

HER MAJESTY THE QUEEN

v

JORDANCO KUZMANOV

Ontario Court of Justice

Toronto, Ontario

A. Queijo for the Crown

G. Faulkner for the Defendant

Before: J. Opalinski J.P.

Heard: July 24, 2012

Delivered: October 25, 2012

CHARGES

1. The Defendant is charged with the offence of:

- i. Permit Motor Vehicle to be operated without insurance contrary to section 2(1)(b) of the *Compulsory Automobile Insurance Act*, R.S.O. 1990 c. C. 25 which states:

Subject to the regulations, no owner or lessee of a motor vehicle shall cause or permit the motor vehicle to be operated on a highway unless the motor vehicle is insured under a contract of automobile insurance;

ISSUE

2. The issue before the court is whether or not the Defendant did cause or permit his motor vehicle to be operated on a highway when it was not insured under a contract of automobile insurance.

ARGUMENT FOR THE CROWN:

3. The Crown submits that the Defendant's permission is an implied permission as the keys were left in plain view and it is an issue as to how far do we go with the concept of permit.

ARGUMENT OF DEFENCE AGENT:

4. The agent for the Defendant has made an argument that the Defendant gave evidence that he had not permitted his son to operate his motor vehicle and as such the key element of the offence that the Crown needs to prove has not been proven.

EVIDENCE FOR THE CROWN:

5. The court heard evidence from two Crown witnesses, Police Officer Reynolds and John Duratti.
6. The evidence of Ontario Provincial Police Officer Reynolds may be summarized as follows:
 - (a) On September 5, 2011 at approximately 3:35 pm, Officer Reynolds observed a Black 1997 BMW bearing license plate number BFTS508 travelling northbound on Highway 400.
 - (b) Just south of Finch Avenue on Highway 400, the Officer ran the licence plates of the said vehicle on the ministry website and received certain information. As a result of this information he caused the vehicle to be stopped.
 - (c) The driver of the said vehicle was a Donce Kuzmanov, the son of the Defendant, with a November 2, 1980 date of birth who was asked for his driver's licence, ownership and insurance.
 - (d) The officer compared the VIN number on the vehicle with that contained on the vehicle permit and insurance card.
 - (e) The insurance that the driver provided for the said vehicle was from York Fire and Casualty Insurance. It was valid from October 26, 2010 to October 26, 2011.
 - (f) The officer took pictures of the documents and a statement about the owner of the vehicle.
 - (g) On September 6, 2011 at 11:26 am the officer contacted a representative of the insurance company and received certain information.
 - (h) On the basis of this information the officer attended at the Defendant's place of residence at 1 Baylawn Circle, Brampton on October 20, 2011.
 - (i) The vehicle was neither reported as stolen nor were there any outstanding hits, however, the court did not hear any evidence by way of a statement

taken by the officer from the driver of the vehicle indicating that he had permission to operate the vehicle.

- (j) To date a valid contract of automobile insurance for the said vehicle has never been provided.

7. The second witness for the prosecution, Mr. John Duratti's evidence may be summarized as follows:

- (a) Mr. Duratti was formally employed as a Senior Underwriter for York Fire & Casualty Insurance Company. York Fire & Casualty Insurance Company is currently known as Unica Insurance, the change having occurred less than 1 year ago. Mr. Duratti's position remains that of Senior Underwriter with Unica Insurance.
- (b) His position was to review new business and changes to auto and home insurance.
- (c) He has access to all records held in the normal course of business.
- (d) The Defendant's policy number with York Fire & Casualty Insurance Company was YFHOAP160707. This policy was canceled on October 26, 2010 and reissued on the same day under policy number YFHOAP216219.
- (e) On January 17, 2011 the policy was canceled due to non-payment. A letter had been sent out on December 15, 2010 by registered mail to advise that the policy was being cancelled and the Defendant was given 32 days to pay.
- (f) This letter was sent to the Defendant's last known address at 1 Baylawn Circle Brampton and a copy was also sent to the Defendant's insurance broker M. Lukic & Associates. It is practice to have the broker and the insured contact each other. There is no evidence that the registered letter, had never been received by the Defendant.
- (g) The Defendant had 3 vehicles on the said policy which also including a 2003 Mercedes and a 2008 Mustang.
- (h) Mr. Duratti confirmed that on September 5, 2011 the vehicle in question, being the Black 1997 BMW was not insured.

EVIDENCE FOR THE DEFENCE:

8. The Defendant's evidence may be summarized as follows:

- (a) The Defendant stated that he was sitting at home when his doorbell rang. It was October 20, 2011.
- (b) He was informed by the police officer who attended at his home on that day his son had been driving the Defendant's vehicle.
- (c) The Defendant indicated that he had no clue on September 5, 2011 that his son had been driving his vehicle until the officer had informed him of that on October 20, 2011.
- (d) The Defendant further indicated that he later found out, after the police

attended at his house, that his 30-year-old son had been visiting friends with his girlfriend.

- (e) He did not have permission to drive that vehicle and had never taken the vehicle before, nor did he normally take the vehicle.
- (f) The vehicle was never reported as stolen as when the Defendant did return to his home after visiting friends on September 5, 2011 at 11 pm. the said vehicle was in the same place in the driveway.
- (g) The Defendant did not dispute that he did not have insurance on the BMW on September 5, 2011 and that he now does have insurance on both the BMW and Mercedes vehicles. The insurance on the Mustang has been cancelled. The Defendant indicated that he takes public transit to work.
- (h) He did not hide the keys as they were constantly by the fireplace and his son could have had access to them.
- (i) The Defendant believed that there was no need to specifically indicate to his son that he not have access to the keys. He felt that it was not needed.

THE LAW:

9. The Defendant is charged with the offence of causing or permitting a vehicle to be driven when it was not insured by a contract of automobile insurance. The key word in section 2(1)(b) of the *Compulsory Automobile Insurance Act* is the word '**permit**'.
10. When interpreting statutes a recent decision of *Celgene Corp. v. Canada (Attorney General)*, [2011] S.C.J. 1 relied on the approach used in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at page 10 where it was found that:

It has been long established as a matter of statutory interpretation that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

11. Consequently, when looking at the ordinary meaning of the word **permit**, *Webster's New Universal Unabridged Dictionary 2nd Edition* states as follows:

‘to give permission to; to authorize; to allow by silent consent, or by not prohibiting; to tolerate; to give opportunity for’

12. *Black’s Law Dictionary 5th Edition* defines **permit** as:

‘to suffer, allow, consent, let; to give leave or license; to acquiesce, by failure to prevent, or to expressly assent or agree to the doing of an act.’

13. Based on the ordinary sense or meaning of the word **permit**, the court will have to determine if the Defendant allowed, consented or agreed to the use of his vehicle by his son or by failing to prevent his son from using his vehicle he did indeed permit the use of this vehicle when it was not insured as the permission was an implied permission.
14. It is also incumbent upon the court to determine what category this charge falls into. *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299 sets out the three categories of offences. Dickson J stated:
 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 to 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.”
15. This court must ask the question: is the offence that the Defendant is charged with a *mens rea*, strict liability or absolute liability offence? As Justice Dickson points out in *R. v. Sault Ste. Marie supra*, for an offence to be categorized as a *mens rea* offence it should have contained words that purport some mental element such as ‘willfully,’ ‘with intent,’ ‘knowingly’ or ‘intentionally’. These are typically criminal offences where as public welfare offences are *prima facie* strict liability offences.
16. The court in *R. v. Ikponmwosa* [2011] O.J. No. 1367 cites two cases pertaining specifically to an owner permitting the use of his/her motor vehicle by another driver when it was not insured by a contract of automobile insurance. These cases are: *R. v. James*, [2006] O.J. No. 5840 and *R. v. Bedard* [2009] O.J. No. 4720. *R.*

v. James supra found that section 2(1)(b) of the *Compulsory Automobile Insurance Act supra* is not one of strict liability and that the Crown would have to prove beyond a reasonable doubt that the Defendant unlawfully permitted the motor vehicle to be operated. The court in *R. v. Ikponmwosa supra*, suggests that the use of such words by the court in *R. v. James supra* indicates that that court ‘treated the offence of permitting someone to drive a motor vehicle without insurance as a *mens rea* offence’. However, this court would submit that *R. v. James supra* does not stand for that proposition.

17. In the case of *R. v. James* the Appellant gave very clear and unequivocal evidence that she had to authorize her father each time he actually borrowed the vehicle and that ‘he had never taken the vehicle without her permission and without her actually handing him the keys personally’. (at p. 3) The essence of the Appellant’s argument on appeal was that there was no evidence produced by the Crown that the Appellant ever authorized or gave her father permission to operate the vehicle.
18. The Crown argued on appeal that the keys were hanging in the kitchen and the garage and in addition to this her father had his own set of keys. When the Appellant removed the insurance from the vehicle she did not inform her father of having done so, nor did she take away his set of keys, knowing that her father drove the car on a regular basis. Furthermore, the Crown stated that the Appellant’s evidence with regard to the issue of ‘giving permission’ was inconsistent and that in the final analysis she did not ‘meet the onus of due diligence’ (at p. 8) She should have taken the keys away from her father or informed him that there was no insurance on the vehicle.
19. Justice Wake held that the wording of s. 2(1)(b) of the *Compulsory Automobile Insurance Act* would suggest that it is not a strict liability offence and that all the ‘Crown has to prove beyond a reasonable doubt is that the Appellant unlawfully permitted the motor vehicle to be operated’. (at p. 12) His Honour concluded that the Appellant’s evidence was un-contradicted as to ‘the effect that she had no expectation that he would simply take the car without asking to borrow it’. Quite simply, he did not have permission to drive the vehicle at the time in question. (at p. 12) It would be too much to ask of an individual that they should inform a person who could not take a vehicle without explicit permission that the vehicle was not insured, nor should the Appellant have anticipated that her father would have taken the vehicle without her permission, under the circumstances.
20. In the case of *R. v. Bedard supra* the offence was treated as a strict liability offence relying on the analysis of the words “cause” and “permit” in *Sault Ste. Marie supra*, where it was concluded that these words ‘neither denote clearly either full *mens rea* or absolute liability’. As such these words ‘fit much better into an offence of strict liability’. If the section of the statute had used the words knowingly or willfully then it may be more likely that they should be categorized as *mens rea* offences.
21. The court in *R. v. Ikponmwosa supra* chose to accept the approach taken in *R. v. Bedard supra* in categorizing such an offence as strict liability.

22. In the case of *R. v. Sawa* [2008] O.J. No. 5994, it was argued that the Justice of the Peace had erred in law as the evidence presented by the prosecution did not establish beyond a reasonable doubt that the Defendant had permitted the driver to operate the motor vehicle.
23. The Crown's position was that 'because of the fact that someone else was driving the vehicle and that there had been no report that the vehicle had been stolen, that that in itself was proof beyond a reasonable doubt that Mr. Sawa had given the driver permission to operate the motor vehicle' (at p. 4) Moreover, no evidence was tendered at the trial that the driver had not received permission to drive the motor vehicle.
24. Justice Hogan concluded that a key part of the evidence required to convict the defendant was missing, namely, the officer did not state in his evidence how he knew that the owner of the vehicle 'willingly and knowingly allowed the driver to operate the motor vehicle'. (at p. 10) The officer in his evidence merely indicated that he had spoken to the Defendant, received a brief written statement from the driver and then served a summons on the Defendant. There was no mention as to what that statement contained. As such the appeal was allowed and an acquittal entered.
25. In the case of *R. v. Egharevba* [2012] O.J. No. 397 Justice Ray concluded that s. 2(1)(b) of the *Compulsory Automobile Insurance Act supra* creates a strict liability offence and the Crown need not prove a mental element. The 'word permit can be proved by circumstantial evidence but it has to be cumulatively strong enough for an inference of guilt to be drawn'. (at para 16) The court concluded that 'even taking the circumstantial evidence at its highest' there was insufficient evidence to convict.

ANALYSIS:

26. The Crown has to prove beyond a reasonable doubt that the *actus reus* of the offence under section 2(1)(b) of the *Compulsory Automobile Insurance Act supra* has been made out. The Crown was able to prove that the Defendant was the owner of the vehicle driven by his son on September 5, 2011 and that the vehicle was not covered under a valid contract of automobile insurance at that time. The Defendant does not dispute either point, in fact he acknowledged both points. In particular it is the Defendant's contention that he was not aware of the fact that his son had even taken the vehicle on the night in question. What is at issue is whether or not the Defendant did permit his son to drive his vehicle on the highway while the vehicle was not insured.
27. What constitutes permission or consent and can any of the Defendant's action be construed to be acquiescence by failure to prevent? The Crown argued that the Defendant did not take adequate steps to prevent the driver from taking the

vehicle while it was not insured. He should have locked the keys in a drawer rather than leaving them in open view by the fireplace and as such leaving the vehicle accessible. By doing so the permission may be construed to be implied or inferred permission.

28. The Defendant's evidence is unequivocal in that he did not give his son permission to drive the BMW and was not even aware that it had been taken by his son until the police attended at his house some 5 weeks after the fact and told him of this, much to his surprise. He himself did not take the vehicle to work but took the bus and on September 5, 2011 when he returned home at 11 pm after visiting friends, he saw that the BMW was in the same place where it had been before he left. As such there was nothing that would cause him to believe that it had been taken.
29. This court accepts the rationale contained in *R. v. Bedard supra*, that the offence of permitting a motor vehicle to be operated when it was not insured under a contract of automobile insurance be characterized as a strict liability offence. If we are to characterize this offence as a strict liability offence, then we need to ask the question: did the Defendant do all that he could to prevent his son from taking the vehicle? He was not present when the keys for the vehicle were taken by his son and the vehicle driven by him. The vehicle had not been insured. The standard required to make out a defence of due diligence is an objective standard of what would a reasonable person in a similar circumstance have done. Could the Defendant have done more?
30. However, if we look at the rationale for the decision in *R v. James supra*, the court held that it was not necessary to look at this offence as a strict liability offence, but rather the Crown had proven beyond a reasonable doubt the Appellant unlawfully permitted the vehicle to be operated. The court found that the Crown had not made out beyond a reasonable doubt the *actus reus* of the offence and accepted the evidence of the Appellant that permission had never been given to the driver by the Appellant to drive her vehicle. All that the Crown has to prove beyond a reasonable doubt is that the owner of the vehicle unlawfully permitted the vehicle to be operated and this was not done.
31. How far is it expected for the Defendant to bring forth evidence that he could have done more or should have been expected to have done more to prevent the driver from taking the keys and operating the vehicle? *R v. James supra*, suggests that so long as it is clearly spelled out that the driver does not have permission to take a vehicle even though he may have done so in the past, the owner does not have to tell that driver that there is no insurance on the vehicle nor for that matter does he have to take back keys that the driver may have in his possession.
32. Consequently, keys being accessible by the fireplace in one's house, does not constitute implied permission. If certain rules were set out with regard to the operation of the vehicle and consent needed to be given each time the vehicle was

taken as was the case in *R v. James supra*, and the evidence clearly indicated that this consent was not given, then there should be an acquittal of the charges against the Defendant. The key point is whether or not there is evidence showing that there was permission given to the driver to operate the vehicle.

33. The court pursuant to *R. v. WD [1991] 1 S.C.R. 742* should examine the Defendant's evidence for credibility in relation to the Crown's onus of proving the *actus reus* by applying the test set out therein as follows:

"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."

34. This court finds that when applying the test set out in *R. v. WD supra*, in assessing the Defendant's credibility, the evidence of the Defendant is believable. His evidence was consistent and un-contradicted. The court accepts the Defendant's evidence that he normally kept his keys by the fireplace and that by doing so this did not constitute permission.

DISPOSITION:

35. For the reasons set out above, the court finds that the Crown has not met its onus of proving beyond a reasonable doubt that the Defendant did permit his son to operate the motor vehicle on September 5, 2011. On the contrary the evidence of the Defendant is that he did not permit his son to operate the vehicle and was unaware that it had been taken. Even if the court were to characterize this offence as a strict liability offence, where a defence of due diligence is open to the Defendant, the Court has found that the Crown has not made out its onus and will not need to address the issue of whether or not a due diligence defence has been made out.

Dated the 25th day of October, 2012, at the City of Toronto

"J. Opalinski"

Joanna Opalinski J.P.