

ONTARIO COURT OF JUSTICE

B E T W E E N :

THEODORE HUXTABLE

— AND —

THE QUEEN

Before Justice Sheila Ray

Heard on December 1, 2011, January 31, 2011, April 23, May 28, and August 13, 2012

Reasons for Judgment released October 2, 2012

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Ray, J.:

Introduction

[1] On August 13, 2012, I allowed this appeal and substituted an acquittal with reasons to follow. These are the reasons.

[2] Theodore Huxtable was charged on March 17, 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 P. Kowarsky convicted the appellant, who 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. 120 of the same act to allow or dismiss the appeal, set aside the finding on the ground that it is unreasonable or cannot be supported by the evidence, on the ground of a wrong decision on a question of law, or on any ground where there was a miscarriage of justice. If there has been a wrong decision on a ground of law, but no miscarriage has occurred, I can also dismiss the appeal.

[3] Section 2(1)(b) of the *Compulsory Automobile Insurance Act* creates the following strict liability offence:

[4] 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.

The appellant argued that the learned Justice of the Peace erred in law by accepting proof of ownership that offended the best evidence rule, and by finding that there was sufficient circumstantial evidence that the appellant allowed his motor vehicle to be operated without insurance. The respondent replied that sufficient proof of ownership was adduced by the prosecution at trial, and that there was sufficient circumstantial evidence for the learned Justice of the Peace to find that the owner gave the driver permission to use his motor vehicle.

The evidence

[5] The investigating officer in this case testified at trial that he stopped the respondent's vehicle and asked the driver for his driver's licence, permit, and proof of insurance. The driver, who was not the appellant, provided an Ontario photo driver's licence in the name of Justin Huxtable. His date of birth was August 18, 1989. His address was 8 Craddock Street, Concord, Ontario. The officer compared the photo on that licence to the driver, and was satisfied that he was dealing with one and the same individual. The driver also produced a Ministry of Transportation permit for the vehicle, which contained information including an accurate description of the vehicle, the licence plate, and the listed registered owner, who was Theodore Huxtable, the appellant. His date of birth was noted as July 8, 1956, with an address of 17 Bradwick Court in Caledon.

[6] The driver also produced an insurance card that was retained by the investigating officer and entered into evidence at trial. It contained information that the insurance was obtained through Desjardins General Insurance underwritten by Certas Home and Auto Insurance Company, the policy number, and the name of the insured, which was the appellant, with the same address listed that was on the vehicle permit. The effective dates for the insurance were October 22, 2009 to October 22, 2010. The officer noticed that the driver and the owner had the same last name, and enquired as to the relationship. The driver's answer, that he was the son of the owner, was correctly held not to be admissible by the learned Justice of the Peace at trial, because voluntariness was not conceded, and the prosecution did not seek to have a *voir dire* in order to prove the voluntariness of the statement. The officer also verified that the vehicle had not been reported stolen. No certified documents from the Ministry of Transportation were entered into evidence at trial showing that the appellant was the registered owner of the vehicle. An underwriter for Desjardins General Insurance testified at trial that the appellant's insurance had been cancelled for nonpayment on October 19, 2009. It was renewed on October 22, 2009, and again cancelled for nonpayment on February 12, 2010. The appellant was not insured on March 17, 2010.

Proof of ownership

[7] 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.

[8] 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. In both civil and criminal cases, “the best evidence rule” has historically been applied, when a document is adduced as evidence for the truth of its contents: Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 3rd ed, (Ontario: LexisNexis, 2009), c. 18. The rule simply stated is that a party must produce the best evidence that the nature of a case will allow. This means that if the original document is available, it should be produced. If the original has been destroyed or is otherwise unavailable, the contents of the document can be proved by using a copy or other secondary evidence. Photocopies are acceptable if the person who made the copies testifies that they are true copies.

[9] When a witness purports to describe the contents of a document without producing the document, this is generally regarded as hearsay and inadmissible. The situation is different, if the *viva voce* evidence can be found to be an exception to the hearsay rule. In *Re Brown and the Queen* (1975), 11 O.R.(2d) 7 (H.C.) the issue was the identity of the driver. The driver was charged with speeding and failing to produce a chauffeur’s licence, contrary to the *Highway Traffic Act*. The driver identified himself verbally and produced an ownership permit confirming his identification. Morden J. decided that the identity of the driver could reasonably be inferred from his statement coupled with the production of the ownership permit relating to the car being driven. MacLean J. applied the same approach in *R. v. Norat*, [2009] O.J. No. 1083 (C.J.) to a situation in which the driver identified himself and produced a valid permit as well as photo licence. The officer compared the photo to the driver and could definitely see that it was the same person. MacLean J. concluded that the production of the driver’s own documents amounted to an admission following the approach of Hawke J. in *R. v. Macatangay* [2003] O.J. No. 5643 (C.J.). Hawke J. accepted that the production of a driver’s licence is an admission which is an exception to the hearsay rule and as such can be used as evidence of the truth of its contents, as long as there are no problems with admissibility such as voluntariness.

[10] The issue in the case before me is not the identity of the driver, who was not the registered owner. The prosecution in this case must establish the identity of the registered owner. It cannot be said here that, “the driver made admissions against penal interest that were buttressed by documents found in [his] possession.” *R. v. Highland Transport* [1977] O.J. No. 6308 (C.J.), para. 17. MacLean J. accepts this distinction between the two cases in *Norat* at para. 19. I am persuaded by the submissions of the appellant that the learned Justice of the Peace misapplied the *Norat* case, when he extended

it to the facts in this case. The investigating officer's evidence in this case is hearsay, and there is no exception to the hearsay rule pursuant to which it can be admissible. It is not the best evidence. The prosecution had the option at trial of producing certified copies of documents establishing ownership of the vehicle for the truth of their contents pursuant to s. 210(7) of the *Highway Traffic Act*, and declined to do so. This would have been the "best evidence."

[11] I would not expect the production of the original documents for all of the reasons explained by Masse J. at para. 19 of *Highland Transport*:

...to remove the original registration documents from their repository with the Ministry is impracticable, inconvenient and puts these documents at risk of damage or loss.

[12] The use of certified copies is designed to obviate the need to remove documents from the Ministry. The use of certified copies would also address the practical concerns raised by MacLean J. at para. 28 of *Norat*:

In order to produce the "best evidence" in cases where drivers are required to produce documents at the roadside, officers investigating those matters would either have to seize the documents (thus leaving the drivers without the documents needed to operate the motor vehicle in the future) or take them away temporarily to some place where photocopies can be made (presumably by going to a police station while the drivers wait at the roadside for the officers to return). This is simply not practical and, in my view, is inconsistent with the simplified procedures contemplated under the *Highway Traffic Act* and other related legislation. These laws are designed to allow officers to deal with drivers quickly at the roadside with the least inconvenience to the drivers. Common sense dictates that the laws are aimed at regulating the everyday comings and goings of drivers on the highways and to require simple means of providing proof of things such as driver's licence, ownership, and insurance.

[13] The use of certified copies is a "simple means of providing proof of things such as driver's licence, ownership, and insurance." It saves the officers from having to "seize the documents (thus leaving the drivers without the documents needed to operate the motor vehicle in the future) or take them away temporarily to some place where photocopies can be made (presumably by going to a police station while the drivers wait at the roadside for the officers to return)." The use of certified copies is entirely consistent with the "simplified procedures contemplated under the *Highway Traffic Act* and other related legislation." It will not turn provincial offences court proceedings into "a trap for the unskilled and unwary" as submitted by the respondent. This phrase coined by the Ontario Court of Appeal in *R. v. Jamieson* (1981) 64 C.C.C.(2d) 550 is generally used with reference to self-represented litigants. The prosecution is not a self represented litigant. I do not agree that it imposes an unusual hardship for the prosecution to obtain certified copies of documents, which are in the government's possession and control. The use of certified copies attenuates the rigours of the "best evidence rule." It is a short cut that makes it easier for the prosecution to prove ownership without the inconvenience and risk of damage or loss to original documents occasioned by removing them from their safe repository. It also saves officers from having to seize documents or make copies of them at the scene.

[14] There is no case of which I am aware, or that has been brought to my attention, where the approach in *Brown* or *Norat* has been used, when vehicle ownership is the is-

sue, and the driver is not the owner. The approach of the courts has been entirely consistent in this context. I do not have to decide in this case which of the conflicting evidential approaches I accept, that have been applied with respect to the issue of driver identification, because that was not the issue in this case. I accept that with respect to driver identification there have been three approaches. Latimer J. took the view in *R. v. Sambhi* [2003] O.J. No. 3131 (C.J.) that the evidence of an officer who read from a driver's licence was not hearsay in a trial where the licence was not admitted into evidence. Hawke J. in *Macatangay* and MacLean J. in *Norat* took the view that the evidence of what an officer saw in roadside documents as recorded in his notes was hearsay, but it was an exception to the hearsay rule, because it was an admission. Lampkin J. in *R. v. Germanis* [2001] O.J. No. 3225 took the view that the notes taken by the officer from roadside documents were hearsay and did not fall under any exception to the hearsay rule including the admission exception. I will leave the determination of which of these three views I accept for another day, because driver identification is not the issue in the case before me.

[15] The learned Justice of the Peace erred in finding that ownership of the vehicle had been established beyond a reasonable doubt.

Circumstantial evidence

[16] The normal rules of evidence would also apply to the fact driven determination of whether or not a defendant permitted his 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. 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.

[17] The circumstantial evidence in this case is that the driver was able to produce documents belonging to the owner at the scene, the driver and the owner had the same last name, and the vehicle was not reported stolen. The learned Justice of the Peace was satisfied that this was “*prima facie*” evidence that “the owner provided permission to the driver to drive the vehicle,” and because there was “no evidence to the contrary,” he convicted the appellant. I disagree. The factual conclusion of the learned Justice was not supported by the evidence. There is more than one inference that could be drawn the three factors upon which the Justice relied, even when viewed cumulatively. His conclusion was speculative and unreasonable.

Conclusion

[18] The learned Justice of the Peace made a legal error when he misapplied *Norat*, and he reached an erroneous conclusion that the respondent had proved ownership beyond a reasonable doubt. He also erred when he concluded that the respondent had proved beyond a reasonable doubt that the owner had given permission to the driver to use his vehicle. The appeal is allowed and an acquittal entered.

Released: October 2, 2012

Signed: “Justice Sheila Ray”