

Regina v. Middlebrook
Regina v. Miller
Regina v. Laporta

Indexed as: R. v. Miller
(C.A.)

65 O.R. (2d) 746
[1988] O.J. No. 253
Action Nos. 1087/86, 0505/86, 317/87

ONTARIO
Court of Appeal
Dubin A.C.J.O., Martin and Tarnopolsky JJ.A.
March 8, 1988.

Constitutional law -- Charter of Rights -- Fundamental justice -- Provincial legislation authorizing justice of the peace to suspend driver's licence as result of default of payment of fine imposed for conviction under provincial motor vehicle legislation -- Motorist entitled to appeal to provincial court to review justice's exercise of discretion -- Provision not unconstitutional -- Highway Traffic Act, R.S.O. 1980, c. 198, s. 29(2) -- Provincial Offences Act, R.S.O. 1980, c. 400, s. 70(2).

Constitutional law -- Charter of Rights -- Cruel and unusual treatment or punishment -- Provincial legislation requiring six months' suspension of driver's licence for person convicted of driving while licence suspended -- Suspension of driver's licence not constituting punishment and neither cruel nor unusual -- Provision not offending guarantee to protection against cruel and unusual treatment or punishment nor guarantee to fundamental justice -- Canadian Charter of Rights and Freedoms, ss. 7, 12 -- Highway Traffic Act, R.S.O. 1980, c. 198, s. 35.

Constitutional law -- Charter of Rights -- Presumption of innocence -- Evidentiary provision -- Provincial legislation providing for presumptive inference of service of notice of driver's licence suspension where given by registered mail unless accused establishing on balance of probabilities that he did not for certain reasons receive notice -- Provision not creating reverse onus with respect to essential element of offence -- Charge of driving while suspended regulatory offence to which defence of due diligence still applicable to accused -- Evidentiary provision respecting notice not unconstitutional -- Canadian Charter of Rights and Freedoms, ss. 11(d), 7 -- Highway Traffic Act, R.S.O. 1980, c. 198, ss. 34, 35.

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 7, 11(d), 12
 Highway Traffic Act, R.S.O. 1980, c. 198, ss. 29(2) (rep. & sub. 1985, c. 13, s. 7), 34 (am. 1982, c. 15, s. 8), 35(3) (rep. & sub. 1981, c. 48, s. 4; am. 1983, c. 63, s. 12)
 Provincial Offences Act, R.S.O. 1980, c. 400, s. 70(2)

APPEALS from a dismissal of their applications for prohibition by (1) the accused Middlebrook and Laporta (unreported), and (2) the accused Miller from a judgment of Reid J., 55 O.R. (2d) 417, 27 C.C.C. (3d) 30, sub nom. Re Miller and The Queen, 41 M.V.R. 141.

J. Wallbridge, for appellant, Lavern Middlebrook.

J.C. Fleming, for appellant, Larry Miller.

K.E. Wright, for appellant, Angelo Laporta.

K.L. Campbell, for the Crown, respondent.

The following judgement was delivered orally by

DUBIN A.C.J.O.:-- In these three appeals counsel for the appellants challenge certain sections of the Highway Traffic Act, R.S.O. 1980, c. 198, on the ground of their constitutionality, the allegation being that they infringe the Canadian Charter of Rights and Freedoms. The appeal of Middlebrook, unreported, concerns s. 29(2) of the Highway Traffic Act which, in conjunction with s. 70(2) of the Provincial Offences Act, R.S.O. 1980, c. 400, authorizes a justice of the peace to suspend, not to renew or not to issue a driver's licence in default of payment of a fine imposed upon conviction for an offence under the Highway Traffic Act and two related statutes until the fine is paid.

The appellant contended that s. 29(2) contravened s. 7 of the Charter because the legislation does not establish any criteria for the exercise of this discretion. We are all of the view that the discretion vested in the justice of the peace does not render s. 29(2) unconstitutional; nor does it render unconstitutional s. 35 which makes it an offence for a person to drive a motor vehicle while his driver's licence is suspended. The appellant exercised his appeal to the Provincial Court judge who dismissed the appeal and obviously concluded that there had been no error in the exercise by the justice of his discretion. We find no merit in this appeal and it is dismissed.

The sole ground of appeal in Miller [see *Re Miller and The Queen* (1986), 27 C.C.C. (3d) 30, 55 O.R. (2d) 417, 41 M.V.R. 141] was that s. 35(3) of the Highway Traffic Act which mandates a six-month suspension of the driver's licence of a person who is convicted of driving while his licence is suspended, is unconstitutional as constituting cruel and unusual punishment in contravention of s. 12, and also contravenes s. 7 as being contrary to the principles of fundamental justice. The six-month suspension of the driver's licence of a person convicted under s. 35 of driving while his licence is suspended does not constitute punishment within the meaning of s. 12 and, in any event, is neither cruel nor unusual, nor does it offend s. 7.

Furthermore, we are not to be taken as having approved the view of the motions court judge that the operation of a motor vehicle on a highway in this province is a fundamental right or liberty within the contemplation of s. 7 of the Charter. Moreover, Miller had pleaded "guilty" to the offence charged and before the imposition of sentence made an application for prohibition. Although the application was dismissed on the merits, we consider that it was not a case for prohibition and the matter should have continued before the justice of the peace and any relief sought should have been by way of appeal. This appeal must be dismissed.

The appeal in Laporta, unreported, with one exception, raises the same issues as in Miller. The additional point raised in Laporta was that s. 34 contravened the presumption of innocence protected by s. 11(d), and also contravenes s. 7 of the Charter. Section 34 provides for a presumptive inference of service of notice of suspension where it is given by registered mail unless the accused establishes on a balance of probabilities that he did not, for the reasons set forth in the section, receive the notice.

In our view, s. 34 does not create a reverse onus with respect to an essential element of the offence under s. 35. Section 35 is a regulatory offence to which the defence of due diligence is applicable; absence of notice is relevant to such a defence. Section 34 in our view does not contravene either ss. 11(d) or 7 of the Charter, and this appeal must also be dismissed.

Appeals dismissed.