

ONTARIO COURT (PROVINCIAL DIVISION)

HER MAJESTY THE QUEEN

v.

CHARLES GAJARSKY

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P. O. A. A P P E A L H E A R I N G

HEARD BEFORE HER HONOUR R. SHAMAI
On the 5th day of November, 1998 at
OLD CITY HALL, Toronto, Ontario

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APPEARANCES:

Ms. W. Ramroop

Prosecutor

Mr. K. Curtis

Agent for the Appellant

UPON COMMENCING:

MS. RAMROOP: Number seven, Charles Gajarsky.

MR. CURTIS: Good afternoon, Your Honour.

THE COURT: Good afternoon.

MR. CURTIS: For the record Curtis, initial K., appear as agent for that appellant. I believe it is number seven on the docket.

THE COURT: Okay. I'm sorry your name, please?

MR. CURTIS: I'm sorry?

THE COURT: Your name, please.

MR. CURTIS: Curtis, C-U-R-T-I-S...

THE COURT: Okay.

MR. CURTIS: ... initial is K. and it's agent.

THE COURT: Okay, thank you.

MR. CURTIS: Yes. I appear in a brief argument...

THE COURT: Okay.

MR. CURTIS: ... against a conviction and an appeal of conviction. The offence date was in September last year and the conviction was in April this year. And, I am going to make a very focused argument.

THE COURT: Delightful.

MR. CURTIS: When Your Honour is ready.

THE COURT: Thank you.

MR. CURTIS: Well, I should first of all say that the defence is very conscious of the potential seriousness of the accident

5 In that it's a school bus offence. It's
an offence of not stopping when the
appellant is approaching the school bus.
But the argument in appeal of the
conviction is that there are two essential
elements that must be present for the
defendant to commit this offence.

10 Two of the essential elements, not all of
them, but two of the most essential
elements are the bus must be stopped and
the lights should be flashing. And in
this case it appears that the defendant
15 has approached the vehicle and stopped at
some stage for a few seconds and then
proceeded.

20 But there is evidence in the transcript
that the vehicle was stopped for a while.
But to be sure, there is no evidence the
lights on the front of the bus were
flashing and that's the focus of my
argument. That in the absence of one of
the two essential elements there can be no
evidence of "the offence". And the reason
25 that I am saying that there is no evidence
that the lights on the front of the bus
flashing is on page 10 it's line 20, where
in cross-examination the officer is asked:
"Well, did you see the lights on the front
of the bus flashing"?
30 And he says, "No, I did not".

I am not going to make a laboured argument. I am just going to say there is no evidence the lights were flashing and so there is no evidence of the offence and then it should have been acquitted.

THE COURT: Sir, I am just flipping through here, flipping through the transcript, and I see at page six that the Crown's witness Garfield says at line 11: "Now as this bus was stopped and the sign was out and flashing the children were getting off and the roof lights were going". Does any of that refer to the lights that you have described?

MR. CURTIS: Well there are two sets of roof lights. There is one on the back and one on the front. But my argument is the officer says quite clearly he didn't see the front lights flashing. I know that he says they are on the same circuit but that doesn't necessarily mean that because the back lights are flashing the front ones are flashing. It's not the same as those two signals that come out on the side where there is one light and reflected at the front and reflected at the back so it's one light, not two lights, same as the roof lights are. That's my argument.

THE COURT: I see, okay. I see, okay. Is there any place in here that the provision of the statute is set out?

MR. CURTIS: Provision of....

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THE COURT: Okay. Is there anywhere in the transcript, or elsewhere that you have handy, that the provisions of the statute would be set out?

MR. CURTIS: Well, I have got a copy of the H.T.A..

THE COURT: Okay.

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MR. CURTIS: Section 175, I believe.

THE COURT: Oh, thank you.

Okay, so it's subsection 11 of Section 175...

MR. CURTIS: Yes.

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THE COURT: ... that were are dealing with here.

MR. CURTIS: Yes. Yes, I believe that's correct.

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THE COURT: It provides that "... every driver or streetcar operator when meeting on a highway, other than a highway with a median strip, a stopped school bus that has it's overhead red signal lights flashing shall stop before reaching the bus and shall not proceed until the bus moves or the overhead red signal lights have stopped flashing".

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MR. CURTIS: That's why I was focusing on the red lights flashing.

THE COURT: Now I understand that there are more than -- there is more than one red flashing light potentially could be seen on the...

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MR. CURTIS: Yes, I believe so.

THE COURT: ... bus.

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MR. CURTIS: There is one flashing, or two flashing to the front, two to the back, and there are a couple on the stop sign arms that come out.

THE COURT: Okay. Okay, I think that I have your point there, sir. Is there something further?

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MR. CURTIS: Nothing further I wish to add, Your Honour.

THE COURT: Okay. Prosecutor's position please.

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MS. RAMROOP: Your Honour, I have had an opportunity to read this particular transcript quite -- and I will just point out to you quickly the areas where there is evidence of the lights flashing.

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The section clearly indicates "roof lights", it does not specify front or rear, it indicates "overhead roof lights". On page five at around line 15 to 20 there is evidence:

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It's roof lights as it was slowed. "It activated it's roof lights as it was slowed. When it came to a stop the sign on the side came out it again flashing and the children began departing the bus".

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Line 23: "And to the upper right and upper left of the front of the vehicle and at the top are big red -- large red lights that flash intermittently".

Page six, line about 12: "Now as this bus was stopped and the sign was out and

flashing the children were getting off and the roof lights were going".

And again, on page seven at about line 21:

"Question: And you indicated that there was a school bus stopped with roof lights activated. Can you describe these roof lights, please"?

Answer: "Yes, the roof lights are approximately four inches in diameter, they flash intermittently so when the front lights flash the right one will come on the left one is out and then the left one comes on the right one goes out".

Page eight, about line six:

"Are they overhead on top of the vehicle?

Answer: Yes.

Question: And what colour are the lights?

Answer: Red".

Line 17, sorry at 14: "Question: And how long had it been stopped when you observed -- when you first observed the defendant's vehicle?

Answer: It had been stopped for about three seconds".

Line 29: "Is that where the vehicle stopped when the school bus was or was it stopped before it reached the school bus?

Answer: Before it reached the school bus.

Question: And you indicated this....", page nine, line seven. "And you indicated it was stopped there for about five

seconds?

Answer: That's correct.

Question: And then what happened?

Answer: Then he just proceeded past the school bus while it was still sitting there.

Question: And when the vehicle proceeded past the school bus what was the school bus doing at this point?

Answer: Still departing the children. The lights were still flashing and the sign was still out.

Question: Was the school bus in motion or stopped?

No, it was still sitting there.

Question: I'm sorry you indicated the lights were still flashing?

Answer: That's correct.

Question: And what lights are these again that you are referring to?

Answer: All the lights on the school bus. The lights on the top of the school bus and the lights on the stop sign".

In re-examination by the prosecutor on page 13, line about six:

"Question: In terms of lights, when the defendant stopped and then proceeded...

Answer: Yes.

... what flashing lights did you observe on the bus at this point?

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Answer: At that point I could see the rear red flashing lights and the stop sign lights flashing".

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The agent has pointed out one part of the transcript to this Court negating all other relevant and very important evidence for the Court to come to a proper conclusion.

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In my respectful submission, based on all of the evidence given by the witness, this appeal should not be granted.

THE COURT: Okay, thank you. Do you wish to respond, sir?

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MR. CURTIS: Well, I'm going to rely on my original comment that the officer said he didn't see the front lights flashing and all of the comments made by my friend may be depleted by the officer's comment: "I didn't see the front lights flashing". That's all I have to say, Your Honour.

THE COURT: Thank you, sir.

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The very neat point that was raised by the appellant in this case has to do with the evidence as to the actual operation of the front overhead red lights on a school bus.

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Section 175 (11) of the Highway Traffic Act requires every driver or streetcar operator when meeting on a highway, other than a highway with a median strip, a

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stopped school bus that has it's overhead red signal lights flashing shall stop before reaching the bus and shall proceed until the bus moves or the overhead red signal lights have stopped flashing.

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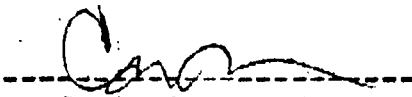
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The witness for the prosecution mentions many times the flashing lights that were operating in various places on the bus but when asked specifically, in essence in two questions, whether the witness saw the front overhead lights flashing or whether it was an assumption that they were flashing he said that he did not, in fact, observe the red lights activated in the front of the school bus. And I'm afraid that with deference to the prosecutor's position that is sufficient in my estimation to raise at least a reasonable doubt with respect to the sufficiency of the evidence and in my view, an acquittal ought to be entered and I am going to do that.

MS. RAMROOP: I believe that completes my matters in this court, Your Honour.

THE COURT: Thank you.

5 THIS IS TO CERTIFY that
the foregoing is a true
and accurate transcript
of my recordings to the
best of my skill and
ability.

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Catherine Jordan
Official Court Reporter

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