

ONTARIO COURT OF JUSTICE

B E T W E E N :

BARAK NERIAN

— AND —

HER MAJESTY THE QUEEN

Before Justice Sheila Ray
Heard on December 16, 2009
Reasons for Judgment released on January 11, 2010

Derek Knipe **Agent for the respondent, Attorney General**
Mario Jianjioppo **Paralegal acting for the appellant**

Ray, J.:

INTRODUCTION

[1] Barak Nerian has appealed his sentence for the offence of operating a motor vehicle without insurance contrary to s. 2(1)(a) of the *Compulsory Automobile Insurance Act*, R.S.O. 1990, c. C. 25. It is a part III appeal pursuant to s. 116 of the *Provincial Offences Act*, R.S.O. 1990, c. H-8, as amended. I have the discretion pursuant to s. 122 of the same act to vary the sentence within the limits prescribed by law for the offence of which the defendant was convicted or to dismiss the appeal.

[2] The appellant received the minimum sentence of 5,000 dollars and was given 12 months to pay the fine. The total amount that is now outstanding is six thousand two hundred and fifty five dollars. The appellant sought relief against the minimum fine pursuant to s. 59(2) of the *Provincial Offences Act*, above, which was denied by the learned Justice of the Peace, and which is the subject of this appeal.

FACTS

[3] On September 13th, 2005, the appellant's vehicle struck the rear of another motor vehicle, which was turning right into a strip mall. Upon impact, the appellant's vehi-

vaulted over the vehicle it collided into and landed in the parking lot. The appellant was subsequently transported to Sunnybrook Hospital, where he was treated for two broken legs and other fractures and injuries. The appellant did not have insurance on his vehicle. He was represented at his trial by an agent, whom he instructed to plead guilty on his behalf.

[4] In a sworn affidavit filed with this court, the appellant states that he has become disabled for life as a result of the accident. He has severely limited mobility and he suffers from constant pain aggravated by plates and screws in his legs. One leg is shorter than the other. He suffers from nightmares of the accident and is unable to have proper rest or sleep. He is unable to work in his trade as a general contractor. He is not a Canadian citizen. He is in Canada subject to a work permit. His wife is a United States citizen working in Canada under a work permit. He is not entitled to any disability assistance or worker compensation. He has no income, only expenses. As a result of her pregnancy, his wife has limited income.

DECISION OF THE LEARNED JUSTICE OF THE PEACE

[5] The learned justice of the peace began his reasons by listing some of the relevant aggravating factors in the case. He found it to be an extraordinary circumstance that the appellant drove an all train vehicle on a public highway without insurance, as well as without any personal protection such as a helmet, and without licence plates. He noted that the highway was a busy public highway in the largest and most populated city in Canada. He noted that the appellant had been charged with a number of related infractions, he drove carelessly, and the collision was a very violent rear end one resulting in damage and injuries.

[6] The learned justice of the peace also took into account in his decision that the appellant had no previous record, that he paid a “mighty price” for his indiscretion on that day in terms of the substantial injuries he sustained and the incredible impact upon the income of his home. He also appeared to take issue with a submission made by the appellant’s agent that the appellant had no form of income replacement benefits and went on to speculate that he may be entitled to such benefits by virtue of having insurance on another vehicle. After engaging in such speculation the learned justice of the peace stated that he “recognized” that such income replacement benefits may be available.

[7] After listing all of these factors, the learned justice of the peace emphasized that “fact of the fact” was that the appellant drove a vehicle that was unlicensed, uninsured, on a public thoroughfare, and drove it at such a speed that he could not stop. In those circumstances particularly, it appeared to the learned justice of the peace that relief against the minimum fine would not be appropriate.

IS THERE ANY JUSTIFICATION FOR VARYING THE APPELLANT’S SENTENCE?

[8] The facts admitted at trial included aggravating factors that were elements of the companion offences, which were withdrawn. As such, it was entirely appropriate for the learned justice of the peace to take these aggravating factors into account on sentence. The additional aggravating and mitigating factors listed by the learned justice of the peace were

also relevant and appropriate considerations save and except the speculation that income replacement benefits may have been available, which the learned justice of the peace specifically indicated that he "recognized."

[9] It was also appropriate to include a consideration of aggravating factors in the s. 59(1) assessment. "Exceptional circumstances" that are unduly oppressive or otherwise not in the interest of justice" cannot be assessed without reference to these factors. The financial circumstances of the defendant must also necessarily factor into whether relief against the minimum fine is necessary in order to prevent an oppressive result.

[10] All of the factors taken into account by the learned justice of the peace in reaching his decision on sentence were appropriate save and except the speculation that income replacement benefits may have been available. He also seems to have glossed over the financial circumstances of the appellant that were explained in his agent's submissions. The income replacement factor should have received no consideration and the details of the appellant's financial circumstances appear to have been minimized. For all of these reasons, there does appear to be justification for varying the appellant's sentence within the limits prescribed by law.

CONCLUSION

[11] The learned justice of the peace appears not to have adequately considered the financial circumstances of the appellant before denying s. 59(1) relief. He also "recognized" the speculative factor of potential income supplements based upon the possibility that another vehicle owned by the appellant may have been insured. He did not have an evidentiary foundation for recognizing this highly speculative factor.

[12] Furthermore, it is reasonable to conclude that the financial circumstances of the appellant were exceptional, and it would be unduly oppressive to require him to pay the minimum fine. As noted above, the appellant has sworn in an affidavit that was uncontested at the appeal hearing, that he has become disabled for life as a result of the accident. He has severely limited mobility and he suffers from constant pain aggravated by plates and screws in his legs. One leg is shorter than the other. He suffers from nightmares of the accident and is unable to have proper rest or sleep. He is unable to work in his trade as a general contractor. He is not a Canadian citizen. He is in Canada subject to a work permit. His wife is a United States citizen working in Canada under a work permit. He is not entitled to any disability assistance or worker compensation. He has no income, only expenses. As a result of her pregnancy, his wife has limited income.

[13] For all of these reasons, I am allowing the sentencing appeal in this case, and I am exercising my discretion to lower the fine to one thousand dollars. There will be three years to pay the fine.

Released: January 11, 2010

