

R. v. Jenkins, 2010 ONCA 278 (CanLII)

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COURT OF APPEAL FOR ONTARIO

Doherty, Feldman, Sharpe, Simmons and Gillese JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Wayne Jenkins

Appellant

Jordan Glick, appearing as *amicus curiae*

Riun Shandler and Peter Scrutton, for the respondent

Heard: March 23, 2010

Pursuant to leave to appeal granted by Simmons J.A. on February 19, 2009, on appeal from the order of Justice Bruce J. Young of the Ontario Court of Justice, dated February 4, 2008, dismissing an appeal from the convictions entered and sentences imposed by Justice of the Peace Angelo Cremisio on November 10, 2003.

Doherty J.A.:

[1] The appellant was convicted of driving while his licence was under suspension in contravention of the *Highway Traffic Act*, R.S.O. 1990, c. H.8. The trial proceeded *ex parte*. The appellant was sentenced to 10 days in jail and ordered to pay a fine of \$7,500.

[2] Several years later, the appellant attempted to appeal to the Ontario Court of Justice. Young J. (the “appeal judge”) dismissed that appeal on February 4, 2008. Simmons J.A. granted leave to appeal from that order pursuant to s. 131(1) of the *Provincial Offences Act*, R.S.O. 1990, c. P.33 (the “Act”).

[3] There was some disagreement between counsel as to the nature of the order made by the appeal judge. Specifically, the Crown characterizes the order as a refusal of leave to extend the time to appeal to the Ontario Court of Justice. The appellant characterizes the order as a dismissal of the appeal. It is not entirely clear from the transcript whether the appeal judge dismissed the motion for an extension or dismissed the appeal itself. On balance, however, I am satisfied that he dismissed the appeal.

[4] There are three issues:

- Does s. 54(1)(a) of the *Provincial Offences Act*, which permits *ex parte* trials even in circumstances where there is a possibility of incarceration, violate s. 7 or s. 11(d) of the *Charter*?
- Did the appeal judge err in law in dismissing the appellant’s appeal from conviction either by requiring him to demonstrate a defence on the merits or by failing to give him a fair opportunity to present his case?
- Did the appeal judge err in failing to consider the appellant’s sentence appeal and, if so, was the fine imposed harsh and excessive in the circumstances?

The Factual Background

[5] The appellant was charged on July 3, 2003, with driving while his licence was under suspension. He was given a summons by the police officer compelling him to appear in court on July 29, 2003. The appellant did not attend. The matter was adjourned to November 10, 2003, for trial.

[6] In his affidavit and cross-examination filed in this court, the appellant contends that he did not attend court on July 29, 2003, because he was not feeling well. He asserts that he attempted to get his sister to go to court for him, but she could not attend. The appellant has considerable experience with both the criminal justice system and the provincial offences regime. He clearly understood the need to go to court and that he could have someone attend on his behalf.

[7] On August 27, 2003, the appellant, who was prohibited from driving under both the *Criminal Code* and the *Highway Traffic Act*, was once again found driving his motor vehicle. He was arrested and taken into custody on several charges, including another charge of driving while his licence was suspended under the *Highway Traffic Act*. The appellant was held in custody and, on October 6, 2003, pled guilty to the

charges arising out of the August 27, 2003 arrest. He received a sentence of four months in addition to the six weeks he had spent in custody prior to his plea.

[8] In his affidavit and cross-examination, the appellant asserts that he understood that his guilty pleas on October 6, 2003, encompassed all of his outstanding driving charges, including the charge that was laid on July 3, 2003. There is no evidence that the appellant made any inquiries or that anyone told him that his October 6, 2003 guilty pleas included the July 3, 2003 charge. Nothing in the record of the proceedings on October 6, 2003, suggests that any of the guilty pleas referred to the earlier charge. The appellant's claim comes down to an assertion that he assumed, without any basis for doing so, that all of his outstanding matters were being dealt with on October 6, 2003.

[9] The appellant was in custody when the July 3, 2003 charge, which was adjourned on July 29, 2003, came on for trial on November 10, 2003. The appellant had no idea that his trial was scheduled for that day because he did not attend as required by the summons on July 29, 2003, and made no inquiries in the intervening three months to determine his trial date. The appellant knew that he could find out his trial date by calling the courthouse indicated on the summons. In any event, the appellant's claim that he assumed that the July 3, 2003 charge was disposed of on October 6, 2003, forecloses any suggestion that, had he not been in custody, he would have attended his trial on November 10, 2003. The fact that the appellant was in custody on November 10, 2003, had nothing to do with his failure to attend at his trial.

[10] The court proceeded with an *ex parte* trial on November 10, 2003. The evidence established that the appellant was driving while his licence was under suspension on July 3, 2003. The prosecutor requested a jail sentence of seven to 15 days primarily because the appellant had a prior conviction for driving while his licence was under suspension. The prosecutor also requested the minimum \$5,000 fine. The trial judge imposed a sentence of 10 days in jail and a fine of \$7,500. A warrant was issued for the appellant's arrest.

[11] The appellant was in custody serving the sentence imposed on October 6, 2003, until December 26, 2003. The warrant issued on November 10, 2003, was not executed until June 2, 2004. The police attended at a dispute between the appellant and his landlord and, when a CPIC check revealed the outstanding warrant, arrested the appellant. He served his 10-day sentence.

[12] About three years after he completed his sentence, the appellant made inquiries about the status of his licence. He anticipated that his various driving prohibitions and license suspensions would soon expire and that he would once again be eligible for a licence. He was told that in addition to the prohibitions and suspensions, there were a number of outstanding fines, including the \$7,500 fine imposed on November 10, 2003. He could not recover his licence as long as his fines remained unpaid. Consequently, in July 2007, the appellant launched appeals from various convictions arising out of different proceedings, including an appeal from the November 10, 2003 conviction and sentence.[1] In that appeal, the appellant claimed that he could not attend his trial on November 10, 2003, because he was in custody.

The Constitutionality of Section 54(1)(a)

[13] The relevant part of s. 54(1) of the Act provides:

Where a defendant does not appear at the time and place appointed for a hearing and it is proved by the prosecutor, having been given a reasonable opportunity to do so, that a summons was served, ... the court may,

(a) proceed to hear and determine the proceeding in the absence of the defendant; or

(b) adjourn the hearing and, if it thinks fit, issue a summons to appear or issue a warrant in the prescribed form for the arrest of the defendant.

[14] Section 54 appears in Part IV of the Act. That Part applies to any proceeding commenced under the Act, including Part III proceedings like the one at issue. Part III proceedings involve the more serious offences prosecuted under the Act and provide a procedure that is much like the one found in the summary conviction provisions of the *Criminal Code*.

[15] The appellant was properly served with a summons requiring him to attend court on July 29, 2003. He did not attend on that date, nor did he attend on the trial date of November 10, 2003. Under s. 54(1)(a) of the Act, the court had the jurisdiction to proceed *ex parte* with the trial and with the sentencing if the appellant was convicted.

[16] *Amicus* does not take issue with the court's statutory authority to proceed *ex parte* under s. 54(1)(a), but claims that the section is unconstitutional, at least where there is the potential for incarceration. Counsel argues that the appellant's failure to attend as required by the summons cannot be viewed as an implied waiver of his constitutional right to attend and participate in his trial. Counsel submits that the present scheme does not distinguish between defendants who actually choose not to attend and defendants who, for valid reasons, cannot attend their trial. Counsel further contends that mere non-attendance cannot give rise to an implied waiver of constitutional rights unless there are safeguards sufficient to ensure that the defendant did, in fact, waive those rights. Counsel submits that the Act does not contain those safeguards either in the processes governing *ex parte* trials or in the procedures available for challenging the results of those trials. Counsel refers to the provisions applicable to indictable criminal offences that require proof that the accused has absconded before the court can proceed in their absence as the kind of legislation that would provide adequate constitutional protection: see s. 475 of the *Criminal Code*.

[17] Crown counsel submits that this court should decline to hear the constitutional issue because it was not raised before the appeal judge. Generally speaking, appeal courts will not hear arguments that were not made below. The court does, however, have a discretion to hear those arguments. I am satisfied given the nature of the constitutional argument that it can be fully, effectively and fairly addressed on appeal. The appeal record assembled by the parties and the submissions of counsel contain the information necessary to determine whether s. 54(1)(a) of the Act violates either s. 11(d) or s. 7 of the *Charter*: see *R. v. Roach* 2009 ONCA 156 (CanLII), (2009), 246 O.A.C. 96 (C.A.) at paras. 6-8.

[18] *Amicus* acknowledges that his constitutional arguments face a formidable obstacle. This court decided the exact issue against him in *R. v. Felipa* reflex, (1986), 55 O.R. (2d) 362.

[19] *Felipa* is indistinguishable from this case. In *Felipa*, as in this case, the defendant was charged with driving while under suspension contrary to the *Highway Traffic Act*. In both cases, the trial proceeded *ex parte*. In *Felipa*, the court proceeded under s. 55(1) of the *Provincial Offences Act*, R.S.O. 1980, c. 400. That section is the predecessor to s. 54(1); the wordings of the two provisions are virtually identical. In *Felipa*, as in this case, the defendant was sentenced to a period of incarceration after being found guilty in the *ex parte* proceedings.

[20] In rejecting the contention that the *ex parte* proceedings violated the appellant's rights under ss. 7 and 11(d) of the *Charter*, Houlden J.A. said at p. 365:

Section 55(1)(a) does not deprive the defendant of his right to be present at his trial. To exercise the right the defendant need only appear at the time and place

fixed for the trial. The section merely provides the machinery to be employed if the defendant does not avail himself of his right to appear at the trial.

[21] *Felipa* relied on appellate judgments from two other provinces that upheld the constitutionality of the provisions governing *ex parte* trials in summary conviction proceedings, now s. 803(2) of the *Criminal Code*: see *R. v. Tarrant* 1984 CanLII 659 (BC C.A.), (1984), 13 C.C.C. (3d) 219 (B.C.C.A.); *R. v. Rogers*, reflex, [1984] 6 W.W.R. 89 (Sask. C.A.). On this appeal, the court was not referred to any provincial appellate decision that has reconsidered or in any way cast doubt on the correctness of *Felipa* or the authorities on which it relied.

[22] The Supreme Court of Canada has not addressed the constitutionality of *ex parte* trials either in the context of provincial legislation or the summary conviction provisions in the *Criminal Code*. I am not aware of any Supreme Court of Canada decision that has referred to *Felipa*. [2]

[23] In *R. v. Richard*, 1996 CanLII 185 (S.C.C.), [1996] 3 S.C.R. 525, the Supreme Court of Canada did consider the constitutionality of legislation from New Brunswick that, for minor regulatory offences, provided that a failure to respond to a ticket within a given time constituted a waiver of a right to trial and resulted in a conviction without any inquiry into the merits of the allegation. The legislation in *Richard* is similar to that found in Part I of the Act. Part I of the Act applies only to minor regulatory offences. [3]

[24] In *Richard*, LaForest J., for a unanimous court, held that the legislation was constitutional, stating at para. 35:

It is therefore my view that the New Brunswick legislature has acted in accordance with the *Charter*. While it is true that it has established a scheme that deprives accused persons of the benefit of s. 11(d) of the *Charter*, that deprivation operates in circumstances where the litigants involved have in any event validly waived their right to be presumed innocent and their right to a fair and public hearing by an independent and impartial tribunal.

[25] *Amicus* submits that the court in *Richard* accepted that a defendant's failure to respond to a ticket constituted a waiver of constitutional rights only because the offences in question were purely regulatory and a defendant did not face the risk of imprisonment if convicted. Counsel submits that the reasoning in *Richard* is some indication that, where the liberty interest of a defendant is engaged by the risk of imprisonment, more than mere non-attendance will be required to imply a waiver of constitutional rights. Counsel submits that *Richard* casts doubt on the reasoning in *Felipa* and should signal a reconsideration of that decision by this court.

[26] I agree that the regulatory nature of the offences in question and the absence of any possibility of imprisonment were important contextual considerations in *Richard*: see *Richard* at para. 30. I do not, however, agree that the analysis in *Richard* has any bearing on the *Felipa* analysis.

[27] The statutory provision upheld in *Richard* not only denied the defendant the right to a trial, but also presumed the defendant's guilt if he did not respond to the ticket within the designated time. Section 54(1)(a) of the Act has no such effect. A defendant who does not appear for his trial is still presumed innocent. In the *ex parte* proceedings, the prosecutor must prove the defendant's guilt beyond a reasonable doubt according to the generally applicable evidentiary and procedural rules. The defendant has a trial before an independent and impartial tribunal. As Houlden J.A. concisely put it in *Felipa*, the Act simply provides a mechanism for proceeding with a trial where the defendant does not avail him or herself of the

right to appear at that trial.

[28] As stressed in *Richard* at paras. 28-29, constitutional rights, including those protected by ss. 7 and 11(d), can only be given meaning within a specific context. The reasoning in *Richard* addresses a fundamentally different legislative scheme than that at issue in this case. Nothing in *Richard* causes me to doubt the correctness of the analysis in *Felipa*.

[29] A litigant seeking to have this court overturn one of its prior decisions must demonstrate compelling circumstances that justify departure from earlier authority. It is not enough to simply show that a good argument can be made for taking a different view of the law. The rationale underlying the institutional reluctance to overrule earlier decisions and the factors that may cause a court to overrule its earlier decisions are clearly set out in *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* 2005 CanLII 21093 (ON C.A.), (2005), 76 O.R. (3d) 161 (C.A.), at paras. 118-127, leave to appeal to S.C.C. refused *reflex*, (2006), 216 O.A.C. 399n. Only one of the factors identified in *Polowin* exists in this case – overruling *Felipa* would establish a rule more favourable to the accused: *Polowin* at para. 124. That factor standing alone cannot justify overruling a prior authority.

[30] Apart from the argument based on *Richard*, which I have rejected above, *amicus* does not point to any other factor that would justify overruling *Felipa*. No case has been made out for reconsidering that decision. Certainly, I am not satisfied that it is “manifestly wrong”: *Polowin* at para. 126. To the contrary, I think it is right.

[31] In upholding the constitutionality of *ex parte* trials under the Act, I do not suggest that they are or should become the norm.[4] Clearly, there is a risk of a miscarriage of justice inherent in an *ex parte* proceeding that does not exist where the defendant is present. This risk exists despite the significant legislative and administrative safeguards in place to facilitate a defendant’s appearance at trial personally, by counsel or through an agent. For example, a defendant can, with a simple phone call to the location identified in the summons, find out when his or her trial is scheduled even if the defendant has missed the return date on the summons. In addition, some, but not all, miscarriages occasioned by *ex parte* proceedings can be rectified on appeal. To acknowledge that an *ex parte* proceeding can result in a miscarriage of justice does not, however, advance the constitutional analysis. A procedure need not be foolproof to be constitutional.

[32] Prosecutors and judges have a role to play in minimizing the risk of miscarriages of justice through *ex parte* proceedings. An *ex parte* trial is not automatic when a defendant fails to appear in answer to a charge under Part III of the Act. The prosecutor must request an *ex parte* trial and the trial judge has the discretion to proceed *ex parte* or to take other steps, usually the issuance of a warrant, to compel the attendance of the defendant.

[33] The court was told in oral argument that there are no formal guidelines in place to assist prosecutors in deciding when to request an *ex parte* trial. In every case where the prosecutor will seek a custodial sentence upon conviction, the prosecutor would be well-advised to consider whether an *ex parte* proceeding is appropriate. The longer the period of imprisonment sought, the less inclined the prosecutor should be to request an *ex parte* trial. If the prosecutor ultimately decides that it would be proper to proceed *ex parte*, he or she should advise the trial judge, before the trial begins, of their intention to seek a custodial sentence and the range of sentence that they anticipate will be appropriate. The trial judge can use this information to decide whether to proceed with the trial or take other action, such as adjourn the hearing and issue a warrant for the defendant’s arrest.

[34] Finally, it is worth noting that, as observed by Simmons J.A. during the oral argument of this appeal,

declining to proceed *ex parte* and issuing a warrant for the arrest of the defendant carries its own significant risk of an unnecessary deprivation of liberty. Issuing a warrant is often the only viable alternative to an *ex parte* proceeding where the defendant has not appeared in answer to a summons. A person arrested on a warrant issued when he or she did not attend their trial may well spend some time in custody before that trial is held or the person is released on bail. If the person is convicted and receives a non-custodial sentence, he or she will have spent more time in custody than would have been the case had the trial proceeded *ex parte*. This risk is significant given that the vast majority of *ex parte* trials do not result in sentences of imprisonment.[5]

[35] I would uphold the constitutionality of s. 54(1)(a) of the *Act*. The court has jurisdiction to proceed with an *ex parte* trial when the conditions precedent under the statute are met. Whether the court should do so, will depend on the circumstances. The exercise of that discretion in a specific case is reviewable on appeal.

The Conviction Appeal

[36] There are several procedural problems associated with the conviction appeal. The appellant was self-represented in the lower court. In this court, initially Crown counsel, and subsequently Mr. Glick as *amicus*, recognized a potential injustice and did their best to create a record and get to the merits of the appellant's claims. The court acknowledges and appreciates the assistance of Crown counsel and Mr. Glick.

[37] I propose to address the merits of the conviction appeal based on the record that is before this court. In doing so, however, I stress that virtually none of this material was before the appeal judge. He cannot be criticized for the manner in which he addressed the appeal given the material that was before him.

[38] The appellant complains that the conviction entered and sentence imposed on November 10, 2003, were unfair because he did not know anything about those proceedings, was in custody on other matters and, therefore, was unable to attend the trial.

[39] A valid explanation for non-attendance offered on appeal may justify setting aside a conviction entered after an *ex parte* trial. There is no valid explanation here. The appellant did not know about the trial date because he chose not to attend on July 29, 2003, as required by the summons. He knew he was required to attend and he knew that if for some reason he could not attend, someone could attend on his behalf. He took no meaningful steps to either appear in person or have someone appear for him. The appellant made no attempt after July 29, 2003, to determine his trial date. He knew that his trial date could be determined by a simple phone call to the courthouse identified on the summons. He has offered no acceptable explanation for not taking any steps to determine his trial date or to have anyone attend on his behalf. Furthermore, on the appellant's own version of events, he was not concerned about the July 3, 2003 charge because he assumed he had pled guilty to that charge and others in October. On his version of events, he believed that he had pled guilty to the July 3, 2003 charge on October 6, 2003, and was serving his sentence on November 10, 2003. While that belief was entirely unreasonable, the fact remains that whether the appellant was in or out of jail, he would not have gone to court in answer to the July 3, 2003 charge on November 10, 2003. His incarceration was irrelevant to his failure to attend.

[40] The real explanation for the appellant's absence at his trial is clear. He chose not to go to court on July 29, 2003, although he knew he was required to go to court. The appellant chose to do nothing to find out when his trial was scheduled. He did nothing about it because it was of no concern to him. He chose to ignore the charge. The appellant became concerned only years later when the outstanding fine flowing from his November 10, 2003 conviction became an inconvenience for him. Nothing in the specific circumstances

of this case would justify setting aside the conviction entered after the *ex parte* trial on November 10, 2003.

The Sentence Appeal

[41] The sentence appeal centres on the quantum of the fine imposed at trial and the appeal judge's failure to consider the sentence appeal on its merits. At trial, the prosecutor asked for the imposition of the minimum fine of \$5,000. The trial judge, without giving any reasons for doing so, imposed a fine of \$7,500. As the matter had proceeded *ex parte*, he did so without the benefit of any information concerning the appellant other than his criminal and driving records. The trial judge made no reference to these records when imposing the \$7,500 fine.

[42] The appeal judge did not deal with the sentence appeal on its merits. This is understandable as the appellant had not filed anything that would assist the appeal judge in addressing the sentence appeal. Specifically, the appellant had not filed the trial transcript. We now have that transcript and additional material.

[43] Crown counsel has fairly conceded that the trial judge erred in principle in imposing a larger fine than was requested by the prosecutor without giving any reasons for doing so. The Crown also fairly acknowledges that it can offer no justification for increasing the fine beyond the minimum fine requested by the prosecutor.

[44] Counsel for the appellant accepts the Crown's concessions, but argues that this is an appropriate case to exercise the jurisdiction under s. 59(2) of the Act and impose a fine that is lower than the minimum fine. Counsel advised the court that the appellant has limited means and that, while he is presently paying off his fines in accordance with a payment schedule set for him, those payments are onerous for him.

[45] I would allow the appeal from sentence and impose the minimum of \$5,000. Fairness dictates that trial judges should not impose a greater sentence than the one requested by the prosecutor in an *ex parte* trial without giving good reasons for doing so. Specific factors justifying the increase should be identified before the trial judge goes beyond the sentence requested by the prosecutor.

[46] The appellant has not, however, made out a case for the imposition of a fine below the statutory minimum. If the payments are posing a real problem, the appellant has potential remedies under s. 69 of the Act.

Conclusion

[47] I would hold that the *ex parte* trial provision in the Act is constitutional. I would dismiss the conviction appeal. I would allow the sentence appeal and vary the fine from \$7,500 to \$5,000.

RELEASED: "DD" "APR 15 2010"

"Doherty J.A."

"I agree K. Feldman J.A."

"I agree Robert J. Sharpe J.A."

"I agree Janet Simmons J.A."

"I agree E.E. Gillese J.A."

[1] The appellant acted for himself on these appeals and, understandably, his documentation was less than perfect. While the Notice of Appeal referable to the November 10, 2003 proceedings referred only to sentence, it is clear that the appellant intended to appeal both conviction and sentence. None of the other appeals launched by the appellant have made it to this court.

[2] *Tarrant* and *Rogers* were referred to by Wilson J., writing for the majority on that point, in *R. v. Lee*, 1989 CanLII 21 (S.C.C.), [1989] 2 S.C.R. 1384, a case that addressed the constitutionality of s. 526.1 (now s. 598) of the *Criminal Code*. Nothing said in *Lee* can be taken to either approve or disapprove of the reasoning in *Tarrant* or *Rogers*.

[3] The constitutionality of the Ontario legislation was upheld in *R. v. Carson* reflex, (1983), 4 C.C.C. (3d) 476 (Ont. C.A.). See also *R. v. Miller* (2010), 251 C.C.C. (3d) 43 (B.C.C.A.).

[4] It is fair to assume that the vast majority of *ex parte* trials result in a conviction. The affidavit material filed in this court indicates that only 3.4 % of all Part III dispositions between April 2008 and March 2009 were *ex parte* convictions.

[5] Only 13.5% of the 2,196 *ex parte* convictions for driving while under suspension in 2008/2009 resulted in a jail sentence.

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