

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

GORDON HARRY

Before Justice D.A. Harris

Heard on July 5, 2011

Reasons for Judgment delivered December 1, 2011

N. Isak for the Appellant, Her Majesty the Queen

G. Ellis for the Respondent, Gordon Harry

REASONS FOR JUDGMENT

HARRIS J.:

[1] Gordon Harry was charged with speeding and with driving while suspended, both contrary to the *Highway Traffic Act* of Ontario. Following a trial, the presiding Justice of the Peace convicted Mr. Harry with respect to the speeding charge but dismissed the charge of driving while suspended.

[2] This is a Crown appeal against the dismissal of the charge of driving while suspended.

[3] The appeal is dismissed for the following reasons.

[4] The presiding Justice of the Peace heard evidence that Mr. Harry was operating a motor vehicle on March 28, 2010 and that at that time his licence to operate a motor vehicle was suspended as a result of an unpaid fine.

[5] A certified copy of a Notice of Suspension was introduced into evidence as Exhibit 1.

[6] The attached certificate indicated that the Notice of Suspension had been mailed to Gordon J. Harry at 691 Fielden Avenue, Rear, Port Colborne, Ontario on March 19, 2010.

[7] By virtue of s. 52(2) of the *Highway Traffic Act*, Mr. Harry was deemed to have received that document on March 26, 2010 unless Mr. Harry established “that he did not, acting in good faith, through absence, accident, illness or other cause beyond his control, receive the notice”.

[8] Mr. Harry testified that he did not receive the document until the day after March 28, 2010. He then paid the outstanding fine immediately.

[9] With respect to his mail delivery, he testified that “... I’ve always had problems with my mail being at a, like a house, in rear and front, that sometimes I don’t get my mail for a week, week and a half.”

[10] He then went on to say that “It’s just sometimes I get bills like three, four, five days late, depending on what, where the mailman puts the mail. Sometimes he puts them in the front slot and I don’t get it because it goes through the other apartment.”

[11] Mr. Harry also testified that he had not paid the fine earlier because his employer had said that he was going to pay it and Mr. Harry assumed that the employer had done so.

[12] A look at a calendar discloses that March 28, 2010 was a Sunday.

[13] The presiding Justice of the Peace convicted Mr. Harry with respect to the speeding charge but with respect to the charge of driving while suspended, he said:

On count one, with respect to you driving while under suspension. There are a number of circumstances that I have to look at. One, were you aware of the suspension? I am not convinced that you were aware of the suspension, through no fault of your own. If you do the math, and I cannot disagree with your representative, this was mailed out on the 19th of March. So, nine days later you are stopped. The mail is not delivered on Saturday and Sundays; I do not disagree with that. There are enough issues that have been brought to this court’s mind, that create a reasonable doubt in my mind, with respect to you knowing that you were driving under suspension.

However, you have also brought to the court’s attention, and it would seem to me that you have some problems with your mail. I do not think that you have taken enough due diligence to address that issue. So, perhaps you need to do that. Maybe take a look at getting [a] separate post box or something, or having the people that live in the front make sure that your mail gets delivered.

At the end of the day, in my view, the Crown has not made its case on count one, and that case will be dismissed.

[14] The first paragraph is clear and unambiguous. The presiding Justice of the Peace was not convinced beyond a reasonable doubt that Mr. Harry knew that his licence was suspended.

[15] This was a perfectly reasonable conclusion for the presiding Justice of the Peace to reach.

[16] The Notice of Suspension had been mailed on March 19. There would have been no mail delivery on Saturday, March 27 or Sunday, March 28 and it would have been quite possible for the Notice to arrive as late as Monday, March 29, especially where there had been a history of problems with mail delivery as there had been here. Further, in light of Mr. Harry's belief that his employer had paid his only outstanding fine, in the absence of the Notice, there would have been no reason for Mr. Harry to believe that there was a problem with his licence.

[17] The Appellant argued that the presiding Justice of the Peace applied the wrong test. It was not necessary for the prosecution to prove beyond a reasonable doubt that Mr. Harry knew of his suspension. It was only necessary to prove beyond a reasonable doubt that he was driving and that his licence had been suspended. It was then up to Mr. Harry to establish on a balance of probabilities that he did not otherwise know of the suspension and that his lack of knowledge was not due to his negligence.

[18] The Appellant correctly stated what Mr. Harry was required to prove here.

[19] The Supreme Court of Canada in *R. v. Sault Ste Marie*, [1978] 2 S.C.R. 1299 (S.C.C.) determined that all regulatory offences fell into one of three classifications.

[20] The Supreme Court of Canada in *R. v. MacDougall*, [1982] S.C.J. No. 89 (S.C.C.) and the Ontario Court of Appeal in *R. v. Miller*, [1988] O.J. No. 253 (Ont. C.A.) stated that driving while suspended falls into the classification of a strict liability offence.

[21] The effect of this is set out in *R. v. Montgomery*, [2006] O.J. No. 2267 (Ont. C.J.) where MacDonnell J. stated at para. 11 that:

Because it is a strict liability offence, the burden on the Crown is discharged upon proof of the *actus reus* of the offence, namely (i) that the defendant's licence to drive was suspended, and (ii) that while it was suspended, he drove. The Crown does not have to prove knowledge of the suspension, although in most cases it will attempt to do so with the aid of s. 52(2) of the *Highway Traffic Act*.

[22] So, applying the principles set out in *Sault Ste Marie*, *supra* at pp. 1325 and 1326, it would have then been open to Mr. Harry

to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused

reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event.

[23] So the first thing that Mr. Harry had to do was to prove on a balance of probabilities “that he did not, acting in good faith, through absence, accident, illness or other cause beyond his control, receive the notice”. That would then rebut the presumption set out in s. 52(2) of the *Highway Traffic Act*.

[24] That would not, however, have been the end of the matter here. It is recognized by both MacDonnell J. in *Montgomery, supra* at para. 12, and by the Ontario Court of Appeal in *Miller, supra* that “Evidence that the notice of suspension mailed by the Registrar of Motor Vehicles was not received would be an important circumstance to consider in relation to this issue”.

[25] MacDonnell J. goes on to state, “However, such evidence would not necessarily discharge the burden on the appellant unless he also established that he did not otherwise know of the suspension and that his lack of knowledge was not due to his negligence”.

[26] The agent for Mr. Harry drew my attention to the decision of *R. v. Bellamo*, [1995] O.J. No. 313 (Ont. C.J.) where Fairgrieve J. concluded that the proper test in drive suspended cases was whether the defence had left the court with a reasonable doubt as to whether the defendant was aware of the suspension.

[27] The reasoning from this case was also adopted by Tetley J. in *R. v. Lupo*, [2008] O.J. No. 5591 (Ont. C.J.).

[28] These were both Provincial Offences appeals that would have been binding on the presiding Justice of the Peace in this case.

[29] These decisions however are contrary to the ruling by the Ontario Court of Appeal in *Miller, supra* where it is clearly stated that the onus would be on Mr. Harry to prove, on a balance of probabilities that he did not know of his suspension and that his lack of knowledge was not due to his own negligence.

[30] So did Mr. Harry meet that onus here?

[31] As I stated earlier, Mr. Harry testified that he did not receive the Notice of Suspension until the day after he had been charged with this offence. The presiding Justice of the Peace noted that this could reasonably be true in light of the fact that the Notice of Suspension had been mailed on March 19. There would have been no mail delivery on Saturday, March 27 or Sunday, March 28 (the day of the alleged offences) and it would have been quite possible for the Notice to arrive as late as Monday, March 29, especially where there had been a history of problems with mail delivery as there had been here.

[32] Mr. Harry also testified that he believed that his employer had paid the fine that led to the suspension.

[33] If the presiding Justice of the Peace believed Mr. Harry, he should have dismissed the charge. It is likely that had the presiding Justice of the Peace stated in his reasons for judgment that he believed Mr. Harry, this appeal would not have been brought.

[34] Unfortunately, the presiding Justice of the Peace did not say that he believed Mr. Harry. Neither did he say that he did not believe Mr. Harry. When I read the reasons for judgment in their entirety, the only conclusion that I can reach is that the presiding Justice of the Peace did believe him. My reasoning for this is as follows.

[35] If the presiding Justice of the Peace did not believe Mr. Harry, he should not only have said so but he should have also indicated why he did not believe him.

[36] In *R. v. Gagnon*, [2006] 1 S.C.R. 621 (S.C.C.), the Supreme Court of Canada noted at para. 21 that “the accused is entitled to know why the trial judge is left with no reasonable doubt”. Similar sentiments are expressed by the Ontario Court of Appeal in *R. v. Ezard*, [2011] O.J. No. 3575 (Ont. C.A.) and in *R. v. A.J.S.*, [2011] O.J. No. 3864 (Ont. C.A.) where the Court stated at para. 18 of its endorsement that, “As stated by the Supreme Court of Canada, the appellant was entitled to understand why his evidence did not raise a reasonable doubt”.

[37] In *R. v. Dinardo*, [2008] 1 S.C.R. 788 (S.C.C.), Charron J. stated at para. 26 that “a failure to sufficiently articulate how credibility concerns were resolved may constitute reversible error”.

[38] In *R. v. W.(D.)*, [1991] 1 S.C.R. 742 (S.C.C.), the Supreme Court of Canada required judges to specifically consider whether the judge believed an accused person’s testimony as part of the process of determining whether the Crown had proven its case beyond a reasonable doubt.

[39] In this case, the presiding Justice of the Peace did not say that he did not believe Mr. Harry. Neither did he state any reason why he might not have believed Mr. Harry.

[40] What he did do was refer to undisputed facts that could be viewed as providing some corroboration for what Mr. Harry had said.

[41] The presiding Justice of the Peace clearly believed Mr. Harry when he said that his employer had agreed to pay the fine.

[42] He also clearly believed what Mr. Harry said about his recurring problems with his mail being delivered late on occasion.

[43] In fact, after reviewing all of the evidence and the reasons of the presiding Justice of the Peace in their entirety, I am satisfied that the presiding Justice of the Peace believed Mr. Harry when Mr. Harry said that he did not know of his suspension and that his lack of knowledge was not due to his own negligence.

[44] I find that it was not necessary here for the presiding Justice of the Peace to expressly state this in his reasons for judgment although it would certainly have been better had he done so.

[45] If I am wrong however and it was an error for the presiding Justice of the Peace to fail to expressly state that he believed Mr. Harry's evidence and that Mr. Harry had proven on a balance of probabilities that he did not know about his suspension, I would still dismiss the appeal.

[46] Had this been an appeal by Mr. Harry against a conviction, I could have dismissed the appeal pursuant to s. 120(1)(b)(iii) of the *Provincial Offences Act* if I was of the opinion that no substantial wrong or miscarriage of justice had occurred. The rules are different with respect to an appeal against acquittal.

[47] The powers on appeal against acquittal are set out in s. 121. That section, unlike s. 120, does not enumerate the instances in which I may allow or dismiss such an appeal. Instead, it is necessary to look to decisions of the Ontario Court of Appeal and the Supreme Court of Canada for guidance in that regard.

[48] In *R. v. Paquette* (1975), 19 C.C.C. (2d) 154 (Ont. C.A.), the Court dealt with similar provisions in the *Criminal Code*. At p. 162, the Court said:

It is to be observed that the term, "no substantial wrong or miscarriage of justice" is not incorporated in this subsection as it is in the situation of an appeal by an accused. However, in this case we think it appropriate to analogize the test, and we would hold that the Crown has satisfied us that it cannot be said that but for the misdirection the verdict of the jury would necessarily have been the same.

[49] This test was approved by the Supreme Court of Canada in *R. v. Vézeau*, [1976] S.C.J. No. 71 (S.C.C.), and in *R. v. Morin*, [1988] S.C.J. No. 80 (S.C.C.).

[50] In the case of Mr. Harry I would have been satisfied that no substantial wrong or miscarriage of justice occurred. The decision of the presiding Justice of the Peace was not unreasonable and the Crown has not demonstrated that the decision would not necessarily have been the same absent any error.

[51] So, as I stated earlier, I would still dismiss the appeal even if it was an error for the presiding Justice of the Peace to fail to expressly state that he believed Mr. Harry's evidence and that Mr. Harry had proven on a balance of probabilities that he did not know about his suspension.

[52] This leaves one final issue.

[53] The Appellant argued that the presiding Justice of the Peace was not satisfied that Mr. Harry had exercised due diligence here. The Appellant relies on the reasons for judgment where the presiding Justice of the Peace stated:

However, you have also brought to the court's attention, and it would seem to me that you have some problems with your mail. I do not think that you have taken enough due diligence to address that issue. So, perhaps you need to do that. Maybe take a look at getting [a] separate post box or something, or having the people that live in the front make sure that your mail gets delivered.

[54] There is no basis for any suggestion that Mr. Harry might need to take further steps to correct his mail delivery problem in order to qualify for a due diligence defence.

[55] Mr. Harry had provided his correct address to the Ministry of Transportation. Canada Post was aware of where that mail was supposed to go. That was evident from the fact that on occasion the mail was delivered to that location on time. The fact that Canada Post placed his mail in the wrong mailbox on other occasions, thereby delaying its receipt by Mr. Harry, does not provide sufficient basis for the presiding Justice of the Peace to make a ruling that Mr. Harry needed to get a new mailbox in order to exercise due diligence.

[56] In any event, I am not satisfied that the presiding Justice of the Peace made such a ruling. First of all, such a ruling would have been inconsistent to his statement in the following paragraph where he said, "the Crown has not made its case on count one, and that case will be dismissed."

[57] In addition, the statements by the presiding Justice of the Peace were far from unequivocal. The statements "**perhaps** you need to do that" and "**Maybe** take a look at getting [a] separate post box or something" (emphasis added by me) fall far short of constituting judicial direction that Mr. Harry had to do these things in order to have exercised due diligence. It is more likely an example of a judicial officer being less than totally precise in his choice of words in an oral judgment¹ and an example of a judicial officer attempting to give some advice as to how a defendant might avoid further problems in the future.

[58] The appeal is dismissed.

Released: December 1, 2011

Signed: "Justice D.A. Harris"

Justice D.A. Harris

¹ A phenomena that is not uncommon in any busy trial court.