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R. v. Dhanota

Between
Her Majesty the Queen, and
Kuldip Dhanota

[2001] O.J. No. 3426

Ontario Court of Justice
Brampton, Ontario
Kastner J.

Oral judgment: July 27, 2001.
(61 paras.)

Counsel:

R. Brencis, Provincial Prosecutor.
S. Parker, for Mr. Dhanota.

¶ 1 **KASTNER J.** (orally):— This is an appeal by Mr. Dhanota who was charged with an offence pursuant to s. 144(18) of the Highway Traffic Act, namely, for failing to stop at a red light.

¶ 2 The date of the alleged offence was November 13th 1999. The matter ultimately came to trial on December 6th 2000. There was an intake period in which the defendant filed a notice of intention to appear for trial and the court office sent out a notice of trial. A period of approximately 11 months passed between the time that the court document was sent out with the notice of trial and the trial date of May 12th 2000.

¶ 3 On May 12th 2000, the matter was marked not reached. There is no further elaboration for the reason on that particular date. The only other notation on the back of the certificate is "Not reached. Closed tier. Estimate one hour minimum."

¶ 4 The appellant has not filed the transcript of the proceedings of May 12th 2000. And thus, aside from the systemic issue of the matter not being reached, there is nothing factually upon which an appellate court can make any further findings as to the reasoning behind the May 12th date, nor whether or not there was any waiver by any party of delay.

¶ 5 In any event, after May 12th of 2000, the next date set by all parties was December 6th 2000. Again, without the transcript of May 12th, there is no indication as to whether or not there was anything asserted at that particular time by the defendant with regard to his constitutional right to trial within a reasonable time.

¶ 6 Mr. Walia, an agent, appeared for the defendant at trial on December 6th 2000. In advance of that time he filed a notice application pursuant to s. 11(b) of the Charter of Rights and Freedoms. That notice was served upon the Attorney General of Canada, The Attorney General of Ontario Municipal Prosecutor and the Court.

¶ 7 The Justice of the Peace in this case heard an argument with respect to s. 11(b) of the Charter prior to proceeding to trial on December 6th 2000. On that application, Mr. Walia indicated he wished to call evidence to establish actual prejudice.

¶ 8 Viva voce evidence was called from Mr. Dhanota. Mr. Dhanota asserted that he could not remember anything, that he could not recollect anything, that he was unable to perform his work properly, and that the fact of the passage of time had upon him was, "putting a lot of pressure on my mind."

¶ 9 In cross-examination it was established that at least in part, the nervousness and anxiety related not only to the charge, if at all, but to the fact that: There were some lasting medical injuries as a result of the collision involved in the charge; as a result of not being able to work for a period of some three or four months as a result of a pain condition which was still operative at the time of the first trial date in May; and largely, it appears, because he had been sued in relation to the accident and that he had a great deal of anxiety through the civil lawsuit and the insurance company.

¶ 10 The Justice of the Peace hearing the application found as a fact from what he had heard that the defendant was more nervous of the fact that he might be facing a lawsuit, "as opposed to this."

¶ 11 The Justice of the Peace then indicated that, "As far as his memory goes, well, we will have to take -- the Court will have to take that into account." He further stated, "Mr. Dhanota does not have to testify. He is not required to testify. He can if he wishes. But it is not a requirement that he testify. So in as far as his memory goes, the Court will take that into account and consider what has happened."

¶ 12 The Justice of the Peace further elaborates in his reasons to indicate because the defendant asserted that he forgot the incident would be no reason to dismiss the charge or stay the charge.

¶ 13 It is of note that the application was brought by the agent pursuant to s. 11(b) of the Charter. At no time was there an application or argument with relation to s. 7 of the Charter and the right to prepare full answer and defence. Nor was it ever asserted during the course of the trial which followed that there was an intention to have Mr. Dhanota give evidence and that the passage of time had impaired his memory to the extent that he was unable to give instructions.

¶ 14 Following the s. 11(b) ruling and another procedural ruling, the trial was held. After the Crown called witnesses, Mr. Walia brought a motion for a non-suit.

¶ 15 When the Justice of the Peace made his ruling with respect to that, Mr. Walia elected on behalf of Mr. Dhanota to decline to call evidence. That was clarified by the Court and re-asserted as a decision to elect to call no defence with the submission that there was a reasonable doubt. It was submitted that the grounds for the defence, "the only submissions" as Mr. Walia called it, were with respect to the weight to be given to the evidence and whether or not a reasonable doubt was raised. There was nothing asserted at any time with regard to an inability to call a defence, merely an election or a tactical decision to decline to call a defence.

¶ 16 The Justice of the Peace in the Charter ruling refers to case law, namely, the Supreme Court of Canada decision in R. v. Morin (1992), 71 C.C.C. (3d) 1. He weighs the factors in accordance with R. v. Morin. In his brief reasons, His Worship refers to the liberty of the individual which he says has not been denied, that there was no custody. The security of the person, he indicates, is not at issue under the facts that were put before him. The concern was a possible lawsuit.

¶ 17 There was an evidentiary basis upon which the Justice of the Peace could find that there was no actual prejudice in the sense that the absence of memory which was asserted by the defendant and which was the subject of cross-examination was asserted to be present from the outset, as opposed to being due to the passage of time, that is, by anxiety or medical condition or otherwise, the defendant claimed to have no memory of the incident and that the fact that the matter took place in December rather than in May was not a contributing factor to the loss of memory.

¶ 18 Thus, there was a reasonable factual basis upon which the Justice of the Peace could make findings on the contested evidence which, when balanced will all of the factors as outlined in R. v. Morin, the Justice of the Peace was entitled to come to the discretionary conclusion that under the circumstances of this particular case

that the right to trial within a reasonable time had not been infringed. As such, there was a reasonable basis for the legal ruling that was made by the Justice of the Peace, which the Appellate Court ought not to interfere with.

¶ 19 The second appeal issue raised in this case is that of personal service. Mr. Dhanota received on the date of the incident in question, namely November 13th 1999, a Part One Certificate of Offence delivered by Constable Brown. The Certificate of Offence certifies on the face of it by the officer that he served the offence notice personally upon the person charged on the offence date. It was argued at trial and on appeal that the circumstances surrounding the delivery of documentation at the hospital on the night in question does not amount to personal service.

¶ 20 Again, the Justice of the Peace heard evidence on the issue. The evidence consisted of three parties: Mr. Dhanota, his wife, and the officer. Mr. Dhanota indicated as follows:

> "Q. Mr. Dhanota, do you remember getting this ticket that we are here for today in the court?
>
> A. Yes. I got it.
>
> Q. Okay. And do you remember it?
> A. No.
> Q. Okay.
> A. Ticket was not personally handed over to me. It was handed over to my wife. Somebody brought it to the hospital and showed it to me, the ticket."

¶ 21 Mr. Dhanota's wife testified that she was not present when any issue of service took place, and that she arrived at the hospital at 2:45 a.m. -- this would be November 14th of 1999 -- because his son had called, that the police officer had already gone. She indicated that she found the ticket that had been written for her husband's name on the small table beside the bed "in emergency cabinet." She was asked what she did with the ticket. She said, "I take it and come to home."

¶ 22 Officer Brown testified on the issue. He indicated that he spoke to Mr. Dhanota briefly at the scene of the accident and after the accident when Mr. Dhanota was transferred to Peel Memorial Hospital by ambulance, he did attend the hospital and speak to him briefly there. The transcript discloses as follows:

> "Q. And did you at that point told him that he is being charged, and did you serve the ticket to Mr. Dhanota at that time?
> A. Yes, sir. I showed Mr. Dhanota the ticket. He was laying -- he was actually laying on his back in the hospital on a backboard. My recollection of Mr. Dhanota is he had a similar-coloured turban on his head. I believe he was complaining of some type of chest injury, from what I can recall.
> Q. And Officer, where was the ticket left at the time when you left the hospital?
> A. I explained it to Mr. Dhanota when he was laying on the stretcher on the backboard. I advised him what the charge was, advised him he had the right to contest it. The normal explanations that we give when we issue ..."

¶ 23 At which point, the interpreter interrupted. And following that exchange:

> "A. Explained to him the normal process of the -- how to deal with the ticket as a defendant. And after I was done explaining it for Mr. Dhanota, out of respect for him, I left the document with his wife.
>
> Q. Are you stating, Officer, that his wife was there at the time, are telling ....
> A. Well, there was a lady there, sir, that I assumed it was his wife. She was identifying herself as a family member.

Q. So the time when you were there and you wrote the ticket and you left the ticket there, you gave it to the person who was there at the time?
A. Yes, sir.
Q. And you did not serve it to the defendant? You gave it to the person who was the lady at that time -- was then served to her?
A. My assumption was that explaining it to Mr. Dhanota was service. I explained to him that he was charged with the offence. I held the ticket up, showed him the ticket, and again advised him of the charge, explained the process and I advised that I would leave the document with the family member. I wasn't just going to stuff it in his pocket or just lay it on the stretcher.
Q. At any point, did Mr. Dhanota receive the ticket from you?
A. I did not hand it to him personally, no.
Q. Thank you. And you said the ticket was then given to the person or a lady who was there presumably -- could be a wife -- but it was a lady to whom you had given it to?
A. Yes. I was advised it was a family member."

¶ 24 The officer was then asked the time at which he served the offence notice. And he indicated approximately 23:55, which would be 11:55 p.m. on the same date of the offence.

¶ 25 It is clear from the evidence that was before the Justice of the Peace that the officer had provided the ticket to someone other than Mrs. Dhanota. The argument was made by Mr. Walia as agent, pursuant to s. 3(5) of the Provincial Offences Act that what had occurred under the circumstances did not amount to personal service "Because," Mr. Walia said, "the officer did not touch Mr. Dhanota as service."

¶ 26 The Justice of the Peace clarified with Mr. Walia what it was that he was arguing and he indicated that, "Personal service was the only argument." This is at page 27 of the transcript.

¶ 27 After full argument, the Justice of the Peace denied the motion, indicated that service had to be accomplished and it was accomplished. He found in the circumstances that the gentleman was in a hospital lying on a bed going to have an x-ray because he has been involved in an accident, and that the officer testified that rather than stuffing the thing in his pocket or under his belt or something like that, that he explained it to him, told him what he could do and gave it to a person he perceived to be a family member. The Justice of the Peace found under the circumstances that that was service.

¶ 28 The Justice of the Peace analogized to other cases in which people have been ticketed by policemen and refused to accept the ticket and the policeman ends up tossing the certificate of offence into the vehicle or placing it under a windshield, which was also service. The Justice of the Peace found in the circumstances that service was accomplished because the officer went to the hospital, that he testified that he spoke to the man, explained the circumstances as to what happened and what he was doing and then, rather than place the certificate of offence in his pocket or wherever because the man appeared to be injured, he gave it to a person who he perceived to be a family member. Ultimately, the Justice of the Peace indicated that he was satisfied that service had been properly accomplished.

¶ 29 Mr. Parker, on behalf of Mr. Dhanota on appeal, argues that His Worship failed to follow the principal of stare decisis in that there was a previous decision by Judge Douglas, as he then was, in the Provincial Offence Act Appeal of James Canning heard on October 13th 1995, which Mr. Parker asserts is determinative of this issue as he says, the facts are on all fours with the facts in this particular case.

¶ 30 The Canning decision was argued by Mr. Walia at trial to the Justice of the Peace. There were further discussions between all parties to the litigation and the Justice of the Peace of "other decisions" which were on this point, including a decision of the Superior Court of Justice, R. v. Salim, [2000] O.J. No. 507, which was decided in the Superior Court on February 18th 2000.

¶ 31 His Worship indicated that he was relying on Superior Court decisions, that it was the name that he was trying to recall, that is Salim. He reiterated that his decision was that service was proper under the

circumstances.

¶ 32 The James Canning decision is difficult to discern the facts, as there is merely the dialogue between His Honour and the prosecutor and the agent on the appeal and no factum or anything to disclose the entirety of the facts in Canning. But from what can be gleaned from the report (the decision is an unreported case), although Ms. Hamilton asserted that there was proper service and that there had been certain discussions in pretrial conference, that His Honour found that on the transcript which was the record of the proceeding, the officer in that case served the father as opposed to the defendant, as the defendant was injured and lying on a stretcher somewhere, according to the transcript, "through a door or two", that the defendant did not witness the officer serve the father and that the father did not say at the time in front of the defendant, "I am accepting this summons on behalf of my son."

¶ 33 So that factually, on the Canning decision, it appears that the service was remote geographically and temporally from the person being served.

¶ 34 It is apparent that Justice Douglas left open the possibility that certain factual scenarios may justify an argument made by the prosecutor that personal service had been affected in that His Honour says, following his recitation of the facts in Canning, to the effect that had service been witnessed by the defendant in his presence and the father accepted it or said some words to that effect, "I would have the jurisdiction to do what you have asked me to do, but at least it would be a stronger case for you, I think, to make the argument." Ultimately it appears that His Honour found that on the record, the defendant was not properly served, and thus the prosecutor's appeal was dismissed.

¶ 35 The decision that was inferentially referred to by the Justice of the Peace of the Superior Court of R. v. Salim et al. involved a different technicality being argued on appeal. However, Mr. Justice McKinnon in the Superior Court of Justice indicates as follows:

> "Appellate case law requires Provincial Offences Courts to look at substance and not at procedural irregularities in its adjudication. The overall philosophy is to ensure that technical objections do not impede an impartial verdict on the merit. The transcript in all four cases shows no evidence of any prejudice to any of the respondents because of the issuing officer's failure to check off the service box."

¶ 36 The Justice of the Peace, in giving reasons on the service issue, refers inferentially to this underlying philosophy.

¶ 37 It is also clear in s. 2 of the Provincial Offences Act that the purpose of the Act is to replace the summary conviction procedure for the prosecution of provincial offences including the provisions adopted by reference to the Criminal Code of Canada with a procedure that reflects a distinction between provincial offences and criminal offences but allows in s. 2(2) to have as an aid to interpretation, judicial interpretation of and practices under corresponding provisions of the Criminal Code.

¶ 38 Leaving aside the issue of whether or not personal service was affected for the time being, the appellant fails on the issue of alleging that the Justice of the Peace did not follow the principal of stare decisis in that Canning is a distinguishable case upon its facts and that it appears that there were decisions which inferentially did not adopt philosophy in Canning by the Superior Court of Justice of which the Justice of the Peace would be bound.

¶ 39 For the purpose of the hearing of this appeal, I must go on to consider whether or not under the circumstances the Justice of the Peace was correct in law in making the determination that personal service had been affected.

¶ 40 The Justice of the Peace was entitled to accept the evidence of the officer on service, which would establish that subjectively the officer believed that personal service had been accomplished. It is apparent from

the record that the Justice of the Peace did accept that evidence and found that personal service had been affected.

¶ 41 The issue of personal service is not a subjective one alone. Merely because an officer subjectively believes that he has complied with personal service is not sufficient. There must be an objective basis to that subjective belief. The issue of what constitutes personal service is an issue of law.

¶ 42 Personal service is not defined in the Provincial Offences Act. It does not appear to be defined in any provincial regulations. Section 2 of The Act allows for an aid to interpretation, by analogy, a judicial interpretation of practices corresponding to the Criminal Code. Personal service is defined in Black's Law Dictionary as being made by, "delivering it to the person named in person or handing him a copy and informing him of the nature and terms of the original." Personal service is to be distinguished from substitutional service or constructive service which is defined by the Criminal Code of Canada and allows for the service upon a person that is over the age of adulthood at a usual place of abode.

¶ 43 That is not being argued in this particular case.

The Crown relies here upon personal service. Another definition for personal service comes in the Rules of Criminal Proceedings in the Ontario Court of Justice. Rule 5 of The Rules relates to the service of documents. Personal service in rule 5.02(1)(a) states:

> "Where a document is to be served personally, the service shall be made on an individual by leaving a copy of the document with the individual."

¶ 44 In the case at bar, Mr. Parker argues that the officer had alternatives open to him. Namely, he could have affected personal service by leaving the document on the person of Mr. Dhanota on the stretcher either by placing it in a pocket or by leaving it on the stretcher. Or, he could have served the document personally within 30 days of the offence in person. Or, he could have proceeded within a six-month period pursuant to Part Three of the Provincial Offences Act and affected service as in accordance with Part Three.

¶ 45 The fact that options are available to the officer is not determinative as to the reasonableness of the officer's actions, so long as it is in compliance with statute. One might argue in the circumstances of this case that the actions of the officer here in explaining the ticket, showing the ticket, and explaining how to defend such a ticket were more respectful of the rights and understanding of the individual than a re-attendance at some later point by a uniformed officer at the place of residence or workplace of the defendant.

¶ 46 However, the balance of convenience argument is not acceptable in and of itself. If service in this particular case was not personal service, then whether or not it was more convenient to do it that night at the hospital as opposed to somewhere else would not cure an otherwise improper service.

¶ 47 What is the purpose of service? Service is made by the Provincial Offences Officer in order to make the recipient aware of the charge, to inform the recipient of the nature of the charge and the options that are available to the recipient in order that he or she might prepare a defence to the charges or determine that they wish to file for a trial date or determine that they wish to make an appointment with the prosecutor or any number of options that are available to a party charged under a Part One certificate. In this particular case, the officer's evidence, which was clearly accepted by the Justice of the Peace, addressed all of these concerns.

¶ 48 There was no evidence as to a loss of consciousness on the part of the defendant or any medical condition which would inhibit his understanding of what was being explained to him at that time. It is clear on the defendant's own evidence on the motion that the ticket was shown to him and explained to him.

¶ 49 Is there any prejudice to the defendant in this case? The Superior Court in R. v. Salim refers to whether or not there was any evidence of any prejudice to a respondent because of an officer's failure to check off a box. Parenthetically in this case, was there any prejudice affected upon the appellant by leaving the ticket, shown to the defendant and explained to him, with a family member at his bedside?

¶ 50 The officer in his evidence refers to his action as being out of respect for the defendant. In addition, there is a practical aspect in that, had the officer thrown or placed the ticket on top of the stretcher which was on its way to x-ray, the likelihood of that piece of paper being lost was higher than safekeeping it to the family member that was standing right there when the ticket was explained. And thus, the officer in effect ensures that the ticket will then be available in writing for the appellant to look at and take whatever actions they see fit to do when they are feeling better.

¶ 51 Did the actions of the officer in this case compromise the appellant's ability to prepare a defence? Nothing on the record before the Trial Court establishes any connection with the preparation of a defence in the manner of service. In fact, in this particular case, the defence chose to call no evidence.

¶ 52 The respondent prosecutor in this case also draws the Court's attention to an endorsement of the Ontario Court of Appeal in the case of R. v. Marshall Golden, [1989] O.J. No. 2732, an endorsement of January 20th 1989. The Court of Appeal was considering a different aspect of s. 3 of the Provincial Offences Act in that particular appeal, as at that particular time, it was part of the legislation that the officer was to request that the certificate of offence be signed by the person charged.

¶ 53 At the Provincial Offences Appeal Court, Judge Montgomery, as he then was, found that there was no prejudice or misleading by the officer failing to request that he sign the certificate of offence. In lengthy reasons given, Judge Montgomery refers to a number of cases and the philosophy behind the drafting of the Provincial Offences Act in suggesting that these are offences which are intended to establish a speedy, efficient and convenient method dealing with offences under the Act of the Legislature or regulations and that the Provincial Offences Act and the notices served thereunder are not intended as a trap for "those who are unskilled and unwary, but rather as an inexpensive and efficient way of dealing with, for the most part, minor-type offences."

¶ 54 All of the reasons of Judge Montgomery were before the Court of Appeal in R. v. Golden. The endorsement is brief. It appears that our Appellate Court indicated that there was a breach of the section when the officer failed to ask the appellant to sign the notice. However, the appellant was served with notice. He appeared before the trial court, and so the Court had jurisdiction. The appeal failed, and was remitted to trial court for trial.

¶ 55 The Crown argued at trial and on appeal that an attornment to jurisdiction cures any defect that might otherwise be apparent with regards to service. When pressed, however, in a hypothetical situation it is conceded by the prosecutor that in the event that there was no personal service, that is, that on a hearing on a motion where evidence to the contrary was brought and accepted to rebut personal service, that attornment would not cure an otherwise inadequate service.

¶ 56 It is clear in this case that the defendant received the document on the night in question via his family member and via explanation and that three hours later, when his wife came to the hospital, the document was still there on the table beside him and that it was taken by her and given to her husband.

¶ 57 Further, the appellant herein did file a Notice of Intention to appear at trial with the certificate number on it, and appeared for his trial having retained and instructed an agent.

¶ 58 On the facts before the Justice of the Peace, the police officer explained the ticket in full to the appellant. There was nothing in the evidence which indicated a haste or a subjective belief of any inconvenience which would establish that the officer was taking a shortcut that he was not entitled to do. He subjectively felt it was service because of what he had done, namely explained the offence notice, explained the charge, explained the options and given it to a family member in the presence of the appellant.

¶ 59 Under the circumstances of this case, the Justice of the Peace was entitled to find that the actions of Constable Brown constituted personal service. The document was, in accordance with Black's Law Dictionary's definition, explained, in that the nature of it was imparted to the appellant and that the original was present. As personal service is defined in this Court in the Rules of Criminal Proceedings, personal service was affected by leaving a copy of the document with the individual.

¶ 60 In these circumstances in which it can reasonably be brought to the attention of the individual and safeguarded for future consideration, I am then satisfied that the Justice of the Peace did not err in finding that personal service was affected on the facts as he found them at trial in this case. There being no appeal as to the merits or the substance of the trial proceeding, the appeal will be dismissed.

¶ 61 I would like to thank both Mr. Brencis and Mr. Parker for a very thorough argument.

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