

2015 ONSC 1885 (CanLI)

DATE: 2015/03/24

SUPERIOR COURT OF JUSTICE

HEARD: March 10, 2015

[2] The appellant had a single trial before Justice A. T. McKay of the Ontario Court of Justice at London, for two *C.C.* offences (assault with a weapon (a car) and dangerous driving) and two *Highway Traffic Act (HTA)* offences (fail to stop for police and fail to report damage to property).

[3] The appellant was found guilty of dangerous driving and fail to stop for police. He was acquitted on the assault with a weapon and failure to report damage to property.

[4] The appellant appeals his convictions on the ground that it is impermissible to simultaneously try charges laid pursuant to the C.C. and charges laid pursuant to the P.O.A. and, as a result, seeks a declaration that the trial was a nullity.

[5] When the appellant's trial commenced, the C.C. and P.O.A. informations were before the Court. Crown counsel proposed the appellant be arraigned on both informations and counsel for the appellant consented. The Court proceeded to try the appellant for all four charges simultaneously.

Analysis:

[6] In 1992, the Supreme Court in *R. v. Clunas* (1992), 70 C.C.C. (3d) 115 decided to reverse the historical law that it was impermissible to jointly try charges set out in two or more informations, even if the charges were laid pursuant to the same enabling statute.¹

[7] The Court in *Clunas* was asked to decide whether the joint trial of one summary conviction matter and one indictable matter was a jurisdictional or procedural error. In *Clunas*, the matters had proceeded to a joint trial on consent of the Crown and defence. In finding that it was not an error to try the matters together in one trial, the Court held:

Whether the accused consents or not, joinder should only occur when, in the opinion of the court, it is in the interests of justice and the offences or accused could initially have been jointly charged.²

[8] The appellant submits that *Clunas* has provided a two-prong test to determine whether the joinder of two informations ought to be allowed to proceed in a simultaneous trial as follows: First, by asking whether the two separate informations could be joined in

¹ *Phillips and Phillips v. the Queen* 1983 8 C.C.C. (3d) 118

² *R. v. Clunas* (1992), 70 C.C.C. (3d) at para. 33

a single information? And second, whether the same rules of procedure and evidence govern the two informations?

[9] The Crown submits that the comments made in the *Clunas*' decision that joinder should only occur when the offences could initially have been jointly charged, relates to the C.C. restrictions on joinder pursuant to sections 589 to 593 of the C.C. Given that the court in *Clunas* was dealing with the joinder of two C.C. charge informations, (i.e. one indictable and one summary conviction), the Crown submits that is why the Court had to make this comment.

[10] The Crown further submits that its position is supported by the reference made in *Clunas*'s immediately following the statement relied upon by the appellant, when the court states:

I would adopt the American Federal Rules of Criminal Procedure formulation, which is as follows³:

The court may order two or more indictments or informations or both to be tried together if the offences and the defendants, if there is more than one, could have been joined in a single indictment or information. The procedures shall be the same as if the prosecution were under such single indictment or information.

I would also add, quoting from the Law Reform Commission's Working Paper 55, at p. 39, the following:

... any particular aspects of the rule in favour of severance would have to be inapplicable in order for this judicial joinder to occur. This rule would thus reflect the rule for unsuccessful severance on a joint charge.

³ Ibid. at p. 125

[11] The Crown asks this Court to interpret *Clunas* not as prohibiting the joint trial of a *P.O.A.* information and a *C.C.* information, but rather, as a statement abandoning the previous rigid adherence to antiquated procedural practices.

[12] The issue of whether a *C.C.* information and a *P.O.A.* information could be heard at the same time was not before the Court in *Clunas*, nor was the issue ever specifically addressed according to both parties before this Court.

[13] The Court in *Clunas* concluded that when the joinder of offences (or of a number of accused for that matter), is considered, the Court should seek the consent of both the accused and the prosecution. If consent is withheld, the reasons should be explored. Whether the accused consents or not, joinder should only occur when, in the opinion of the Court, it is in the interests of justice and the offences (or accuseds) could initially have been jointly charged.

[14] As indicated earlier, *Clunas* was dealing with two *C.C.* charges. Whether the offences or accuseds could have initially been jointly charged is an issue that speaks to the nexus of the fact situation. If the nexus is found then, whether the separate informations could have been joined initially is not of importance when you consider adopting a principled approach taking into consideration the interest of justice, including the efficient use of judicial resources, while ensuring not to prejudice the interests of the accused.

[15] As set out in *R. v. Krisza* 2007 ONCJ 471, Morneau J. reviewed the law of joining *C.C.* charges and *P.O.A.* charges and although she did not order a joint trial, she refused to order a joint trial as a result of a lack of consent by the parties.⁴

⁴ Para. 66

[16] Holding two separate trials in the matters that arose out of the same set of facts has the potential to result in inconsistent verdicts which, in my view, is not in the interest of justice.

[17] A judge of the Ontario Court of Justice has the jurisdiction to hear both the *C.C.* and *P.O.A.* informations separately and is empowered to try provincial offences matters as well as summary conviction offences.

[18] The *P.O.A.* provides for its own procedure and specifically in section 2 thereof highlights that there are differences between the procedures in the *C.C.* and in provincial prosecutions. However, as in this case, the appellant is charged under Part III of the *P.O.A.* Proceedings were commenced by information. The rules of evidence at the criminal trial, including proof beyond a reasonable doubt, etc., would be essentially the same, whether in the summary conviction criminal proceeding or in the provincial proceedings.

[19] The appellant raises the issue of the difference between the federal and provincial rules of evidence that govern the contradicting of one's own witness. In my view, the slight difference between section 9(2) of the *Canada Evidence Act*, R.S.C. E-10 and section 23 of the *Ontario Evidence Act*, R.S.O. 1990, c. E. 23 did not affect the outcome of the trial in this case. The appellant was not prejudiced by it.

[20] For these reasons, I find that the decision in *Clunas* supports the permissibility of a more efficient and effective trial process unencumbered by artificial rules that serve no useful purpose and rest on no sound principle.

[21] Accordingly, the appeal is dismissed.

Appeal as to Sentence:

[22] At the outset, leave was granted to appeal as to sentence.

[23] The standard to be considered on an appeal of sentence is whether the sentence imposed is a fit sentence. A variation of sentence should only be allowed where the appeal court is convinced the sentence imposed is unreasonable in that it is clearly excessive or inadequate, that the sentencing judge applied the wrong principles or that the sentencing judge failed to consider all the relevant facts.⁵

[24] The appellant submits that the sentencing judge erred in two ways: a) that he failed to recognize in the sentencing phase one of the findings of fact that he found during the conviction phase and that is that the appellant “panicked”; and b) he found that general deterrence could only be met by a suspended sentence, probation and a driving prohibition and not by a conditional discharge, probation and a driving prohibition.

[25] The appellant did not apply for a stay of his prohibition from driving; he performed his community service hours, paid his fine and victim fine surcharge. His probation officer did not recommend any counselling and he is no longer required to report to him.

[26] At the time of the offences, the appellant was 19 years of age and 21 at the time he was sentenced. He had no prior criminal record and comes from a stable and supportive family. He was a full-time Fanshawe College student living with his parents and now, as of the fall of 2014, works full-time as a salesperson for a flooring accessories company.

[27] At issue is whether imposing a suspended sentence is the appropriate sentence instead of a conditional discharge. As the Court of Appeal said in a case in which a provincial court judge refused to grant a discharge to a pair of shoplifters and instead suspended the passing of sentence:

We do not think that a suspended sentence is a greater deterrent to youths that may be tempted to steal than a discharge, certainly not a

⁵ *R. v. Shrophshire*, [1995] S.C.J. No. 52 at paras. 46-50

conditional discharge with probation. The fact of speedy apprehension, arrest and trial with the public disgrace and jeopardy which is thereby occasioned should be sufficient deterrent, and the future of these two young men need not be jeopardized by insisting that they bear a criminal record.⁶

[28] In the conviction phase, the dangerous driving was triggered by what the Court had itself characterized as “panic”. However, when it came to the sentencing phase, the Court did not mention in his reasons the “panicking” aspect of the offence.

[29] One could categorise this finding as important to sentencing when the appellant’s conduct is entirely out of character and as a young person with above average potential to contribute meaningfully to society, and a conviction could seriously restrict the appellant’s opportunities in the future.

[30] In this Court’s view, given that a discharge would not be contrary to the public interest, the nature and circumstances of the offence does not preclude the granting of a discharge, especially bearing in mind that the Court found the appellant drove away from the officer because the appellant “panicked”, and the subsequent driving was of very brief duration.

[31] Accordingly, the suspended sentence for dangerous driving is set aside and replaced with a discharge.

Disposition:

[32] The conviction appeal is dismissed but the sentencing appeal is allowed and replaced with a discharge.

Justice J. N. Morissette

Date: March 24, 2015

⁶ *R. v. Cheung*, 1976 CarswellOnt 1307 (C.A.) at para. 4.