

ONTARIO COURT OF JUSTICE

IN THE MATTER OF an appeal under subsection 135(1) of the *Provincial Offences Act*, R.S.O. 1990, c. P.33, as amended;

B E T W E E N :

Anto RIMAC
Appellant

— AND —

Her Majesty the Queen
Respondent

Before Justice R.J. LeDressay
Heard on June 7, 2013
Reasons for Judgment released on June 11, 2013

J. Stewart for the prosecution
Gary Lewin for the defendant Anto Rimac

LeDressay J.:

[1] There are two issues in this appeal.

[2] The first issue is whether the omission of the *Highway Traffic Act* section number on the certificate of offence issued under Part 1 of the *Provincial Offences Act* should result in the certificate being quashed when the defendant is deemed not to dispute the charge even if the offence is properly and clearly described on the certificate.

[3] If the answer to the first issue is no, then the second issue in this appeal arises. That issue is whether the offence in this specific case was properly and clearly described on the certificate.

[4] The appellant has provided me with the cases of *R. v. Wilson* [2001] O.J. No. 4907 OCJ, *R. v. Sivaguru* [2004] O.J. No. 2927 OCJ, *R. v. Recto Cachero* April 15, 2008 OCJ, *R. v. Rhonda Donovan* May 12, 2009 OCJ and the decision of *R. v. Bradford Jacques* April 2, 2004 OCJ. These cases all support the proposition that a certificate of offence is not complete and regular on its face if the section number is not present. I should note that the *Jacques* case at paragraph 17 refers to the issue under consideration in this case but that the court's comment is clearly *obiter* as the court was deciding a different issue in that case which was regarding the correctly naming of a defendant in a certificate of offence.

[5] The Crown has submitted the cases of *York (Regional Municipality) v. Billinger* [2005] O.J. No 2627 and the decision of *R. v. Hargan* [2009] O.J. No. 776 OCJ. The Crown submits these cases in support of the proposition that the section number is not essential on a certificate where the offence is otherwise properly described.

[6] There is therefore clearly competing case law on this issue. In my view, the most complete and compelling analysis of this issue was made by Justice Epstein in the *Hargan* case. Justice Epstein reviewed in detail and distinguished the reasoning in the *Wilson* and *Sivaguru* cases and then he concluded the following at paragraph 20:

[20] In the circumstances of this case I am of the view that there was no confusion created by the absence of the section of the [Highway Traffic Act](#) on the certificate. The offence was properly described in accordance with regulation 950 (as amended). By virtue of s. 5 of regulation 950 the description used by the officer to refer to the offence on the certificate may be used to describe an offence under [s. 106\(2\)](#) of the [Highway Traffic Act](#) and the section number is surplusage. The Appellant was adequately informed of the charge which he faced and the certificate was complete and regular on its face. Therefore, the Justice of the Peace was correct in entering a conviction. I respectfully disagree with the position taken in *R. v. Wilson* (*supra*) and *R. v. Sivaguru* (*supra*) that the section number is essential on a certificate where the offence is otherwise properly described. The appeal must be dismissed.

[7] I note that the only decision presented to me by the appellant which is subsequent to Justice Epstein's ruling in *Hargan* is the decision of *R. v. Rhonda Donovan* from May 12, 2009. It appears that the court in that case was not provided with Justice Epstein's thorough analysis, as it is never referred to in the brief reasons for judgment in the *Donovan* case.

[8] Therefore I find that the omission of the Highway Traffic Act section number on

the certificate of offence issued under Part 1 of the *Provincial Offences Act* should not result in the certificate being quashed when the defendant is deemed not to dispute the charge and if the offence is properly and clearly described on the certificate.

[9] As a result, the second issue in this case must be considered, and that is whether the offence was properly and clearly described on the certificate.

[10] Section 78.1(1) of the *Highway Traffic Act* reads as follows:

Hand-held devices prohibited

Wireless communication devices

78.1 (1) No person shall drive a motor vehicle on a highway while holding or using a hand-held wireless communication device or other prescribed device that is capable of receiving or transmitting telephone communications, electronic data, mail or text messages. 2009, c. 4, s. 2.

[11] Therefore this section incorporates three essential elements. The section prohibits persons from, 1. driving a motor vehicle, 2. while holding or using, 3. a handheld wireless communication device or other device as specified in the subsection.

[12] The certificate of offence in this case alleges that the appellant “did commit the offence of drive motor vehicle while operating a handheld communication device contrary to the Highway Traffic Act.”

[13] In the *Hargan* case Justice Epstein indicated that an offence was properly described if it was in accordance with Regulation 950 of the *Provincial Offence Act*. By virtue of section 5 of Regulation 950 the description used by the officer to refer to the offence on the certificate may be used to describe an offence under the *Highway Traffic Act* and the section number is surplusage.

[14] Regulation 950, schedule 43, item 223 regarding section 78.1(1) indicates that the authorized wording for a charge under s.78.1(1) is “Drive – hand-held communication device”.

[15] Therefore on the facts of this case it cannot be said that the wording used on the certificate of offence by the officer in charging the appellant in this case matches or is in

strict compliance with the approved wording as set out in Regulation 950 of the *Provincial Offences Act*.

[16] Sections 25(2), 25(4) and 25 (6) of the *Provincial Offences Act* must also be considered. Those sections read:

Allegation of offence

(2) Each count in an information shall in general apply to a single transaction and shall contain and is sufficient if it contains in substance a statement that the defendant committed an offence therein specified. [R.S.O. 1990, c. P.33, s. 25 \(2\)](#).

...

Idem

(4) The statement referred to in subsection (2) may be,

(a) in popular language without technical averments or allegations of matters that are not essential to be proved;

(b) in the words of the enactment that describes the offence; or

(c) in words that are sufficient to give to the defendant notice of the offence with which the defendant is charged. [R.S.O. 1990, c. P.33, s. 25 \(4\)](#).

...

Particulars of count

[\(6\)](#) A count shall contain sufficient detail of the circumstances of the alleged offence to give to the defendant reasonable information with respect to the act or omission to be proved against the defendant and to identify the transaction referred to. R.S.O. 1990, c. P.33, s. 25 (6).

[17] Section 25 applies to Part III proceedings commenced by Information. However, the basic principles enunciated in this section must also have some applicability when considering whether less serious charges commenced under Part I by Certificate of Offence have sufficient detail in assessing whether the wording used the in Certificate of Offence properly describes the offence.

[18] The appellant argues that the word “operating” used by the charging police officer in the Certificate of Offence is different from the wording used in section 78(1).1 of “holding or using”. The word “using” is defined in the dictionary as “to employ for some purpose; put into service; make use of.” The word operating is defined as “to work or use a machine, apparatus, or the like.” In this particular case it is a distinction without a difference.

[19] In this case the wording used by the officer on the certificate of offence provides more information than required by the official wording set out pursuant to Regulation 950 of the *Provincial Offences Act* schedule 43 and clearly describe the three elements of the offence in Section 78(1).1 of the *Highway Traffic Act*. The words used by the police officer on the certificate of offence are clearly words that are sufficient to give the appellant reasonable information and notice of the offence with which the appellant is charged. Therefore I further find in this case that the offence is properly and clearly described on the certificate of offence itself.

[20] Therefore, the appeal is dismissed.

Released: June 11, 2013

Richard LeDressay

Signed: “Justice LeDressay”