

Case Name:

R. v. Egharevba

Between

**Her Majesty the Queen, and
Osayomore Egharevba**

[2012] O.J. No. 397

2012 ONCJ 43

Court File No. 4862 999 10 TB606013 00

Ontario Court of Justice

S. Ray J.

Heard: December 1, 2011.

Judgment: January 31, 2012.

(16 paras.)

Counsel:

Andrew Smith, Agent for the appellant, Attorney General.

Vartan J.S. Manoukian, Licensed Paralegal acting for the respondent.

Reasons for Judgment

S. RAY J.:--

INTRODUCTION

1 Osayomore Egharevba was charged on January 23, 2010 with committing the offence of permitting a motor vehicle to be operated without insurance contrary to s. 2(1)(b) of the *Compulsory Automobile Insurance Act*, R.S.O. 1990, c. C. 25. Justice of the Peace M. Rotman dismissed the charge, on the basis that the prosecution had not proved that the respondent had permitted the motor vehicle to be operated without insurance. The province has appealed his decision pursuant to s. 116 of the *Provincial Offences Act*, R.S.O. 1990, c. H-8, *as amended*. I have the discretion pursuant to s. 121 of the same act to allow or dismiss the appeal, set aside the finding and order a new trial, or en-

ter a finding of guilt with respect to the offence of which, in my opinion, the respondent should have been found guilty, and pass a sentence that is warranted in law.

2 Section 2(1)(b) of the *Compulsory Automobile Insurance Act* states the following:

Compulsory automobile insurance - 2.(1) Subject to the regulations, no owner or lessee of a motor vehicle shall, (a) operate the motor vehicle; or (b) cause or permit the motor vehicle to be operated, on a highway unless the motor vehicle is insured under a contract of automobile insurance.

3 The appellant argued that the learned Justice of the Peace dismissed the charge solely because there was no direct evidence that the respondent permitted or allowed his motor vehicle to be operated without insurance, and it was incumbent on him to consider the circumstantial evidence. The respondent submitted that even the circumstantial evidence in the case was too weak for a conviction, and furthermore, that this was an offence that required proof of *mens rea* and not a strict liability offence. The respondent suggested that it is implicit from the wording of s. 2(1)(b) that the prosecution must show that the respondent unlawfully or knowingly permitted the motor vehicle to be driven.

THE EVIDENCE

4 The investigating officer in this case testified at trial that he stopped the respondent's vehicle and asked the driver for his driver's license, ownership permit, and insurance card. The driver, who was not the respondent, produced his driver's license, but could not provide an insurance card for the vehicle he was driving. The officer could not remember if the driver had an ownership permit. The officer testified that the driver had the key for the motor vehicle and there was no sign that the steering column for this motor vehicle had been tampered with in any way. The officer also said that he did not have any reason to believe that the motor vehicle had been reported as stolen or otherwise taken without the consent of the owner, even after running checks on the vehicle.

5 A certified copy of a document from the Ministry of Transportation of a plate by date search was made an exhibit at trial. There is no dispute that the document proved the respondent to be the owner of the motor vehicle in question in this case, and that there was a clear connection between her and the person driving her motor vehicle at the material time as they lived at the same residential address.

6 The investigating officer further testified that he had not been able to contact the respondent, and since the day of this traffic stop, no one has come forward to him with proof that there was a contract of motor vehicle insurance covering the motor vehicle in question in this case on the relevant offence date.

CLASSIFICATION OF THE OFFENCE

7 *R. v. City of Sault Ste. Marie* [1978] 2 S.C.R. 1299 is the Supreme Court of Canada case that created the classification scheme that governs regulatory offences including those created by the *Compulsory Automobile Insurance Act*. Justice Dickson concluded in that case that there were three categories of offences: absolute liability, strict liability, and those that required proof of *mens rea* or a mental element. At issue in this case is whether s. 2(1)(b) is an offence of strict liability or an offence that requires proof of *mens rea*. Does the wording import a requirement for the prosecution to prove some positive state of mind such as intent, knowledge, or recklessness, or does the prosecu-

tion only need to prove the doing of the prohibited act, leaving it open to the defendant to avoid liability by proving that he took all reasonable care?

8 My colleague, Justice John Takach, concluded very persuasively and convincingly in *R. v. Be-dard* [2009] O.J. No. 4720 that the words "permit the operation of a motor vehicle on a highway" do not create a positive state of mind such as intent, knowledge, or recklessness as spoken of in *R. v. City of Sault Ste. Marie*. The words "knowingly" or "wilfully" are not used in the section. I note that the words "intentionally" and "recklessly" are also not used. I agree with my colleague that the word "permit" is a broader term and does not embrace intent or recklessness. At paragraph 11 of his decision, my colleague reproduces a sometimes overlooked passage from the Sault Ste. Marie case, where the interpretation of the troublesome words "cause" and "permit" are discussed. After explaining that it is an over-simplification to suggest that a person could not be said to be permitting something unless he knew what he was permitting, the Supreme Court of Canada concluded in that passage that the words "cause" and "permit" fit much better into an offence of strict liability than either full *mens rea* or absolute liability.

9 I appreciate that my colleague, Justice David Wake, has said in the case of *R. v. James* 2006 CarswellOnt 2592, that he does not believe that when the offence is particularized as it is under the section, that it is one of strict liability, but all I see in the section is a failure by Parliament to particularize any mental element into the section. The facts in the James case were such that they were incapable of supporting a conviction, however the offence was classified in that case. There was direct evidence called, which contradicted the circumstantial evidence that the owner permitted her vehicle to be used. The owner testified that she had not given the driver, her father, permission to use the vehicle. So my colleague's point in the James case about how the offence should be classified is really only *obiter dicta*. It is also suggested that the unpublished case of *R. v. Martin Sawa*, of my colleague, Justice Mary Hogan, somehow stands for the proposition that the wording of s. 2(1)(b) implies a mental element, and that the James and the Sawa cases are two cases that "go the other way." With the greatest of respect, I did not read any conclusion in the Sawa judgment that the offence of permitting a vehicle to be driven without insurance was a *mens rea* offence.

10 Justice Hogan concluded in the Sawa case that the officer simply did not do any investigation and that the officer did not provide any explanation for his conclusion that the owner allowed, caused, or permitted his car to be driven. According to the transcript of reasons in that case, even the prosecutor said, "It's a little light, yes," after Justice Hogan stated her conclusion. There was no circumstantial evidence in both the James and the Sawa cases that the driver of the vehicle surrendered an ownership permit to the officers, who stopped them. Such evidence may not prove who the owner was, but it would be circumstantial evidence linking the driver to the owner, particularly if the officer discovered through a proper investigation circumstantial evidence that the vehicle appeared not to be stolen.

CIRCUMSTANTIAL EVIDENCE

11 Section 2(1) of the *Provincial Offences Act* states that:

2.(1) **Purpose of the Act** - The purpose of this Act is to replace the summary conviction procedure for the prosecution of provincial offences, including the provisions adopted by reference to the *Criminal Code* (Canada), any variation in wording without change in substance shall not, in itself, be construed to intend a change of meaning.

12 While the purpose of the *Provincial Offences Act* is to provide a procedure for the prosecution of provincial offences that reflects the distinction between such offences and criminal offences, the jurisprudence is well settled that the same rules of evidence do apply. Two authorities for this approach to evidence in provincial offences cases are cited in Murray D. Segal and Rick Libman's *The 2011 Annotated Ontario Provincial Offences Act* (Toronto: Carswell, 2011) and they are *R. v. Roberts* [2001] O.J. No. 5654 (C.J.) and *R. v. Bonnick* (2003), 45 M.V.R. (4th) 129. The normal rules of evidence would apply then to the fact driven determination of whether or not a defendant permitted her motor vehicle to be driven without insurance, and a fact-finder would be expected to consider all relevant evidence before the court. The evidence would sometimes be direct, sometimes circumstantial, and sometimes a combination of both.

13 Facts in issue cannot always be proved by direct evidence alone. This is why the need arises for the prosecution to call circumstantial evidence, and for the courts to consider it. The use of circumstantial evidence does not mean that provincial offences will become "a trap for the unskilled and unwary" envisaged by the Ontario Court of Appeal in *R. v. Jamieson* (1981) 64 C.C.C.(2d) 550. It should not entail a complicated application of the rule in *Hodge's* case, which was the subject of lengthy submissions before me in this case. The learned authors of *The Law of Evidence in Canada* (3rd ed) (Lexis-Nexis, 2009) have noted at page 68 of their book that the use of the rule in *Hodge's* case has declined, and this has occasioned a parallel decline in the significance of the distinction between direct and circumstantial evidence.

14 I fully agree with the appellant that the learned Justice of the Peace did not enumerate the factors that he took into account, when he concluded that a key element in the case was missing, and that there was no evidence of the word "permit." I fully agree that there is room for concern that the circumstantial evidence called by the prosecution may not have been taken into account. Circumstantial evidence such as the fact that the driver and the respondent lived at the same address, and the steering wheel not looking as if it had been tampered with, I agree, is relevant evidence that must be weighed. I agree that one simply cannot tell from the judgment of the learned Justice, whether they were weighed or not. But I am equally convinced that had the learned Justice of the Peace considered the circumstantial evidence that was called in this case, it would have been open to him to reach the same conclusion that he did, and at the end of the day there was no substantial wrong or miscarriage of justice.

15 If there were evidence that the driver did in fact produce the ownership papers to the officer, when he was stopped, that would be circumstantial evidence, which could be weighed into the mix with other circumstantial evidence. But when the officer cannot even remember whether the driver had proof of ownership with him, this is tantamount to precisely the kind of investigation that my colleague Justice Hogan found in the *Sawa* case to be inadequate, and where even the prosecutor agreed that the evidence was "a little light."

CONCLUSION

16 Section 2(1) (b) of the *Compulsory Automobile Insurance Act* creates a strict liability offence for all of the reasons that I have already stated. There is no requirement for the prosecution to prove a mental element. And furthermore there is no basis for implying any additional language that is not there, that easily could have been had Parliament wished it. The word "permit" can be proved by circumstantial evidence, but it has to be cumulatively strong enough for an inference of guilt to be drawn. Otherwise, the offence will not be made out. Even taking into account the circumstantial ev-

idence in this case at its highest, there is still insufficient evidence to substantiate the word "permit," and the prosecution did not prove its case. The appeal is dismissed.

S. RAY J.

cp/e/qlacx/qljxr