1999 CarswellBC 2682, 48 M.V.R. (3d) 1, 181 D.L.R. (4th) 719, 132 B.C.A.C. 270, 215 W.A.C. 270, [1999] B.C.J. No. 2666, 1999 BCCA 684

R. v. Alexis

Regina, Respondent and Jessie Alexis, Appellant

Regina, Respondent and Dennett Robert Sloan, Appellant

British Columbia Court of Appeal

Proudfoot, Ryan, Saunders JJ.A.

Judgment: November 19, 1999
Docket: Vancouver CA025203, CA025185

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Proceedings: reversing (September 22, 1998), Doc. Prince George TR 0202 (B.C. S.C.); affirming (September 22, 1998), Doc. Prince George CS03919 (B.C. S.C.)

Counsel: *S.F. Peleschok*, for Appellant, Jessie Alexis.

M.D. Smith, for Appellant, Dennett Robert Sloan.

A. Budlovsky, for Crown/Respondent.

Subject: Criminal; Evidence

Criminal law --- Driving offences — Operation of motor vehicle while disqualified — Presumption of disqualification — Certificate of disqualification — Admissibility of certificate

Accused charged with driving while disqualified or prohibited — In each case, Crown tendered certificate of disqualification containing typographical error substituting lower-case letter "i" for number "1" — Each certificate was otherwise complete — In case of accused A, admissibility of certificate was sole issue at trial — In case of accused S, accused proposed to offer full defence in event certificate was held to be admissible — Trial judge excluded certificates as unreliable on basis of typographical error and acquitted each accused — Crown's appeals from acquittal were allowed and Summary Conviction Appeal Court convicted each accused — Accused appealed from conviction — Appeal by accused S. allowed and new trial ordered, appeal by accused A. dismissed — Certificate of disqualification is inadmissible as unreliable where certificate so flawed as to deprive trier of fact of conclusive proof of accused's knowledge of certificate — Certificate will stand as prima facie proof of knowledge where identity of accused, period of suspension and fact of prohibition are clear on face — In each present case, typographical error present does not render certificate vague or any element required to es-

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tablish prima facie proof of knowledge uncertain — Certificates were properly admitted — Appeal by accused S. properly allowed, as exclusion of certificate barred S. from presenting case.

Cases considered by *Saunders J.A.*:

National Society for the Prevention of Cruelty to Children v. Scottish National Society for the Prevention of Cruelty to Children, [1915] A.C. 207 (U.K. H.L.) — referred to

R. v. Ahlstrom (July 10, 1990), Doc. Vancouver CC900659 (B.C. S.C.) — referred to

R. v. Enberg (April 10, 1987), Doc. Vancouver CA005137 (B.C. C.A.) — referred to

R. v. Frederick (September 22, 1998), Doc. Prince George C01171 (B.C. S.C.) — considered

R. v. Hines (1979), 36 N.S.R. (2d) 524, 5 M.V.R. 231, 64 A.P.R. 524 (N.S. C.A.) — referred to

R. v. McCullagh (1990), 19 M.V.R. (2d) 1, 53 C.C.C. (3d) 130, 38 O.A.C. 54 (Ont. C.A.) — referred to

R. v. Player, 33 M.V.R. 145 (B.C. C.A.) — referred to

R. v. Zwicker (1980), 38 N.S.R. (2d) 361, 5 M.V.R. 283, 69 A.P.R. 361, 53 C.C.C. (2d) 239 (N.S. C.A.) — distinguished

Statutes considered:

Criminal Code, R.S.C. 1985, c. C-46

s. 259(4) [en. R.S.C. 1985, c. 27 (1st Supp.), s. 36] — pursuant to

s. 260(5) [en. R.S.C. 1985, c. 27 (1st Supp.), s. 36] — referred to

Interpretation Act, R.S.B.C. 1996, c. 238

s. 36(1)(b) — referred to

Motor Vehicle Act, R.S.B.C. 1979, c. 288

Generally — referred to

s. 88(1) — pursuant to

Motor Vehicle Act, R.S.B.C. 1996, c. 318

Generally — referred to

APPEAL by accused from judgments reported at *R. v. Sloan* (September 22, 1998), Doc. Prince George TR 0202 (B.C. S.C.), allowing Crown appeals from judgment reported at (September 22, 1998), Doc. Prince George CS03919 (B.C. S.C.), acquittal of accused on charges of driving while prohibited and convicting accused.

***Saunders J.A.*:**

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1 These two matters were heard together as they engaged similar issues. Both applicants applied for leave to appeal and appeal from the decisions of Mr. Justice Vickers sitting as Summary Conviction Appeal Judge, each appeal having disposed of by Mr. Justice Vickers by reasons dated September 22, 1998.

2 The applicant Mr. Sloan was charged that on March 5, 1997, he drove a motor vehicle while prohibited from doing so contrary to s. 88(1) of the *Motor Vehicle Act*, R.S.B.C. 1979, c. 288 as amended. The applicant Mr. Alexis was charged that on October 25, 1996, he drove a motor vehicle while prohibited from doing so under s. 259(4) of the *Criminal Code*.

3 At trial each applicant succeeded and the case against each was dismissed when the trial judge found that typographical errors on the certificates presented by the Crown under the respective legislations created ambiguity and raised questions of reliability. In each case the typographical error was insertion of the letter "i" in place of the numeric "1" wherever the numeric "1" should have occurred. It would be fair to describe the error as not glaring.

4 While the issues raised before us are similar in the two cases, the legislation under which the applicants were charged and the course of proceedings were somewhat different and I address the two cases separately. I start with the case of *R. v. Sloan*. In that case the only witness called at trial was Constable Nezan. He was not cross-examined on the evidence he gave, which in summary, was this:

On the 5th of March 1997 he stopped a speeding pickup truck. The applicant was the driver. The constable asked the driver to produce his driver's license. The applicant produced a valid Alberta driver's license with a photograph which depicted him. It was in the name of Dennett Robert Sloan whose birthday was September 19, 1969. Constable Nezan gave the applicant a speeding ticket, and through a computer check, obtained information that the applicant was prohibited from driving. However, after he had a conversation with the applicant, he let the applicant drive off. Constable Nezan then requested certain documents regarding the applicant's driving prohibition. He received two. One was a certificate of the Superintendent stating (complete with errors):

> I, VICKI L. FARRALLY, Superintendent of Motor Vehicles in the Province of British Columbia, DO HEREBY CERTIFY that DENNETT ROBERT SLOAN, whose British Columbia Driver's Licence number is 3693053, and whose recorded date of birth is i9 SEPTEMBER i969, was prohibited from driving a motor vehicle and the prohibition was in effect during the entire day of 05 MARCH i997 under section 85 of the Motor Vehicle Act.
>
> I do hereby certify that the records kept by the Superintendent of Motor Vehicles under the Motor Vehicle Act contain a document that indicates DENNETT ROBERT SLOAN has acknowledged that he/she has received from the Superintendent a Notice of Prohibition against driving a motor vehicle pertaining to the prohibition mentioned above and showing a signature that, from a comparison with the signature on the records of the Insurance Corporation of British Columbia, appears to be that of DENNETT ROBERT SLOAN, the person whom the Superintendent of Motor Vehicles intended to prohibit from driving a motor vehicle.
>
> The statements in this Certificate are based on the records kept by the Superintendent of Motor Vehicles under the Motor Vehicle Act and this Certificate is provided under the authority of the Motor Vehicle Act.
>
> DATED this i8 day of MARCH, i997, at the City of Victoria in the Province of British Columbia.

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5 Defence counsel raised objections to the admissibility of both documents. Before hearing from the Crown on the validity of the certificate, the learned trial judge on his own motion referred to some prior decisions of the Provincial Court dealing with the same typographical error in which the numeric "1" appears as the small letter "i" complete with dot. Defence counsel adopted the argument the learned trial judge raised.

6 The learned trial judge apparently referring to his earlier decision in *R. v. Alexis*, the companion case this morning, would not admit the certificate saying:

> ... The case that I dealt with did not have that case. My case was all the dates, such as in here, the computer had substituted the small letter "i" for the number one.
>
> I declined to admit the certificate in the evidence on the basis that all ambiguities have to be exercised in favour of the accused and that if the Superintendent purports in these documents to examine the records yet does not read the document itself that it forwards that — reads the document itself before the Superintendent forwards it out with this obvious error on the face of the document, that that is not sufficient attention to documentation to allow these items to be introduced in evidence.
>
> So I'll exclude it from evidence now. There's two cases on this and I think I'm compelled by law to follow my own reasoning so I'll exclude it from evidence now. I won't admit it. It does seem picky, but I took the position there and I do here again that where the accused is in jeopardy of detention. Where the Crown has the advantage of proceeding by documented certificate, which is a tremendous advantage, there should be sufficient attention to detail in these documents to cause the courts to have confidence that these searches have been carried out. Where there is a stamped signature of the Superintendent of Motor Vehicles, but whoever has stamped that upon there has not noticed that the computer is using letters instead of numbers, that causes a considerable amount of lack of confidence in how closely they're examining their documents. ...
>
> . . . . .
>
> ... It may well be, but however the Superintendent wishes to print his documents is his business and if three reasonably educated and well intentioned people cannot agree upon whether — what it is, that's an ambiguity that I don't think is necessary in documentation. There's a simple way of dealing with this. It's you use the backspace on your computer and your remove it and you put the proper number in and the document is a hundred percent. It's sloppy documentation. They're not checking their certificates. They're not noticing it and it undercuts the assertions they make in there that they're checking their documents.

7 In his earlier decision in *R. v. Alexis* to which he referred, he had said:

> ... it's also quite obvious that whoever is stamping these motor vehicle certificates of disqualification down at I.C.B.C. for Graham Read,[sic] isn't paying particular attention to the document because on the face of it, they're not reading it otherwise they wouldn't have stamped it. I can't believe they would have sent it out in that fashion.
>
> I think that does tend to raise a doubt in my mind about the underlying assertions contained in this document. The use of certificates is not simply just a pro-forma matter in which I would say, "well, it's a certificate from I.C.B.C. that's close enough". I don't think in our law that's the test, and I do know there's the gen-

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> eral principal of our law that ambiguities have to be exercised in favour of the accused. Situations such as the birthdate are very material. This is the type of error that could have been very easily corrected by the person who examined the document and I do know that errors occur in documents from time to time, from 20 - 25 years of hanging around courtrooms. So, where there is an ambiguity I'm going to resolve it in favour of the accused and I'm not going to admit the certificate into evidence.

8 The Crown appealed to the Summary Conviction Appeal Court. Defence counsel argued that the learned trial judge exercised his discretion to exclude the document not because the applicant was misled but because he had no confidence in the document, that is, that the learned trial judge considered the document unreliable. Defence counsel admitted that it was impossible for him to argue that the applicant was misled. Defence counsel also argued for a new trial if he was unsuccessful on the main issue, saying that if the certificate had been admitted he would have argued a defence at trial.

9 Mr. Justice Vickers referred to his earlier decision in *R. v. Frederick* (September 22, 1998), Doc. Prince George C01171 (B.C. S.C.) and found that the learned trial judge erred in not admitting the certificate into evidence. In doing so he said:

> The issue on this appeal is whether the learned Provincial Court judge erred when he declined to admit the Certificate of the Superintendent of Motor Vehicles.
>
> For the reasons set out in the decision filed today, ***R. v. Frederick*** (27 August 1998), Prince George C01171 (B.C.S.C.), the appeal is allowed and the acquittal is set aside. There will be an order that the respondent is guilty of the offence charged and remitting the matter to the learned judge of the Provincial Court for sentencing.

The passage referred to by Mr. Justice Vickers in *R. v. Frederick* is:

> When I consider the whole of the evidence and in particular, the contents of both certificates I am satisfied that the computer or typographical error does not create any ambiguity. The information is clear beyond any possibility of doubt. It is apparent the lower case i has been placed on the document where the number 1 should appear. No person could be mislead as to the information contained in these documents. In the absence of an ambiguity the appeal cannot succeed: *R. v. Enberg*, (10 April 1987), CA005137 (B.C.C.A.); *R. v. Player* (10 January 1985), CA002515 (B.C.C.A.).

Mr. Justice Vickers then found the applicant guilty as charged and remitted the matter to the Provincial Court for sentencing.

10 The applicant has raised these issues:

> (1) whether the learned Appeal Court judge erred in reversing the discretion exercised by the learned trial judge and whether he misapprehended the learned trial judge's finding that the certificate was unreliable;
>
> (2) whether the learned Appeal Court judge erred in convicting the appellant rather than ordering a new trial.

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11 The applicant was tried on February 17, 1998. At that time a new *Act* was in force and had been in force since April 21, 1997. In keeping with the *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 36(1)(b) the proceeding commenced under the old *Act* was continued under and in conformity with the new *Act* so far as it could be done consistently with the new *Act*.

12 Both the old *Act* and the new *Act* provide for prosecution for driving while prohibited and also for proof of that offence by way of a certificate. There is no difference between the *Acts* material to this case. Both provide that where a person is charged with driving while under prohibition

> ... the Court hearing the charge may admit into evidence a certificate of the Superintendent stating the information required by [the subsection] and [where/if] the certificate of the Superintendent is admitted into evidence it is proof that the defendant had knowledge of the prohibition or suspension in effect at the time of the alleged offence ...

The old *Act* includes expressly the defence "unless he proves on the balance of probabilities that he did not know of the prohibition or suspension". Both *Acts* contain a provision detailing the information that must be in the certificate, including that the prohibition or suspension was in effect on the date of the alleged offence and that the records contain certain information confirming that the notice of prohibition was mailed to the person or contain documents otherwise indicating knowledge of the prohibition being brought home to the person.

13 The certificate in this case complies with the old *Act* and the new *Act* as to content, except as to insertion of small dotted "i's" in place of numeric "1's".

14 Before us it was argued for the applicant that Mr. Justice Vickers erred in failing to deal with the question of reliability, and that the learned trial judge's decision that he lacked confidence in the reliability of the certificate and was therefore inadmissible, was correct.

15 It is true that Mr. Justice Vickers did not deal with the issue of reliability and rested his conclusions on the question of ambiguity. However, insofar as the learned trial judge dealt with both ambiguity and reliability, and in his first decision *R. v. Alexis* which he followed, linked the two issues, I start with consideration of his conclusion that the typographical errors made the documents ambiguous.

16 *Odger's Construction of Deeds and Statutes* (5th ed.) contains the following comment on ambiguity at p. 76:

> An ambiguity is defined as "an expression capable of more than one meaning" ...

A mere imperfection in the form of a document does not render the information the document contains unreasonable let alone ambiguous. A useful formulation of the test for ambiguity is set out by Lord Dunedin in *National Society for the Prevention of Cruelty to Children v. Scottish National Society for the Prevention of Cruelty to Children*, [1915] A.C. 207 (U.K. H.L.) at p. 214:

> ... would the description standing as it does, supposing there had been no competitor who had the exact name, have fitted the second competitor? If that is so I think the question of ambiguity arises;

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. . . . .

Further in circumstances such as these, the test is whether the accused may be misled and prejudiced. I refer to a series of cases: *R. v. Hines* (1979), 5 M.V.R. 231 (N.S. C.A.); *R. v. Player* (1985), 33 M.V.R. 145 (B.C. C.A.); *R. v. Enberg* (April 10, 1987), Doc. Vancouver CA005137 (B.C. C.A.); *R. v. Ahlstrom* (July 10, 1990), Doc. Vancouver CC900659 (B.C. S.C.); *R. v. McCullagh* (1990), 53 C.C.C. (3d) 130 (Ont. C.A.).

17 Here the question on ambiguity may be put: are the phrases containing the error, or the whole certificate, capable of more than one meaning? Could the person referred to in the Certificate of Disqualification be any other person than the applicant; could the prohibition from driving be any other than from 23 May 1995 to 23 May 1997? In my view, they could not. The certificate was not ambiguous let alone misleading or one which could prejudice the applicant. In this, in my view, Mr. Justice Vickers was correct and the conclusion of the learned trial judge was not reasonable.

18 I turn now to the reliability argument. The trial judge linked his conclusion on reliability to his conclusion that the document was ambiguous. The applicant contends that the *Act* provides discretion to the trial judge whether to receive a certificate in evidence and that he exercised his discretion against admission of the certificate in a reasonable fashion. He has referred us to *R. v. Zwicker* (1980), 53 C.C.C. (2d) 239 (N.S. C.A.) to support his submission that the certificate is not reliable. In that case, the issue was whether a certificate was prepared in accordance with the legislative scheme. There was evidence that blank forms of the certificate with the registrar's signature on it were pre-printed and then to meet the particulars of each case the blanks were filled out. The Nova Scotia Court of Appeal held that such a certificate was not admissible. In my view the circumstances of the *Zwicker* case are distinguishable both on their facts and in the issue presented in this case.

19 The issue here is whether the learned trial judge exercised his discretion judicially. Was it reasonable for him to question the reliability of the information contained in the certificate in these circumstances?

20 In my view the typographical error on the certificate in which all numeric "1's" appear as small dotted "i's" is not a reasonable basis for doubt of the reliability of the information contained in it.

21 There was nothing which would indicate that the certificate was improperly issued. There was no error of substance in it and nothing to indicate the information in it was unreliable, or that the Superintendent's statement that she was certifying that information was unreliable.

22 In my view the conclusion that the certificate might be unreliable was purely speculative. It is wrong not to rely on probative evidence based on pure speculation, let alone not to admit it. Where as here the speculation was based on a misprint which the learned trial judge held rendered the certificate ambiguous, yet which could not be misleading in the circumstances, the error is compounded. For these reasons, I conclude that the learned trial judge erred in principle. I conclude the discretion was not exercised judicially. The certificate should have been admitted, and in not doing so, the learned trial judge erred.

23 That leaves the question, should a new trial be ordered?

24 The learned trial judge entered an acquittal on the basis there was no evidence after he ruled that the certificate was not admissible. The applicant did not have the opportunity to present a defence to the certificate. We are instructed by counsel that Mr. Justice Vickers was advised that the applicant would wish to present a defence to the case. One cannot say a successful defence is impossible to the charge.

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25 I am of the view that the appropriate disposition is to grant leave to appeal, set aside the conviction and remit the matter to the Provincial Court for a new trial.

26 I turn now to the case of *R. v. Alexis*. In this case Mr. Alexis was charged under s. 259(4) of the *Criminal Code*. At trial the applicant admitted that he was driving on the day set out in the information, October 25, 1996, and the only issue was whether the Certificate of Disqualification on which the Crown wished to rely as proof that the applicant was prohibited from driving met the requirement of s. 260(5) of the *Criminal Code*. That section provides:

> 260. (5) In proceedings under section 259, a certificate setting out with reasonable particularity that a person is disqualified from
>
> (a) driving a motor vehicle in a province, purporting to be signed by the registrar of motor vehicles for that province, or
>
> (b) operating a vessel or aircraft, purporting to be signed by the Minister of Transport or any person authorized by the Minister of Transport for that purpose
>
> is evidence of the facts alleged therein without proof of the signature or official character of the person by whom it purports to be signed.

27 The material part of the Certificate of Disqualification (complete with errors) is:

> Pursuant to section 260(5) of the Criminal Code of Canada, I. H. Graham Reid, Senior Vice President for the Insurance Corporation of British Columbia, the registrar of motor vehicles for British Columbia under section 260(7) of the Criminal Code of Canada, DO HEREBY CERTIFY that JESSIE ALEXIS, whose British Columbia driver's licence number is 4704357, and whose recorded date of birth is i6 MARCH i964, was disqualified from driving a motor vehicle on any highway in Canada for the entire day of 25 OCTOBER i996 by reason of being prohibited on 23 MAY i995, in British Columbia from operating a motor vehicle in Canada, pursuant to section 259(2) of the Criminal Code of Canada. Such prohibition was imposed for a period of 2 YEARS, commencing on 23 MAY i995 and expiring on 23 MAY i997.
>
> DATED this i5 day of JANUARY, i997, at the City of Victoria in the Province of British Columbia.

28 The trial judge found the certificate of disqualification to be ambiguous and refused to admit it. I have earlier referred to the reasons he gave.

29 On the summary conviction appeal brought by the Crown, Mr. Justice Vickers concluded the certificate was not ambiguous. It was heard along with *R. v. Sloan*, and Mr. Justice Vickers relied upon the decision of *R. v. Frederick*. Mr. Justice Vickers set aside the acquittal and directed that the matter of sentencing be remitted to the Provincial Court judge.

30 In seeking leave to appeal the order of Mr. Justice Vickers, the applicant submits that the trial judge was correct in declining to admit the Certificate of Disqualification into evidence. Before us he relied upon the reliability argument which was not addressed by Mr. Justice Vickers in his reasons.

31 The errors in the certificate are the same as in *R. v. Sloan*, that is, where one would expect numeric "1's",

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one sees small dotted "i's".

32 For the reasons I earlier expressed in dealing with *R. v. Sloan*, it is my view that the certificate was neither ambiguous nor unreliable as found by the learned trial judge. To conclude from a consistent typing mistake that the information contained in the certificate may not be reliable was, in my view, to speculate and was not a reasonable conclusion.

33 I conclude that the learned trial judge erred in principle in excluding the Certificate of Disqualification. I would grant leave to appeal and dismiss the appeal.

***Ryan J.A.*:**

34 I agree.

***Proudfoot J.A.*:**

35 I agree.

***Ryan J.A.*:**

36 The appeal in *R. v. Sloan* is allowed to the extent that the conviction is set aside and a new trial ordered. The appeal with respect to *R. v. Alexis* is dismissed.

Appeal by accused S. allowed and new trial ordered; appeal by accused A. dismissed.

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