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R. v. Amankwaa

Between
Her Majesty the Queen, and
Isaac Amankwaa, defendant

[1997] O.J. No. 6014

Ontario Court of Justice (Provincial Division)
Etobicoke, Ontario
Quon J.P.

Heard: February 4, 1997.
Judgment: April 1, 1997.
(17 pp.)

Criminal law — Procedure — Trial, motions — Motion for a nonsuit, (for dismissal at close of Crown's case) — Motor vehicles — Regulation of vehicles and traffic — Observance of highway markings — Observance of signs and traffic control signals — Statutes — Interpretation — Extrinsic aids — Other statutes — Similar statutes in other jurisdictions.

Trial on a charge of failing to obey a lane sign. The accused was travelling westbound in a lane that required all vehicles except buses to turn right at the next intersection. The accused was not driving a bus. He did not turn right, but rather proceeded straight ahead. He claimed that since the lane continued on the other side of the intersection, he was entitled to proceed as he did. He also claimed that since the traffic signs did not specify the times of day for which the restrictions were in force, the charge was brought under the wrong section of the Highway Traffic Act. He had been charged under a section requiring drivers to obey instructions on official signs erected on highways divided into clearly marked lanes for traffic. The defence moved for a non-suit on the basis of those arguments.

HELD: Accused acquitted. The motion for a non-suit was dismissed as the Crown had established a prima facie case. However, the Crown failed to prove the elements of the offence. Some sections of the Highway Traffic Act referred merely to marked lanes, whereas the section in question referred to clearly marked lanes. Based on statutes from other jurisdictions, evidence of clearly marked lanes required evidence on the method used for dividing the road into distinct lanes and evidence on the visibility of the lane demarcations. The prosecution failed to prove that the accused was driving within a clearly marked lane.

Cases Considered and Referred to

Mezzo v. The Queen, [1986] 1 S.C.R. 802, 27 C.C.C. (3d) 97 (S.C.C.)
Monteleone v. The Queen, [1987] 2 S.C.R. 154, 35 C.C.C. (3d) 193 (S.C.C.)
Plourde c. La Reine (1981) 14 M.V.R. 26 (N.B.Q.B.) per Angers J.
R. v. Barok, [1967] 2 O.R. 128 (O.H.C.) per Fuller J. at Welland.

R. v. Falconer (1978) 1 M.V.R. 62 (N.S.S.C. [Appeal Division])
R. v. Morabito (1949), 93 C.C.C. 251, [1949] 1 D.L.R. 609, [1949] S.C.R. 172
R. v. Paul (1976), 27 C.C.C. (2d) 1, 33 C.R.N.S. 328 (S.C.C.)
R. v. Skorput (1992) 72 C.C.C.(3d) 294 (Ont. Ct. (Prov. Div)) per McDonnell at Toronto. Authorities referred to:

Blacks Law Dictionary, 6th ed. (1979), "clearly"

Statutes, Regulations and Rules Cited:

Highway Traffic Act, R.S.O. 1990, c. H.8, ss. 141, 154(1)(c), 155, 182(1), 182(2).
Motor Vehicle Act (New Brunswick).
Motor Vehicle Act (Nova Scotia), s. 105(2), 105(3).

Counsel:

B. Irvine, agent for the Attorney-General.
B. McLeod, agent for the defendant.

QUON J.P.:—

1. INTRODUCTION

¶ 1 These are my reasons for judgment on a charge of "failing to obey lane sign" contrary to paragraph 154(1)(c) of the Highway Traffic Act, R.S.O 1990, c. H.8. The defendant's charge stems from his act of proceeding straight through an intersection while supposedly being in a lane of traffic restricted to right turns. The defendant was charged for failing to complete the right turn as he entered the intersection, as required by posted traffic signs and instead drove his vehicle across the intersection.

¶ 2 The prosecution witness in the trial was the police officer who issued the certificate of offence. The officer provided evidence in chief and under cross-examination. Following completion of the prosecution's case, the defendant's agent brought a motion for non-suit basing it on two grounds. The first and primary ground being the sign that prohibited any movement except right turns failed to state the times the sign was to be applicable. This ground was linked to a submission by the defence that the defendant was therefore charged under the wrong section. The second ground espoused by the defence was that the existence or the continuation of the right turn lane on the other side of the intersection would, by implication, permit vehicles to proceed through the intersection, and for drivers to disregard the sign and markings prohibiting through movement within that lane.

¶ 3 After the prosecution and the defence propounded their arguments on the motion, I gave my ruling and dismissed the defendant's motion for non-suit. Subsequently, the defence elected not to call any further evidence.

¶ 4 As a response to the defendant's agent's request for clarification on my dismissal of the non-suit motion, I also include my reasons for dismissing that motion in this judgment.

2. FACTS

¶ 5 There exists an intersection in the City of Etobicoke where Eglinton Avenue West and Martingrove Road cross. Etobicoke, on the date the defendant was charged, was a city within the Municipality of Metropolitan Toronto. On the west side of Martingrove Road, Eglinton Avenue appears to be comprised of four lanes - a marked left turn lane, two lanes for eastbound traffic and a right turn lane marked by signs.

¶ 6 There are two signs erected in relation to that right turn lane on Eglinton Avenue. The first sign a driver observes when travelling eastbound on Eglinton Avenue towards Martingrove Road is a green warning sign - located 100 metres west of the intersection. The sign states "Right Lane Must Exit". The second sign is an international sign and located 25 to 30 metres west of the intersection. The second sign was described as a white arrow pointing to the right on a black background indicating the lane is a right turn lane. Words under this international sign state "Buses Excepted".

¶ 7 In addition, there are two arrows on the surface of the roadway indicating the lane is for right turns.

¶ 8 On the east side of this intersection - that is, on the easterly portion of Eglinton Avenue West, east of Martingrove Road, the right turn lane, if prolonged through the intersection, continues on as a lane, but is restricted for buses. Specifically, buses do not have to make a right turn if travelling in the right turn lane but can continue through the intersection in an easterly direction in the same lane. There is a bus stop on the south side on Eglinton Avenue, east of Martingrove Road.

¶ 9 Police Constable Schulze was situated on the south side of Eglinton Avenue, east of Martingrove Road on July 12, 1996. At approximately 5:55 p.m. on July 12, 1996, Constable Schulze stated he observed the defendant, Isaac Amankwaa, eastbound on Eglinton Avenue travelling in the right turn lane. The officer stated that Mr. Amankwaa did not make a right turn as required by the signs and markings relating to the right turn lane, but drove eastbound through the intersection, so that he approached the officer's position east of Martingrove Road on the south side of Eglinton Avenue. The officer stopped the defendant and charged him for disobeying a lane sign. The defendant identified himself to the officer with a valid Ontario driver's licence.

¶ 10 Constable Schulze stated he had a clear view of the intersection and there were no obstructions which would prevent any motor vehicle using the right turn lane from completing the right turn, and necessitating moving straight through the intersection. He also stated the signs and markings relating to the right turn lane were clearly visible to drivers travelling eastbound on Eglinton Avenue in the right turn lane. Also the officer stated the traffic is heavy at this time of the day and the defendant's vehicle was not a bus.

Defendant's argument:

¶ 11 The defendant's agent in his final submissions, relied on his argument that he presented in the non-suit motion. He argued there was no evidence of "times" stated on the sign governing the right turn lane as required by section 155 and that the sign governed by paragraph 154(1)(c) should only apply during the times stated on the sign. Since there are no times stated on the right turn sign then the sign would not be applicable to the defendant or at any time.

¶ 12 The agent for the defendant also submitted that when using paragraph 154(1)(c) the right turn sign shall bear the "times". He also submitted that if the charge would have been laid under subsection 182(1), the agent probably meant subsection 2 of that section, it would have been the proper charge and that he would have no argument with a charge laid under subsection 182. However, since paragraph 154(1)(c) was used, the defendant's agent submits, then the official sign should state the times it is applicable as required by

section 155.

¶ 13 Section 182 and its heading refer to signs and markings used on highways:

> SIGNS AND MARKINGS - Signs to be obeyed
>
> 182. (1) The Lieutenant Governor in Council may make regulations providing for the erection of signs and the placing of markings on any highway or any type or class thereof, and prescribing the types of the signs and markings and the location on the highway of each type of sign and marking and prohibiting the use or erection of any sign or type of sign that is not prescribed.
> (2) Every driver or operator of a vehicle or street car shall obey the instructions or directions indicated on any sign so erected.

Prosecution's argument:

¶ 14 The Provincial Prosecutor also based his final submissions on the argument he propounded in his submissions for the non-suit motion. He submitted that if the defendant's argument was sound then every sign shall say at "all times" or "every time forever".

3. MOTION FOR NON-SUIT

¶ 15 The defendant's agent submitted in the motion for non-suit that the signs directing drivers to turn right should state the times as referred to in section 155 of the Highway Traffic Act. There were no times stated on the governing signs. The defendant's agent submits that, in the absence of stated times on the sign, the sign would therefore be inapplicable. He further stated that section 155 overrides section 154 with respect to the times on the sign and that the defendant was charged under the wrong section.

¶ 16 The defendant was charged under paragraph 154(1)(c). That paragraph states [my emphasis]:

> 154. (1) Where a highway has been divided into clearly marked lanes for traffic, ... (c) any lane may be designated for slowly moving traffic, traffic moving in a particular direction or classes or types of vehicles and, despite section 141, where a lane is so designated and official signs indicating the designation are erected, every driver shall obey the instructions on the official signs.

¶ 17 Section 141 is a definition section that governs right turns at intersections, right turns where there are multiple lanes, left turns across the path of an approaching vehicle, left turns at intersections and where there are multiple lanes and turns by extra long vehicles.

¶ 18 Section 155 and its heading follows below [my emphasis]:

> TIMES DESIGNATION APPLICABLE
>
> 155. A designation of a lane for classes or types of vehicles made under clause 154(1)(c) shall apply during the times stated on the official signs.

¶ 19 The defendant's agent in his primary argument on the motion failed to clearly explain why he believed that paragraph 154(1)(c) was the incorrect section for the charge against the defendant.

¶ 20 In his secondary point of argument, the defendant's agent referred to a 1994 decision of the late Judge Dneiper. The agent stated to the court he would forward a copy of that decision to the Court. Unfortunately, he has failed to forward that decision or submit the name of that case to the Court. Basically his argument was that, if the lane continues on the opposite side of the intersection, one may travel through the intersection without having to complete the required right turn.

¶ 21 The Crown's reply to the defendant's primary argument was that, if the defendant's logic was sound then every speeding sign should state times when it is applicable. Instead the times, submits the Crown, only matter if there are situations where there is an exemption. This exemption, the Crown states, is for buses. The Crown's agent submitted that time is not a relevant factor to this charge.

¶ 22 The Crown's position on the defendant's second argument is that just because there is a lane on the other side of the road that allows the traffic to go through, logic would dictate that the lane is either for buses to continue through because buses are excepted, or, if someone is turning right from Martingrove to go east on Eight Avenue there would be a lane for a vehicle to turn in. The Crown's agent submitted that the charge is subject to traffic that is west of Martingrove Road and there was a fairly significant distance of travel and several indicators saying that one must exit to the right.

¶ 23 Also the Crown's position was that there was a prime facie case.

Test on Motion for Non-Suit

¶ 24 The test to determine whether the motion for non-suit should be granted or dismissed is found in R. v. Paul (1976), 27 C.C.C. (2d) 1, 33 C.R.N.S. 328 (S.C.C.). The majority in R. v. Paul referred to R. v. Morabito (1949), 93 C.C.C. 251, [1949] 1 D.L.R. 609, [1949] S.C.R. 172 at page 4 in Ritchie J.'s opinion and at page 9 in De Grandpere J.'s opinion. The principle adopted by the Supreme Court of Canada is that the court has only to consider whether there is evidence upon which a properly instructed jury acting reasonably might have convicted the defendant.

¶ 25 In Mezzo v. R., [1986] 1 S.C.R. 802, 27 C.C.C. (3d) 97 (S.C.C.) it was decided that the issue on a motion for non-suit is whether there is evidence on all essential points of a charge which, if believed by a properly charged trier of fact acting reasonably, and unanswered, would warrant a conviction. The court may not consider the credibility of the witness or the quality or weight of the evidence that the witness has given.

¶ 26 In Monteleone v. R., [1987] 2 S.C.R. 154, 35 C.C.C. (3d) 193 (S.C.C.), at page 198 Of 35 C.C.C., it was decided that while there must be evidence on all essential elements of the charge, there need not be direct evidence on all essential elements. It is sufficient if the evidence on some or all essential points is entirely circumstantial.

¶ 27 I ruled that the Crown was able to establish a prime facie case when I dismissed the motion for non-suit. That is, the Crown was able to establish evidence for all of the essential elements of the charge and therefore, the Crown is permitted to proceed further with the trial.

Prime Facie case

¶ 28 When the courts refer to prime facie case, there are two usages of the term, and depending on the context used, the court may be referring to a "permissive" sense or to a "presumptive sense". When prime facie is used by the courts in the permissive sense, it means that the Crown is not required to meet any onus beyond adducing "some" evidence, and the evidential or persuasive burden is not shifted to the accused. When the prosecution establishes a prime facie case in the permissive sense it simply allows the prosecution with the burden of persuasion to proceed or continue with the proceeding. In this sense, the trier of fact to is permitted to draw the inference sought by the party alleging the prime facie case.

¶ 29 On the other hand, when the courts use prime facie case in the presumptive sense, the courts presume the truth of the facts alleged by the prosecution unless it has been rebutted by the defence. In the presumptive sense there is at least a shift of the evidential burden to the other party once a prime facie case is established.

¶ 30 These two usages of the prime facie term have been skillfully explained by McDonnell J. in his judgment in R. v. Skorput (1992) 72 C.C.C. (3d) 294. At pages 296-300, his Honour states [my emphasis below]:

> The concept of a prima facie case is understood by courts in two senses. Quite different implications attach to its use depending on which sense is intended. At a minimum, a prima facie case is one which contains evidence with respect to all elements which the party asserting an allegation must demonstrate. In this sense, it corresponds to the requirements for a committal for trial pursuant to s. 548(1) of the Criminal Code, or for the dismissal of a motion for non-suit at the end of the prosecution's case. An example of this usage is provided in R. v. Morabito (1949), 93 C.C.C. 251 (S.C.C.).
> In that case, there was an issue concerning what the Crown must establish in order for an accused to be called upon for a defence. Speaking for the majority of the Supreme Court of Canada, Kellock J. stated at p. 254:
>
> > No authorities were cited to indicate just what cogency of proof is required to establish a prima facie case at that stage, and I have not run across any case in which the point was settled. I presume, therefore, that, in order to put the accused upon his defence, a Judge or Magistrate sitting alone need only find such evidence as would entitle the Crown, in a jury case, to have the facts left to the decision of the jury. In other words, the criterion would be whether the evidence is such as a jury might, in the absence of contradiction or explanation, reasonably and properly convict upon.
>
> In R. v. Mezzo (1986), 27 C.C.C. (3d) 97, the Supreme Court of Canada again considered the nature of the test to be applied on an application for a directed verdict. On behalf of a majority of the Court, McIntyre J. affirmed the well known test articulated by Ritchie J. in U.S.A. v. Sheppard (1976), 30 C.C.C. (2d) 424, at p. 427. He stated, at p. 102, that Ritchie J. had "adopted as the measure of sufficiency the concept of a prima facie case, that is, a case containing evidence on all essential points of a charge which if believed by the trier of fact and unanswered, would warrant a conviction."
> This first sense in which 'a prima facie case' is understood might be termed the permissive sense: it will permit, but does not require, the trier of fact to draw the inference sought by the party alleging the prima facie case. However, the concept of a prima facie case is sometimes understood to describe evidence which has greater cogency than merely

permitting an inference. Black's Law Dictionary, (5th ed.) 1979, at p. 1071, states that "courts use prima facie to mean not only that plaintiff's evidence would reasonably allow conclusion plaintiff seeks, but also that plaintiff's evidence compels such conclusion if the defendant produces no evidence to rebut it." Professor Cross (Cross on Evidence, 6th ed., at pp. 60-61) notes that while evidence of this degree of cogency is referred to as prima facie, it might conveniently be described as 'presumptive'. He refers to R. v. Jacobson and Levy [1931] App. D. 466 at 478, for the dictum that "in the absence of further evidence from the other side, the prima facie proof becomes conclusive proof.."

An illustration of a presumptive prima facie case is provided in R. v. Proudlock (1978), 5 C.R. (3d) 21 (S.C.C.). In that case, the central issue was whether evidence which was disbelieved by the trier of fact was "evidence to the contrary" within the meaning of the presumption created by what is now s. 348(2) of the Criminal Code. In deciding that issue, the court was required to assess the significance of an amendment to the wording of that provision. The subsection had provided that evidence that a person broke and entered a place "is prima facie evidence" that he did so with intent to commit an indictable of fence. It was amended to provide that evidence of break and entry "is, in the absence of any evidence to the contrary, proof" of the relevant intent.

Writing for the majority of the Supreme Court, Pigeon J. concluded that the amendment did not change the effect of the subsection. That is, he regarded 'prima facie evidence' as evidence which was, in the absence of evidence to the contrary, conclusive. At p. 30 he wrote:

> If the prima facie case is made up by the proof of facts from which guilt may be inferred by presumption of fact, the law is clear on the authorities that, because the case in the end must be proved beyond a reasonable doubt, it is not necessary for the accused to establish his innocence, but only to raise a reasonable doubt: This he may do by giving evidence of an explanation that may reasonably be true, and it will be sufficient unless he is disbelieved by the trier of fact, in which case his testimony is no evidence. In any case, the evidence given by himself or otherwise has to be such as will at least raise a reasonable doubt as to his guilt; if it does not meet this test the prima facie case remains and conviction will ensue. [emphasis added]

In Proudlock, the elements of a prima facie case were defined in part by a statutory presumption which relieved the Crown of the obligation of leading any other evidence of the requisite intent. In some situations, upon establishing a prima facie case, the Crown will be relieved of the obligation to call further evidence in relation to the mental aspect of an of fence, even in the absence of a statutory presumption. In R. v. Lock (1974), 18 C.C.C. (2d) 477 (O.C.A.), the accused was charged under the Criminal Code with driving while disqualified. It is an element of that offence that the accused know at the time of the driving that he is disqualified. The Crown led evidence to prove that Lock drove and that he was at the time disqualified. No evidence was adduced that he had been notified of the disqualification.

At p. 4831 Martin J.A. stated that "even in offences involving full mens rea the evidential burden of introducing evidence of lack of knowledge of a material element of the offence may pass to the accused in some cases on proof of the doing of the prohibited act." He further stated, at p. 484:

> It does not follow, however, that anything more than the proof of the commission of

> It does not follow, however, that anything more than the proof of the commission of the prohibited act is required to constitute a prima facie case. Where the prosecution establishes a prima facie case, the accused runs the risk of being convicted unless he discharges the evidential burden of introducing evidence of lack of knowledge of a material element of the offence. If, however, at the end of the whole case the Court entertains a reasonable doubt with respect to the accused's knowledge of a material element of the offence, he is entitled to be acquitted."

The language employed by Martin J.A. might be thought to suggest that a conviction would not necessarily follow a failure by the accused to discharge the evidential burden.
However, his reasons as a whole make clear that that would only be so if there was some basis in the evidence for reasonably doubting the existence of knowledge. There is nothing inconsistent between this approach and that of Proudlock.
Perhaps the most common applications of the concept of a prima facie case in the presumptive sense arise in prosecutions for regulatory offences. On such prosecutions, the Crown is ordinarily not required to prove any culpable mental state or negligence on the part of the defendant. The Crown establishes all that it must in order to secure a conviction - that is, it establishes a prima facie case - by proving that the defendant committed the actus reus of the offence: R. v. Sault Ste. Marie (1978), 40 C.C.C. (2d) 353, at 373-374 (S.C.C.); R. v. Wholesale Travel Group Inc. (1991),
8 C.R. (3d) 145 (S.C.C.), per Gory J., at 184. Once the Crown establishes a prima facie case in this sense, fault is presumed, and the onus shifts to the defendant to show on a balance of probabilities that all reasonable care was taken.
The distinction between the two senses in which the expression 'prima facie case' is used is more than a matter of academic interest. A prima facie case understood in the first or permissive sense, as demonstrated in Morabito and Mezzo, does not require the Crown to meet any onus beyond adducing 'some' evidence, and no burden - evidential or persuasive - is shifted to the accused. Establishing a prima facie case in this sense simply allows the party with the burden of persuasion to proceed. On the other hand, a prima facie case understood in the second or presumptive sense shifts at least an evidential burden, and in the case of a regulatory offence a persuasive burden, to the accused, who must discharge it in order to avoid conviction. It is very important to recognize that while the prosecution must establish the elements of the prima facie case beyond a 'reasonable doubt in order to shift the burden to the accused, the allocation of the burdens between the parties does not occur until all the evidence in the trial has been heard, and the trier of fact is embarked upon an assessment of guilt or innocence. That is, the concept of a presumptive prima facie case does not affect trial procedure. An accused's decision as to whether to adduce evidence to meet an evidential or persuasive burden must inevitably be based on an assessment of what it is open to the trier of fact to find. The defence will not have the benefit of a preliminary ruling as to the trier of fact's view of the evidence before electing whether to call evidence.

Premature argument by defendant's agent

¶ 31 I dismissed the motion and determined that the defendant's submission that section 154 was the incorrect charge was premature. There are several reasons why I felt it was a premature argument in a motion for non-suit. For me to decide whether section 154 was the wrong charge, I would have to possibly weigh evidence to determine if it was the wrong charge, and weighing evidence at this stage of the trial is improper. I am only able to weigh evidence after all the evidence is before the court. This means that the

defendant must be given an opportunity to present its defence before I am to weigh the evidence.

¶ 32 In addition, even if I had concluded that section 154 was the incorrect charge, the prosecution would have been given the opportunity to bring a motion for an amendment of the charge.

¶ 33 In sum, as I informed the defendant's agent, I only had to determine in a motion for non-suit whether the prosecution had established some evidence for each essential element for the charge made pursuant to section 154.

4. ANALYSIS OF LAW AND FACTS ON A CHARGE OF DISOBEY LANE SIGN

¶ 34 I am able to dispose of this proceeding without having to address all the issues that emerged during the trial. Certain issues brought to the court's attention by the defendant's agent will have to be saved and argued by him on another day. The issues which I will not touch upon to dispose of this proceeding are as follows:

(1) Whether the existence or a continuation of a lane on the opposite side of the intersection allows a driver of a vehicle to proceed straight through the intersection contrary to signage and markings restricting that lane specifically to right turns.
(2) Whether the defendant has been charged under the wrong section.
(3) Whether section 155 of the Highway Traffic Act requires that "times" be actually stated, attached or placed on a sign directing right turns.
(4) Whether the absence of any stated times referred to in section 155 of the Highway Traffic Act on a right turn sign makes the sign invalid.

¶ 35 The issue, in my opinion, that needs to be considered by me, to succinctly and expeditiously dispose of this proceeding, is whether the prosecution has proven beyond a reasonable doubt that the defendant was driving in a lane that was a "clearly marked lane" pursuant to section 154 of the Highway Traffic Act. Whether the highway has been divided into "clearly marked lanes" for traffic is a precursor to be proved beyond a reasonable doubt before the Court has to analyze any other issues to determine guilt or innocence.

Clearly Marked Lanes

¶ 36 The defendant was charged under paragraph 154(1)(c). The first part of section 154 refers to situations where a highway has been divided into "clearly marked lanes" for traffic.

154. (1) Where a highway has been divided into clearly marked lanes for traffic,
(c) any lane may be designated for slowly moving traffic, traffic moving in a particular direction or classes or types of vehicles and, despite section 141, where a lane is so designated and official signs indicating the designation are erected, every driver shall obey the instructions on the official signs.

¶ 37 I find in the instant case that the prosecution has failed to meet its legal burden of proof that the defendant was driving his vehicle within a "clearly marked lane" west of Martingrove Road pursuant to section 154 of the Highway Traffic Act. Whether the lane is clearly marked is an essential element of the charge of disobey lane sign. "Clearly marked lanes" means more than just a statement from the prosecution witness using the words "marked lanes" to describe the lanes on Eglinton Avenue and the number of lanes

Eglinton Avenue has been divided into. To establish the presence of "clearly marked lanes" beyond a reasonable doubt, it would normally require more evidence than was given by the prosecution witness. At the very least, the prosecution has to establish how the lanes alleged in the prosecution's cases are demarcated. This is the minimum evidence required to be put forth.

¶ 38 It would be difficult for the prosecution to establish the actus reus of the offence if it fails to establish the existence of clearly marked lanes.

¶ 39 In Black's Law Dictionary (6ed), "clearly" is defined to mean:

> visible, unmistakable, in words of no uncertain meaning. Beyond a question or beyond a reasonable doubt; honestly, straightforwardly, and frankly; plainly. Without obscurity, obstruction, entanglement, confusion, or uncertainty. Unequivocal.

¶ 40 The official French language version of the first part of section 154 referring to "where a highway has been divided into clearly marked lanes for traffic" follows below with my emphasis:

> 154 (1) Si une voie publique est divisée en plusieurs voies nettement indiques:

Clearly marked lanes in the French language is "voies nettement indigues".

¶ 41 To determine the meaning of "clearly marked lanes" I am first guided by R. v. Barok [1967] 2 O.R. 128 (O.H.C.), per Fuller J. at Welland. Fuller J. in ruling on an appeal from the dismissal of the charge under the Highway Traffic Act for "failing to stop for a parked school bus" made reference to the purpose of white solid or broken lines on roads in Ontario:

> Highways in this Province have one-way roadways and two or more lane roadways. Many of the roadways have painted on them lines to designate lanes for traffic and on two-lane roads, there are in places two solid white lines dividing the two lanes and also on four-lane highways, there are two solid white lines dividing the roadway. There appears to be nothing in the Highway Traffic Act to specify the exact meaning of any particular type of lines painted on a highway, but reference might be made to the following sections of the Highway Traffic Act, as follows:
>
> 71(1) Where a person in charge of a vehicle on a highway meets another vehicle, he shall turn out to the right from the centre of the roadway, allowing to the vehicle so met one-half of the roadway free, but this does not apply to a vehicle, road-building machine or apparatus while engaged in the construction, maintenance or making of a highway.
>
> 75. Where a highway has been designated for the use of one-way traffic only and official signs have been erected accordingly, vehicles shall be driven only in the direction so designated.
>
> 76. Where a highway has been divided into clearly marked lanes for traffic,
>
> (a) a vehicle shall be driven as nearly as may be practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety;
>
> (b) in the case of a highway that is divided into three lanes, a vehicle shall not be driven in the centre lane except when overtaking and passing another

vehicle where the roadway is clearly visible and the centre lane is clear of traffic within a reasonably safe distance, or in preparation for a left turn, or where such centre lane is at the time designated for the use of traffic moving in the direction in which the vehicle is proceeding and official signs are erected to indicate such designation;

(c) any lane may be designated for slowly moving traffic or traffic moving in a particular direction provided that official signs are erected to indicate such designation, and where a highway is so designated the driver of every vehicle shall obey the direction on the official signs.

77(1) Where a highway is divided into two separate roadways, no person shall operate or drive a vehicle or lead, ride or drive an animal, (a) along or on such highway except on the roadway on the right-hand side, having regard to the direction in which the vehicle is being operated or driven or the animal is being led, ridden or driven; or (b) from one roadway to the other roadway except where a crossing is provided. [rep. & sub. 1964, c. 38, s. 10]

(2) Every person who contravenes any of the provisions of subsection 1 is liable, for the first offence to a fine of not more than $10; for the second offence to a fine of not more than $20; for the third offence to a fine of not more than $30; and for any subsequent offence to a fine of not more than $50.

¶ 42 Fuller J. also in R. v. Barok states the purpose of white lines on roads after referring to various sections of the Highway Traffic Act [my emphasis]:

> It would appear from reading the sections that white lines, whether broken or solid, on a roadway are for the purpose of marking lanes for traffic.

¶ 43 It is my conclusion that one can infer that lines are for the purpose of marking lanes, but the converse situation cannot be presumed or inferred. That is, marked lanes do not necessarily mean they have been delineated by lines. It cannot be assumed that "marked lanes" refer to "clearly marked lanes". Marked lanes have further been described by the word clearly, so it means something in addition to marked lanes or lanes that contain markings painted on the road or lanes referred to by signs.

¶ 44 In the context of interpreting the meaning of "clearly marked lanes", the Highway Traffic Act differentiates between "marked lanes" and "clearly marked lanes" as can be seen by the use of the words "marked lanes" in section 141. In subsection 141(2) the words "marked lanes" are used:

> (2) Where a driver or operator of a vehicle intends to turn to the right into an intersecting highway, he or she shall, where the highway on which he or she is driving has marked lanes for traffic, approach the intersection within the right-hand lane or, where it has no such marked lanes, by keeping immediately to the left of the right curb or edge of the roadway and he or she shall make the right turn by entering the right-hand lane of the intersecting highway where the lane is marked or, where no such lane is marked, by keeping immediately to the left of the right curb or edge of the roadway being entered.

¶ 45 Section 154 refers to "clearly marked lanes". This indicates that when the legislators enacted section

154, they intended "clearly marked lanes" to be different than "marked lanes" as used in section 141. If the legislators wanted to use "marked lanes" then they would have expressly used those two words "marked lanes" instead of further describing marked lanes as "clearly marked lanes" in section 154. Therefore, I find "clearly marked lanes" are more specific than just "marked lanes". Evidence of "marked lanes" is therefore not evidence of "clearly marked lanes".

¶ 46 In interpreting the meaning of "clearly marked lanes", I have looked to other jurisdictions and their legislation for assistance and as an aid in my interpretation of "clearly marked lanes". Therefore, my reasons in the construction of the words "clearly marked lanes" have been influenced by decisions rendered in other provincial jurisdictions, and from enacted statutes from those jurisdictions that required the lines that demarcate a road or highway into distinct and separate lanes, be clearly visible before a charge and conviction can be entered.

¶ 47 Unlike Ontario's Highway Traffic Act, New Brunswick legislation, namely the Motor Vehicle Act, requires that lines on a road demarcating lanes be clearly visible.

¶ 48 Angers J. in Plourde c. La Reine (1981) 14 M.V.R. 27 at page 28 states:

> "L'article 154(2) de la Loi sur les Véhicules à Moteur, R.S.N.B. 1973, c. M-17 prescrit que les lignes qui apparaissent sur une chaussée doivent être "nettement visibles".

¶ 49 Angers J. found that the Crown had failed to prove the actus reus of the offence. He concluded that without clear lines, one could not conclude that the responsible authorities wished to control traffic by means of lines. In addition, Angers J. stated that even if a defendant has a guilty mind, he cannot be found guilty if the lines are not clear. At pages 28-29 Angers stated:

> "La poursuite dans cette cause n'a pas prouvé l'actus reus de l'infraction et à mon sens il importe peu que l'accusé savait que dans le passé il y avait à cet endroit des lines qui étaient visibles. En l'absence de lignes nettement visibles, la Cour ne peut pas conclure que les autorités responsables voulaient contrôler le traffic à cet endroit par le moyen de ligne sur la chaussée ou modifier les lignes qui ont peut-être existées ou abolir les lignes complètement. Même avec l'intention coupable, un indivdu ne peut commettre une infraction qui n'existe pas."

¶ 50 In that case, the appellant was convicted of driving to the left of a solid line. The Act required that line be clearly visible. The officer conceded that the line was difficult to see but if one paid attention one would see it that day. The infraction occurred at night. The appellant testified that he knew there was a line there but he believed he had not passed it. The trial Judge found him guilty and the appellant appealed. The appeal was allowed based on reasons Angers J. gave above.

¶ 51 Similarly, Nova Scotian legislators viewed it important to require evidence of "clearly visible" lines before a person could be charged and subsequently convicted of the charge.

¶ 52 In R. v. Falconer (1978) 1 M.V.R. 62 (N.S.S.C. [Appeal Division]), MacKeigan C.J.N.S. for the Court at page 63 referred to sections of the Nova Scotia Motor Vehicle Act the appellant was charged under [my emphasis]:

> 105(2)
> Notwithstanding subsection (1) and subject to subsection (3), where a highway is

divided into lanes for the movement of vehicles in the opposite direction by lines upon the highway,

(a) where the highway is marked with a solid double line, the driver of a vehicle shall drive the vehicle to the right of the line only;

105(3) Subsection (2) shall not apply,

(c) where the lines are not clearly visible or where it is reasonable and prudent to drive to the left of the lines due to weather or other conditions.

¶ 53 The legislation of New Brunswick and Nova Scotia require the existence of clearly visible lines before a person is culpable for contravening particular rules of the road. In contrast, Ontario's legislation does not specifically state or require the existence of clearly visible lines before a person is culpable of certain driving offences. The legislation under scrutiny in the case at bar requires "clearly marked lanes". Therefore, the prosecution may be able to meet its burden of proving clearly marked lanes without proving the existence of "clearly visible lines" to demarcate individual lanes. Whether the prosecution has met its burden has to be decided on a case by case analysis of the evidence. However, in the case at bar, the prosecution needed to provide more evidence than it did in describing the lanes of traffic at the intersection. It would have been helpful to the prosecution's' case to know what method was used by the authorities to divide the highway into lanes and whether this method of division or demarcation was visible to drivers on this particular day. Therefore, "clearly marked lanes" requires evidence on the method used for dividing the road into distinct lanes and evidence on the visibility of these lane demarcations to drivers.

¶ 54 When the motion for non-suit was argued, the prosecution's evidence with regards to "clearly marked lanes" was sufficient for me to have dismissed the motion for non-suit. There was some evidence before me - the officer testified to 4 lanes of traffic and two of them were marked for left and right turns. The evidence was sufficient at this point to survive the court's scrutiny on the motion for non-suit, but when the trial was concluded and I had to determine proof beyond reasonable doubt, I was unable to conclude that the burden had been met by the prosecution.

5. CONCLUSION

¶ 54a The prosecution has failed to discharge its burden of proving beyond a reasonable doubt that Eglinton Avenue West, west of Martingrove Road was divided into "clearly marked lanes" and that the defendant was driving his vehicle within a "clearly marked lane". Since the prosecution has failed to prove its case beyond a reasonable doubt, the charge against the defendant Isaac Amankwaa of disobeying a lane sign is dismissed. [The Court also numbered this paragraph "54". QL has assigned the number 54a.]

QUON J.P.

* * * * *

¶ 55 Appendix A

Cases Considered and Referred to

Mezzo v. The Queen, [1986] 1 S.C.R. 802, 27 C.C.C. (3d) 97 (S.C.C.)

Monteleone v. The Queen, [1987] 2 S.C.R. 154, 35 C.C.C. (3d) 193 (S.C.C.)
Plourde c. La Reine (1981) 14 M.V.R. 26 (N.B.Q.B.) per Angers J.
R. v. Barok, [1967] 2 O.R. 128 (O.H.C.) per Fuller J. at Welland.
R. v. Falconer (1978) 1 M.V.R. 62 (N.S.S.C. [Appeal Division])
R. v. Morabito (1949), 93 C.C.C. 251, [1949] 1 D.L.R. 609, [1949] S.C.R. 172
R. v. Paul (1976), 27 C.C.C. (2d) 1, 33 C.R.N.S. 328 (S.C.C.)
R. v. Skorput (1992) 72 C.C.C.(3d) 294 (Ont. Ct. (Prov. Div)) per McDonnell at Toronto.

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