Citation: *R. v. Fong*, 2004 ONCJ 222

COURT FILE No.: Metro North Court

ONTARIO COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN

— AND —

MAN-HO FONG

Before Justice Beverly A. Brown
Heard on September 15 and October 6, 2004
Reasons for Sentence released on October 6, 2004

Mr. Michael Lunski .... for the Crown
Mr. T. Crawford .... for the accused

BROWN, J. :

<u>Introduction:</u>

[1] Mr. Fong was charged with four offences in relation to events on September 10, 2003. He entered pleas of guilt and was found guilty of the following offences:

1) being the owner, and operating the motor vehicle with no insurance, contrary to s. 2(1)(a) of the *Compulsory Automobile Insurance Act* ;

2) failure to drive in the marked lane, contrary to s. 154(1)(a) of the *Highway Traffic Act*;

3) failure to remain at the scene of the accident, contrary to s. 200(1)(a) of the *Highway Traffic Act*; and

4) failure to comply with provisions after obtaining ownership of a vehicle, of applying to the Ministry for a new permit for the vehicle, contrary to s. 11(2) of the *Highway Traffic Act*.

The issue for this court's consideration is not in relation to the standard fines proposed by counsel for the *Highway Traffic Act* fines. Rather, the issue under consideration is the request of counsel that the court impose a fine for the *Compulsory Automobile Insurance Act* offence far below the minimum fine for this offence.

Facts of Offences:

[2] On September 10, 2003, at approximately 5:13 p.m. Mr. Fong was operating a yellow Suzuki motorcycle on Highway 401 Eastbound, east of Dixon, in Toronto. Mr. Fong was moving between lanes of the highway, and then the eastbound ramp, without signalling. An officer of the O.P.P. directed Mr. Fong to move to the south shoulder of the highway for failure to drive in a marked lane. At this time, Mr. Fong identified himself as Ben Wong, with a date of birth of July 7, 1983. He was issued a ticket for fail to provide permit and valid insurance, but fled the scene in the course of the officer's investigation. The officer did not pursue Mr. Fong due to the dangers inherent in a pursuit on the 401 highway at this location at this time.

[3] At 5:30 p.m., there was a report of an abandoned motorcycle on the westbound ramp for the 401 highway. The motorcycle had collided with the guardrail. There was damage by scraping the concrete barrier for a 4 metre distance. In addition, there was damage to the motorcycle mirror, clutch handle and additional damage to the vehicle. The driver did not remain at the scene of the accident.

[4] Later that night, the officer contacted the registered owner of the motorcycle. This person gave the officer the name of the new owner of the motorcycle. At 8:30 p.m., the officer contacted Mr. Fong. At this time, Mr.Fong advised that he owned the motorcycle and reported it stolen to the York Regional Police and was waiting for the police. Mr. Fong

was advised to attend the police station. At 9:37 p.m. a lawyer for Mr. Fong called the Toronto detachment for the police for information regarding this occurrence. The officer could at that point identify the prior driver of the motorcycle. The lawyer advised the officer that the owner would cancel the report that the motorcycle had been stolen, and would contact the detachment.

[5] Ultimately Mr. Fong did attend at the police detachment and the officer who had initially investigated the matter identified him as the prior driver of the motorcycle. He was arrested, read a caution, charged with the offences and released on a promise to appear. At the time of these incidents, Mr. Fong did not have any valid insurance for this motorcycle. In addition, when he had acquired ownership of the motorcycle, he failed to apply for a permit to transfer the ownership of the motorcycle.

<u>Circumstances of Offender:</u>

[6] While Mr. Fong did not have a criminal record, he had a driving record that was filed as exhibit 1. This record reflected convictions for the following offences :

April 27, 2001 (offence date April 21, 2001) Violation of G1 Licence conditions

April 12, 2002 (offence date March 16, 2002) Radar warning device in motor vehicle

Nov. 4, 2002 (offence date Aug. 18, 2002) Defective/ improper/ no muffler

August 5, 2003 (offence date April 26, 2003) Fail to surrender permit for motor vehicle
Drive motor vehicle no currently validated permit

[7] Mr. Fong is 21 years of age and is a university student. He is studying business and has been a citizen of Canada since 1994. He lives alone in a residence owned by his parents. His parents reside in Hong Kong. He expressed remorse through his counsel for this incident.

[8] In relation to the prior conviction for failing to surrender permit, counsel for Mr. Fong advises that he simply did not have proof of insurance on that occasion. Counsel for Mr. Fong submits that this was the first time he had no insurance on the vehicle. He submits that Mr. Fong does not work and relies on income from his parents. He attends school at the Mississauga campus and relies on a vehicle to attend school. His counsel advises that he is a full-time student, but that after October 22, 2004 he will be commencing part-time employment. Counsel also expressed a concern on the part of Mr. Fong that his parents not find out about these convictions. Counsel also advised that for whatever fine the court imposes, he would request time to pay the fine in the range of one year, if possible.

[9] Counsel submitted that the court should impose the following joint submission. Firstly, to impose upon Mr. Fong a fine below the $5000 minimum fine for the s. 2(1)(a) *Compulsory Automobile Insurance Act* offence of $2,000 based upon Mr. Fong's financial situation. Counsel suggested that the court had discretion to reduce this $5,000 minimum fine amount based upon a person's ability to pay. In addition, counsel put forward for the court's consideration a fine of $300. for the fail to remain count, consecutive, the minimum fine of $90 for fail to apply for permit, and the minimum fine of $90. for fail to drive in marked lane.

[10] The court has considered the fact that Mr. Fong entered pleas of guilt as an indication of remorse and that this will be considered in mitigation of sentence. The court notes that this guilty plea was entered on September 15, 2004, on the date these charges and another charge was before the court scheduled for trial.

<u>Sentencing provisions:</u>

[11] Section 2 of the *Compulsory Automobile Insurance Act, R.S.O. 1990, c. C-25* provides:

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. 1994, c. 11, s. 383; 1996, c. 21, s. 50 (3).

(3) Every owner or lessee of a motor vehicle who,

(a) contravenes subsection (1) of this section or subsection 13 (2); or

Note: On a day to be named by proclamation of the Lieutenant Governor, clause (a) is amended by the Statutes of Ontario, 2002, chapter 22, section 33 by striking out "subsection 13 (2)" and substituting "subsection 13 (11)". See: 2002, c. 22, ss. 33, 36 (2).

(b) surrenders an insurance card for inspection to a police officer, when requested to do so, purporting to show that the motor vehicle is insured under a contract of automobile insurance when the motor vehicle is not so insured,

is guilty of an offence and is liable on a first conviction to a fine of not less than $5,000 and not more than $25,000 and on a subsequent conviction to a fine of not less than $10,000 and not more than $50,000 **and, in addition, his or her driver's licence may be suspended for a period of not more than one year**. R.S.O. 1990, c. C.25, s. 2 (3); 1996, c. 21, s. 50 (4).

[emphasis added]

[12] The *Provincial Offences Act*, R.S.O.1990, c. P-33, Section 59, provides as follows:

59(1) No penalty prescribed for an offence is a minimum penalty unless it is specifically declared to be a minimum.

(2) Although the provision that creates the penalty for an offence prescribes a minimum fine, **where in the opinion of the court exceptional circumstances exist so that to impose the minimum fine would be unduly oppressive or otherwise not in the interests of justice**, the court may impose a fine that is less than the minimum or suspend the sentence.

[emphasis added]

Joint submission:

[13] It is clear that although the court is not bound by a joint submission as to sentence, the court is obliged to give it serious consideration. The court ought not to reject the joint submission unless the sentence would bring the administration of justice into disrepute

[14] The court notes that the Court of Appeal for Ontario has released a number of judgments which have dealt with the imposition of sentence where there has been a joint submission, including *R. v. Rubenstein* (1987), 41 CCC (3d) 91; LTA ref'd 41 CCC (3d) vi, *R. v. Dorsey,* [1999] O.J. No. 2957 (C.A.) and *R. v. Cerasuolo* (2001), 151 CCC (3d) 445 (Ont.C.A.)

[15] In addition, as the Court noted in *Rubenstein, supra,* the power of a trial judge to impose sentence cannot be limited to a joint submission, and a joint submission cannot be basis upon which a defendant escapes the sentencing judge when it appears that the joint submission will be rejected. Otherwise, this could lead to a situation where a defendant would keep withdrawing a guilty plea until the defendant found a trial judge who would accept the joint submission. This would put the court in the unseemly position of bargaining with a defendant.

[16] A guilty plea is like a finding of guilt after trial. It gives rise to the need for the trial judge to impose a proper sentence, as determined by the trial judge. The guilty pleas in this case were entered on the date scheduled for the trial of the charges.

[17] This court provided counsel with the opportunity, on the date of the guilty pleas, and on today's date, to put forward any cases or other information which counsel would like to put before the court prior to the imposition of sentence, given the court's reluctance to impose a fine below the statutory minimum required by the *Compulsory Automobile Insurance Act*. The matter was put over to today's date for sentence to provide this further opportunity for counsel to put any other information before the court, and to permit the court the opportunity for further consideration and reflection upon the joint submission in relation to the suggested fine for this offence. This court has asked Crown (and defence) counsel

if are any other factors which should be conveyed to the court, given that at times the Crown and defence arrive at a joint submission for reasons that might not otherwise be known to the trial judge. The court has considered the additional factual circumstances submitted by defence counsel as submitted to the court today. There was no information coming from the Crown on today's date to explain the rationale for this joint submission.

[18] The court has also researched the law and reviewed a number of cases where a request for a fine below the statutory minimum of $5,000 was requested.

[19] This court gives serious consideration and respect to the joint submission and is of the view that the court should only depart from it where the court considers the joint submission to be contrary to the public interest, and which if accepted, would bring the administration of justice into disrepute. The court is mindful of the fact that this is a high threshold, and that it is intended to give rise to the confidence in a defendant, who gives up the right to a trial, that the joint submission will be respected by the judge who imposes sentence.

[20] Nonetheless, the court is of the view that the joint submission of a fine of $2,000, far below the minimum fine of $5,000 for this offence, notwithstanding the court's ability, pursuant to s. 59 of the *Provincial Offences Act,* to reduce this minimum fine in the case of exceptional circumstances, would be contrary to the interests of justice, to the extent that it would be contrary to the public interest and bring the administration of justice into disrepute.

[21] The Legislature made a policy decision, in 1996, in proclaiming the minimum sentencing provisions for this offence, to provide for a minimum fine of $5,000. for this offence. Similar to the situation in *R. v. Fagbemi* , [2000] O.J. No. 2550 (O.C.J.), the

financial circumstances of the defendant are somewhat sketchy. In both *Fagbemi* and in the subject case, the defendants are students. This court has enquired into Mr. Fong's ability to pay, and been advised that Mr. Fong is a student, living in a home owned by his parents, and driving a vehicle owned by a family member. Mr. Fong plans to commence a part-time employment position in a few weeks. This court finds persuasive the reasoning of the court in *Fagbemi, supra,* which reviewed the imposition of the fines imposed by the justice of the peace. In the judgment, the court noted :

> " minimum fines prescribed by the Compulsory Automobile Insurance Act exceed, by design, the ability to pay of virtually everyone in the community likely to commit the offences in question. The statutory provisions themselves dictate a departure from the principles of sentence that normally govern the imposition of fines.

As held by the court in *Fagbemi, supra,* this court is of the view that the specific legislative policy reflected in the statutory minimum fine of $5,000 provided by the Compulsory Automobile Insurance Act, in 1996, reflects a principle of great significance. It reflects a change to the provincial legislative policy as of the changes to the minimum fine in1996. As noted in *Fagbemi, supra,* the increase in the penalty from a fine of $500., tenfold, to a minimum fine of $5,000.:

> "was intended to exceed significantly the insurance premiums that would be payable by even the highest-risk group of car owners. The obvious intention was to provide an additional inducement to comply with the statute for those most likely to resist obtaining insurance, including, I would have thought, relatively poor young male students like the appellant. As Robins J.A. stated in R. v. DiLorenzo (1984),] at p. 25 (Ont. C.A.), with respect to the 3-year minimum licence suspension for avoiding police engaged in a pursuit, "[t]he Legislature has specifically declared the minimum penalty and no basis exists upon which to vary or modify its manifest intention".

[22] The court finds the reasoning in this judgment to be persuasive. Most people in society would have difficulty paying a $5,000. fine. However, the amount of the minimum

fine is clearly designed to compel vehicle owners to insure their vehicles, bearing in mind what might be a high cost of a premium for insurance coverage for some owners. There is a significant public interest in encouraging owners to have insurance coverage. Likewise, the principles of general deterrence and protection of the public are important in these types of cases, where it is important to deter other vehicle owners from ignoring their legal responsibility to insure their vehicles. Insurance coverage of this nature is clearly to the benefit of all users of the road, and pedestrians alike.

[23] The issue of ability to pay, within the court's ability to consider the s. 59 *Provincial Offences Act* provision, must in this court's view not be considered in isolation. As noted in *Fagbemi*, the cost of obtaining insurance should be included in the consideration of the decision to purchase or use a motor vehicle. A student without means of income, and without proper means of acquiring and insuring a motor vehicle, should not be able to escape the usual penalties for this offence simply by virtue of this circumstance.

[24] All in all, the situation of Mr. Fong is not exceptional. He is a university student. He was operating a motor vehicle, without insurance, in a way that caused an officer to stop him on the 401 Highway. He fled from the officer, who was unable to pursue him. He was later involved in a motor vehicle accident, although there is no indication that anyone was injured. He falsely reported that the vehicle had been stolen. There are numerous aggravating circumstances in this case. Insurance is required to be on vehicles in the event that a vehicle is ever involved in an accident, which actually occurred in this case. Mr. Fong has a record for some prior Highway Traffic Act violations, albeit of relatively minimal nature. Nonetheless, counsel have put forward a submission that the minimum fine be reduced purely on the basis of Mr. Fong being a university student who is not working. This is not an "exceptional circumstance" which in the court's view would result,

for this offender, and this offence, in the $5,000 fine being unduly oppressive or otherwise not in the interests of justice.

Conclusion:

[25] In the end, the court finds that the joint submission would bring the administration of justice into disrepute. Considering the situation of the offender, including his personal situation and financial circumstances, and including his prior relatively minor *Highway Traffic Act* violations over the short period he has had his licence, and also considering the aggravating circumstances of the offence, and the fact that there will be other fines imposed for the Highway Traffic Act offences, the court also considers the principle of totality. In the circumstances, and based upon the fact that a joint submission was put forward to reduce the minimum fine, the court will not increase the fine beyond the minimum amount of $5,000. Accordingly, there will be a fine of $5,000. imposed for the s. 2(1) *Compulsory Automobile Insurance Act* offence, a fine of $ 300.00 for the fail to remain offence, $90. for the offence of failure to drive in the marked lane, and $90. for the offence of failure to comply with provisions after obtaining ownership of a vehicle, of applying to the Ministry for a new permit for the vehicle.

[26] The Court will also allow Mr. Fong a period of time within which to make payment of the fines. Pursuant to s. 66(3) of the *Provincial Offences Act*, time to pay will be given to Mr. Fong, given his financial situation which would preclude his ability to make full payment beyond 15 days from today's date. Accordingly, there will be a schedule of payment for these fines as follows:

> Schedule:
> 2 fines of $90 each for failure to drive in marked lane, s. 154(1)(a), and failure to comply with provisions of s. 11(2), respectively of H.T.A. within 15 days
> fine of $300. for s. 200(1)(a) of H.T.A. within 60 days

fine of $5,000 for s. 2(1)(a) C.A.I. to be paid at the minimum rate of $200. per month, commencing with first payment due on January 5, 2005, with the full amount to be paid no later than January 5, 2007

Released: October 6, 2004

Signed: "Justice Beverly A. Brown"