

Case Name:
R. v. Sawa

Between
Her Majesty the Queen, and
Martin Sawa

[2008] O.J. No. 5994

Ontario Court of Justice
Toronto, Ontario

M.L. Hogan J.

November 26, 2008.

(83 paras.)

Counsel:

A. Smith, Mr., Counsel for the Crown.

S. Palaccia, Mr., Agent for the Accused.

M.L. HOGAN J.:--

1 MR. SMITH: Good morning again, Your Honour. Sawa? This would be the matter at - for Madam Clerk's benefit, the matter at line number six on the Appeal's proper list.

2 THE COURT: Okay.

3 MR. PALACCIA: Good morning, Your Honour. Last name for the record, is Palaccia, spelt P-A-L-A-C-C-I-A, initial S. I'm appearing as a representative of the Appellant who's before the Court. Can you state your name for the record, sir?

4 THE ACCUSED: Martin Sawa.

5 THE COURT: All right, can we have the -- what are we doing with this matter first and then ...

6 MR. SMITH: It's a contested appeal, Your Honour.

7 THE COURT: All right, can we have the Interpreter sworn or affirmed, please?

MAHASSEN MAHMOUD: AFFIRMED - Interpreter Arabic/English

8 THE COURT: Okay, you can have a seat along with Mr. Sawa, all right?

9 MR. PALACCIA: This is an appeal for a conviction for the offence of committing the operation of a motor vehicle without insurance. The appellant was convicted by way of an ex parte trial on ...

10 MADAM INTERPRETER: Sorry, can you speak a little bit slower?

11 MR. PALACCIA: My apologies.

12 THE COURT: Yes, please.

13 MR. PALACCIA: The appellant was convicted on the 15th of January, 2007 by way of an ex parte trial. Now, the charge before the Court was one where the Crown was required to establish a number of things. First and foremost, Your Honour that he be able to establish that the appellant permitted the driver of the vehicle to operate the motor vehicle and that that vehicle was without insurance.

14 Now on the day of trial, Your Honour, the Crown brought forward one witness and that was the charging officer. The charging officer testified essentially that he stopped a driver by the name of Mr. Currio (ph), and that Mr. Currio was stopped for committing an offence of, I believe disobeying a stop sign. Upon further investigation it was the officer then learned that the driver was not the owner of the vehicle. And then through further inquiries eventually made his way to the Appellant and charged him with the offence that's before the Court.

15 Now, Your Honour, it's the Appellant's position that the learned Justice of the Peace erred in law by finding that the prosecution had proven its case beyond a reasonable doubt.

16 If I turn to the Reasons for Judgment, Your Honour, I direct your attention to, my apologies, to page 17, paragraph or line 24.

"There's no evidence that Mr. Currio had explicit permission of Mr. Sawa to drive, but in the absence of that explicit permission and in the absence of any other information, the Court concludes that there was implicit permission."

17 Now, Your Honour, at trial there was no statement tendered by the prosecution indicating an admission, an indication that Mr. Sawa had permitted the driver, Mr. Currio to operate the motor vehicle in question. The driver was not -- did not testify that he was given permission to operate the motor vehicle in question.

18 The Crown's position was that because of the fact that someone else was driving the vehicle and that there had been no report that the vehicle had been stolen, that that in itself was proof beyond a reasonable doubt that Mr. Sawa had given the driver permission to operate the motor vehicle. And the Appellant's position is that that is -- would not be a reasonable inference to make to establish the foundation for a reasonable inference that Mr. Sawa did give permission to the driver to operate that vehicle.

19 Having said that, Your Honour, that is the amount of evidence that was put forth. There was nothing further to support the charge. And again, it's the Appellant's position that the Crown did not prove the case beyond a reasonable doubt and the learned Justice of the Peace should not have found the defendant guilty on the offence based on the evidence that was before the Court.

20 Those would be my brief submissions, Your Honour, subject to any questions or comments you may have.

21 And one last thing I would like to bring forward. I did find one case, it was unreported, involving this particular type of charge, and if I could -- I've already provided it to my friend, but it's a case of Christina James, if I can just pass it forward, Your Honour? It deals with the same offence. It was an appeal, it was presided over by His Honour Judge Wake (ph) dealing with the offence of permitting the operation of a motor vehicle without insurance.

22 And in his Reasons for Judgment he granted the appeal. He overturned the conviction Your Honour. And in his Reasons for Judgment, that would be page 11 -- line 23 or 24, actually, Your Honour.

"While there is substantial case law to suggest an onus of operating a motor vehicle and being the owner while the motor vehicle is not insured is an offence of strict liability, I do not believe that when the offence is particularized as it is under s. 2.1(b) of the Compulsory Automobile Insurance Act, that it is one of strict liability and that the only defence open to the Appellant is one of due diligence. I think the Crown has to prove beyond a reasonable doubt that the Appellant unlawfully permitted the motor vehicle to be operated."

23 So, those would be my submissions, Your Honour, in regards to our position for the grounds.

24 THE COURT: Go ahead.

25 MR. SMITH: Thank you. Your Honour, in response to this matter, the prosecution, as respondent, takes the position that the conviction was entirely appropriate under the circumstances, Your Worship, Your Honour, I should say. In this particular matter, Your Honour, there was no ...

26 THE COURT: Slow down a bit for the Interpreter.

27 MR. SMITH: Certainly, I apologize Madam Interpreter. In this particular matter, Your Honour, as it indicates, the defendant's agent took his name off the record because he was unable to reach the defendant, on page three of the transcript.

28 THE COURT: Just let me read this.

29 MR. SMITH: Yes. Essentially the agent appeared and asked for permission to be removed from the record and that was granted.

30 THE COURT: Okay. I see it, mm-hmm.

31 MR. SMITH: Yes, though an ex parte trial did proceed as Mr. Polaccia indicated. Your Honour, I respectfully submit that the Crown did prove its case beyond a reasonable doubt.

32 I respectfully submit, Your Honour, my friend's assertion as to the fact that there was no statement from the defendant, no testimony from the driver is impermissibly narrow in terms of the meaning of permit.

33 Further, Your Honour, it shows us a fundamental problem in that there is a belief that in the P.O.A. courts the Crown has to prove its entire case by direct evidence. That is not the case, Your Honour. It is the same Rules of Evidence that apply in the courts Your Honour normally presides in, that being both direct and circumstantial evidence can apply and be considered in the case.

34 THE COURT: Well, what is the circumstantial or direct evidence here that he had permission?

35 MR. SMITH: Certainly. I will pass, give this to my friend. It's from Black's Law Dictionary, 5th Edition, Your Honour, and I'll quote the meaning of permit as a verb.

"To suffer, allow, consent, let, to give leave or license, to acquiesce by failure to prevent or to expressly ascent or agree to the doing of any act."

36 So, respectfully, Your Honour, the Crown need not prove that someone actually verbalized, "I give you permission to drive my car." You can actually permit something to happen by simply doing nothing to prevent it from happening.

37 THE COURT: If you know it is happening.

38 MR. SMITH: Well, for example if one leaves their keys around and someone just picks them up, it's their motor vehicle, they are responsible for it. If they are careless in that respect, then I would say that they failed to prevent.

39 Furthermore, Your Honour, as Mr. Palaccia indicates in the case he just tendered, it is from the same level of court. The Crown does have to prove its case beyond a reasonable doubt.

40 The Crown proved the motor vehicle in question was operated on a highway, that the Appellant is the owner of that motor vehicle, that the officer spoke to this individual, that the officer subsequently followed up and charged the defendant. There was, as the officer indicated, no report of this motor vehicle ever being stolen, nor was there ever any evidence tendered to the contrary at trial that this person did not have permission to operate this motor vehicle.

41 Absent any evidence of that nature, Your Honour, I respectfully submit under the

42 MR. SMITH: I'm sure, I'm sure I saw something earlier that Mr. DeFaria had asked a question of that nature. Anyway, I can't seem to find it, Your Honour, although I'm sure I saw it earlier.

43 THE COURT: Well, it says,

"Upon further investigation it was discovered the vehicle did not have insurance on it and the owner of the vehicle willingly and knowingly allowed the driver to operate the motor vehicle.

44 Well, I don't know what that evidence is. He just said "Upon further investigation." And then he says,

"I contacted the registered owner and received a brief written statement from the driver."

45 But nowhere have I got anything that indicates that -- what was said. He says he went to -- you attended his place of residence, you spoke with him. And then it goes on to indicate he serves a summons on him, but there is nothing there ...

46 MR. SMITH: Yes.

47 THE COURT: ... that indicates that the driver -- what the driver told him, which ...

48 MR. SMITH: Yes.

49 THE COURT: I think the, whoever was prosecuting failed to ask some fairly key questions about the Information, so that -- what we have got here, I do not feel, unless you can find something else. I am not saying that necessarily they would have had to have circumstances, the only reasonable inference that could be drawn from the evidence at trial was that in fact, this person did have the permission or consent ...

50 THE COURT: Can you show me in the transcript where it is that the officer testified that he had done the requisite search to ensure that the vehicle was not stolen?

51 MR. SMITH: Yes, Your Honour, a moment of the Court's indulgence, please? Oh, all right, here it is I think I have found it, bottom of page 14.

52 MR. SMITH: Yes.

53 THE COURT:

"The author has indicated in his testimony that he has received no information that the vehicle that day had been stolen."

54 MR. SMITH: Right, and I do believe there is actually a point at which Mr. DeFaria (ph) ...

55 THE COURT: Right.

56 MR. SMITH: ... as part of his examination in-chief did ask the officer that question and the officer indicated there was no such report.

57 THE COURT: Let us see if we can find that.

58 MR. SMITH: Just a moment of the Court's indulgence.

59 THE COURT: Well, it does indicate from pages eight onward that he spoke to the owner and - I am reading it over and I see nothing where ... come as witnesses, but I do not have anything definitive in the officer's testimony as to what this investigation was and how he determined this. If that had been there, then I would agree with you, but -- and if I am missing something, but ...

60 MR. SMITH: No, I ...

61 THE COURT: ... I have looked at it several times now ...

62 MR. SMITH: Yes.

63 THE COURT: ... and I cannot see it. And given what he said, like, I do not know, the further investigation if that could have been from somebody else from somebody else, if it was a statement or something he took from the actual owner, and that is very different, but we do not have that in evidence.

64 MR. SMITH: True.

65 THE COURT: And I think that is the difficulty.

66 MR. SMITH: That is the difficulty ...

67 THE COURT: Yes.

68 MR. SMITH: ... perhaps yes, Your Honour.

69 THE COURT: Like, I say, I am not -- ...

70 MR. SMITH: But not the fact that ...

71 THE COURT: -- I would not be saying on the Appeal it was required that, that the owner had come in and testified or something otherwise. I would find it sufficient for the officer to have done the appropriate investigation and put in the evidence that way, but we did not quite get that evidence as I see it here. So, I think that changes things.

72 MR. SMITH: It is a little light, yes.

73 THE COURT: So, based on that, I am prepared to allow the appeal, but I will set a new trial date.

74 MR. PALACCIA: I was hoping that the matter would be dealt with by way of an acquittal, Your Honour. If the evidence -- obviously, there was no statement tendered ...

75 THE COURT: Oh, right, sorry you are right. It should be ...

76 MR. PALACCIA: ... so at the end of the day ...

77 THE COURT: ... -- I should be acquitting. It has been awhile since I have sat in this court, so yes, I think you are right, absolutely right based on the lack of evidence, there simply should be an acquittal.

78 MR. PALACCIA: I thank Your Honour.

79 MR. SMITH: Thank you.

80 MR. PALACCIA: I thank my friend.

81 THE COURT: All right. Thank you.

82 MR. SMITH: Thank you, Madam Interpreter.

83 MADAM INTERPRETER: Thank you.

qp/s/qllox/qljxr