

ONTARIO COURT OF JUSTICE

DATE: 2018 05 08
COURT FILE No.: Brampton 15 863

IN THE MATTER OF an appeal under 116(1)(a) of the *Provincial
Offences Act*, R.S.O. 1990, c. P.33, as amended;

B E T W E E N :

THE CORPORATION OF THE CITY OF MISSISSAUGA
Respondent

— and —

GAGANDEEP SEKHON
Appellant

Before Justice M. M. Rahman
Heard on March 2 and April 25, 2018
Reasons for Judgment released on May 8, 2018

Carla Mariuzcounsel for the prosecution
Philip Alexiu agent for the defendant Gagandeep Sekhon

On appeal from a conviction by Justice of the Peace Denis Lee on January 5, 2017.

RAHMAN J.:

I. Overview

[1] The appellant was convicted of two charges at an *ex parte* trial – acting as the driver of a tow truck without being licensed, contrary to City of Mississauga By-Law 521-04; and, obstructing or hindering a mobile licensing inspector, contrary s. 426 of the *Municipal Act*.

[2] The appellant appealed his conviction on the grounds that he had not received the summons to appear in court, and because the conduct of the trial justice created a reasonable apprehension of bias.

[3] The appeal hearing started on March 2, 2018, and was adjourned to permit the appellant to file additional material about the service of the summons. On April 25, 2018, having seen the appellant's additional material, the respondent conceded the appeal and the parties jointly submitted that a new trial was the appropriate remedy. In his factum, the appellant asked for a new trial before a different justice of the peace.¹

[4] I allowed the appeal from the bench and explained that written reasons would follow on the apprehension of bias issue. These are those reasons.

II. The Trial Proceedings

[5] As mentioned above, the appellant was not present for his trial. It proceeded *ex parte*. Although the appellant was not personally served with the summons, it had been left with his father. Since the summons had been left with an adult at the appellant's home, the appellant had been properly served² and there was nothing improper about proceeding with an *ex parte* trial.³

[6] An *ex parte* trial like this one would normally be a simple, uneventful matter. Unfortunately, from the outset, the trial justice decided that the court ought to serve as a stage. After the court clerk read the charges, and asked the court to enter a plea, the justice responded sarcastically as follows:

THE COURT: I'm going to throw myself on the mercy of the Court and plead not guilty *in absentia*.

¹ Subsection 126(1) of the *Provincial Offences Act* requires that a new trial be held before a different justice than the one who conducted the original trial, unless otherwise ordered by the appeal court.

² Subsection 26(2) of the *Provincial Offences Act* permits a provincial offences officer to leave a summons at a defendant's last known place of abode with someone who appears to be at least sixteen years old.

³ Paragraph 54(1)(a) of the *Provincial Offences Act*.

[7] Later, after the prosecutor had finished her examination in-chief of the by-law enforcement officer, the justice decided to ask his own questions. He asked the officer why he got the impression that Mr. Sekhon was soliciting business. He then asked the following questions:

THE COURT: When Mr. Sekhon had his tow truck license in the City of Mississauga, “conditional one year, no further HTA, by-law, Criminal Code of Canada, or Canada charges [sic] or convictions, must notify mobile license of any news changes immediately [sic].” To my suspicious mind, that would indicate that he did not have a sterling driving record when he was licensed.

A. Correct.

THE COURT: Thank you, Okay. Do you get encounters of this kind with any sort of frequency?

A. A Few times a year, yes.

THE COURT: Okay. Were there any – his demeanour, his manner, I can imagine the colour of the air was about as blue as my note paper here, but were there any personal physical threats?

A. He entered my personal space.

[8] After these questions, the justice provided his reasons for judgment and convicted the defendant.

[9] The prosecutor then made submissions on sentence. She explained that it was not an appropriate case for the minimum fine especially given the appellant’s behaviour towards the by-law officer. She sought a \$2,500 fine on each charge.

[10] The justice then delivered his reasons for sentence. He ultimately decided to impose a fine that was double what the prosecutor was seeking on the obstruction count to send a message.

[11] At the outset of his sentencing reasons, the justice felt the need to comment on his dissatisfaction with the practice of prosecutors amending charges for failing to yield to emergency vehicles.

THE COURT: You know, one of the, one of the things that aggravates this Court is when a prosecutor amends the charges of fail to move over for an emergency vehicle to something like disobey sign, or to a lesser charge.

[12] The justice then made derisive comments about the appellant and referred to having been censured for making similar comments on a prior occasion.

The COURT: The business of dealing with the public is a tough one. And in this instance, we had a city inspector out there trying to do his job and dealing with a boar [sic]. In the judicial council – I’m not allowed to call him an idiot because I got slapped down for using that term for a defendant by the judicial council. I don’t know if it was the term or the fact that I told him it was the least pejorative term I could think of at the time.

[13] The justice concluded by explaining that he was imposing double the fine requested by the prosecutor on the obstruction charge, because of the way the appellant had treated the officer and “to send the strongest possible message to the public, to these tow operators, that this kind of behaviour is totally unacceptable.” The justice then expressed his indifference about the prospect of his sentence being appealed.

THE COURT: Now I may get slapped down if it gets appealed or whatever, but I don’t care. I love Shakespeare, he’s always got a good word for whatever situation and this is “To thine own self be true” and I think this has to be done in this manner. So the second fine will be \$5,000.00. Both 15 days to pay. And we’ll see what kind of bluster the defendant brings with him for a reopening request or an appeal...

[PROSECUTOR] An appeal.

THE COURT: ...whatever.

III. Analysis

[14] There is a strong presumption of judicial impartiality. The threshold for a successful allegation of perceived judicial bias is high. However, that threshold may be met with cogent evidence. In *R. v. S. (R.D.)*, the Supreme Court re-affirmed the long-standing test to be applied in determining whether judicial conduct has led to a reasonable apprehension of bias as follows:⁴

⁴ *R. v. S. (D.R.)*, [1997] 3 SCR 484 at para. 111, citing *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369.

[T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. . . . [The] test is “what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. . . .”

[15] In my view, the justice’s comments give rise to a reasonable apprehension of bias. A reasonably informed person would conclude, based on all of the justice’s comments that a conviction was inevitable from the outset in this case.

[16] None of the comments, on their own, would have created a reasonable apprehension of bias. It would have been preferable if the justice had not asked the question about why the officer thought the appellant was soliciting business. Asking that question could have given the appearance that the court was trying to shore up the prosecution’s case. On its own, that question would not necessarily have created an apprehension of bias. However, when all of the justice’s comments excerpted above are considered together, they created a reasonable apprehension of bias.

[17] There was no reason for the justice to ask, during the trial, whether the appellant had a clean record. That fact had nothing to do with whether he committed either offence. Similarly, the question about whether the by-law officer felt threatened did nothing to advance the prosecutor’s case. It may have ultimately been relevant to sentencing; however, the prosecutor could have led that evidence after the justice had found the appellant guilty.

[18] Further, the comments that the justice made in his sentencing reasons colour his questioning during the trial. The justice made it clear that he did not think those who behaved as the appellant did received sufficient penalties. This was apparent from his dissatisfaction with prosecutors resolving charges for drivers who do not yield to emergency vehicles. Again, on its own there is nothing wrong with commenting on perceived problems in the system. But in the context of all of his other comments, these comments contribute to the perception that he was not impartial.

[19] The justice's derisive comment about the appellant reinforces the appearance of bias. While the justice may have been justified in describing the appellant's behaviour as boorish, it was unnecessary to add that he was not allowed to use the word "idiot" and that he had been censured for doing so in the past. Indeed, by saying he could not call the appellant an idiot because he was not allowed to, he effectively called him one.

[20] The justice also expressed the view that his sentence would likely not withstand an appeal. This leads to the perception that he was imposing the sentence not because he considered it to be fit one, but because it furthered a particular message that he personally wanted to send. His quotation of Shakespeare could only have reinforced the appearance that he was imposing the sentence as his own personal view, to make a point, and rather than imposing a fit sentence as a court.

[21] An *ex parte* trial is still a trial. It must be conducted fairly and must have the appearance of being conducted fairly, by an impartial judicial officer. Just because a defendant is not present does not mean a conviction is inevitable. The presumption of innocence still applies, as does the burden of proof beyond a reasonable doubt. In some ways, it is even more important for a justice to remain above the fray in an *ex parte* trial because nobody is there to speak for the defendant. Reading the justice's comments as a whole would lead a reasonably informed member of the public to conclude that the appellant's conviction was a foregone conclusion from the outset.

IV. Conclusion

[22] Justices of the peace perform many important functions within the criminal justice system. When they hear matters under the *Provincial Offences Act*, they preside over a court of record.⁵ The justice's comments in this case were unnecessary. They were not judicial. This kind of behaviour not only creates an apprehension of

⁵ Normally, provincial judges preside over the Ontario Court of Justice. A provincial offences court is the one exception where a justice of the peace may preside: *Courts of Justice Act* R.S.O. 1990, c. C. 43, s.39(2).

bias requiring a re-trial, but it brings disrepute to the court and the office of the justice of the peace.

[23] A provincial offences court is the only interaction that most Ontarians will have with the Ontario Court of Justice. I recognize that proceedings in provincial offences court are necessarily less formal than they are in criminal court. However, a court of record is not a place for a judicial officer to engage in sarcasm or self-aggrandizing humour. Nor is it meant to be used as a soapbox to express the judicial officer's personal views. What took place during the appellant's trial was not the kind of image that this court should present to the public.

[24] The appeal is allowed and a new trial ordered.

Released: May 8, 2018


Justice M.M. Rahman