

ONTARIO COURT OF JUSTICE

CITATION: *R. v. John*, 2018 ONCJ 787

DATE: 2018 11 02

COURT FILE Nos.: Halton 15 – 7547 and 17 - 7661

IN THE MATTER OF an appeal under section 116 of the *Provincial Offences Act*, R.S.O. 1990, c. P.33, as amended;

B E T W E E N :

HER MAJESTY THE QUEEN
Respondent

— AND —

David JOHN
Appellant

Before Justice D.A. Harris
Heard on September 24, 2018
Reasons for Judgment released on November 2, 2018

P. Wright **counsel for the respondent**
A. Smart **agent for the appellant David John**

HARRIS D.A. J.:

INTRODUCTION

[1] David John was charged by way of Part III Informations, with the following four offences:

(1) Between the 16th day of May and the 6th day of June, 2015 at 557 Wettlaufer Terrance, Town of Milton, Regional Municipality of Halton, Central West Region, operate an electrical contracting business without holding a valid electrical contractor license, contrary to Section 3 of Ontario Regulation 570/05, and did thereby commit an offence contrary to s. 113.20(1)(d) of the Electricity Act, S.O. 1998, Chapter 15, Schedule A, as amended.

(2) Between the 16th day of May and the 6th day of June, 2015 did fail to file with the Inspection Department a completed application for inspection of work on an electrical installation at the premises located at 557 Wettlaufer Terrance,

Town of Milton, Regional Municipality of Halton, Central West Region, as required by the provisions of Rule 2-004(1) of the Electrical Safety Code adopted by reference in Ontario Regulation 164/99, as amended, and did thereby commit an offence contrary to s. 113(12)(b) of the Electricity Act, S.O. 1998, Chapter 15, Schedule A, as amended.

(3) Between the 10th day of May and the 10th day of June, 2015 at 576 Wettlaufer Terrace, Town of Milton, Regional Municipality of Halton, Central West Region did commit the offence of Operate an electrical contracting business without holding a valid electrical contractor license, contrary to Section 3 of Ontario Regulation 570/05, and did thereby commit an offence contrary to s. 113.20(1)(d) of the Electricity Act, S.O. 1998, Chapter 15, Schedule A, as amended.

(4) Between the 10th day of May and the 10th day of June, 2015 fail to file with the Inspection Department a completed application for inspection of work on an electrical installation at the premises located at 576 Wettlaufer Terrance, Town of Milton, Regional Municipality of Halton, Central West Region, as required by the provisions of Rule 2-004(1) of the Electrical Safety Code adopted by reference in Ontario Regulation 164/99, as amended, and did thereby commit an offence contrary to s. 113(12)(b) of the Electricity Act, S.O. 1998, Chapter 15, Schedule A, as amended.

[2] Mr. John did not appear for his trial. It proceeded in his absence.

[3] Five witnesses testified for the Crown.

[4] At the end of the trial, the presiding justice of the peace convicted Mr. John of all offences.

[5] She then sentenced him to fines of \$10,000 per offence and to imprisonment for five days.

[6] Mr. John has appealed against these convictions on the basis that the presiding justice of the peace erred in law in:

(a) admitting into evidence certain statements made by Mr. John to investigator Roger Neal without holding a *voir dire* to determine if; (1) Mr. Neal was a person in authority and if so, (2) was the statement made voluntarily;

(b) admitting into evidence certain business records and their contents without requiring compliance with either the common law rules or statutory authority regarding such records;

(c) finding that the evidence of the civilian witnesses identified Mr. John beyond a reasonable doubt as the person they dealt with.

[7] Mr. John has appealed against the sentences on the basis that they were harsh and unreasonable in all of the circumstances, and that the presiding justice of the peace

exceeded the Crown submission without informing Mr. John that she was considering doing that.

[8] I will address each of these grounds of appeal in the same order as set out above.

THE STATEMENT TO MR. NEAL

[9] In *Ibrahim v. The King* the Privy Council said:

It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.¹

[10] The Supreme Court of Canada adopted the "Ibrahim rule" in *Proske v. The King*² (1922), 63 S.C.R. 226, and subsequently applied it in other cases.³

[11] Accordingly, the Crown must prove beyond a reasonable doubt that a statement made to a person in authority was made voluntarily. Otherwise, it will be excluded.

[12] In this case, Mr. Neal certainly appeared to be a person in authority. He was a retired policeman who had been employed by the Electrical Safety Association as an investigator for the previous nine years. He was tasked with investigating this case. He swore the Informations charging Mr. John and he prepared the Crown brief. As part of his investigation, he interviewed Mr. John and received a verbal statement from him.

[13] Any doubts I might have as to Mr. Neal's status as a person in authority exist only because the presiding justice of the peace did not canvas this issue, as she was required to, before admitting the statement purportedly made by Mr. John.

[14] Further she did not canvas whether the statement was made voluntarily.

[15] She simply allowed Mr. Neal to testify that Mr. John had admitted to him that he, Mr. John had contracted with Mr. Rivera and Mr. Chiasson to provide electrical services but that he was not a licenced contractor and that he had not obtained any permits with respect to those projects.

[16] Counsel for the respondent argued that there was nothing in the evidence to suggest that the statement was not made voluntarily. I would agree with that assessment.

¹ *Ibrahim v. The King*, [1914] A.C. 599 (P.C.), at p. 609:

² *Proske v. The King* (1922), 63 S.C.R. 226 (S.C.C.)

³ *Boudreau v. The King*, [1949] S.C.R. 262, *R. v. Fitton*, [1956] S.C.R. 958, *R. v. Wray*, [1971] S.C.R. 272, and *Rothman v. The Queen*, [1981] 1 S.C.R. 640.

[17] That is not however the test. Mr. John did not have to prove that the statement was not voluntary. The onus was on the Crown to prove beyond a reasonable doubt that it was made voluntarily.

[18] The Ontario Court of Appeal has made it clear that 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.⁴

[19] The statement should not have been admitted into evidence.

THE RECORDS OF THE ELECTRICAL SAFETY ASSOCIATION

[20] Matthew Pitman testified that he was employed by the Electrical Safety Association as a journeyman electrical inspector in 2015 but had advanced to be a senior electrical inspector at the time of the trial. He prepared two documents that were introduced as exhibits in this case. His information was based partly on hearsay statements that had been made to him by others, and partly on his examination of certain records.

[21] He testified that no permits had been issued for the two projects which were the subject of this case.

[22] Scott Eason testified that he was a licencing project specialist employed by the Electrical Safety Association. He had searched the records of the Electrical Safety Association and found no record of David John being licensed as an electrical contractor. He also found no record of permits being issued for the two projects which were the subject of this case.

[23] These records and their contents constituted hearsay evidence. They should not have been admitted into evidence unless they fell within one of the exceptions to the hearsay rule.

[24] The common law exception in Canada is that records made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record should be received in evidence as *prima facie* proof of the facts stated therein.⁵

[25] In Ontario, section 34.1 of the *Evidence Act* sets out similar preconditions for the admissibility of electronic records.

[26] The Crown did not prove that those preconditions had been met here.

[27] Further, Mr. Pittman also relied on hearsay statements that others had made to him.

⁴ *R. v. Jenkins*, [2010] O.J. No. 1517 (Ont. C.A.) at para. 27.

⁵ *Ares v. Venner*, [1970] S.C.J. No. 26 (S.C.C.)

[28] The evidence of Mr. Pittman and that of Mr. Eason should not have been admitted.

THE IDENTIFICATION EVIDENCE

[29] Counsel for Mr. John argued that the homeowners in this case, Rafael Rivera and Jeff Chiasson, had not identified the defendant Mr. John as the person they had hired to work in their homes.

[30] I disagree.

[31] Both men testified that they hired someone to do electrical work on their homes. The man they hired identified himself as David John and provided certain contact information to them. They subsequently passed that contact information to Mr. Neal.

[32] Mr. Neal used that contact information to arrange a meeting with someone who identified himself as David John. Mr. John showed Mr. Neal a valid Ontario driver's licence identifying himself as David John. The photograph on that licence matched the person who claimed to be David John. Mr. Neal charged that person and had him summonsed to court.

[33] I am satisfied that this was sufficient evidence for the presiding justice of the peace to find that the person referred to by the witnesses was in fact the defendant David John.

REMEDY

[34] The relevant portions of section 120(1)(a) of the *Provincial Offences Act* provide that on the hearing of an appeal against a conviction, the court by order, may allow the appeal where it is of the opinion that, the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or on any ground, there was a miscarriage of justice.

[35] Section 120(2) provides that where the court allows an appeal under clause (1)(a), it shall direct a finding of acquittal to be entered, or order a new trial.

[36] In this case, the presiding justice of the peace wrongly admitted the evidence referred to above. This was a wrong decision on a question of law.

[37] In the absence of the statement to Mr. Neal and the evidence of Mr. Pitman and Mr. Eason, there was no evidence to prove that Mr. John was not licensed or that he did not obtain the necessary permits. Accordingly the convictions cannot stand.

[38] I am satisfied however that the appropriate remedy here is to allow the appeal against conviction, set aside the convictions and order a new trial. It is not appropriate to direct a finding of acquittal to be entered.

[39] I am also ordering, pursuant to section 51 of the *Provincial Offences Act*, that Mr. John is to attend in person for that trial.

THE SENTENCE APPEAL

[40] There is no need for me to address this in light of the above decision.

[41] I feel compelled, however to comment on the decision by the presiding justice of the peace to add imprisonment for five days as part of the sentence.

[42] Crown counsel did not ask for this. He asked for the fines that were then imposed. It was only when the justice of the peace proposed adding jail to the sentence that counsel agreed with the proposal.

[43] The Ontario Court of Appeal has stated that 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.⁶

[44] In this case there was no good reason expressed to add the jail term.

[45] In fact the justice of the peace sentenced Mr. John without the benefit of knowing any information about him other than that he had no prior convictions.⁷

[46] More concerning, she went on at great length about her considering it very seriously when a defendant fails to show up for trial. She stated that, “it tells me a certain attitude or mentality that he has,” and that “the fact that he cares not about these charges is certainly serious”.

[47] These comments were made in the absence of any information as to why Mr. John had not appeared for the trial.

[48] Similarly, there was no evidentiary basis for referring to him as a, “travel by night operator” or suggesting that, “when he gets the paperwork of what happened today he is going to throw that in the recyclable I’m sure”.

[49] Further, Mr. John had no idea of this added jeopardy. The position of the Crown had always been that the Crown was seeking substantial fines. When it was proposed that this be changed to add jail, fairness called for the matter to be adjourned so that Mr. John was put on notice of that fact and was given an opportunity to oppose it.

[50] In that regard, I find it distressing that Crown counsel (who was not Mr. Wright) did not point this out to the presiding justice of the peace rather than eagerly adopting her proposal. Further he should not have mentioned outstanding charges or noted that, “this case has exhausted the ESA and its resources”. The presiding justice of the peace properly rejected both of these suggestions in her reasoning but they should not have been advanced by Crown counsel as factors justifying jail here.

⁶ *R. v. Jenkins*, *supra* at para. 45.

⁷ *Ibid.*, at para. 41

[51] Jail is to be imposed only as a last resort. It should not be referred to as “a jiggle, a little jig-jag” or as “just a little touch so that he will get this”.

[52] It is also not the only sentence that can satisfy the principles of denunciation and deterrence. Fines totaling \$40,000 could also satisfy those principles.

DISPOSITION

[53] The appeal against conviction is allowed. The convictions are overturned. A new trial is ordered. Mr. John is ordered to appear in person for that trial.

Released: November 2, 2018
Signed: Justice D.A. Harris