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R. v. Germanis

Between
Her Majesty the Queen, respondent, and
William Germanis, appellant

[2001] O.J. No. 3225

Ontario Court of Justice
Newmarket, Ontario
Lampkin J.

Oral judgment: July 12, 2001.
(23 paras.)

For previous proceedings, see [2001] O.J. No. 2935 (Ont. C.J.), per Justice Vibert A. Lampkin.

Charge: O. Reg. 340/94 sub. 6(l), para I — Highway Traffic Act — Class G2 licence holder drive when blood alcohol concentration above zero

Statutes and Regulations cited:

Canada Evidence Act, R.S.C. 1985, c. C.5, sections 24, 25 and 26.
Evidence Act, R.S.O. 1990, c. E.23, sections 25, 26, 28, 29, 31 and 32.
Highway Traffic Act, R.S.O. 1980, c. 400, subsection 184(3).
Highway Traffic Act, R.S.O. 1990, c. H.8, subsection 210(7).

Cases cited:

Ford v. Hopkins (1700), 1 Salk. 263, 91 E.R. 250.
Kajala v. Noble (1982), 75 Cr. App. Rep. 149, [1982] Crim. L.R. 433 (Q.B. Div.).
R. v. 2934752 Canada Inc. (carrying on business as Highland Transport), [1997] O.J. No. 6308 (Ont. Prov. Div.).
R. v. B. (K.G.), [1993] 1 S.C.R. 740, 148 N.R. 241, 61 O.A.C. 1, 79 C.C.C. (3d) 257, 19 C.R. (4th) 1, [1993] S.C.J. No. 22.
Re Brown and the Queen (1975), 11 O.R. (2d) 7, 64 D.L.R. (3d) 605, 30 C.C.C. (2d) 300 (Ont. H.C.).
R. v. Colavita Construction Ltd., [1993] O.J. No. 4484 (Ont. Prov. Div.).
R. v. Khan, [1990] 2 S.C.R. 531, 113 N.R. 53, 41 O.A.C. 353, 59 C.C.C. (3d) 92, 79 C.R. (3d) 1, [1990] S.C.J. No. 81.
R. v. Triumbari (1988), 29 O.A.C. 326, 43 C.R.R. 379, 42 C.C.C. (3d) 481, 8 M.V.R. (2d) 1, [1988] O.J. No. 1043 (Ont. C.A.).

Authors and Works cited:

Cross, Sir Rupert: Evidence, 2nd ed. (London: Butterworths, 1963)
Phipson on Evidence, 13th ed. by John Huxley Buzzard (London: Sweet & Maxwell, 1982).

Counsel:

L. Angus for Mark A.J. McDonnell, for the Crown.
Malcolm Higgins, for the defendant.

¶ 1 **LAMPKIN J.** (orally):— On 14 November 2000, the appellant was found guilty of operating a motor vehicle on 6 May 2000 as the holder of a G2 Licence while his blood alcohol was above zero.

1: FACTUAL BACKGROUND

¶ 2 On 6 May 2000, Police Constable Kirkos stopped a motor vehicle being operated by the appellant because the vehicle displayed no front licence plate. The officer requested production of his driver's licence permit and valid proof of insurance for the motor vehicle.

¶ 3 The appellant produced a valid Ontario driver's licence in his name. The officer was satisfied with the identification provided to him.

¶ 4 The officer noted the odour of an alcoholic beverage emanating from the area of the appellant's mouth and further that his eyes were glassy.

¶ 5 The officer made a demand that the appellant provide a sample of breath into an Alcotest 7410 GLC, an approved screening device for detecting the presence of alcohol in the blood of a person. The result of the sample showed that the appellant did have alcohol in his blood.

¶ 6 The officer issued a 12-hour suspension of the appellant's driver's licence and charged him with four offenses under the Highway Traffic Act, R.S.O. 1990, c. H-8, one of them being that he was operating the motor vehicle having a class G2 licence while having alcohol in his blood.

¶ 7 At trial, the officer testified that the appellant produced to him a class G2 licence. The appellant's representative objected to this evidence being given on the ground that it was hearsay as the officer was merely reciting from his notes what he had purportedly read off of the licence. The licence itself was not produced. Neither was a photocopy thereof produced. Nor was a certified copy thereof produced. The objection was overruled. At the close of the Crown's case, a motion for non-suit on behalf of the appellant was dismissed. The appellant did not testify but proposed to call another police officer to testify that documents under the seal of the Registrar of Motor Vehicles could have been obtained from the Ministry pertaining to the class of the appellant's licence. The Crown conceded that was indeed so. It is the position of the appellant that the officer's testimony pertaining to the class of licence taken off of the document produced to him was inadmissible as hearsay evidence because the document was not produced in court and further that the officer's oral evidence offended the best evidence rule.

¶ 8 Counsel for the respondent submits that Constable Kirkos did not have any lawful authority to seize

the licence nor did he have lawful authority to remove it temporarily to make a photocopy at the police station. Counsel submits further the officer's testimony of the appellant's class of licence was the best evidence available for the trial.

¶ 9 The appellant relies on R. v. Colavita Construction Ltd., [1993] O.J. No. 4484 (Ont. Prov. Div.), an unreported judgment of Provincial Judge Hugh K. Atwood, released on 10 September 1993. In that case, the defendant was convicted at an ex parte trial of operating a motor vehicle where the gross weight exceeded that for which the permit had been issued. The particulars of the permitted gross weight and proof of ownership were taken from the registration permit of the tractor in the possession of the driver. No certified copies of documents from the Ministry of Transportation were filed in proof of the permitted gross weight or ownership. On appeal, the conviction was set aside and a new trial ordered. The learned judge held that the viva voce evidence of the Ministry officer who had stopped the truck and caused it to be weighed was hearsay in so far as proof of ownership and permitted weight were concerned and the evidence was inadmissible for its truth.

¶ 10 Further reliance is placed on R. v. 2934752 Canada Inc. (carrying on business as Highland Transport), [1997] O.J. No. 6308 (Ont. Prov. Div.), an unreported judgment of Provincial Judge Rommel G. Masse, released on 20 May 1997. In this case, upon request, the driver of a tractor-trailer produced his driver's licence and documents purporting to show that the registered owner of the vehicle was the defendant numbered corporation. The officer examined the documents and made notes of the particulars. The vehicle was found to be overweight for its particular axle configuration. At trial, the officer did not produce any Ministry records regarding the registration of the vehicle, relying on the notes that he had made of the contents of the documents that had been produced by the driver. The prosecution argued that the observations that the officer had made of the documents were not hearsay and were admissible for the truth thereof. The learned justice of the peace ruled that the evidence was inadmissible and dismissed the charges. The appeal was dismissed. Inter alia, Judge Masse relied on R. v. Colavita, supra, and ruled that it was incumbent on the Ministry to prove the existence of documents in its possession by the production of copies certified by the Registrar of Motor Vehicles.

¶ 11 Counsel for the respondent submits that R. v. Highland Transport, supra, is distinguishable from the case at bar in that the corporation was charged pursuant to information provided by the driver of the motor vehicle who was not the owner whereas, in the case at bar, the appellant surrendered his own documents to the investigating officer. The respondent relies, inter alia, on Re Brown and the Queen (1975), 11 O.R. (2d) 7, 64 D.L.R. (3d) 605, 30 C.C.C. (2d) 300 (Ont. H.C.). In that case, Mr. Brown was charged with speeding and failing to produce a driver's licence. He verbally identified himself and gave his address as 40 High Park Avenue, apartment 1209, Toronto, and produced an ownership permit substantiating his identification. No one appeared on his behalf at trial and the trial proceeded ex parte. He was convicted. On an application to quash the conviction, Justice John Morden, as he then was, held that a reasonable inference could be drawn from Mr. Brown's answer to the officer, coupled with the production of the ownership permit relating to the car being driven that Mr. Brown, at the address furnished by him, was the driver of the vehicle. Mr. Brown argued that the evidence should have gone further and should have included information from the records of the Registrar of Motor Vehicles to the effect that Donald A. Brown lived at 40 High Park Avenue, Toronto. Justice Morden ruled that, if the submission was relevant, it went to weight rather than to admissibility.

¶ 12 In R. v. Highland Transport, supra, Judge Masse distinguished Re Brown and the Queen on the ground that the driver had made admissions against his penal interest that were buttressed by the documents in his possession.

¶ 13 The respondent also refers to R. v. Triumbari (1988), 29 O.A.C. 326, 43 C.R.R. 379, 42 C.C.C. (3d) 481, 8 M.V.R. (2d) 1, [1988] O.J. No. 1043 (Ont. C.A.). In that case, the defendant was convicted of the offence of driving while his licence to drive was under suspension. Inter alia, the prosecution tendered as part of its evidence a certificate of suspension under the seal of the Ministry of Transportation and Communication and the printed signature of the Registrar of Motor Vehicles under subsection 184(3) of the Highway Traffic Act, R.S.O. 1980, c. 400. The Ontario Court of Appeal held that the document was prima facie evidence of its contents. Speaking for the court, Appeals Justice Houlden said that "if the information on the certificate was challenged, it would require an examination of the records, not of the clerk who prepared the certificate". Counsel for the respondent submits that, similarly, if the appellant's driver's licence were to have been endorsed incorrectly, a certificate would also be in error requiring a further examination of the Ministry's records. And further that, if the constable had erroneously noted down the class of licence, the issue could be challenged merely by the production of the Ministry document that was in the possession of the appellant. It is to be noted that, at the very least, R. v. Triumbari, the prosecution tendered a certificate of suspension under the seal of the Ministry of Transportation and Communications and the printed signature of the Registrar of Motor Vehicles. The prosecution did not rely on notes that the officer had made of the notice of suspension. A certificate of suspension under the seal of the Ministry of Transportation and Communications authenticated by the printed signature of the Registrar of Motor Vehicles was tendered in evidence.

¶ 14 The appellant relies on the maxim that "the best evidence must be given on which the nature of the case permits". It is a rule that first appeared in 1700 in the English case of Ford v. Hopkins (1700), 1 Salk. 263, 91 E.R. 250, and was regarded as the great fundamental principle upon which the law of evidence depended. In Kajala v. Noble (1982), 75 Cr. App. Rep. 149, [1982] Crim. L. R. 433 (Q.B. Div.), the English Divisional Court described the rule as having gone by the board long ago.

¶ 15 Phipson on Evidence, 13th ed. by John Huxley Buzzard (London: Sweet & Maxwell, 1982) at paragraph [5-06] states that (emphasis in original text):

> the chief illustration of the "best evidence" maxim has always been found in the rule which demands that the contents of documents must, in the absence of legal excuse, be proved by primary and not by secondary or substitutional evidence.

¶ 16 Sir Rupert Cross in Evidence, 2nd ed. (London: Butterworths, 1963), stated at page 12:

> It is sometimes said that all that is left of the best evidence rule is the requirement that the original of a private document must be produced in order to prove its contents unless its absence can be explained.

¶ 17 The rule has been completely gutted with respect to public documents. Various statutes provide for the admission of certified copies of public records or extracts therefrom into evidence. See, for example, sections 24, 25 and 26 of the Canada Evidence Act, R.S.C. 1985, c. C.5; sections 25, 26, 28, 29, 31 and 32 of the Ontario Evidence Act, R.S.O. 1990, c. E.23; and subsection 210(7) of the Highway Traffic Act of Ontario.

¶ 18 There is an unbroken rule that runs throughout the history of Anglo-Canadian criminal and quasi-criminal law that the prosecution has the burden of proving every element of the offence alleged against a defendant. The defendant is not required to assist the prosecution in its case against him. He can sit back and say: "You have alleged that I have committed an offence, then prove it." And that proof must be by evidence

that is legally admissible.

¶ 19 The rules of hearsay evidence have been somewhat relaxed in recent years and there is now a principled approach to its admissibility. Where original direct evidence is not available, hearsay evidence is admissible where it is necessary and reliable. The tendered evidence must meet a certain threshold of reliability for its admissibility. R. v. Khan, [1990] 2 S.C.R. 531, 113 N.R. 53, 41 O.A.C. 353, 59 C.C.C. (3d) 92, 79 C.R. (3d) 1, [1990] S.C.J. No. 81; R. v. K.G.B., [1993] 1 S.C.R. 740, 148 N.R. 241, 61 O.A.C. 1, 79 C.C.C. (3d) 257, 19 C.R. (4th) 1, [1993] S.C.J. No. 22.

¶ 20 There is no doubt that the evidence of the constable pertaining to the contents of the licence is hearsay evidence. He testified from memory and the notes that he made.

¶ 21 His evidence does not fit into any of the pigeon-holes of the old common law exceptions to the hearsay rule:

(a) admissions and confessions;
(b) statements by deceased persons;
(c) reputation; and
(d) statements admitted as part of the res gestae.

¶ 22 Nor does his viva voce evidence satisfy the requirement of necessity in the sense contemplated by the new jurisprudence. It is common ground that the Ministry of Transportation and Communications is required by law to keep records of permits of persons licensed to drive in the Province of Ontario and of the restrictions and classes of drivers' licences. Subsection 210(7) of the Highway Traffic Act permits the proof of the contents of those documents in court by tendering certified copies thereof. While that is not the only method of proving the contents of the permit or licence, the viva voce evidence of the officer in proof thereof is hearsay and not admissible for its truth. It is not a question of challenging the accuracy of the officer's evidence given by consulting his notes. It is putting the prosecution to the strict proof of all elements of the offence. The necessity requirement is simply not fulfilled.

¶ 23 In the circumstances, the appeal is allowed, the conviction set aside and an acquittal entered.

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