

ONTARIO COURT OF JUSTICE

In the matter of an appeal under subsection 116(1) of *The Provincial Offences Act*, R.S.O 1990, c.P. 33 as amended

BETWEEN

HER MAJESTY THE QUEEN

Respondent

- and -

JANE RAHAM

Appellant

Before: The Honourable Mr. Justice G. J. Griffin

Heard: July 23rd, 2009

Judgment: September 4th, 2009

Mr. B. Starkman for the Appellant, represented by Mr. G. Burd

Mr. A. Smith, for the Respondent

On appeal from a conviction by His Worship Justice of the Peace
J. Chiang, dated August 17th, 2008

FRIDAY, SEPTEMBER 4TH, 2009:

THE COURT: Good morning.

MR. SMITH: Good morning, Your Honour. For the record, Andrew Smith, Provincial Prosecutor appearing on behalf of the Attorney General in regard to the matter of Jane Raham, the POA Appeal.

THE COURT: Great, Mr. Smith.

MR. BURD: Good morning, Your Honour, my name is Greg Burd, B-U-R-D, and I am appearing as agent for Mr. Brian Starkman today for purposes of hearing your decision, as well as for the appellant, Jane Raham. The last name is Burd, B-U-R-D.

THE COURT: Beautiful. Thanks, guys.

MR. BURD: Thank you.

MR. SMITH: Thank you.

R E A S O N S F O R D E C I S I O N

GRIFFIN, J: (Orally):

INTRODUCTION:

This is an appeal involving the relatively new offence of stunt driving by speed alone. At the trial before Justice of the Peace, Ms. Raham's agent argued that the offence of driving a motor vehicle at a rate of speed that is 50 kilometres per hour or more over the speed limit is an absolute liability offence, and as the penalty provision allows for up to six months imprisonment, the offence violates section 7 of the *Canadian Charter of Rights and Freedoms*, namely:

"The right to life, liberty and security of person and

the right not to be deprived thereof except in accordance with the principles of fundamental justice."

The Justice of the Peace, without the benefit of reasons, ruled as follows on that issue:

"On this matter the court agrees with the prosecution that the section 172 is a strict liability offence."

Based upon that ruling, the *Charter* argument was dismissed and the Justice of the Peace then considered the evidence given by the Crown, and without commenting in any manner on the evidence given by Ms. Raham, the appellant, found her guilty of the offence of stunt driving by driving at a rate of speed that was 50 kilometres per hour or more over the posted speed limit, contrary to section 172(1) of *The Highway Traffic Act*.

The notice of appeal was filed by the para-legal who had appeared at trial and the ground of appeal was as follows:

"Justice of the Peace erred in finding that the section was constitutional under section 7 of *The Charter of Rights*."

When this appeal first came before me, the para-legal filed written submissions from a case entitled R. v. Brown [2009] O.J. No. 269 (O.C.J.), which had been drafted by Mr. Brian E. Starkman. I contacted Mr. Starkman to determine if he knew that the para-legal was making use of and filing the Brown material in the within case. And to make a long story short, invited Mr. Starkman to take over this appeal as it was largely his written material being relied upon by a para-legal who was

having some difficulty articulating the argument. Mr. Starkman agreed to take the matter on, and he filed a very well prepared appellant factum with Mr. Andrew Smith, the Provincial Prosecutor, filing an equally well prepared respondent's factum.

The issue to be determined is whether the offence of stunt driving, as defined by section 3(7), Regulation 455/07 is an absolute liability offence or a strict liability offence. Counsel for the respondent, in a very fair manner, provided at paragraph 34 of the respondent's factum,

"The respondent would respectfully submit and take the position that if this Honourable Court is of the view that the offence of stunt driving under section 172(1) of *The Highway Traffic Act* as defined by section 3(7), of Ontario Reg. 455/07 is an offence of absolute liability, then this offence cannot be saved by section 1 of *The Charter* as a reasonable limit on the appellant's rights under section 7 of *The Charter*."

THE RELEVANT CONSTITUTIONAL STATUTORY AND REGULATORY PROVISIONS:

Section 7 and section 52(1) of *The Canadian Charter of Rights and Freedoms* provides:

Section 7

Everyone has the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 52(1)

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution

is, to the extent of the inconsistency, of no force or effect.

Section 172(1) and (2) of *The Highway Traffic Act* are as follows:

Section 172(1)

Racing, stunts, etc, prohibited – No person shall drive a motor vehicle on a highway in a race or contest, while performing a stunt or on a bet or wager.

(2) Offence – Every person who contravenes subsection (1) is guilty of an offence and on conviction is liable to a fine of not less than \$2,000 and not more than \$10,000 or to imprisonment for a term of not more than six months, or to both, and in addition his or her driver's licence may be suspended.

Section 3, including 3(7) of Ontario Reg. 455/07 describes stunt. For the purpose of these reasons, I am not going to read the entire section, but they will form part of the written or the decision as it is prepared.

Definition, "stunt"

3. For the purposes of section 172 of the Act, "stunt" includes any activity where one or more persons engage in any of the following driving behaviours:

1. Driving a motor vehicle in a manner that indicates an intention to lift some or all of its tires from the surface of the highway, including driving a motorcycle with only one wheel in contact with the ground, but not including the use of lift

axles on commercial motor vehicles.

2. Driving a motor vehicle in a manner that indicates an intention to cause some or all of its tires to lose traction with the surface of the highway while turning.

3. Driving a motor vehicle in a manner that indicates an intention to spin it or cause it to circle, without maintaining control over it.

4. Driving two or more motor vehicles side by side or in proximity to each other, where one of the motor vehicles occupies a lane of traffic or other portion of the highway intended for use by oncoming traffic for a period of time that is longer than is reasonably required to pass another motor vehicle.

5. Driving a motor vehicle with a person in the trunk of the motor vehicle.

6. Driving a motor vehicle while the driver is not sitting in the driver's seat.

7. Driving a motor vehicle at a rate of speed that is 50 kilometres per hour or more over the speed limit.

8. Driving a motor vehicle without due care and attention, without reasonable consideration for other persons using the highway or in a manner that may endanger any person by,

i. driving a motor vehicle in a manner that indicates an intention to prevent another vehicle from passing,

ii. stopping or slowing down a motor vehicle in a manner that indicates the driver's

sole intention of stopping or slowing down is to interfere with the movement of another vehicle by cutting off its passage on the highway or to cause another vehicle to stop or slow down in circumstances where the other vehicle would not ordinarily do so,

iii. driving a motor vehicle in a manner that indicates an intention to drive, without justification, as close as possible to another vehicle, pedestrian or fixed object on or near the highway, or

iv. making a left turn where,

(A) the driver is stopped at an intersection controlled by a traffic control signal system in response to a circular red indication;

(B) at least one vehicle facing the opposite direction is similarly stopped in response to a circular red light indication; and

(C) the driver executes the left turn immediately before or after the system shows only a circular green indication in both directions and in a manner that indicates an intention to complete or attempt to complete the left turn before the vehicle facing the opposite direction is able to proceed straight through the intersection in response to the circular green indication facing that vehicle.

THE FACTS:

If one were asked to describe a stunt driver, the appellant would not immediately spring to mind. She is a 62-year-old grandmother who was travelling from Kanata, where her daughter had recently given birth to twins, back to her home in Oakville. She was travelling on Highway Number 7 as there are less trucks than on Highway 401, and she has a fear of being in the blind spot of a big truck. The facts are as follows:

- I) April 29, 2008, Ontario Provincial Police
Officer, Doolan was conducting traffic enforcement on Highway 7 in an unmarked police vehicle equipped with a speed measuring device known as a Genesis Two directional radar unit.
- ii) Officer Doolan is qualified to operate the device in question, used the device in accordance with his training and manufacturer's specifications on the day in question.
- iii) Shortly after 11:30 a.m. he was travelling westbound on Highway 7 which has a posted speed limit of 80 kilometres per hour, and there was a line of traffic he was following, the head vehicle being a tractor trailer, then an Audi A4 motor vehicle, a third vehicle, then himself.
- iv) The group of vehicles was travelling at 90 kilometres per hour at the time. At a straight section of the road, the Audi that was behind the tractor trailer pulled out into the eastbound lane, accelerating to quite a high rate of speed passing the tractor trailer. He moved into the eastbound lane to

get a speed reading from the front antenna of his vehicle. He was able to obtain readings initially at 129 kilometres per hour, which increased incrementally to 130, and then to 131 kilometres per hour, which he locked in on the display of his radar. The Audi slowed down after passing the tractor trailer, but remained in excess of the speed limit travelling at 110 kilometres per hour.

- v) He was able to get directly behind the Audi, and it slowed down further upon it coming upon a Volvo station wagon.
- vi) The Audi which was approaching a built-up area of Highway 7, namely Kaladar, where the posted speed is reduced to 60 kilometres per hour. Just prior to entering the 60 kilometre per hour zone the Audi began the process to pass the slower Volvo, but chose instead to slow down and did not complete the passing of the Volvo.
- vii) Officer Doolan at that point activated the roof lights, with Ms. Raham, the Audi driver, pulling over near the OPP station on the west side of Kaladar. She was the lone occupant of the vehicle, and had a valid driver's licence.
- viii) The vehicle was impounded by operation of section 172(7) at the Ford dealership in Kaladar.
- ix) Officer Doolan testified that there was nothing unsafe or remarkable about Ms. Raham's lane change, and that the only evidence pertaining to the charge was the speed as indicated on the speed measuring device.

x) Ms. Raham testified that as she passed the tractor trailer it was longer than she thought it was, and his speed seemed to pick up as she was passing. Her words were that,
"I did out of a sort of fear reaction pick up speed to get past him and back into the westbound driving lane."

xi) As well, Ms. Raham testified that when she visits her daughter in Kanata she takes Highway 7 from Oakville because there are less trucks and she is not comfortable with big trucks because she does not like getting in their blind spot, and she has had occasion where a truck did pull out into her lane. On Highway 7 she is able to avoid having trucks changing lanes.

Justice of the Peace Chiang, upon hearing about Ms. Raham having to take a taxi from Kaladar to Belleville so she could catch a train to Oakville, paying \$75 a day storage to the Ford dealer in Kaladar for the vehicle which had been impounded, as well learning that she is a divorced, single, retired woman who volunteers teaching adult literacy, decided to reduce the minimum fine of \$2,000 to a fine of \$1,000 with surcharge.

MY ANALYSIS:

So it is clear, the automatic driver's licence suspension at the side of the road and the immediate impoundment of the motor vehicle used to speed 50 kilometres or more over the speed limit, is not the issue, nor is the minimum fine of not less than \$2,000. The only issue is the possibility of imprisonment for up to six months for an absolute liability offence.

Justice Lamer in the Supreme Court of Canada case referenced Reference re: Motor Vehicle Act, British Columbia, s. 94(2) (1985) 2 S.C.R., 486 at paragraph two, in a succinct manner provided,

“In other words absolute liability and imprisonment cannot be combined.”

If the stunt driving offence defined by section 3(7) of the Ontario Regulation 455/07 is a strict liability offence, then the appeal fails, while if it is determined to be an absolute liability offence the appeal will succeed. I have had the benefit of reading the following cases which have decided that speed alone as set out in section 3(7) of Regulation 455/07 is a strict liability offence:

1. R. v. Araujo, 2008 ONCJ 507 August 27th, 2008 decision of Justice of the Peace MacPhail
2. R. v. Piette (2008) ONCJ 466 September 17th, 2008 decision of Justice of the Peace Doelman
3. The Municipality of Muskoka v. Luo, 2008 ONCJ 478 October 2nd, 2008 decision of Justice of the Peace Evans
4. R. v. Mongeon, 2008 ONCJ 562 October 10th, 2008 decision of Justice of the Peace Ross
5. R. v. Almeida 2008 ONCJ 631 November 13th, 2008 decision of Justice of the Peace Barnes
6. R. v. Brown 2009 ONCJ 6 January 19th, 2009 decision of Justice of the Peace Cuthbertson
7. R. v. Vanioukevitch 2009 ONCJ 185 February 6th, 2009 decision of Justice of the Peace Brown
8. R. v. Sgotto 2009 ONCJ 48 February 17th, 2009 decision of

Justice of the Peace Frederiksen

9. R. v. Aftab 2009 ONCJ 153 April 15th, 2009 decision of Justice of the Peace Coopersmith
10. R. v. Goonoo 2009 ONCJ 248 June 1st, 2009 decision of Justice of the Peace Mankovsky

As well I have read the following case which concluded that it is an absolute liability offence; namely, R. v. Tavukoglu 2009 ONCJ 260 April 8th, 2009 decision of Justice of the Peace Waugh. Justice Dickson, in R. v. Sault Ste. Marie {1978} 40 CCC (2d) 353 at page 374 makes it clear, public welfare offences are presumed to be strict liability offences. While,

"Offences of absolute liability would be those in respect of which the Legislature has made it clear that guilt would follow proof merely upon the prescribed act."

In this case, the prescribed act is speeding and the evidence relied upon by the prosecution was in the words of Officer Doolan,

"The speed as indicated on the speed measuring device."

Justice of the Peace Chiang, in his reasons for judgment, proceeded on the basis that it was an absolute liability offence although he referred to it as a strict liability offence. I say this because his analysis involves the fact that Officer Doolan is a qualified radar instructor who tested the radar device and the device provided the reading of 131 kilometres an hour in a posted 80 kilometre an hour zone, so therefore the Court finds - I am quoting,

"So therefore the Court finds all of the elements of the offence have been met and finds the defendant guilty as charged."

Justice of the Peace Chiang did not turn his mind to the appellant's testimony about why she was driving the way she was driving, and whether her evidence gave rise to a due diligence defence, as he proceeded on the basis that this was an absolute liability offence, although he called it a strict liability offence.

He did this in my view because the reality of the situation is that section 3(7) of Regulation 455/07 is a speeding offence, albeit a speeding offence by another name namely, stunt driving. One is reminded of the words of William Shakespeare from Romeo and Juliet,

"What's in a name? That which we call a rose by any other name would smell as sweet."

In 1976, the Ontario Appeal in R. v. Hickey 13 O.R. (2d) 228 ruled that speeding is an absolute liability offence, for which reasonable mistake of fact is not a defence. As recently as 2008, the Ontario Court of Appeal in R. v. Polewsky (2002) C.C.C. (3d) 257 at paragraph three wrote,

"Speed is a factor in many collisions. The overall regulatory pattern adopted by the Legislature, the subject matter of the legislation used, suggests that speeding should continue to be interpreted as an offence of absolute liability."

As Justice of the Peace Waugh quite properly points out at paragraph 26 of her decision of R. v. Tavukoglu [2009] O.J. No. 2410 quote,

“The only difference between speeding under section 128 and speeding under section 172(1) is the penalty.”

It is important however not to approach the task to classify the offence on the basis of deductive reasoning. That is, if speed is an absolute liability offence, and if stunt driving under section 3(7) of the Regulation is speeding 50 kilometres over the posted speed limit, therefore stunt driving under section 3(7) must be an absolute liability offence. It is clear from the Ontario Court of Appeal decision of R. v. Kanda [2008] O.J. No. 80 how one should proceed in deciding the classification of speeding under section 3(7) of the Ontario Regulation 455/07. At paragraph nine Justice MacPherson wrote in commenting on the words of Justice Dickson in R. v. Sault Ste. Marie [1978] S.C.J. No. 59 (S.C.C.),

“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 language used. It is to this assessment that I now turn.”

So I will follow that process.

OVERALL REGULATORY PATTERN:

The *Highway Traffic Act*, as Justice MacPherson noted in R. v. Kanda [2008] 227 C.C.C. (3d) 417 (Ont. C.A.) creates many offences which include strict liability offences, absolute liability offences, as well as *mens rea* offences. The overall regulatory pattern was determined to be neutral when he considered how to classify section 106(6) of *The Highway Traffic Act*, and I am unable to reach any other conclusion other than it is neutral as it relates to attempting to classify section 3(7) of Regulation 455/07.

THE SUBJECT MATTER:

Section 3(7) of Regulation 455/07 is designed to address public safety by deterring excessive speed. Speeding is a factor in many accidents, which have resulted in death, serious bodily harm and significant property damage.

Excessive speed or extreme speed only creates greater risk and in the interest of protecting the public it was determined that there must be more serious sanctions for the driver who drives at grossly excessive speeds.

The subject matter is essentially a speeding offence that could be described as extreme speeding, but the Legislature decided to call it stunt driving.

I would refer again to the Ontario Court of Appeal decision in

R. v. Polewsky [2005] O.J. No. 4500, at paragraph three, the Court wrote,

“Speed is a factor in many collisions. The overall regulatory pattern adopted by the Legislature, the subject matter of the legislation and the language used suggests that speeding should continue to be interpreted as an offence of absolute liability.”

Here the subject matter is speeding, and the need to protect the public supports the classification of it being an absolute liability offence.

PENALTY:

Section 172(2) provides a minimum fine of \$2,000 and not more than \$10,000, as well as an imprisonment for a term not more than six months, as well a driver’s licence suspension for up to ten years for a second offence. The potential for incarceration militates against the classification of absolute liability, and therefore supports a classification of strict liability.

THE PRECISION OF LANGUAGE:

One of the more interesting aspects concerning precision of language is found in section 3 of Regulation 455/07 as follows:

- i) section 3(1) uses words,
“In a manner that indicates an intention”,
- ii) section 3(2) uses the words,
“In a manner that indicates an intention.”
- iii) section 3(3) uses the words,
“In a manner that indicates an intention.”
- iv) section 3(4) uses the words,

"That is reasonably required."

v) section 3(8) uses the words,
"In a manner that indicates an intention."

Obviously the use of such precise language makes it clear that these offences cannot be classified as absolute liability offences. On the other hand, section 3(5), 3(6), 3(7) do not use such language, but rather use language that is consistent with an absolute liability offence. Within section 3 of Regulation 455/07, one finds language that supports a conclusion that certain conduct should be classified as strict liability offences, while other conduct should be classified as absolute liability offences. Section 172(1) begins with the words,

"No person shall - "

But as Justice MacPherson pointed out in R. v. Kanda [2008] O.J. No. 80, at paragraph 38,

"First the case law does not support the proposition that the language, no person shall, points to an absolute liability offence."

I am of the view that the precision of the language is such that in section 3 of Regulation of 455/07 there are clear strict liability offences found in section 3 and other offences such as section 3(7) being one which appears to be an absolute liability offence, although not expressly stated. I am of the view that like the overall regulatory pattern the precision of the language is neutral.

The above analysis does not give rise to a definitive answer, as although the penalty provisions suggest a strict liability

offence, the subject matter is indicative of an absolute liability offence, while the precision of language in the overall regulatory pattern is neutral as it relates to properly classifying section 3(7) of the Ontario Regulation 455/07 and section 172 of The Highway Traffic Act.

It bears repeating that Justice Dickson in R. v. Sault Ste. Marie {1978} 2 S.C.R. 1299 established the principle that public welfare offences are presumed to be strict liability offences. The presumption can only remain intact however, if the defence of due diligence is truly available. As Justice Cory wrote at paragraph 42 of R. v. Pontes [1995] 3 S.C.R. 44,

“The defence of due diligence must be available to defend a strict liability offence. If that defence is removed the offence can no longer be classified as one of strict liability.”

If there really is no due diligence defence, then it must be considered an absolute liability offence.

Mr. Justice Bastarache, when sitting as a Justice of the New Brunswick Court of Appeal in R. v. Wilson, [1997] N.B.J. No. 377 at paragraph 17 wrote,

“In Sault Ste. Marie, the Supreme Court affirmed that absolute liability will be found to exist unless the due diligence defence is in fact available.”

In R. v. Sault Ste. Marie [1978] 2 S.C.R. 1299 Justice Dickson explained the due diligence defence as follows:

“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."

A year later in R. v. Chapin [1979] 2 S.C.R. 121 Justice Dickson defined a due diligence defence as follows:

"An accused may absolve himself on proof that he took all care which a reasonable man might have been expected to take in the circumstances, or in other words that he was in no way negligent."

Section 3(7) of Ontario Regulation 455/07 concerns itself with what can only be described as extreme behaviour, that is driving 50 kilometres over the posted speed limit. The appellant quite properly pointed out that nowhere in Ontario does the speed limit exceed 100 kilometres an hour. Therefore an allegation under section 3(7) will by definition involve an allegation of someone going at least 50 percent above the speed limit. Accordingly, the idea of a reasonable man or a mistaken set of facts giving rise to a defence in a situation where the evidence establishes speed of 50 percent or more over the speed limit seems improbable, so improbable that I am unable to imagine a circumstance where a due diligence defence could succeed. The common law defences such as necessity or duress would be available as they are maintained by section 80 of *The Provincial Offences Act*, but they should not be confused with the due diligence defence. It is simply not realistic to say that a person could reasonably advance a defence that they did not know they were speeding when they would have to have been travelling 50 percent above the speed limit. Accordingly, the person

would have to admit speeding, just not at the extreme level of 50 percent over the limit, which would defeat a due diligence defence. The defence would fail because it is impossible to reconcile an admission of speeding with the idea of taking all reasonable steps to avoid speeding at a rate of speed 50 kilometres per hour over the speed limit. The notion that a broken or malfunctioning speedometer could give rise to a mistaken set of facts is simply untenable. When charged under section 3(7) the person would have to be speeding 50 percent or more over the posted speed limit. The point is that at a speed 50 percent or more over the posted speed limit, the person would have to have some knowledge that they were speeding.

The respondent respectfully submitted that a person charged with stunt driving could take the witness stand and give evidence as to what steps they took that showed that they took all reasonable care under the circumstances to comply with the law.

The appellant submitted that it would be fanciful that someone could reasonably advance a defence without having to admit they were speeding to some extent. I agree with the appellant. I am unable to imagine circumstances where a due diligence defence could possibly succeed. Due diligence requires all reasonable care, or a reasonable belief in a mistaken set of facts, and it is not possible in my view to speed at 50 percent over the speed limit and suggest you took all reasonable care, or had a reasonable belief in a mistaken set of facts.

The penalty provisions of section 172 suggest that this is a strict liability offence. As well, there is a presumption that

it is a strict liability offence; however, if there is no due diligence defence, then the offence must be classified as an absolute liability offence.

It is in my view an unfair fallacy to say to the person charged with the offence of stunt driving by speed alone that it is a strict liability offence, and that you are free to advance a due diligence defence when it is clear that no such defence truly exists. The offence of stunt driving as defined by section 3(7) of Ontario Regulation 455/07, should be classified as an absolute liability defence because the defence of due diligence is not available to defend the charge.

MY CONCLUSION:

I repeat what I stated earlier; namely, there is no issue about the validity of automatic driver licence suspension at the side of the road, or the immediate impoundment of a motor vehicle, or a minimal fine of not less than \$2,000, as set out in section 172 of *The Highway Traffic Act*. The only issue is the possibility of imprisonment for up to six months for an absolute liability offence, which I have found section 3(7) of Ontario Regulation 455/07 to be.

As pointed out earlier, the Crown fairly acknowledged that if I conclude as I have that the offence of stunt driving under section 172(1) of *The Highway Traffic Act*, as defined by section 3(7) of the Ontario Regulation 455/07 is an absolute liability offence, then it cannot be saved by section 1 of *The Charter of Rights and Freedoms*, as a reasonable limit of the appellant's rights under section 7. Section 3(7) of the Ontario Regulations 455/07 is unconstitutional as it creates an absolute

liability offence for which one can be imprisoned for six months, contrary to section 7 of *The Charter of Rights and Freedoms*.

The appeal is allowed. The conviction is set aside with a finding of not guilty being entered.

Thank you.

C O U R T C O N C L U D E D

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I, Sharon L. Aylsworth, certify that this document is a true and accurate transcript of the recording of R. v. Jane Raham, in the Ontario Court of Justice, held at 41 Dundas Street West, Napanee, Ontario, taken from Recording No. 2011-1/0388/2009, which has been certified in Form 1.

Date

Sharon L. Aylsworth
Certified Court Reporter