted. Subject to any questions that you may have.
THE COURT: Okay. We will hold the matter down for a minute.

OTHER MATTERS DEALT WITH AT THIS TIME

U P O N R E S U M I N G :

THE COURT: So we just have the one last matter.
MS. JOHN: Yes, Your Honour.
THE COURT: And that's it.
I'm not content with the disposition that was made in this case. So I am going to go and spend a few minutes and see what I can come up with by way of an alternative.
MS. JOHN: Okay.
THE COURT: I'll be back in 15 or 20 minutes.

R E C E S S

U P O N R E S U M I N G :

R U L I N G

WAKE, J.D., (Orally):

Dealing with the matter of Christina James. Christina James is charged on the 16th of February, 2003 at the City of Mississauga, being the owner of a motor vehicle, licence number AJLC551, did unlawfully permit the said motor vehicle to be operated on a highway, to wit: Erin Mills Parkway at approximately 9:53 p.m. when it was not insured under a contract of automobile insurance.

It is conceded that the appellant's father was the driver of the motor vehicle and the question for determination at the trial was whether or not the appellant's father was given permission to drive the motor vehicle. It is also conceded that at the time her father was driving the motor vehicle that the motor vehicle was not insured.

The Justice of the Peace proceeded on the basis that the offence was one of strict liability and that therefore the only defence available to the appellant was one of due diligence.

While there is substantial case law to suggest that an offence of operating a motor vehicle and being the owner while the motor vehicle is not insured is an offence of strict liability, I do not believe that when the offence is particularized as it is under section 2(1)(b) of *The Compulsory Automobile Insurance Act*, that it is one of strict liability and that the only defence open to the appellant is one of due diligence.

I think the Crown has to prove beyond a reasonable doubt that the appellant unlawfully permitted the motor vehicle to be operated.

In this case the appellant's father had given her the car. She was not sure if he had a set of keys to the car. The evidence discloses that he would borrow the car from time to time from his daughter but her un-contradicted evidence was that he would always ask for the keys or permission to borrow it. While the appellant conceded that after she had removed the insurance from the vehicle, she did not inform her father of that fact, nevertheless she stated in evidence, which was un-contradicted, to the effect that she had no expectation that he would simply take the car without asking to borrow it.

I think in those circumstances it is asking too much of the appellant in this case to require her to anticipate that someone in her father's position would take her vehicle without her consent and without her permission. He did not have her permission on the basis of the evidence. And I don't see that there is anything incumbent upon, or that there was anything incumbent upon the appellant to advise her father in light of the past experience she had in lending the vehicle to him upon his request. In those circumstances I don't believe that the offence is made out. The appeal will be allowed and the conviction set aside.

All right. I think that one completes our day.

MS. JOHN: Yes, thank you.

MR. JUBRATTAN: Thank you, Your Honour.

THE COURT: Thank you.

FORM 2

CERTIFICATE OF TRANSCRIPT (SUBSECTION 5(2))

Evidence Act

I, we.....Diane Muir.....certify that this document
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