Indexed as:
R. v. Stone
Between
Edward Bibeau, appellant, and
Raymond Stone, respondent
[1984] O.J. No. 912
No. 8260/83
Ontario County Court
County of Northumberland - Cobourg, Ontario
Murdoch Co. Ct. J.
Heard: January 18, 1984.
Judgment: January 30, 1984.
(9 pp.)
Counsel:

B.W. Long for the appellant, Crown.
S.G. Bazuk for the respondent.

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1 MURDOCH CO. CT. J. (endorsement):— Raymond W. Stone was charge that on the 3rd day of April, 1982, at the Township of Haldimand he

- "being the owner of a motor vehicle, unlawfully did permit the said vehicle on a highway, namely a Haldimand Township Road at 6:07 p.m. when the said vehicle was not insured under a contract of automobile insurance contrary to The Compulsory Automobile Insurance Act, s. 2(1)(a)."

2 The accused appeared before Provincial Court Judge Bark and the charge was dismissed. The Crown appeals.

3 S. 2(1)(a) of The Compulsory Automobile Insurance Act, R.S.O. 1980, c. 83 reads,

- "2.-(1) Subject to the regulations, no owner of a motor vehicle shall,
  - (a)

    operate the motor vehicle
- on a highway unless the motor vehicle is insured under a contract of automobile insurance."

4 The learned trial Judge found that there are two issues:

- (1)

  Is there any evidence before the court concerning insurance or lack thereof?

- (2)

  Does the Crown have the burden of proof under s. 2(1) of the Act, or is the onus on the accused to satisfy the court that he does in fact have insurance?

5 Counsel agree that these are the issues before me.

6 The learned trial Judge found that the only evidence before the court other than a request for ownership and insurance papers was as follows:

- "Q.

  (Crown): I'm sorry, I lost you where. Did you inquire about the insurance?

- A.

  (Officer): Yes. He didn't have any insurance and there was no insurance on the Odyssey."

The learned trial Judge went on to say,

- "The court would conclude that the evidence standing alone falls far short of establishing anything and without some evidence of how the officer reached this conclusion is insufficient to establish that Mr. Stone did not have insurance under s. 2(1) of The Compulsory Automobile Insurance Act."

7 There is further evidence which could support such a finding to which the learned trial Judge has not referred. At page 4 of the transcript,

- "Witness: Mr. Stone produced to me a bill of sale and he was asked also for insurance and ownership for the vehicle which he was unable to do."

The word "unable" might mean inability to produce the evidence of insurance by way of an insurance card as required by s. 3(1) of the Act as well as inability because no insurance existed. Certainly the evidence is at its best equivocal and I see no reason to disturb the learned trial Judge's judgment in that respect. That is not the end of the matter. I am unable to agree with the learned Provincial Court Judge that a certificate required by s. 3(1) of The Compulsory Automobile Insurance Act is evidence of insurance. There is nothing to prevent an insured from cancelling the policy or changing the coverage from one insurer to another.

It is my opinion that the certificate is only truth of the facts therein contained at the moment of filing and while it may continue to be evidence that such insurance is continued so long as the insured has the motor vehicle insured it cannot be said to be accurate at any time after its date.

8 If the onus to prove the existence of insurance is on the Crown it has failed to do so and the appeal must fail. On the other hand if that onus rests on the respondent, who elected at trial to call no evidence, the appeal must be allowed and a conviction entered.

9 Counsel for the appellant submits that the word "unless" in s. 2(1) is a qualification which brings into effect The Provincial Offences Act, R.S.O. 1980, c. 400, s. 48(3),

- "The burden of proving that an authorization, exception, exemption or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the authorization, exception, exemption or qualification does not operate in favour of the defendant, whether or not it is set out in the information."

and places the burden on the respondent of proving that he had a contract of insurance.

10 In Regina v. Park Hotel (Sudbury) Ltd., [1966], 4 C.C.C. 158 the accused was charged with unlawfully selling liquor contrary to The Liquor Control Act, R.S.O. 1960, c. 217. S. 70(1) is as follows:

- "70(1) Except as provided by this Act, The Liquor Licence Act or the regulations hereunder or thereunder, no person shall by himself, his clerk, servant or agent, expose, or keep for sale, or directly or indirectly or upon any pretence, or upon any device, sell or offer to sell, liquor or, in consideration of the purchase or transfer of any property, or for any other consideration or at the time of the transfer of any property, give liquor to any other person."

The accused were convicted and appealed on the ground that there was an obligation on the Crown to negative the exceptions referred to in the section. In dismissing the appeal Lacourciere, D.C.J., (as he then was) said at page 161,

- "I am satisfied, however, that s. 702 of the Criminal Code of Canada, made applicable under s. 3 (am. 1964, c. 113, s. 1) of the Summary Convictions Act, R.S.O. 1960, c. 387, to all provincial statutory offences, is a complete answer to this objection, and that the burden of proving that an exception operates in favour of the defendant is on the defendant and that the prosecutor is not required, except by way of rebuttal, to negative the exception."

11 In Regina v. Hundt, (1971), 3 C.C.C. (2d) 279 the accused was charged with unlawfully supplying contact lenses while not being a member of the Alberta Guild of Ophthalmic Dispensers contrary to s. 36 (am. 1969, c. 84, s. 5) of the Ophthalmic Dispensers Act 1965 (Alta.), c. 66 (now R.S.A. 1970, c. 269). The section of the Act contained the following words: "unless he is a member of the Guild and the holder of a certificate ..." The court found that such words in s. 36 were exceptions, exemptions, excuses or qualifications as contemplated by s. 702 (now 730(2)) of the Criminal Code which says,

- "730.(2) The burden of proving that an exception, exemption, proviso, excuse or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the exception, exemption, proviso, excuse or qualification does not operate in favour of the defendant, whether or not it is set out in the information."

(being similar to s.48(3) of The Provincial Offences Act, supra) and that the burden of proof rested on the accused.

12 In Gordon v. The Queen (1961), 131 C.C.C. 1 the court affirmed a conviction under the Lord's Day Act. S. 11 of the Act provided an exception in the case of any work of necessity or mercy. At p. 7 Locke J. said,

- "If it were intended by the appellant to contend that the operation fell within this exception, the onus was on him to prove it by reason of the provisions of s. 702(2) of the Criminal Code. The appellant, however, elected to call no evidence and there is none in the case for the prosecution upon which a finding such as is suggested could conceivably be made."

13 In Williams v. Russell (1933), 29 Cox. C.C. 640 the Court of King's Bench held that on a prosecution for using a motor vehicle without an insurance policy the onus of proving the possession of the policy was on the accused.

14 In my opinion the issue turns upon whether or not the facts are peculiarly within the knowledge of the accused.

15 Counsel for the respondent submits that the court must look at the whole of the legislation and in so doing must conclude that the substance of the offence is not having insurance while operating a motor vehicle. In support he refers to Rex v. Staviss (1943), 79 C.C.C. 105 where at p. 107 Graham, J.A., of the Nova Scotia Court of Appeal said "it must decide what the substance of the offence is." Counsel for the respondent urges me to find that since the essential element of the offence is not having insurance that proof rests with the Crown. In further support of that position he relies upon Re F.W. Woolworth Co. Ltd. and City of Hamilton (1964), 46 D.L.R. (2d) 602, [1965] 1 O.R. 41 (C.A.).

16 The Ontario Court of Appeal in Rex v. Fresco (1933), 59 C.C.C. 391 quashed the accused's appeal on a charge that not being the owner or agent of the owner of a mining claim he sold gold contrary to s. 424(b) of the Criminal Code. Middleton, J.A., at p. 392 referring to the decision of Rex v. Turner, 5 M. & S. 206, said at p. 392:

- "Lord Ellenborough points out that if the Crown must prove the negative there would be a moral impossibility of ever convicting under this Statute, and therefore common sense showed that the burden of proof in such cases ought to be cast upon the person who, by establishing any one of the qualifications, will be well defended."

and at p. 393,

- "Bayley, J., points out that in addition to the impossibility of the Crown producing satisfactory evidence, there is no hardship in casting the burden upon the accused for he must know his own qualifications and be able to prove it."

The learned judge justice continued at p. 393,

- "It is not without significance that in our Criminal Code, in the case of a summary prosecution, by s. 717, it is expressly provided that the exceptions enumerated in a statute need not be negatived in the information or complaint, and that no proof as to the matters so negatived shall be required on the part of the complainant but may be proved by the defendant if he desires to bring himself within the provisions of the exceptions."

17 Laidlaw, J.A., in Rex v. Roher (1947) 89 C.C.C. 365 considered whether the burden of proof rested on the accused in certain cases. Having satisfied himself as to guilt of the accused he went on in the following vein at p. 374:

- "The burden of proof may be shifted by legislative interference, and certain exceptions to the general rule have been recognized by the common law. One of those exceptions is that "where the subject-matter of the allegation lies peculiarly within the knowledge of one of the parties, that party must prove it, whether it be of an affirmative or a negative character, and even though there be a presumption of law in his favour": Taylor on Evidence, 12th ed. vol. 1, s. 376. "This exception equally prevails in all civil or criminal proceedings instituted against parties for doing acts which they are not permitted to do unless duly qualified": ibid., s. 377.

- In Archibold's Criminal Pleading, Evidence & Practice, 31st ed., p. 330, the present rule upon the subject of negative averments is stated as follows: "In cases where the subject of such averment relates to the prisoner personally, or is peculiarly within his knowledge, the negative is not to be proved by the prosecutor, but, on the contrary, the affirmative must be proved by the

> prisoner, as matter of defence; on the other hand, if the subject of the averment does not relate personally to the prisoner, or is not peculiarly within his knowledge or at least in as much within his knowledge as within the knowledge of the prisoner, the prosecutor must prove the negative."

18 Although his words were obiter I find that they support the view which I take of this matter.

19 The words "unless the motor vehicle is insured under a contract of automobile insurance" I find to be words falling within the exception, exemption, excuse or qualification contemplated by s. 730(2) of the Criminal Code and s. 48(3) of The Provincial Offences Act and further that whether or not the accused has insurance is peculiarly within his knowledge and that burden of proof lies upon the accused.

20 The accused having elected to call no evidence I do not consider this an appropriate case to order a new trial. The appeal will be allowed and a verdict of guilty registered. There will be a fine of Five Hundred Dollars ($500.00) in accordance with s. 2(3) of The Compulsory Automobile Insurance Act.

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