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# R. v. Goldenberg

Between
Her Majesty the Queen, respondent, and
Sydney L. Goldenberg, appellant

[1997] O.J. No. 3353
Doc. 23622749

**Ontario Court of Justice (Provincial Division)**
**Central East Region**
**Libman Prov. J.**

August 18, 1997.
(3 pp.)

*Criminal law — Procedure — Trial judge, duties and functions of — Respecting cross-examination of witnesses — Respecting evidence.*

Appeal by the accused from conviction for failing to drive in a marked line. A police officer had received a complaint about an erratic driver. The officer then set up his cruiser to observe the accused's driving. The accused made several lane changes without signalling and made weaving actions within and outside marked lanes. The accused testified that he was tired while driving home from the cottage. During his cross-examination, the accused objected to being cross-examined about the officer's specific purpose for being at the scene. The accused also complained about not being given an opportunity to explain his reasons for continuing to drive even though he was tired. The trial judge commented on his tired condition in her reasons and drew an adverse inference from the fact that the accused did not have his wife drive.

**HELD:** Appeal allowed. A new trial was ordered. It was improper for the accused to have been cross-examined on the officer's special purpose in being at the scene. The officer's observations, not the information received by him in the complaint, were at issue. The trial judge also erred in treating the appellant's comments respecting his tiredness as evidence rather than as part of his submissions. The trial judge's finding that the accused left the lanes without ascertaining that such movement could be made in safety, and her relating this finding to the times when the accused did not change lanes but weaved outside the lanes were contradictory or ambiguous. This inconsistency must be resolved in favour of the accused.

**Statutes, Regulations and Rules Cited:**

Highway Traffic Act, s. 154(i)(a), 154(1)(a). Provincial Offences Act, s. 135, 138(1).

**Counsel:**

Sydney L. Goldenberg appearing in person.
J. Barrett, for the respondent.

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¶ 1 **LIBMAN PROV. J.** (endorsement):— This is an appeal under the Provincial Offences Act following the appellant's conviction for failing to drive in a marked lane contrary to s. 154(i)(a) of the Highway Traffic Act. The offence was alleged to have taken place, according to the certificate of offence, on 6 October 1996 at 8:20 p.m., at Highway 400, southbound, near Innisfil Beach Road in the Town of Innisfil.

¶ 2 A review of the record persuades me that the unsatisfactory nature of these proceedings mandates that the appellant's conviction must be set aside and a new trial ordered. As a result, I propose to comment very little on the evidence.

¶ 3 Suffice it to say; the Crown presented a prima facie case that the appellant drove his motor vehicle in a manner that falls within the ambit of s. 154(1)(a). The arresting Officer, Constable Hobson, observed numerous "weaving" actions within and outside the marked lane in which the appellant was driving, as well as lane changes without signalling. One such lane change forced another vehicle to slow down and take evasive action. The justice held, correctly, that the burden of proof beyond a reasonable doubt was on the Crown but that this was a strict liability offence, thereby requiring the appellant to establish "that he did what a reasonable person would do faced with the circumstances".

¶ 4 In examination in chief Constable Hobson testified that he set up his cruiser to observe a vehicle that was being driven in an "erratic manner", possibly an "impaired driver". No objection was taken to this evidence. Indeed, it formed part of the narrative. Moreover, the appellant brought out in cross-examination that the officer subsequently satisfied himself, after stopping his vehicle, that he was not impaired.

¶ 5 The appellant testified in his own defence. He stated that he was tired while driving home with his wife from his cottage that evening. However, during cross-examination the provincial prosecutor referred him to the officer's evidence that he was there for "a specific purpose". He then asked the appellant what the purpose was. Mr. Goldenberg objected to this question as being improper and hearsay. The provincial prosecutor then suggested that the officer had received a complaint about an erratic driver and mentioned this to the appellant upon stopping him. The justice of the peace ruled that the fact of the complaint was properly before the court.

¶ 6 While properly part of the narrative of the officer's evidence, it was improper for the appellant to have been cross-examined on this point. The issue for determination was whether the officer's observations, not information received, founded the offence. The justice of the peace did not subsequently refer to this evidence in her reasons for judgment. While this item of evidence might not, alone, be sufficient for interfering with the finding of guilt, it contributes, in my view, to a lingering sense of unfairness on the part of the appellant as to the justice's assessment of the evidence, including his credibility.

¶ 7 In her reasons for judgment, the learned justice commented on the appellant's tired condition. She proceeded to draw an adverse inference against the appellant on the basis that he had not seen fit to have his wife drive the car as this was what a prudent person would have done in the circumstances. The issue of the appellant's wife taking over the driving arose only in the course of the appellant's submissions. When the justice made this observation Mr. Goldenberg complained that he had not had an opportunity to explain his reasons to the court for continuing to drive. This complaint, in my opinion, is well founded. While the appellant may have been the one to raise the issue, it should have been apparent that this was not evidence but part of his submissions, and, treated in such a manner.

¶ 8 Following this reference to the appellant's tired condition, the justice of the peace went on to find that she was satisfied that he "left those lanes [on the highway] and that you did not first ascertain on each occasion that the movement could be made in the safety". This finding of fact, which was available on the evidence, would have grounded the s. 154(1)(a) offence. However, she went on to comment that:

> And by making that finding of fact, I am relating to the times when you were drifting over the white line and not necessarily when you left your lane and changed lanes. I am relating to the times when you were weaving outside your lane ... [emphasis added]

¶ 9 This passage seems to contradict the justice's earlier finding that the movement not in safety occurred when the appellant changed lanes. It is, in my view, at least open to ambiguity, and I must resolve this inconsistency in the reasons in favour of Mr. Goldenberg.

¶ 10 I consider, too, this impugned passage in the context that the justice had earlier referred to a submission, as if it were evidence, respecting the appellant's explanation for driving while in a tired state, as well as the

evidence, not referred to, concerning complaints to the officer about his previous driving.

¶ 11 For these reasons I have concluded that the record is unsatisfactory and that appellate intervention is warranted.

¶ 12 In his Notice of Appeal filed under s. 135 of the Provincial Offences Act, the relief sought by the appellant is that the conviction should be set aside and a verdict of acquittal entered. Mr. Goldenberg also took the position during the course of his submissions that this was the only appropriate disposition. I disagree. It is beyond question that the Crown's evidence gave rise to a case that the appellant was required to meet. Depending upon the view that the trier of fact might take of the evidence adduced in response, the defence afforded to one charged with a strict liability offence may or may not obtain.

¶ 13 Further, I note that the driving said to comprise the offence in question took place on one of the busiest highways in the province on a weekend evening. There were many others using the highway at this time. In my view, this is not a case where there is no longer a societal interest in having an adjudication on the merits.

¶ 14 Pursuant to my jurisdiction as a reviewing court under s. 138(1), I consider that the ends of justice require that I direct a new trial.

¶ 15 Accordingly, the appeal is allowed, the conviction set aside and a new trial ordered.

LIBMAN PROV. J.

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