

ONTARIO COURT OF JUSTICE

B E T W E E N :

Her Majesty the Queen

— AND —

Reginald Johnson

Before Justice of the Peace Kenneth W. Dechert
Heard on March 15, 2007, September 12, 2007 and March 12, 2008
Reasons for Judgment delivered orally on June 18, 2008

D. Howarth for the prosecution
L. Carter for the defendant Reginald Johnson

JUSTICE OF THE PEACE DECHERT:

INTRODUCTION

[1] Reginald Johnson stands charged with the offence of “Turn-Not in Safety”, contrary to subsection 142(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, as amended, hereinafter referred to as the “HTA”, relating to an alleged incident of October 1, 2006.

[2] The trial of this matter began before me on March 15, 2007, in the Ontario Court of Justice-Provincial Offences Court, in the City of Burlington. At that time, the defendant was arraigned on the charge as it was originally worded under certificate of offence no. 86218065, that he on the 1st day of October, 2006 at Postmaster Drive and Upper Middle Road, in the Town of Oakville, did commit the offence of “Left turn-Not in Safety”, contrary to the HTA, section 142(1). The originally worded certificate of offence stated that the alleged offence took place at 8:20 p.m. on the said date. The defendant entered a plea of not guilty to the said charge.

[3] During the course of the trial, the Court granted two prosecution applications to amend the certificate of offence. The certificate was amended so as to delete the word “left” from the offence description, such that the offence was then described as “Turn-Not in

Safety”. The certificate was further amended to delete 8:20 p.m. as the time of the offence and insert 6:00 p.m. in its place, so as to conform with the prosecution evidence in that regard.

[4] Following arraignment, the trial of the matter then ensued. The trial was not completed on March 15, 2007. It was then remanded to September 12, 2007 in the Ontario Court of Justice—Provincial Offences Court, in the Town of Milton for continuation and further remanded to March 12, 2008, when it was eventually completed. I then reserved my judgment and the matter was scheduled for today’s date, June 18, 2008, for its delivery in the Provincial Offences Court in Milton, Ontario.

[5] The prosecution was represented by Ms. D. Howarth of the City of Burlington. The defendant was represented by his representative, Ms. L. Carter.

THE LAW

[6] The defendant stands charged with the offence of “Turn-Not in Safety”, contrary to subsection 142(1) of the HTA. That section reads as follows:

The driver or operator of a vehicle upon a highway before turning to the left or right at any intersection or into a private road or driveway or from one lane for traffic to another lane for traffic or to leave the roadway shall first see that the movement can be made in safety, and if the operation of any other vehicle may be affected by the movement shall give a signal plainly visible to the driver or operator of the other vehicle of the intention to make the movement.

[7] According to the Ontario High Court decision in *Regina v. Lebedorf*, [1962] O.W.N. 233 (Ont. H.C.), subsection 142(1) of the HTA creates two separate offences, the offence of failing to see first that such movement can be made in safety and the offence of failing to give a signal plainly visible to the operator of any other vehicle that may be affected by such movement. The defendant is charged with the first of such offences, that of turn-not in safety. The elements of the *actus reus* of that offence are whether the driver or operator of a vehicle on a highway, prior to executing the left or right turn manoeuvre, first sees that the movement can be made in safety. In determining whether the movement can be made in safety, the Court must apply an objective standard, independent of the driver’s belief in that regard.

[8] The subject offence is, in my view, one of strict liability. This classification accords with the decision of the Alberta Provincial Court in *Regina v. L. (M.V.)*, (1988) 12 M.V.R. (2d) 33 (Alta. Prov. Ct.).

[9] Accordingly, in order to sustain a conviction against the defendant herein, the prosecution need not prove *mens rea* on the part of the defendant, but only that the defendant committed the *actus reus* of the offence. In light of the categorization of the offence as one of strict liability, it is open to the defendant to exonerate himself by establishing the defence of due diligence, on a balance of probabilities, if the prosecution has succeeded in establishing that the defendant committed the prohibited act of turn-not in safety to the standard of proof beyond a reasonable doubt.

THE ISSUES

[10] The ultimate issue in this proceeding is whether the prosecution has proved the subject offence as against the defendant, beyond a reasonable doubt.

[11] Based on the arguments presented by the parties during the course of the trial, it is evident that the identification of the defendant as the person who committed the *actus reus* of the offence, is in issue. Identification is an element which must be proved by the prosecution beyond a reasonable doubt. The determination of the sub-issue of identification involves an assessment of the credibility of the witnesses in this proceeding.

THE EVIDENCE

[12] During the trial of this matter, I received *viva voce* evidence from Mr. Luis Garcia, Mr. Arthur Garcia and Police Constable Pamela McKinnon, tendered on behalf of the prosecution. Furthermore, I received the testimony of the defendant, Mr. Reginald Johnson.

[13] Arthur Garcia was excluded from the court room during the testimony of Luis Garcia, who was called as the prosecution's first witness. Following the completion of his testimony, Luis Garcia remained in the court room while Arthur Garcia testified.

[14] Following the completion of the testimony of Arthur Garcia, the prosecution recalled its first witness, Luis Garcia, after receiving my permission in that regard. I indicated, at that time, that I would consider the fact that Luis Garcia was in the court room when Arthur Garcia testified, in applying the appropriate weight to the testimony of Luis Garcia's testimony which followed that of Arthur Garcia.

(i) The Testimony of Luis Garcia

[15] Luis Garcia testified that on October 1, 2006 at approximately 6:00 p.m. (or probably earlier) he was driving his motor vehicle on Upper Middle Road approaching its intersection with Postmaster Drive, in the Town of Oakville. He stated that at that time, he noticed a green coloured mini-van approximately three hundred metres in front of him, travelling westbound in the left lane of Upper Middle Road, approaching the intersection of Postmaster Drive.

[16] Mr. Garcia testified that as he made this observation, he was behind the said green van in the left lane for westbound traffic and that he was intending to turn left off of Upper Middle Road on to Postmaster Drive. Mr. Garcia stated that as the green mini-van approached the intersection, it was the first vehicle in the left lane before the intersection and that there was no traffic in the right lane of Upper Middle Road. He further noted that there were no vehicles travelling northbound or southbound on the intersecting highway, Postmaster Drive.

[17] Mr. Garcia testified that when he first noticed the green van it was approximately twenty metres east of the intersection of Upper Middle Road and Postmaster Drive. Mr. Garcia stated that the traffic signal light at the intersection, at the relevant time, was a solid

green for westbound traffic on Upper Middle Road. He also indicated that as the green van approached the intersection it had its left turn signal activated.

[18] Mr. Garcia testified that as he and the green van in front of him were approaching Postmaster Drive from the east, he noticed a black car travelling eastbound in the left lane of Upper Middle Road. He stated that approximately one minute after he noticed this eastbound vehicle in the distance, he and the green van in front of him came to a stop in the left lane of Upper Middle Road at its intersection with Postmaster Drive. As indicated earlier, Mr. Garcia noted that the green van had its left turn signal activated. He stated that he believed that it was stopped prior to the white stop line for westbound traffic, at this time.

[19] Luis Garcia testified that as the black car travelling eastbound on Upper Middle Road “was pretty close” to the intersection of Postmaster Drive, the driver of the green van made a left turn in front of the black car and the green van then continued southbound on Postmaster Drive. He testified that when the green van turned in front of the black car, the black car almost collided with the green van.

[20] Mr. Garcia testified that once the green van stopped in the westbound left lane of Upper Middle Road, it then “rolled” into the intersection and proceeded through the intersection, by making a left turn on to Postmaster Drive. Mr. Garcia observed that once the green van turned in front of the eastbound black car, the driver of the black car swerved to its left to avoid hitting the van.

[21] Mr. Garcia testified that the black car then turned to the right around the green van, back into the eastbound lanes. He observed that the black car then skidded across the two eastbound lanes of Upper Middle Road on the east side of the subject intersection, mounting the south curb of Upper Middle Road on a forty-five degree angle, and struck a traffic sign at that location. Mr. Garcia testified that the black car continued to travel over the grassy boulevard adjacent to the south side of Upper Middle Road, an estimated distance of fifty metres, when it spun around at the top of a small hill and stopped facing in a westerly direction.

[22] Mr. Garcia advised that he made the observations of the actions of the green van in turning in front of the black car as well as the actions of the black car after it had swerved around the van until it came to rest off of the roadway, while he was stopped in the westbound left lane of Upper Middle Road at its intersection with Postmaster Drive. He stated that when the black car came to a stop on top of a small hill on the grassy boulevard, he looked over at the said vehicle.

[23] Mr. Garcia testified that his first reaction was to make the driver of the green van aware of the accident. He indicated that he followed the green van “probably all the way home”. He stated that in following the van on Postmaster Drive, before it turned on to Heritage Way, he honked the horn of his vehicle attempting to gain the attention of the van’s driver. He testified that he continued to follow the green van until it stopped at a residence.

[24] Mr. Garcia testified that at that time a male person, whom he later determined was

Reginald Johnson, exited the parked van. Mr. Garcia stated that at that time, he advised this person that he had been involved in an accident and the location of the accident.

[25] Mr. Garcia testified that after speaking with the driver of the green van, he returned to the scene of the accident. He stated that the driver of the van also attended the scene of the accident.

[26] Mr. Garcia noted that the driver attended the scene in the same van which he saw him in at the residence, mentioned above. He indicated that when the police officer arrived at the scene of the accident, he advised her of his observation that the green van parked at the scene of the accident at that time, was the van that he observed make a left hand turn in front of the black vehicle and was the van which was parked at the residence, where he briefly met with the person who was driving the van.

[27] During his testimony-in-chief, Luis Garcia stated that from the time of his initial observation of the green van approaching the intersection of Upper Middle Road and Postmaster Drive, until the time that he “followed it”, he never lost sight of the vehicle. He stated that he could not have lost sight of the vehicle “because there were a lot of turns, and left and rights if I did I wouldn’t have been able to find it”.

[28] As indicated above, the prosecution re-called its witness Luis Garcia to testify following the completion of Arthur Garcia’s testimony. At that time, in response to a question posed by the prosecutor as to what he proceeded to do after he had observed the van make its turn, Luis Garcia testified that after he made the left turn and proceeded through the intersection, the driver of the black car (who he later learned was Arthur Garcia) got out of his vehicle and approached him and asked him if he saw what happened. Luis Garcia stated that he had a conversation with this driver for about two seconds at which time he advised the driver of the black car that he had observed the incident. He testified that he then proceeded to follow the green van which was “still in reach”.

[29] During cross-examination, following his re-called testimony-in-chief, Luis Garcia testified that following his “one and one-half second” conversation with the driver of the black car, he “took off” after the green van. He stated that at that point he was only about one hundred metres away from the van. He indicated that at the end of Postmaster Drive, where it intersects with Heritage Way, there is a stop sign. He advised that the presence of this stop sign allowed him sufficient time to catch-up with the green van and follow it from that point until it stopped at a residence in the area.

[30] Furthermore during cross-examination, Luis Garcia admitted that he was unable to advise as to the licence plate number or make and model year of the green van that he pulled up to in the westbound left lane of Upper Middle Road at Postmaster Drive, and which had made the left hand turn at the said intersection. Mr. Garcia was only able to describe the vehicle as a “greenish min-van”.

[31] At this point in his testimony, Luis Garcia testified that the green van he observed make the subject left turn in front of the black car, was the same green van he observed to be

parked at a residence and being operated at that location by the person he later learned was Reginald Johnson. He stated that he never lost sight of the green van throughout the relevant period of time.

[32] In response to a question posed to him by the defendant's representative, as to whether during the whole period of time when the accident took place, he was focusing on the green van, Mr. Luis Garcia testified as follows:

I couldn't be focusing just on one spot because I wouldn't be able to drive or make the turn as you stated, only looked at the other vehicle. All I can tell you at this point is that I am certain that that was the van. And I'm going to explain to you clearly why I'm certain that that was the van. Maybe I wasn't able to determine at that point or answer your question as to – is it the same van? – the van I was behind and the one I intercepted at the stop sign, no. But I'll tell you and if you allow me I'll tell you why I'm 110 per cent certain that that was the van. I followed that van all the way to his house and he should be witness to that because he saw me and I saw him and we talked and I asked him, once the van came to a full stop, which is the van in question now, that you said it might have been another van or I'm not sure what you said. But all I'm saying is that it came to a stop. From that moment I followed the van all the way to what appears to be Mr. Johnson's house and then Mr. Johnson pulls into a driveway and I basically rolled down my window and see Mr. Johnson, the individual sitting right there, getting out of the van. And then I proceed to say, 'Mr. Johnson you have been in an accident'. And he said, I can't recall exactly what he said, but I'm pretty sure it was something like 'what, who, me'? He was totally unaware of what occurred. ...

(ii) The Testimony of Arthur Garcia

[33] Arthur Garcia testified that on October 1, 2006 at about 6:30 p.m., he was driving his black coloured 2005 Subaru station wagon, eastbound in the right lane of Upper Middle Road, in the Town of Oakville and Region of Halton.

[34] He advised that as he was approaching the intersection of Upper Middle Road and Postmaster Drive, which was controlled by automatic traffic signal lights, a van pulled out in front of him making a left hand turn.

[35] Arthur Garcia stated that he then "swivelled" his vehicle to the left to avoid hitting the van. He went on to state that at that time he lost control of his vehicle, hit a traffic sign and ended up off the roadway on a hill.

[36] Mr. Garcia initially testified that a gentleman who was behind the van at the time and saw what happened "went after the gentleman that was making a left".

[37] Arthur Garcia testified that his intention at that time was to go through the green light which he was facing at that time, travelling eastbound on Upper Middle Road. He went on to advise that the van began to make its left turn in front of him when it was approximately thirty feet away from him. He stated that once the van turned directly in front of him, he swerved to the left to avoid hitting the van and then he lost control of his vehicle moving to the right across the two eastbound lanes on Upper Middle Road and leaving the roadway onto the grassy area adjacent to the south side of Upper Middle Road. He indicated

that once he left the roadway he slid across part of the grassy boulevard until his vehicle came to a stop.

[38] During cross-examination, Arthur Garcia testified that at the relevant time he was operating his car eastbound in the right lane on Upper Middle Road. He indicated that as he was travelling straight through the intersection with Postmaster Drive on a green light, a van made a left turn directly in front of him. As a result of this action, Arthur Garcia took evasive action to avoid colliding with the van and subsequently lost control of his vehicle.

[39] Arthur Garcia testified that at the time that the van turned in front of him, he was travelling at sixty kilometres per hour; the speed limit for that portion of the highway. He indicated that the van turned through the intersection when he entered the crosswalk on the west side of the intersection, such that, at that moment, he was located approximately two car-lengths or thirty feet west of the turning vehicle.

[40] Arthur Garcia testified that after his vehicle came to a stop on a hill on the grassy boulevard adjacent to Upper Middle Road, the individual who witnessed the accident (whom he later identified as the prosecution witness Luis Garcia, seated in the court room at the time) made a left turn from Upper Middle Road on to Postmaster Drive. Arthur Garcia stated that at that time, the witness stopped his vehicle at the side of Postmaster Drive.

[41] Arthur Garcia stated that at this time he started walking toward this person, who at that moment, remained in his vehicle. He stated that it took him a few seconds to walk over to the location of the witness, sitting in his vehicle. He advised that at that time he had a brief conversation with the person in the vehicle, who indicated that he knew what took place and that he was going after the driver of the vehicle that made the left turn in front of him, “to let him know that he caused an accident”.

[42] During re-examination, Arthur Garcia testified that shortly after the incident he had a brief conversation with Luis Garcia. He stated that in engaging in this conversation, which took only seconds, Luis Garcia got out of his car. Arthur Garcia testified that following the brief conversation, Luis Garcia got back into his car and proceeded to attempt to locate the driver of the suspect van.

[43] Arthur Garcia testified that the witness, Luis Garcia, returned to the scene of the accident at a later point in time. He stated that once Luis Garcia returned to the scene of the accident, he waited with Luis Garcia for the police to arrive to investigate the accident.

(iii) The Testimony of Police Constable Pamela McKinnon

[44] Police Constable McKinnon testified, with the benefit of her investigative notes to refresh her memory, that she was, at the time of the subject offence, a member of the Halton Regional Police Service. She stated that on Sunday, October 1, 2006 at approximately 6:30 p.m., she received information which led her to the area of Postmaster Drive and Upper Middle Road, in the Town of Oakville.

[45] Constable McKinnon indicated that she arrived at the said intersection at about 6:37 p.m. At that time, she was approached by a male person who verbally identified himself as Luis Garcia and a second male person who identified himself by means of a valid Ontario driver's licence as Arthur Garcia.

[46] Constable McKinnon testified that at the same time a third male person approached her and identified himself by means of a valid Ontario driver's licence as Reginald Johnson, the defendant before the Court. Constable McKinnon testified that at the same time, Mr. Johnson provided her with a motor vehicle registration permit for a vehicle bearing Ontario licence plate number XKE 883, being a 1999 Dodge Caravan, green in colour.

[47] Constable McKinnon testified that she then conducted an investigation of an alleged incident which took place at the subject intersection. The Officer advised that when she first attended the location, she observed three vehicles parked on Postmaster Drive south of Upper Middle Road. The vehicles belonging to Arthur Garcia and Luis Garcia were parked on the west side shoulder of Postmaster Drive and the vehicle owned by Reginald Johnson was parked on the east shoulder of Postmaster Drive, facing to the north.

[48] Constable McKinnon testified that in conducting her investigation of the accident, she took statements from both Luis Garcia and Reginald Johnson. She stated that a second police officer arrived at the scene, who obtained a written statement from Arthur Garcia.

[49] Constable McKinnon testified that during her investigation, she located skid marks over the eastbound lanes of Upper Middle Road, east of Postmaster Drive. She stated that she took steps to measure these skid marks which extended on an approximate forty-five degree angle, commencing in the left lane, a distance of approximately eighty feet across both the left lane and the right lane to the curb on the south side of Upper Middle Road. She indicated that the tread marks on the pavement in the left lane started approximately fifteen feet east of the intersection of Upper Middle Road and Postmaster Drive.

[50] Constable McKinnon testified that in addition to the skid marks on the roadway itself, she discovered the existence of skid marks or indentations on the grassy boulevard adjacent to the south side of Upper Middle Road. Officer McKinnon testified that she measured the indentations in the grass from the edge of the curb on the south side of Upper Middle Road to where the skid marks in the grass ended, as being a distance of one hundred and seventy-six feet.

[51] Constable McKinnon acknowledged that while the skid marks on the pavement were indicative of a vehicle skidding across two eastbound lanes and mounting the curb at a forty-five degree angle, the indentations on the grassy boulevard were consistent with a vehicle travelling over the grass at an angle less than forty-five degrees; in fact being suggestive of the vehicle travelling parallel with Upper Middle Road in an easterly direction over the boulevard, located east of the south-east corner of the subject intersection.

(iv) The Testimony of Reginald Johnson

[52] During his testimony, the defendant Reginald Johnson, testified that on

October 1, 2006, some time between 5:00 and 5:30 p.m., he was in the process of driving his green coloured “Grand Caravan magic-wagon” westbound on Upper Middle Road from its intersection with Third Line to its intersection with Postmaster Drive, in the Town of Oakville. He stated that as he approached the intersection of Upper Middle Road and Postmaster Drive, he pulled into the westbound left-turn lane on Upper Middle Road for purposes of making a left-hand turn to proceed southbound on Postmaster Drive.

[53] Mr. Johnson testified that at that time, he was facing a solid green traffic light (governing westbound traffic on Upper Middle Road). He stated that as he was approaching the intersection of Postmaster Drive, he noticed the presence of a white car travelling eastbound on Upper Middle Road in the right (curb) lane, distant approximately fifty yards west of the intersection.

[54] The defendant testified that upon noticing the white car, he decided to stop at the white stop line on the east side of the intersection in order to allow the white car to pass in an easterly direction through the intersection. He stated that once the white car passed through the intersection, he noticed in the distance, approximately two hundred yards west of the intersection, a dark coloured vehicle moving in the left, eastbound lane of Upper Middle Road. Mr. Johnson stated that, at that time, he felt that he had enough time to execute the left turn, in light of his observation that the dark car was located approximately two hundred yards west of the intersection. He advised that he then proceeded to make the left turn at a speed of approximately ten to fifteen kilometres per hour and after making the turn he proceeded in a southerly direction on Postmaster Drive.

[55] Mr. Johnson testified that at the time that he made his turn, he did not hear any horns honking or tires squealing. He further testified that at the time that he made his left turn, he did not see any vehicles facing him veer to the left near the traffic median and then proceed to travel across two eastbound lanes “jump the curb” on the south side of Upper Middle Road and then proceed up a mound.

[56] The defendant testified that after making the turn he proceeded southbound on Postmaster Drive, heading for his son’s residence in that area. He stated that when he arrived at his son’s residence, he pulled his van into the driveway and exited the vehicle.

[57] Mr. Johnson advised that at that time he noticed the presence of a vehicle parked across the bottom of his son’s driveway. Mr. Johnson testified that the male party in this vehicle shouted at him as he walked around the back of his van. Mr. Johnson stated that the male party then asked him if he saw what happened “at the crossroads”. He testified that this male party (who he recognized as being the same person as the prosecution’s first witness, Luis Garcia) advised him that there was a “chap” who had just missed the rear of his vehicle and had gone out of control.

[58] Mr. Johnson stated that he was surprised at what was said to him by Luis Garcia, noting that at the time that he made the subject left turn, he never saw a vehicle nearly come into collision with him and then go out of control. Accordingly, Mr. Johnson stated that he then returned to his van and travelled to the area of the intersection of Upper Middle Road

and Postmaster Drive.

[59] Mr. Johnson advised that when he returned to the said intersection, he observed a car stationary on a hill of the grassy boulevard adjacent to the south side of Upper Middle Road and east of Postmaster Drive, facing in a westerly direction.

[60] Mr. Johnson stated that he had a brief conversation with the male person who had been, apparently, driving the vehicle situate on the hill adjacent to the roadway. He indicated that at that point, he left the scene to return to his son's residence. He advised that a short time later he returned to the accident scene with his son, approximately twenty to thirty minutes after he was initially apprised of the accident. Mr. Johnson advised that shortly after returning to the scene, his grandson brought a camera to him and he then proceeded to take the photograph of the accident scene, which was entered as exhibit #1 herein.

[61] Mr. Johnson testified that at that time, he had a brief conversation with the investigating police officer. He stated that when he was told by the officer that she was going to charge him with the offence of "turn-not in safety", he was quite surprised as he felt that the turn that he made was "perfectly safe". In that regard, Mr. Johnson stated that at the relevant time, he saw a "dark car" quite a distance from the intersection and that he thought he had "loads of time" to make the turn.

[62] During cross-examination, Mr. Johnson testified that after making the left turn off of Upper Middle Road on to Postmaster Drive, he proceeded along Postmaster Drive towards his son's residence. He stated that in the process of travelling towards his son's residence, he stopped at one stop sign on Postmaster Drive. Upon being questioned in this regard by the prosecutor, Mr. Johnson advised that as he approached the intersection, he did not hear the sound of a vehicular horn or any other unusual sounds.

[63] Throughout his testimony, the defendant stated that at the time that he made the subject turn, there was only one eastbound vehicle in the vicinity of the subject intersection. This vehicle, being a "dark" vehicle was, at that moment, located approximately two hundred yards west of the intersection. He maintained that in making the subject turn, he did not turn directly in front of an approaching vehicle, as alleged by prosecution witness Luis Garcia.

ANALYSIS

[64] The ultimate issue in this proceeding is whether or not the prosecution has proved the *actus reus* of the offence against the defendant to the standard of proof beyond a reasonable doubt. An important sub-issue is the element of the identification of the defendant. That element must be established beyond a reasonable doubt.

[65] The theory of the prosecutor's case in this matter is that the defendant was, at the material time, the driver of a green coloured min-van, which executed a left turn manoeuvre from the left turning lane for westbound traffic on Upper Middle Road to the southbound lane on Postmaster Drive, and in doing so turned his vehicle directly in front of the vehicle operated by Arthur Garcia, causing him to swerve to the left to avoid a collision. The

prosecution submits that the van operated by the defendant turned in front of Mr. Garcia's vehicle, which was travelling eastbound on Upper Middle Road, as that vehicle was entering the intersection and was approximately thirty feet west of the location of the van.

[66] The prosecution submits that the identity of the defendant as the operator of the van which executed the unsafe turn, has been established beyond a reasonable doubt, through the testimony of both Luis Garcia and Police Constable McKinnon.

[67] The defendant's representative submits that the prosecutor has failed to prove, beyond a reasonable doubt, that the defendant was the driver of the green van which turned directly in front of the vehicle operated by Arthur Garcia. In her argument, the defendant's representative submits that the Court should be left in a state of reasonable doubt as to the defendant's guilt on the subject charge, when the Court considers the defendant's testimony in the context of the totality of the evidence.

[68] In that regard, it is important to note that the defendant has admitted that on October 1, 2006, between 5:00 and 5:30 p.m., he was operating a green coloured "Grand Caravan" westbound on Upper Middle Road, approaching Postmaster Drive. He acknowledged that at or about the same time, he made a left-hand turn from Upper Middle Road across the eastbound lanes of that highway and on to the southbound lane of Postmaster Drive. He stated that he made the turn at the said intersection, while facing a green traffic control signal.

[69] During his testimony, the defendant stated that the turn was made in safety, without incident. In that regard he indicated that prior to conducting the turn he waited for a white coloured car, travelling in the right, eastbound lane of Upper Middle Road, to pass through the intersection. He then indicated that he looked towards the eastbound lanes of Upper Middle Road and noted the presence of a "dark" coloured car travelling in the left, eastbound lane, which he estimated was located approximately two hundred yards west of the subject intersection.

[70] The defendant testified that based on his observations he felt that he had adequate time to safely execute the turn. He stated that he then made the turn and did not notice any vehicle or vehicles in the eastbound lanes of Upper Middle Road, which were affected by the manoeuvre.

[71] The defendant testified that he was surprised when he was approached by Luis Garcia, a short period of time after making the turn and was advised that he was responsible for an accident which had taken place at the subject intersection.

[72] Accordingly, in light of the conflicting evidence before me, I must determine whether the prosecution has proved the issue of the identification of the defendant, beyond a reasonable doubt. In doing so, I must embark on an assessment of the credibility of the witnesses in this proceeding, being mindful of the *dicta* of the Ontario Court of Appeal in its decision in *Regina v. Tahirkheli*, (1998), 130 C.C.C. (3d) 19 (Ont. C.A.) that the determination of the defendant's guilt is not a "simple credibility contest" between the

prosecution and defence witnesses. Furthermore, I must remind myself of the principles established by the Supreme Court of Canada in its decision in *Regina v. W.(D.)*, [1991] 1 S.C.R. 742 (S.C.C.) that the concept of reasonable doubt applies to the assessment of credibility by the trier of fact.

[73] The decision of Cory J. in *Regina v. W.(D.)*, *supra*. explains how credibility is to be assessed in the context of criminal or quasi-criminal trials, commencing at paragraph 27 therein, as follows:

In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole. ...

Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:

'First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.'

If that formula were followed, the oft repeated error which appears in the recharge in this case would be avoided. The requirement that the Crown prove the guilt of the accused beyond a reasonable doubt is fundamental in our system of criminal law. Every effort should be made to avoid mistakes in charging the jury on this basic principle.

[74] In the Supreme Court of Canada decision in *Regina v. Lifchus*, (1997), 118 C.C.C. (3d) 1 (S.C.C.), Cory J., writing for the Court, stated that the phrase "reasonable doubt" may be defined as "a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence". Mr. Justice Cory went on to state that a "reasonable doubt is not a doubt based upon sympathy or prejudice". He noted that the concept of reasonable doubt is logically connected to the evidence or absence of evidence, that it does not involve proof to an absolute certainty nor is it an imaginary or frivolous doubt. He concluded his summary of the definition of the phrase "reasonable doubt", by stating as follows:

...more is required than proof that the accused is probably guilty – a jury which concludes only that the accused is probably guilty must acquit.

[75] During his testimony, the defendant denied that he made an unsafe left turn from the westbound lanes of Upper Middle Road to the southbound lane of Postmaster Drive,

while operating his van sometime between 5:00 p.m. and 5:30 p.m. on October 1, 2006. He admitted making the turn at the said time, however he maintained that it was conducted by him in a safe manner, that it was a normal, uneventful one and that it did not affect any vehicle travelling eastbound on Upper Middle Road.

[76] After carefully considering the testimony of the defendant in its totality, I find his evidence to be clear and worthy of belief. There does not appear to be any internal inconsistencies in his testimony. His demeanour while testifying is not suggestive of an individual who is attempting to overstate or exaggerate certain facts in an attempt to bolster his version of the events.

[77] Furthermore, in my view the strength of the defendant's testimony was not weakened in any significant way as a result of cross-examination by the municipal prosecutor. Accordingly, I find the defendant's exculpatory evidence to be both plausible and generally reliable.

[78] In assessing the credibility of the defendant's exculpatory evidence in this proceeding, I must apply the test enunciated by the Supreme Court of Canada in *Regina v. W.(D.)*, *supra*. This is a case where credibility of the various witnesses is important and potentially determinative of my decision.

[79] Accordingly, in applying the principles set out in *Regina v. W.(D.)*, I must first ask myself whether I believe the exculpatory evidence of the defendant. That evidence is the defendant's general denial that he was the driver of a green van who turned directly in front of Arthur Garcia's vehicle, causing Mr. Garcia to take evasive action to avoid a collision. If I do not believe the evidence of the defendant, then I must determine whether or not I am left in a state of reasonable doubt as to the defendant's guilt, after considering his testimony in the context of the evidence as a whole.

[80] I find that I am unable to firmly believe the defendant's exculpatory evidence in this proceeding due primarily to its obvious lack of independence. However, when I consider the defendant's testimony in the context of the evidence as a whole, I find myself left in a state of reasonable doubt as to his guilt on the subject charge. In particular, I find that the defendant's evidence raises a reasonable doubt as to whether the defendant was, in fact, the operator of the green van that was observed by both Luis Garcia and Arthur Garcia turn across the path of Arthur Garcia's vehicle, at a time when Arthur Garcia's vehicle had just entered the subject intersection and was located approximately thirty feet from the van.

[81] The prosecution evidence establishing the identity of the defendant as the driver of the offending vehicle was proffered primarily through the testimony of Luis Garcia.

[82] Luis Garcia states that at the material time he was stopped behind a green van. He testified that he observed the green van turn left across the path of the vehicle driven by Arthur Garcia, causing him to lose control of his vehicle and skid off the roadway on to the grassy boulevard adjacent to the south-east corner of the intersection.

[83] Luis Garcia stated that after he observed the incident he remained stationary in the

left, westbound lane of Upper Middle Road at its intersection with Postmaster Drive. Luis Garcia testified that after the green van completed its turn and proceeded southbound on Postmaster Drive, he continued to look to his left for a number of seconds, to watch the actions of Arthur Garcia's motor vehicle until it had come to a complete stop facing in a westerly direction on top of a grassy knoll, east of the subject intersection.

[84] Luis Garcia stated that at that time, he completed his left turn off of Upper Middle Road on to Postmaster Drive, stopped his vehicle and without getting out of his vehicle spoke with Arthur Garcia, who was in the process of walking in a westerly direction away from his disabled motor vehicle. Luis Garcia testified that he spoke with Arthur Garcia for a period of approximately two seconds.

[85] Luis Garcia stated that after he completed his brief conversation with Arthur Garcia, he pursued the green van; catching up to it at a stop sign at the end of Postmaster Drive. Luis Garcia testified that he continued to follow this van until it pulled into the driveway of a residence, at which time he observed a male person, later identified to him as Reginald Johnson, exit the green van by way of its driver's side door.

[86] Luis Garcia testified that throughout the course of this incident, he never lost sight of the green van. He was, however, unable to provide any evidence as to the make or model year or the licence plate number of the said green van, which he allegedly followed all the way to the said residence.

[87] After considering the totality of Luis Garcia's evidence, considered in conjunction with Arthur Garcia's evidence, I am of the view that even though Luis Garcia may have honestly believed that he was following the same green van which he observed executing the unsafe turn manoeuvre, that evidence is not sufficiently reliable to permit me to draw a reasonable inference that the defendant was the driver of the offending green van.

[88] In reaching this conclusion, I take into consideration the conflicting testimony of Arthur Garcia, who stated that immediately following the accident he exited his vehicle and began walking across the grassy boulevard towards Postmaster Drive. Arthur Garcia testified that as he was walking away from his vehicle, Luis Garcia stopped his vehicle on Postmaster Drive and exited his vehicle in order to speak with Arthur Garcia. Arthur Garcia stated that his conversation with Luis Garcia lasted only seconds after which time Luis Garcia returned to his vehicle with the intention of pursuing the green van.

[89] During his testimony, Luis Garcia stated that he never lost sight of the subject green van, from the time that he first observed it travelling westbound on Upper Middle Road approaching the intersection of Postmaster Drive until that van entered the driveway of a residence in the area to the south of the said intersection.

[90] I am of the view that Luis Garcia's testimony in this regard is exaggerated and overstated and therefore lacks credibility. It does not appear to be either reasonable or realistic that Luis Garcia was able to keep the subject green van in his sight at all times. I come to this conclusion considering the fact that following the completion of the left turn by

the van, Luis Garcia remained stopped in the left lane of Upper Middle Road and focussed on the actions of the vehicle driven by Arthur Garcia, until it came to rest a considerable distance to the south and east of his location on Upper Middle Road, waiting to make a left turn on to Postmaster Drive.

[91] It seems unlikely that Luis Garcia would have been able to continue to follow the actions of the suspect green van travelling south on Postmaster Drive, while he was essentially looking over his left shoulder, following the actions of Arthur Garcia's vehicle as it skidded out of control on to the boulevard to the south and east of the location of his vehicle.

[92] Furthermore, it seems unlikely that Luis Garcia would have been able to keep the suspect green van within his sight during the time that he stopped on Postmaster Drive to speak to Arthur Garcia. It is illogical to believe that any such conversation lasted only two seconds, considering the fact that Arthur Garcia was, at the time, in the process of walking from the location of his vehicle situate on the boulevard a distance of at least two hundred metres to the east of the area of Postmaster Drive.

[93] Even if I were to accept Luis Garcia's evidence that he did not get out of his vehicle to speak with Arthur Garcia, it is unreasonable to believe Luis Garcia's assertion that even though he stopped and conversed briefly with Arthur Garcia, he was, nevertheless, able to maintain a continuous observation of the suspect green van as it allegedly travelled southbound on Postmaster Drive.

[94] In my view, a reasonable interpretation of the evidence tendered by the prosecution in this proceeding would suggest that Luis Garcia failed to maintain continuity of his observations of the suspect green van after it made the impugned left turn from Upper Middle Road to Postmaster Drive. Once there is a break in the continuity of such observations, the strength of Luis Garcia's evidence linking the defendant as the driver of the green van which apparently executed the unsafe turn, is significantly diminished.

[95] While there remains sufficient evidence of identification to establish a *prima facie* case of the guilt of the defendant on the subject charge, when I weigh the defendant's exculpatory evidence in the context of the evidence as a whole, including the prosecution's weak identification evidence, I am left in a state of reasonable doubt as to whether the defendant was the driver of the specific van which was observed to execute the unsafe turn across the path of Arthur Garcia's vehicle.

THE DECISION

[96] In light of my analysis of the evidence received in this proceeding, and in particular the application of the principles set out in the case of *Regina v. W.(D.) supra.*, to the assessment of the credibility of witnesses, I conclude that I am left in a state of reasonable doubt as to the guilt of the defendant on the charge of "turn-not in safety", contrary to subsection 142(1) of the HTA. I have reached this conclusion after considering the evidence proffered by the defendant in the context of the evidence as a whole. After applying the

second prong of the model instruction set out in *Regina v. W.(D.)*, I am of the view that the prosecution has failed to discharge its onus of proving the element of the defendant's identification, as the person who committed the *actus reus* of the subject offence, to the standard of proof beyond a reasonable doubt.

[97] The defendant, Reginald Johnson, is therefore found not guilty of the subject offence and the certificate of offence is endorsed as being dismissed.

Released: June 18, 2008

Signed: "Justice of the Peace Kenneth W. Dechert"