

ONTARIO COURT OF JUSTICE

MICHELLE RENE

v

HER MAJESTY THE QUEEN

C O U R T P R O C E E D I N G S

BEFORE THE HONOURABLE MADAM JUSTICE M.E. LANE
on August 25, 2004, at TORONTO, Ontario

APPEARANCES:

P. McMahon, Esq.

Prosecutor

J. Cox, Esq.

Agent for the Accused

Old City Hall
Courtroom J

Wednesday, August 25, 2004

MR. MCMAHON: Good morning, Your Honour.

THE COURT: Good morning, sir.

MR. COX: Good morning, Your Honour.

MR. MCMAHON: It's McMahon - M-C-M-A-H-O-N, initial P, for the City of Toronto this morning.

MR. COX: And for the record, it's Cox, spelled C-O-X, initial J, appearing as agent for the applicant in this matter and that is Michelle Rene.

MONITOR'S NOTE: ... Another matter briefly spoken to at this point in the proceedings.

U P O N R E S U M I N G

THE COURT: All right. Well, let's deal first of all with the Rene matter, because you are here on Rene and you are prepared and the materials have been provided to me. Okay

All right. Perhaps, if you will sit down gentlemen, and Mr. McMahon if you will just explain to me your position, which I received by mail

MR. MCMAHON: Yes, Your Honour. Thank you. As you are aware we became seized of this matter back on June the 3rd of 2004. The substance of the appeal is

related to the service box on the Certificate of Offence. It was not ticked off and there was a conviction by way of fail to respond.

THE COURT: Right.

MR. MCMAHON: So, nothing was done with the ticket. There was a fail to respond conviction.

On the original appeal date, Mr. Cox made an argument and I made a counter-argument, absent any demonstrated prejudice I was opposed to the appeal. Since then, I've had an opportunity to look further into the substance of the matter.

It's now my position that the appeal should be allowed and an acquittal ought to be entered. I sent you a letter to that effect on August the 19th of 2004 and I forwarded a copy to Mr. Cox. Now, I do want to distinguish it slightly, in that, the remedy sought by the appellant is to quash the certificate and the position of the appellant, as I understand it, is that ought to have been done when the justice perused the Certificate of Offence and he ought to have found it not complete and proper on its face

5
10
Now, I don't agree that the matter ought to have been quashed by the Justice of the Peace. However, it's my position that the Court, at that time, had no jurisdiction to deal with the matter. Because the Court had no jurisdiction to deal with the matter, the conviction is wrongful. And the jurisdiction issue comes about with respect to s.4 of the *Provincial Offences Act* and that ...

THE COURT: Section 4 did you say?

MR. MCMAHON: Four, yes. Read in conjunction with Regulation 200, Rule 11. I'll just let Mr. Cox get his Act.

THE COURT: So, you are saying the Certificate should not be quashed.

MR. MCMAHON: Yes. But, that the Court had no jurisdiction to deal with the matter, either by way of quashing or to enter a conviction.

THE COURT: Just before you go on and make your argument. What do you say about all those cases, which were part of that casebook, where the remedy that was imposed by the Judges in similar circumstances, was to quash the conviction?

MR. MCMAHON: Yes. I don't agree with that decision. And I'd like to just indicate why I don't agree

THE COURT: Rule 11.

MR. MCMAHON: Rule 11. States
subsection 1 states ...

THE COURT: Just a minute. Regulation
200, s.11 ...

MR. MCMAHON: Sub-section 1 states, "the
Clerk of the Court shall not accept for
filing a Certificate of Offence more than
seven days after the day on which the
offence notice or summons was served,
unless the time is extended by the
Court." And it's clear in its wording,
it says, "shall not accept". Because the
Court cannot establish when, or, if the
summons was served, they erred in
accepting the filing of the Certificate.

And since the Court should not have
accepted the Certificate, which is the
charging document, it ought not be before
the Justice of the Peace to entertain
s.9(1), whether or not he enters a
conviction pursuant to s-s.(a) or ...

THE COURT: Excuse me. I have just lost
you a minute.

MR. MCMAHON: I'm sorry.

THE COURT: It should not be before the
JP to entertain

MR. MCMAHON: To entertain

THE COURT: Right.

5
10
MR. MCMAHON: ... the matter on a fail to respond docket. That means a conviction under s.9(1)(a), which is the fail to respond authority, if the Justice finds it's complete and proper on its face, should not have been entertained. It also means that s.(b) - or rather, s-s.(b) of that same section ought not to be entertained either, that is the quashing of the Certificate.

THE COURT: Okay.

MR. MCMAHON: Because it ought not be before the Justice of the Peace to begin with.

15
THE COURT: Okay. I should refer then back to 9(1)(a) and (b) of the *Provincial Offences Act*?

MR. MCMAHON: Yes.

20
THE COURT: Let's just look there then, 9(1)(a), "where the Certificate of Offence is complete - shall enter a conviction, or is not complete and regular on its face, the Justice shall quash the proceeding".

25
30
MR. MCMAHON: And I can make a further submission with respect to that. The heart of that, before we get to s-s.(a) or (b) is, "where at least 15 days have elapsed after the defendant was served with the offence notice," and because the Court can't establish that 15 days has

MR. MCMAHON: Well, I've thought about this and I've - I don't have it with me, but I actually looked up the definition of acquittal and I found it to be quite broad. We know that the conviction - I'm suggesting at least, that the conviction is wrongful because the Court had no jurisdiction to deal with the matter. And if you peruse the appeal court record

THE COURT: Unfortunately, the appeal court record

MR. MCMAHON: That's the yellow document that's right there. That would mean that the appeal would be allowed and then a number of things can happen. Is it appropriate to send back for a new trial? Well ...

THE COURT: No.

MR. MCMAHON: The trial would not have jurisdiction over the matter, that's my submission to begin with. Is it appropriate to vary the sentence or to vary the matter in some other way?

THE COURT: No.

MR. MCMAHON: Okay.

THE COURT: So, you are saying that the pre-condition has not been established and therefore, (b) would not kick in.

MR. MCMAHON: a) and (b) would not kick in. Both. If the

THE COURT: What is the practicable effect of what you are arguing? Of the difference?

MR. MCMAHON: The practicable effect?

THE COURT: Yes. Like, if I quash the Certificate then the offence goes away. If I enter an acquittal what ...

MR. MCMAHON: If you quash the Certificate I would argue that you also have the ability to consider s-s.(a) and despite any demonstrated prejudice the conviction ought to stand. If you're considering ...

THE COURT: No, but I cannot. Because s-s.(a) kicks in. No, your argument would extend to both (a) and (b).

MR. MCMAHON: Exactly.

THE COURT: There is no remedy then though.

MR. MCMAHON: That's a problem. There is a remedy, but the remedy lies with this Court and not a Justice of the Peace. And I think we probably have to look at the powers of ...

THE COURT: I need an answer to the original question.

MR. MCMAHON: I'm sorry.

THE COURT: What is the difference between quashing and an acquittal, the practicable effect of the difference? If I quash, then I assume that the

5
Certificate is declared a nullity and
there is no further action possible. If
I grant an acquittal, is there any remedy
remaining to the State to proceed, or
would it be *autrefois acquit* and nothing
could

MR. MCMAHON: No, there's no remedy.

THE COURT: So, there is no particular
difference?

10
MR. MCMAHON: Right. But, I want to
refer to the definition then of a
nullity.

THE COURT: Okay. All right.

15
MR. MCMAHON: This is from Black's Law
Dictionary. "Nullity is defined as
nothing. No proceeding and act or
proceeding in cause, which the opposite
party may treat as though it had not
taken place, or which has absolutely no
20 legal force or effect."

25
THE COURT: Well, in the criminal context
when an Information comes before me,
which has not been confirmed by a Justice
of the Peace, and bail is not an issue,
when it has not been confirmed by the
Justice of the Peace, if objection is
taken before they attorn to the
jurisdiction, then my understanding is
that the Information is considered a
30 nullity, null and void and that is the
end of it

5 MR. MCMAHON: This is distinguished because it goes not to the Information, or in this case, the Certificate, because the officer is still certifying that that's his true belief. It goes to service

10 So, it's as if an Information came before you and there was no service on the individual who was charged. It would be marked on an error, because they can't answer to the charge. On an error, no jurisdiction, that's my submission.

15 THE COURT: Well, that is the same thing.

MR. MCMAHON: Well, it's not the same thing, because if you look at the Information and you consider it a nullity, you're taking an action. If it's marked on an error, no jurisdiction, you have no jurisdiction to take an action. In this case ...

20 THE COURT: Well, don't I have the same powers as a Justice though? In this case, it is true we cannot determine when service has been made, but obviously, a Justice has acted on the document that has been put in front of them and the Justice has not considered sub(b).

25 MR. MCMAHON: We don't know that.

THE COURT: Well, no. There's a signature on it from a Justice and a

MR. MCMAHON: I know.

THE COURT: So, presumably the Justice has exercised the power ostensibly, but they have done so incorrectly because it is defective on its face.

MR. MCMAHON: I think I can address your concern. The powers of the court on appeal are, and this is from s.138(1).

THE COURT: Just a minute, 138 ...

MR. MCMAHON: Subsection 1.

THE COURT: Right.

MR. MCMAHON: And this refers specifically to appeals under Part 1 and Part 2, as in this case, Part 1. "Upon appeal the court may affirm, reverse, or vary the decision appealed from or where, in the opinion of the Court, it is necessary to do - it is necessary to satisfy the ends of justice, direct a new trial."

Now, I suppose in reading that, Your Honour, you could allow the appeal and direct a new trial. You have the power to hear a trial. You can peruse the Certificate and find that at trial it's not complete and proper on its face and that it ought to be quashed.

5 THE COURT: No. I have already agreed
that I am not going to direct a new
trial. But, you are saying that I can
affirm. I could not in this case affirm,
because we all agree that it is
incorrect. I can reverse, which would be
to do what the Justice of the Peace ought
to have done when the Certificate was
provided to them and that is just not to
10 act on it, to quash it. What do
Justice's of the Peace do when they are
not complete on their face?

MR. MCMAHON: They quash.

15 THE COURT: They quash. That is right.
'Cause they are required to do it by law

MR. MCMAHON: Yes.

20 THE COURT: So, since I cannot affirm and
I won't direct a new trial, obviously,
and there is no reason to vary, then the
only thing that I am left with is
quashing, 'cause that is the only thing
that I can do. I cannot enter an
acquittal because to enter an acquittal I
think you have to have taken a plea.

25 MR. MCMAHON: I think maybe I ought to
get the definition of acquittal, but,
it's my submission again, that quashing
is

30 THE COURT: Just before you go on. To
enter an acquittal the document on which
you are proceeding has to be valid. And

5 it is not amendable at trial under the
Criminal Code and under these provisions
If there are certain defects they can be
amended at trial and if the person's
attorned to the jurisdiction you can
amend them and you have got broad powers
to do that. And then you would not be
quashing. And in fact, we are not
supposed to quash if it is amendable.
10 But, this is not amendable according to
the case law and it seems to me that I am
required to either affirm, reverse or
vary and I must reverse and the only
thing I can do in reversing, is to do
15 what the Justice should have done in the
first place. Was, when the Certificate
of the Offence is not complete and
regular on its face, which it is not,
than they should have quashed it. And I
20 should have quashed it.

MR. MCMAHON: If I can then ask how -
what weight does the Court then give s.4
read in conjunction with Regulation 200,
Rule 11?

25 THE COURT: You cannot have nothing. It
seems to me you cannot have a void. "The
Certificate shall be filed as soon as
practicable". Quite right. That is
four. Then you move on to "when at least
30 15 days have elapsed". That is true.
There is a 15-day limitation period

before they can take this action. But, what do you do if - in this case is a good example, you cannot determine when the service is not made. So, you cannot determine the exact date.

MR. MCMAHON: Well, in effect, the proceeding was never initiated because of the absence of the service box. And if it's never been initiated it ought not be before the Court

THE COURT: No, no. But, it has been initiated. An officer has initiated a Certificate, which cannot just disappear into a void. Something has to be done with it.

MR. MCMAHON: I don't agree with you, Your Honour, because an officer can write up a ticket and never file it with the Court and that happens. It's only with the filing of the Court that the Certificate - or that the - the proceeding is initiated.

THE COURT: All right. Well, it was filed with the Court

MR. MCMAHON: The Court accepted it for filing.

THE COURT: The Court accepted it for filing.

MR. MCMAHON:

THE COURT: Okay. So, the Court accepted it for filing. So, there has been an

error made. They should not have accepted it for filing.

MR. MCMAHON: Yes.

THE COURT: And then if they did not accept it for filing, then these matters would never get to these appeal courts.

MR. MCMAHON: Yes.

THE COURT: Because in every case we have, which there is a Judgment of one of my colleagues they would never have got this far.

MR. MCMAHON: Yes.

THE COURT: But, they did accept it for filing.

MR. MCMAHON: Yes

THE COURT: And it seems to me the clear statutory obligation is on the Justice of the Peace to review the Certificate and ensure that it is complete and regular on its face. So, that is the statutory duty on the JP. And when the Justice of the Peace fails to do that, then it seems to me an appeal has to step in and do that.

MR. MCMAHON: Thank you.

THE COURT: So, I appreciate your argument and it may be a *lacuna* in the legislation ...

MR. MCMAHON: Yes.

THE COURT: But, it seems to me that, I feel that there is no other option and an acquittal would not be appropriate.

MR. MCMAHON: Thank you

THE COURT: So, I appreciate your argument. Do you wish to make any comments, sir?

MR. COX: No, Your Honour. I believe you addressed all comments I would have made

THE COURT: All right

MR. COX: I do respect Mr. McMahon's comments with regards to - his able arguments, but certainly I'm ready for your Judgment at this point in time.

MONITOR'S NOTE: ... at this point proceedings continue.

Transcript Ordered: August 25, 2004
Transcript Completed: September 1, 2004
Ordering Party Notified: September 1, 2004

Copies of this transcript bearing photostatic signatures are not certified and have not been paid for. Unless transcripts bear the original signature of **Janice Law**, they are not valid, and accordingly, are in direct violation of Ontario Regulation 587/91, **Courts of Justice Act**, January 1, 1990.

FORM 2
CERTIFICATE OF TRANSCRIPT (SUBSECTION 5 (2))

Evidence Act

I, we Janice LAW , certify that
(Please print name of authorized person(s))
this document is a true and accurate transcript of the recording of M. RENE v Regina
..... in the OCT
(Case name) (Name of Court)
held at 60 Queen St W taken from Recording No.
(Court address)
J-114/2004 , which has been certified in Form 1.

September 1/04
(Date)

Janice R
(Signature of authorized person(s))