

CITATION: R. v. Kanda, 2008 ONCA 22
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COURT OF APPEAL FOR ONTARIO

ROSENBERG, MACPHERSON and SIMMONS JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

ASHWANI KANDA

Respondent

Christopher C. Cooper for the appellant, the Corporation of the City of Brampton

David Finley and David Friesen for the intervenor, the Attorney General for Ontario

Richard Litkowski as *amicus curiae*

Heard: December 3, 2007

On appeal from the judgment of Justice Ian B. Cowan of the Ontario Court of Justice dated June 30, 2006, allowing an appeal from the conviction by Justice of the Peace Darlene Florence dated August 24, 2004.

MACPHERSON J.A.:

A. INTRODUCTION

[1] The issue in this case is whether a person caught driving a car containing a child who is not wearing a seat belt can raise a defence of due diligence.

[2] The respondent, Ashwani Kanda, was driving his two sons, aged 12 and 8, to school in April 8, 2004. He was stopped by police constable David Isaacs and charged with violating s. 106(6) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 [now s. 106(4)¹] (“HTA”):

106(6) No person shall drive on a highway a motor vehicle in which there is a passenger who is under sixteen years of age and occupies a seating position for which a seat belt assembly has been provided unless that passenger is wearing the complete seat belt assembly and it is properly adjusted and securely fastened.

[3] The respondent testified that he had ensured that both boys were wearing their seat belts when he left the family home. He was not aware that his younger son, seated in the back seat, had unfastened his seat belt during the drive.

[4] The trial judge, Justice of the Peace Florence, determined that s. 106(6) of the *HTA* was an absolute liability offence and convicted the respondent.

[5] The summary conviction appeal judge, Cowan J., allowed the appeal. He decided that s. 106(6) of the *HTA* was a strict liability offence. It followed that the respondent was entitled to advance a defence of due diligence. Since the trial judge had not addressed the question of due diligence, Cowan J. remitted the matter to her for consideration of that issue.

[6] The appellant obtained leave to appeal the summary conviction appeal judge’s decision. The sole issue on the appeal is whether s. 106(6) of the *HTA* is a strict liability or an absolute liability offence within the definitions of those terms, and the analytical

¹ The current version of the provision, while amended slightly, is for the purposes of this case substantially the same as the version applicable when the respondent was charged. It reads:

106(4) No person shall drive on a highway a motor vehicle in which there is a passenger who is under 16 years old unless,
 (a) that passenger,
 (i) occupies a seating position for which a seat belt assembly has been provided, and
 (ii) is wearing the complete seat belt assembly as required by subsection (5); or
 (b) that passenger is required by the regulations to be secured by a child seating system or child restraint system, and is so secured.

framework for differentiating them, set out in *R. v. Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353 (S.C.C.).

B. FACTS

(1) The events

[7] On April 8, 2004, Constable David Isaacs was working as a member of the uniform patrol assigned to the Regional Traffic Unit of the Peel Regional Police. A provincial seat belt campaign was being conducted throughout April 2004 and Constable Isaacs' duties included dealing with seat belt infractions in the Region of Peel.

[8] Constable Isaacs was parked in an unmarked cruiser at a four-way stop at an intersection in Brampton. At 8:17 a.m., he observed the vehicle driven by the respondent stop at the intersection. He saw three people in the vehicle – a male driver, a child in the front passenger seat, and another child in a rear seat. Constable Isaacs observed the child in the back seat sitting forward, leaning against the back of the driver's seat. Constable Isaacs concluded that the child was not wearing a seat belt.

[9] Constable Isaacs followed the vehicle for about half a block until it stopped. He approached the vehicle and confirmed that the child in the back seat was not wearing a seat belt.

[10] Constable Isaacs prepared and issued an offence notice charging the respondent with violating s. 106(6) of the *HTA*.

(2) The court proceedings

[11] A brief trial took place before Justice of the Peace Florence on August 24, 2004. Constable Isaacs testified about the infraction. The respondent testified that he had ensured that both his sons were wearing their seat belts when they left the family home and that he was not aware until Constable Isaacs informed him that the boy in the back seat had unfastened his seat belt.

[12] The trial judge determined that s. 106(6) was an absolute liability offence and therefore that no due diligence defence was available. She convicted the respondent.

[13] On appeal, the summary conviction appeal judge concluded that s. 106(6) was a strict liability offence. Accordingly, he returned the matter to the trial judge to resolve the respondent's potential due diligence defence.

[14] On August 25, 2006, Cronk J.A. granted the appellant leave to appeal the summary conviction appeal judge's decision pursuant to s. 139 of the *Provincial Offences Act*, R.S.O. 1990, c. P.33 ("POA").

[15] Later, the Attorney General of Ontario intervened in the appeal pursuant to its statutory right under s. 168 of the *POA*. The intervener's position is the same as the appellant's. Accordingly, since the respondent was not represented on the appeal, this court appointed Richard Litkowski as *amicus curiae*.

C. ISSUE

[16] The sole issue on the appeal is whether s. 106(6) of the *HTA* is a strict liability or an absolute liability offence.

D. ANALYSIS

[17] This appeal is governed almost entirely by the well-known decision of the Supreme Court of Canada in *Sault Ste. Marie*. In that case, Dickson J. divided "regulatory" or "public welfare" offences into three categories – *mens rea* offences, strict liability offences and absolute liability offences. He defined them, respectively, in this fashion at pp. 373-74:

1. Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
2. Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. ...
3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

[18] Justice Dickson continued with a discussion of how to differentiate among the three categories of regulatory offences. He stated at p. 374:

Offences which are criminal in the true sense fall in the first category. Public welfare offences would, *prima facie*, be in the second category. They are not subject to the presumption of full *mens rea*. An offence of this type would fall in the first category only if such words as “wilfully”, “with intent”, “knowingly”, or “intentionally” are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. *The over-all regulatory pattern adopted by the Legislature, the subject-matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category.* [Emphasis added.]

[19] I make two observations about this passage. First, Dickson J. articulated a presumption that public welfare offences are strict liability offences; accordingly, this presumption must be the starting point in an analysis of a regulatory provision such as s. 106(6) of the *HTA*. Second, the classification of a particular provision follows from an assessment of the four factors set out in the emphasized portion of the passage – the overall regulatory pattern, the subject matter, the penalty, and the precision of the language used. It is to this assessment that I now turn.

Overall regulatory pattern

[20] Section 106(6) is found in Part VI of the *HTA*. Part VI, comprising ss. 61-107, bears the heading “Equipment” and deals with the various duties imposed upon drivers in the operation of motor vehicles.

[21] The *HTA*, including Part VI of the Act, creates many offences. Importantly, throughout the Act as a whole and specifically within Part VI, there are clear illustrations of all three categories of regulatory offence.

[22] An example of a *mens rea* offence in Part VI of the *HTA* is:

104(2.2) No parent or guardian of a person under sixteen years of age shall *authorize or knowingly permit* that person to ride on or operate a bicycle on a highway unless the person is wearing a bicycle helmet as required by subsection (2.1). [Emphasis added.]

[23] An example of a strict liability offence in Part VI of the *HTA* is:

75(4) A person having the control or charge of a motor vehicle shall not sound any bell, horn or other signalling device so as to make an *unreasonable noise*, and a driver of any motor vehicle shall not permit any *unreasonable amount of smoke* to escape from the motor vehicle, nor shall the driver at any time cause the motor vehicle to make any *unnecessary noise*, but this subsection does not apply to a motor vehicle of a municipal fire department while proceeding to a fire or answering a fire alarm call. [Emphasis added.]

[24] An example of an absolute liability offence in Part VI of the *HTA* is:

84.1(1) Where a wheel becomes detached from a commercial motor vehicle, or from a vehicle being drawn by a commercial motor vehicle, while the commercial motor vehicle is on a highway, the operator of the commercial motor vehicle and the owner of the vehicle from which the wheel became detached are guilty of an offence.

(5) *It is not a defence to a charge under subsection (1) that the person exercised due diligence to avoid or prevent the detaching of the wheel.* [Emphasis added.]

[25] I draw two conclusions about the offences established by the *HTA*, including *Part VI – Equipment*. First, the language necessary to clearly demonstrate an intention to create *mens rea*, strict liability and absolute liability offences is well-known to the legislature and has been employed to create all three types of offences in the *HTA*. Second, as acknowledged by counsel for the Attorney General in oral argument, the *HTA* has many strict liability offences: see, e.g., *R. v. Nickel City Transport (Sudbury) Limited* (1993), 82 C.C.C. (3d) 541 (Ont. C.A.) (dealing with the offence of operating a vehicle where the axle weight exceeds the maximum allowable level).

[26] I conclude that, for the purposes of determining whether s. 106(6) creates a strict liability or absolute liability offence, the overall regulatory pattern is neutral.

Subject Matter

[27] Section 106 of the *HTA* requires most people riding in motor vehicles to wear seat belts. The “important statutory purpose” of the seat belt law is “minimizing driver and passenger injuries resulting from car collisions”: see *York (Regional Municipality) v. Tassone*, 2007 ONCA 215 at para. 8. Subsection 106(6) of the *HTA* advances this purpose by making drivers responsible for ensuring that all passengers under 16 years of age use seat belts. The provision is clearly intended to ensure the safety of vulnerable youthful passengers who cannot be relied upon to take responsibility for their own safety.

[28] The above description of s. 106(6) of the *HTA* might support its classification as an absolute liability offence. However, there are countervailing points relating to the subject matter of the provision.

[29] First, the link between absolute liability and increased compliance with the law is tenuous. As explained by Dickson J. in *Sault Ste. Marie, supra*, at 363:

There is no evidence that a higher standard of care results from absolute liability. If a person is already taking every reasonable precautionary measure, is he likely to take additional measures, knowing that however much care he takes, it will not serve as a defence in the event of breach? If he has exercised care and skill, will conviction have a deterrent effect upon him or others?

[30] Second, the argument that the important public purposes of a law (i.e., child safety) are promoted by easy and efficient enforcement that supposedly flows from absolute liability offences has little bearing on the question of statutory interpretation. As expressed by Dickson J. in *R. v. Chapin* (1979), 45 C.C.C. (2d) 333 at 342 (S.C.C.):

[T]he problems that may be encountered in the administration of a statute or regulation are a very unsure guide to its proper interpretation. Difficulty of enforcement is hardly enough to dislodge the offence from the category of strict liability....

[31] Moreover, to regard strict liability as a serious diminution of enforcement capacity is a misconception. Strict liability is what its name implies – a serious commitment to enforcement of the law. In most cases, if a person commits the act proscribed by the law a conviction will follow because establishing the defence of due diligence or reasonable care will not be easy.

[32] In my view, the subject matter of s. 106(6) of the *HTA* supports a classification of the offence as strict liability. This classification strikes an appropriate balance between

encouraging drivers to be vigilant about the safety of child passengers in their vehicles and not punishing those who exercise due diligence with respect to children's seat belts.

Penalty

[33] The only penalty available for failing to comply with s. 106(6) of the *HTA* is a relatively modest fine. Since the *HTA* does not specify a penalty for violations of s. 106(6), the general penalty provision in s. 214(1) applies, namely, “a fine of not less than \$60 and not more than \$500”. In addition, a driver convicted under s. 106(6) receives two demerit points which is well short of the nine demerit points required for the suspension of a driver's licence. Finally, violating s. 106(6) cannot result in imprisonment.

[34] Moreover, I note that in *R. v. Kurtzman* (1991), 66 C.C.C. (3d) 161 at 172 (Ont. C.A.), this court observed that “there is today little, if any, stigma attached to a violation of Highway Traffic Act provisions governing compliance with traffic signal indicators.” By parity of reasoning, the same point could be made about the stigma attached to a violation of s. 106(6) of the *HTA*.

[35] Accordingly, the penalties relating to s. 106(6) of the *HTA* are consistent with a classification of absolute liability.

Precision of language

[36] As discussed previously, the *HTA* explicitly creates offences in all three categories of regulatory offences. Subsection 106(6) does not contain the triggering language that would make classification virtually automatic.

[37] The appellant and the intervener submit that the triggering words of s. 106(6) – “No person shall” – evince a clear intention to create an absolute liability offence. For several reasons, I disagree.

[38] First, the case law does not support the proposition that the language “no person shall” points to absolute liability. The provision of the *Migratory Birds Regulations*, S.O.R./71-376, in issue in *Chapin* employed this language and was determined by the Supreme Court of Canada to create a strict liability offence. Likewise, in *Nickel City Transport, supra*, at 556, a case involving an *HTA* offence, this court stated that “the language of ‘no operator *shall*’, does not import absolute liability” [emphasis in original].

[39] It is true that some offences employing the “no person shall” or “every driver shall” formulation have been interpreted as absolute liability offences: see *Kurtzman, supra* (failing to stop at a red light) and *London (City) v. Polewsky* (2005), 202 C.C.C. (3d) 257 (Ont. C.A.) (speeding). However, in those cases the proscribed conduct resulted directly from the person's own action. Section 106(6) of the *HTA*, on the other hand,

deals with a situation in which another person – the child passenger – is potentially involved in creating the violation.

[40] Second, s. 106(6) of the *HTA* does not expressly exclude the defence of due diligence. The language of absolute liability is well-known and has been used by the legislature in the *HTA* in s. 84.1. If the legislature wanted to impose the serious consequences that flow from the creation of an absolute liability offence, the means for so doing would have been known and available.

[41] Third, I am attracted to the logic of the interpretation of s. 106(6) of the *HTA* proposed in paragraph 8 of *amicus curiae*'s factum:

Where the section in essence creates an offence of failing to meet a standard or duty of care (the Appellant refers to it as a standard of vigilance – see paragraph 26 of the Appellant's factum), in respect of another person, it is counterintuitive to suggest that the defendant cannot raise a defence of due diligence or reasonable care.

Conclusion

[42] *Sault Ste. Marie* established the framework for classifying regulatory offences. The three categories of such offences, their definitions and differences, have stood for thirty years and were explicitly affirmed in *Lévis (City) v. Tétreault* (2006), 207 C.C.C. (3d) 1 at paras. 13-19 (S.C.C.).

[43] The second important feature of *Sault Ste. Marie* is its strong presumption in favour of strict liability in an interpretive contest between strict and absolute liability. This presumption has also been affirmed in subsequent case law, including *Chapin* and *Tétreault*, and deepened by the Supreme Court's post-*Sault Ste. Marie* declaration that coupling absolute liability offences with the punishment of imprisonment violates s. 7 of the *Charter*: see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.

[44] Against this backdrop, my application of the four factors from *Sault Ste. Marie* leads to the conclusion that the appellant and the intervener have not displaced the presumption in favour of strict liability. The overall regulatory scheme of the *HTA*, including Part VI, is neutral; all three categories of offences are contained therein. The subject matter of s. 106 tells in favour of strict liability. As discussed above, the classification of strict liability strikes an appropriate balance between encouraging drivers to be vigilant about the safety of child passengers in their vehicles and not punishing those who exercise due diligence with respect to children's seat belts. The minor penalty points towards absolute liability. Finally, the wording of s. 106(6) of the *HTA* suggests that it established a strict liability offence.

E. DISPOSITION

[45] I would dismiss the appeal.

RELEASED: January 15, 2008 (“MR”)

“J.C. MacPherson J.A.”

“I agree M. Rosenberg J.A.”

“I agree Janet Simmons J.A.”