ONTARIO COURT OF JUSTICE

IN AND FOR THE PROVINCE OF ONTARIO

FLORENCE GOODMAN

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

>>>>>><<<<<<

A P P E A L P R O C E E D I N G S

before THE HONOURABLE MR. JUSTICE P.H. MEGGINSON
held on December 17th, 2003
at KINGSTON, Ontario

>>>>>><<<<<<

Appearances:

T. Brown, Esq. — Agent for the Appellant

A. Ravielli, Ms. — Counsel for the Respondent

ONTARIO COURT OF JUSTICE

IN AND FOR THE PROVINCE OF ONTARIO

T A B L E O F C O N T E N T S

	Page
Submissions by T. Brown	2
Submissions by A. Ravielli	10
Finding by the Court	19

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Regina v. Goodman
POA Appeal
Wednesday 17th December 2003

MS. RAVIELLI: Your Honour, I propose to show you the....
THE COURT: Well, you will have to because, as I say, I never got the time I planned on to read the factums today.

In the matter of an appeal under Part Three of the Provincial Offences Act between Florence Goodman, Appellant, Her Majesty the Queen, Respondent, the Appellant is appealing from a conviction before Her Worship Justice of the Peace C.E. Hickling on the 21st of February 2003 on a charge under section 199(1) of the Highway Traffic Act. All right, it is your appeal then.
MR. BROWN: I'll introduce myself, Your Honour. My name is Todd Brown...
THE COURT: Yes, good morning.
MR. BROWN: ...B-R-O-W-N, first initial T. I appear in the capacity of agent for Ms. Goodman. I'm not counsel. She's aware of my status as agent, not counsel, and I'm here with her instructions and I'm ready to proceed.
THE COURT: All right. I can indicate I have read the entire trial transcript.
MR. BROWN: Oh well, that's certainly very helpful. I didn't actually provide a factum in the true sense to the court, but I did expand on grounds for appeal. They were delivered to the court. Can I enquire, has Your Honour had the opportunity to review the grounds that were set out in the....
THE COURT: Only the grounds set out in the original Notice of Appeal. I was treating your additional document as a factum and I have not read it.
MR. BROWN: I see, okay. Well....
MS. RAVIELLI: That's fine, Your Honour. I think Mr.

Brown's grounds for appeal will be sufficiently addressed by me and you'll know exactly the grounds that I will be putting forward very quickly.

THE COURT: Well, for me, the trial transcript, I know what the issues were before the Justice of the Peace at trial and they appear to be essentially the same here.

MS. RAVIELLI: Yes.

MR. BROWN: They're identical, yes.

THE COURT: All right, go ahead.

MR. BROWN: It's just really a rehashing of the substantive argument advanced at trial.

THE COURT: Yes. Go ahead then.

MR. BROWN: I'm going to be brief, Your Honour. I guess to put it in the simplest of terms, the complaint lodged in this appeal is essentially one that deals with the evidentuary use that ought to be made of what's commonly referred to is in-dock identification.

Just at a cursory look at the facts of the case and how the trial enfolded, it seems that Mrs. Goodman was, of course, the defendant who was before the court during the trial. On behalf of the Crown, Mr. McLelland gave evidence. He was the only civilian witness who gave evidence on behalf of the Crown and there was, of course, evidence from the investigating officer.

Mr. McLelland essentially in-chief indicated that Mrs. Goodman appeared to be the driver of the vehicle. Of course, he was a witness to the collision that had occurred in the parking lot. His evidence was tested under cross-examination and I think it would probably be helpful to direct Your Honour's attention to that actual

portion. It was at page 24, line 9.

On behalf of Mrs. Goodman, I put a question to Mr. McLelland, several actually, under cross-examination. At line 9, I asked, "The evidence that you had offered earlier with regards to the lady to my right being the driver of the motor vehicle, you indicated that it appeared to be the lady sitting right there". His answer was, "That's correct". I asked him to, "Clarify what does appear to be mean". He indicated in his candor that "It was nine months ago" and to the best of his recollection, "It appeared to be the individual".

I further put to Mr. McLelland in the form of a question, "You'd agree with me that to be able to identify someone nine months after an occurrence when you've only had the opportunity to view them for a very short period of time is very difficult to do". He agreed. He answered, "Yes".

I continued, Your Honour, and I asked, "And is there any way that you'd be able to describe to the court just how certain you are or are not"? He answered, "In terms of what? Clarify the question". "In terms of the person sitting to my right as being the person you saw operating the motor vehicle, given it was nine months ago and you viewed her for a very short period of time".

I further put to him, "Are you relatively certain"? His answer, I believe, is relevant to this appeal, "It appears to be. Would I say with one hundred percent certainty? No, I couldn't say that".

THE COURT: Does a witness ever identify with one hundred

percent certainty?

MR. BROWN: Well, it has happened, I suppose.

THE COURT: Yes, rarely.

MR. BROWN: Yes. That being said, the issue that I bring to you is actually one that I fashioned on a number of appellant authorities, such as ***Reitsma***. I believe, a copy was submitted to the court.

Another decision is ***Samuels*** from the Ontario Court General Division in Ottawa, what I thought was remarkably on point and this decision, in my respectful view, set out what use and what weight should be attached to an in-dock identification when that in-dock identification is being offered as substantive proof in the absence of any other proof that the person - I'll say the prisoner's dock in this case, it would have been the defence table - is the person who is alleged to have committed the crime or in this case, the offence.

THE COURT: Well, why do we not just refer to it as an in-court identification. I know the traditional term is dock identification, but that suggests that somebody is sitting in the prisoner's box and well singled out...

MR. BROWN: Yes.

THE COURT: ...which was not the case here.

MR. BROWN: It does. Your Honour interestingly uses the term well singled out. I actually touched on that issue during the trial. It probably would be appropriate to refer Your Honour's attention to that passage. On page 21 of the trial transcript at approximately line 20, I put a series of questions to Mr. McLelland, attempting to uncover just to what degree Mrs. Goodman would have been singled out, I suppose, and not to use too forceful a

term, Your Honour, but I was attempting to discover just how suggestive the identification procedure that was employed may have been. I asked Mr. McLelland, "Did you know that part of your role as a witness in these proceedings would be to identify Mrs. Goodman as the driver of the vehicle"? "I would have assumed that." "And just for clarity, there are no other people in this courtroom who are involved in these proceedings. Is that correct"? Answer, "I would assume not". Question, "Nobody in the body of the court"? Answer, "Pardon me"? "There's nobody in the body of the court". Answer, "No, it's empty".

So, I think ultimately, Your Honour, if we're to take sort of a snapshot of the proceedings, on the evidence, there was nobody else in the courtroom who was really the subject of any type of identification with the exception of Mrs. Goodman, that Mr. McLelland was aware of his role as a witness in this proceeding to the extent that he would be required to identify Mrs. Goodman. She was, of course, seated next to myself at the defence table. She answered to the arraignment, etcetera.

The issue in this appeal, and it's my respectful submission, that the Crown ought to have in one way or another solidified the identity of the accused or the defendant in this case prior to trial, that the courtroom isn't the appropriate place for, what I'll describe, as a rather unsafe ground or testing ground for the civilian witness's ability to identify Mrs. Goodman as the operator of the motor vehicle.

Now, a number of authorities on the point were put to Her Worship at the conclusion of the trial. I don't want to waste your time and go through them all in detail, but I think - I don't know - Your Honour, I guess, hasn't had the opportunity to read this, but I think a passage from ***Reitsma*** is on point and I would like to read that into the record.

THE COURT: I did read the passages from ***Reitsma*** and the other cases which were read in, in argument in the trial and in the transcript.

MR. BROWN: Yes. ***Samuels***, of course, was also cited in the materials that I filed with this appeal.

I think that on the whole of it, Your Honour, the issue really becomes whether or not the Justice of the Peace ought to attach any weight to the evidence of Mr. McLelland with regards to him singling out Mrs. Goodman as the driver of the motor vehicle.

At the end of the day, I think what would have been preferable is the witness, Mr. McLelland, should have been given the opportunity to identify Mrs. Goodman as the driver of the vehicle in a non-suggestive fashion, perhaps with photographs. I'm not suggesting, you know, a line-up for a relatively minor offence such as this would be an efficient use of resources, but at the end of the day, I think that there were....

THE COURT: How would they run a line-up without arresting the defendant?

MR. BROWN: Yes, precisely. I'm aware of that, Your Honour.

THE COURT: It was not a case for arrest.

MR. BROWN: That's right, yes, although it was mentioned in the trial transcript by the investigating officer that he had pondered arresting the defendant for a Criminal Code offence, but that's neither here nor there, I suppose.

If Your Honour's read the trial transcript, something of interest, and the officer made this comment on two occasions, that he didn't actually want to speak to Mrs. Goodman directly because he didn't want to have to take what he described as a caution statement from her. So, it appears on the evidence that the investigating officer had, in fact, the opportunity to speak with Mrs. Goodman. He would have been in a position, should she have conceded to that, to take a statement from her. In fact, if she was the operator of the motor vehicle and there's, of course, a statutory compulsion on her to provide certain information, that tool was available to the investigating officer, but he, on the evidence, actually made a conscious decision not to question her with regards to her being the operator of the motor vehicle.

THE COURT: Well, I suppose, in reality, if he were to interview her in a caution statement, either it would have been done over the telephone, which is somewhat awkward, or he would have had to go to Toronto to interview her or she voluntarily would have had to come to Kingston.

MR. BROWN: Yes, I agree entirely. I don't know if I should go so far as to get into the issue as to whether or not that statement taken over the telephone would be automatically not admissible for one reason or the other but, at least, I think the crown would have been in a far better position to lead proper evidence as to Mrs. Goodman

being the operator of the vehicle or otherwise.

THE COURT: I take your point. Whatever decision was made, the police and the crown have to live with its consequences.

MR. BROWN: That was my point, yes. Should I let my friend respond at this point, Your Honour?

THE COURT: Well, let us have all your argument.

MR. BROWN: All right. That's really the gist of my argument. There are some subtleties that I think are significant.

Now, I embarked on cross-examination of Mr. McLelland. It was probably a little bit odd in that I was attempting to elicit from him what he knew his role to be as a witness for the prosecution. In the course of that cross-examination, there was an objection. Her Worship acceded to my request in having Mr. McLelland step outside of the courtroom while I explained to Her Worship exactly what it was that I was up to. She was, no doubt, a little confused as to why I was questioning Mr. McLelland as to what he recalled from the previous court appearance.

I think at the end of the day, what took place was that I put to Her Worship, in the course of explaining myself and to Mr. McLelland, that he had heard an exchange that took place between Her Worship and I on the November 8th, I guess it was, court appearance. I wanted to know if he was, in fact, in the courtroom when that exchange took place. I put to him that it was to the effect that Mrs. Goodman would be required to attend court for the purposes of an in-court identification.

Now, I don't want to split hairs, but when - if the whole gist of this appeal is really that the identification procedure employed was suggestive, that buttresses that position, if I could use that word, because Mr. McLelland was in court and his intended role in the proceedings was laid out for him in open court. So, you know, at the end of the day when Mr. McLelland returns to court, Mrs. Goodman is there. He had indicated under cross-examination that he was aware, at least in part, that he was going to be required to identify her. And again, in my respectful submission, that goes to the suggestiveness, for lack of a better word, of the in-court identification procedure that was employed.

The description that was put into evidence from Mr. McLelland that he had given to the investigating officer was rather terse. There was a paucity of identifying features. There wasn't....

THE COURT: Elderly, dark-haired lady, five foot two or three.

MR. BROWN: Right, that's correct. There was nothing that leaps out, in my respectful view, that leaps out of that description.

THE COURT: And lo and behold, sitting at the counsel table responding to the charge is an elderly dark-haired lady, five foot two or three.

MR. BROWN: Lo and behold, yes.

THE COURT: Whom we do not even know, by any evidence, was the wife of the owner of the vehicle.

MR. BROWN: Not by any admissible evidence, Your Honour. If Your Honour's satisfied, sufficiently understands my position, I'll...

THE COURT: I understand it, I think.
MR. BROWN: ...be happy to sit down. Thank you.
THE COURT: Yes, Ms. Ravielli.
MS. RAVIELLI: Good morning, Your Honour. With respect to my friend's position, I think it's important to look at this case and understand the grounds of the appeal.

My friend is suggesting that the decision by Justice of the Peace Hickling was unreasonable. The test for an unreasonable verdict, if I may quote from my arguments here, is "whether the verdict is one that a properly instructed jury could reasonably have rendered and this test applies equally to trials by Judge alone", therefore I think it's important to look at all the evidence that was put before Her Worship Hickling.
THE COURT: All the admissible evidence.
MS. RAVIELLI: All the admissible evidence.
THE COURT: Some went in strictly for the narrative...
MS. RAVIELLI: I agree.
THE COURT: ...and that is not admissible.
MS. RAVIELLI: I'm sorry?
THE COURT: I say some was stated to go in strictly for the narrative...
MS. RAVIELLI: Yes, yes.
THE COURT: ...and that, of course, is not admissible evidence for the truth of its contents.
MS. RAVIELLI: No, it's not and I know where you're going with this, Your Honour, and perhaps I can address that right now. I would suggest to you that Her Worship accepted the evidence of Police Constable Dempster of his investigation in terms of she was satisfied that he was satisfied as to who the registered owner of the vehicle

was through his investigation, having been given the licence plate number of the vehicle, making identification through the Ministry of Transportation and then subsequently locating - identifying the registered owner and locating him and calling him, who was Mr. Gordon, in fact.

But, I would suggest to you that through his investigation, Justice Hickling accepted that Police Constable Dempster, at that moment in time, was satisfied with the information given to him, enough so to lay the charge. She did not admit any of the conversation that he had with Mr. Goodman to the truth of the matter, but she did, in her reasons, make specific reference to Police Constable Dempster and simply the process and she gave it the weight that it deserved and I can't specifically say what weight was given to it, but I would suggest that in making reference to it, she accepted the fact that, in and of itself, Police Constable Dempster felt that he had received sufficient information to lay a charge and from that point on, you....

THE COURT: Well, that went to his grounds for laying the charge...

MS. RAVIELLI: Exactly, exactly.

THE COURT: ...but, can the function of deciding of the charge as made out in the evidence be delegated to the charging officer?

MS. RAVIELLI: No, and I'm certainly not putting that forward to you, Your Honour. Ultimately, my argument rests on the fact that the in-dock identification was not the sole piece of evidence or the sole evidentuary foundation for Justice of the Peace Hickling's finding of

guilt. Taking all of the evidence that she spoke to and that was put before her and that was accepted and admitted by the court, putting it all together and looking at the finding of guilt, through the lens of the test as put forward by ***Beniars*** (ph) and many other Supreme Court cases that I didn't feel I should burden the court with, however it's very clear that the appeal court is not to rehash the evidence and I'm not suggesting that you're not aware of this, but simply to point out that her verdict has to be looked through the lens of whether the information and the evidence put before her was sufficient to sustain a finding of guilt.

THE COURT: I agree that it is not for an appeal court to rehash the evidence...

MS. RAVIELLI: No, of course and I just....

THE COURT: ...but surely it is for an appeal court to determine, as a mixed question of fact and law, whether the evidence was sufficient to support the verdict.

MS. RAVIELLI: Well, I would submit that it was, Your Honour, and Police Constable Dempster's evidence is not the only evidence that was accepted by Her Worship in this case.

THE COURT: What else was there that bore on the identification...

MS. RAVIELLI: Well, the identification....

THE COURT: ...except a very terse description of the driver by Mr. McLelland?

MS. RAVIELLI: Well, I would suggest, Your Honour, that it wasn't so terse in terms of the fact that he did describe two elderly individuals, one with dark hair, one was five foot two or three and then a gentleman with greying hair, who was five foot ten, exiting a vehicle,

describing the vehicle itself and having a licence plate to add to that description. Putting that all together as well as, and I would emphasize that, Justice Hickling emphasized this as well in her reasons, that Mr. McLelland, the eye witness, his actual eye witness account in terms of when he was actually in the mall, in the parking lot of the mall watching the events unfold, I would suggest that the in-court identification is not an isolated event and cannot be separated from the events which form the basis of the identification in terms of the fact that there was reliability found by Her Honour (sic) in this identification as it related to what he saw and how long he saw it for, the circumstances, his positioning, etcetera. I can go into more detail if you wish....

THE COURT: Well, certainly there was a prima facie inference available from the evidence that the elderly male was, in fact, the registered owner of the car, Mr. Goodman, but how much farther can we go with what we have?

MS. RAVIELLI: Well, Your Honour, I would suggest that through - this is ultimately what I am respectfully submitting to this court is that looking at all the evidence, the investigation and what it lead to, the eye witness account and the factors of reliability in what Mr. McLelland saw, I mean if I could just speak very quickly on this.

THE COURT: Do not rush.

MS. RAVIELLI: Thank you. Mr. McLelland had - and my friend cross-examined him on this in terms of his position in the parking lot and if he had to turn around, etcetera - Mr. McLelland was very clear that he had an unobstructed view, a continuous view and an uninterrupted view of the

events that happened, ie. he heard a bang and saw what happened simultaneously. He didn't flip-flop on that. He was very clear. He said, "No, I was facing the parking lot. I heard a bang", but insofar as he heard the bang, he also saw it. He didn't have to turn around and Justice Hickling accepted that and as well, this was not a fleeting glance. It was a prolonged observation. He saw the collision occur....

THE COURT: Well, a double-barrelled observation. I say a double-barrelled observation before the couple went into the store and after they...

MS. RAVIELLI: Yes, yes...

THE COURT: ...came out again.

MS. RAVIELLI: ...exactly, and exiting the car and looking at the damage of the vehicle. It wasn't simply that they rushed past him. He had the opportunity to observe them throughout, which I would suggest could have gone on anywhere between a minute, two minutes, five minutes. I mean we can't quantify, but we can certainly acknowledge that Mr. McLelland didn't have a fleeting glance of individuals he didn't know. Obviously, he didn't know them. They weren't people he had any contact with beforehand, but given the amount of time and the nature of the view, of the situation of him witnessing this event, I would suggest that there is a certain reliability that falls from that.

As well, Mr. McLelland's description was very consistent. He testified that he did, in fact, provide a description to the officer on the scene.

THE COURT: Not all of which apparently got into the officer's notes.

MS. RAVIELLI: No, and...

THE COURT: That happens.

MS. RAVIELLI: ...I would suggest that Mr. McLelland can't be held responsible for what may or may not have gotten into the notes of the officer. However, there were reasonable inferences that could be drawn and I would submit that Justice Hickling drew those inferences in terms of the fact that he gave a description to the officer. The officer located the registered owner and the individual that did end showing up in court, coincidentally, they all fit into the description that was provided by Mr. McLelland. I suggest that....

THE COURT: Well, can we build anything on the coincidence of the appellant showing up in court pursuant to the summons...

MS. RAVIELLI: No, Your Honour, I...

THE COURT: ...she was appearing to a summons served on her.

MS. RAVIELLI: ...I have no difficulty agreeing with my friend and with this court that in-court identification is suggestive in and of itself by its very nature....

THE COURT: And here, particularly so, I suggest.

MS. RAVIELLI: Yes. I mean having read the transcript and seeing that Ms. Goodman was the only individual in court, the suggestiveness, the risk of the suggestiveness being very high is....

THE COURT: Also, a witness who came, knowing that the trial had been deferred so he could hopefully provide an in-court identification of the appellant.

MS. RAVIELLI: Well, I would suggest, Your Honour, that as an eyewitness, it's implied that part of that particular position for any individual would be to

identify an individual in court. It may not be stated to them clearly or overtly on any given occasion, however, I would suggest that that is something that eyewitnesses, per se, know that there's a risk of and as my friend correctly pointed out and I would submit as well, not to lessen the severity of Provincial Offences Court, however, other than an in-court identification, provided the individual doesn't have a criminal record, we don't have photo line-ups. We don't have straight line-ups either. One has to deal with the situation as it arises and if an eyewitness identification is required, I would suggest that given the circumstances and given the reliability of the factors and I would also suggest that Justice Hickling found Mr. McLelland to be credible because that is also another element to identification. It's not always necessary to find because of certain elements that may be present. However, I would think that in this case, it was important to point out. Putting all those facts together, I would suggest that Justice of the Peace Hickling's finding of guilt was reasonable based on what was in front of her.

As well, I think it's important to note, taking this in terms of Mr. Brown's argument in terms of the officer not having questioned Ms. Goodman, I would agree with Your Honour that that would have been perhaps - I would agree with Your Honour that I believe Constable Dempster chose not to do that at that particular time because of the distance between Kingston and Toronto, because it was over the phone and perhaps also due to the apparent age of the individual insofar as not putting her in a position that would be too awkward or too, I would say, disconcerting

for her....

THE COURT: Well, I do not know that it matters, but it came through fairly clearly that the officer thought he was giving her a break by charging her under the Highway Traffic Act section rather than section 252 of the Code.

MS. RAVIELLI: Yes. I think that was the officer's prerogative in that particular situation and...

THE COURT: Yes, I am...

MS. RAVIELLI: ...I think there's a certain deference...

THE COURT: ...not quarrelling with it.

MS. RAVIELLI: ...that should be accorded to officers in that situation, in any given situation given that he was simply attempting to follow through on the investigation, but take all the factors into account in terms of who the actors and the particular circumstances were and what their circumstances were and what the circumstances at that moment in time were.

But again, I would suggest that this isn't a case of a straight-forward, in-court identification. Taken in that, sure, there's a suggestiveness to it, but I would suggest that there were other factors that played into, that ultimately led up to that identification that would buttress it and make it more reliable in terms of what Mr. McLelland saw, when he saw it, how he saw it and as well, the reliability and the credibility of this witness.

I would again point to Justice Hickling's reasons for judgement in terms of her taking into account the difficulty of witness identification and her putting together of the evidence and looking at that and then her verdict. I would suggest that the reasonableness of it is

there.

I think that would be all of my argument, Your Honour at this point, subject to any questions on your part.

THE COURT: Okay. No, I think you have covered it all. Anything further?

MR. BROWN: I'm content, Your Honour. I won't take anymore of your time either.

THE COURT: All right. Well, I do intend to retire briefly to consider my decision on this appeal, but before I do parenthetically, unreasonable is a very strong adjective to apply to Her Worship Justice of the Peace Hickling. I have known her and her work for many years and I have always found her to be a very experienced and learned trial Justice of the Peace. The question is whether, as we all do sometimes, she erred here.

C O U R T R E C E S S 11:12 a.m.

U P O N R E S U M I N G 11:27 a.m.

THE COURT: Yes, in the Goodman appeal, after taking some time to consider the submissions, I have made the following endorsement on the appeal record. With respect to a very learned and experienced trial Justice of the Peace, this court is of the view that she erred in this case in convicting upon the evidence before her. The in-court identification of the defendant was so flawed as to render it unsafe to act upon it.

One: The eyewitness, Stan McLelland, found credible, acknowledged that he could not be absolutely certain in his identification after some nine months.

Two: In McLelland's presence, the trial was adjourned to require the defendant to appear for the anticipated purpose of in-court identification by McLelland.

Three: In court on the eventual trial date, the appellant was present with her agent representative. She was the only female person in the body of the courtroom and roughly matched the description of the driver given by McLelland to police.

Four: There was no admissible evidence that the appellant was, in fact, the wife of or even related to the male person determined to be the registered owner of the vehicle and;

Five: No antecedent identification procedures were resorted to be confirmed by McLelland's in-court identification. See Regina v. Samuels (1993), O.J. 4143 Ontario Court General Division, and Reitsma v. The Queen (1998), 125 C.C.C. (3d)(1).

Taken as a whole, the identification evidence here was insufficient reasonably to support a conviction. The appeal against conviction is allowed, the conviction set aside and an acquittal entered.

MR. BROWN: Thank you, Your Honour.

MS. RAVIELLI: Thank you.

THE COURT: And I thank both the agent for the appellant and the agent for the crown for their arguments and assistance.

MR. BROWN: Your Honour, the matter of Mrs. Goodman's

fine has been paid. I take it in this jurisdiction, it would automatically be returned or would it require....

THE COURT: Do you want something in the endorsement?

MR. BROWN: It may be helpful, Your Honour.

THE COURT: I will just have Madam Clerk add it to the foot of the endorsement on the third page of it, fine if paid, to be refunded.

MR. BROWN: Once again, thank you, Your Honour.

MR. RAVIELLI: Thank you, Your Honour.

THE COURT: Thank you.

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FORM 2

Certificate of Transcript

Evidence Act, subsection 5(2)

I, Christine Pettus, certify that this document is a true and accurate transcript of the recording of Gpodman v. The Queen in the Ontario Court of Justice taken from Recording No. 512/03.

June 24th, 2004
Date

Christine Pettus
Certified Court Reporter

Certificate of Transcript (Rev. 04/03)

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ONTARIO COURT OF JUSTICE

B E T W E E N:

THE CORPORATION OF THE CITY OF KINGSTON

- and -

FLORENCE GOODMAN

****

P R O C E E D I N G S A T T R I A L

BEFORE HER WORSHIP, JUSTICE OF THE PEACE C.E. HICKLING,
on February 21st, 2003, at KINGSTON, Ontario

****

OFFENCE: Section 199(1) - *HIGHWAY TRAFFIC ACT*
Fail to report/furnish accident

****

APPEARANCES:

M. Petty — Counsel for the Crown

T. Brown — Counsel for the Accused

****

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TABLE OF CONTENTS

WITNESS:	Exam. in-Ch.	Cr-exam.	Re-exam.
DEMPSTER, Cst.	2	10	10
MacLELLAN, Stan	11	16	

****

E X H I B I T S

EXHIBIT NUMBER **Entered on Page**

- No Exhibits Entered -

****

REASONS FOR JUDGMENT Page 39

****

THE COURT: Florence Goodman, you are charged, Ma'am, on the 24th day of May, 2002, at the City of Kingston, the East Region, being in charge of a motor vehicle and directly or indirectly involved in an accident, the damage of which apparently exceeded $1,000, did fail to report such accident forthwith to the nearest provincial or municipal police officer and furnish the officer such information or written statement concerning the accident as may be required by the officer or by the registrar, contrary to Section 199(1) of the *Highway Traffic Act*. Do you understand the charge?

MS. GOODMAN: Yes.

THE COURT: And the plea to the charge is?

MR. BROWN: I'll assist the defendant, Your Worship. Not guilty.

THE COURT: You can have a seat beside your counsel if you would like.

MR. PETTY: Good morning, Your Worship. If we might have an order for excluding the witnesses.

THE COURT: Do you have any witnesses to call?

MR. BROWN: I think an exclusion is appropriate, Your Worship.

THE COURT: There will be an order for exclusion of witnesses. Anyone that will be giving evidence in respect to Florence Goodman, please have a seat outside the main waiting room. You will be paged in as required.

MR. PETTY: With the exception of Cst. Dempster. He's going to be my first witness.

MR. BROWN: No difficulties with the officer.

CST. DEMPSTER: SWORN

EXAMINATION-IN-CHIEF BY MR. PETTY:

Q. Good morning, Officer Dempster.

A. Good morning.

Q. I understand that on Friday, May 24th, 2002, you had occasion to lay a charge. Could you describe?

A. Yes, it was regarding a motor vehicle accident on - in a private parking lot at 1201 Division Street within the City of Kingston and with Her Worship's permission, may I refer to my notes to refresh my memory?

THE COURT: Those are notes you made at the time?

THE WITNESS: Yes, I did.

THE COURT: Any additions or deletions?

THE WITNESS: No.

THE COURT: You have a somewhat independent recollection of these events?

THE WITNESS: Yes, I do.

THE COURT: Mr. Brown, any comments?

MR. BROWN: Can I look at the notes, please, briefly, Your Worship?

THE COURT: Yes, sir.

MR. BROWN: Those are the notes that were disclosed?

THE WITNESS: Yes.

MR. BROWN: Your Worship, I received disclosure, those notes were included. Accordingly, I have no objection to the officer referring to them to refresh his memory.

THE COURT: Thank you.

A. At approximately 12:50 or just shortly before

that, p.m., I was driving through the Kingslake Plaza which is 1201 Division Street in the City of Kingston when I was flagged down by a couple of gentlemen who told me they had observed an accident involving two vehicles.

MR. BROWN: I have to object, Your Worship, to the officer. It appears that he is offering us evidence of what he was told by third parties. It strikes me as hearsay.

THE COURT: Well, not so much so. If it goes any further, but he was obviously flagged down because there was an accident I think.

MR. BROWN: It's part of the narrative. I understand, thank you.

A. I received information from two citizens in the - in the plaza and commenced an investigation into an accident that involved two vehicles, one which was parked and the licence plate of that was an Ontario licence plate, ALXM 943. I observed this vehicle in the parking lot. It was a 1995 Volkswagen, purplish in colour. The second vehicle that was involved, to my knowledge, was not there but information about it was provided to me by persons who flagged me down.

MR. PETTY: Q. That information being?

MR. BROWN: Your Worship, I'm sorry.

THE COURT: Yes, I'm just wondering where this is going.

MR. BROWN: I'll reserve my objection.

THE WITNESS: If I'm allowed to proceed.

THE COURT: Just keep going but be careful where you're going.

THE WITNESS: I was given a front licence plate number for that vehicle. It was an Ontario licence plate.

THE COURT: Then, because of that information you received, what did you do?

THE WITNESS: Okay, I - I assessed, I looked at the....

MR. PETTY: Your Worship, I'm not offering this for the truth of its contents but for the fact that it was said. This goes to Cst. Dempster having proper grounds to lay a charge.

THE COURT: Well, I agree, but you've got witnesses that are probably the witnesses that gave him the licence number. I don't think a lot is going to hang and fall on this. I think at this point....

MR. PETTY: You just mentioned you didn't know where, so I'm trying to provide.

THE COURT: Didn't know where what?

MR. PETTY: You didn't know where this was going. I tried to provide the purpose of this line of questioning.

A. I - I examined, since the Volkswagen was the only vehicle at the scene, I examined it and observed an area of damage on the passenger side at the rear. The rear fender had been buckled outward so that there was a V or a crease in it and this was just behind the wheel well on the rear passenger side and it appeared that the fender had also been pulled off of the frame as there was a gap between the - the metal structure of the car and the fender which appeared to be fibreglass.

I - there was no - no one approached me as the

owner of the Volkswagen. I had only the witnesses to speak to. I took statements from two of the witnesses. I then went to the station to - to complete my investigation. I had to rely on - on information from the Ministry as to who the owners of the vehicles were based on the information I had. As part of my investigation, I contacted a Miss Annette Kemper, who indicated she....

MR. BROWN: Objection..

A. All right.

THE COURT: Well, I don't know what he is going to say.

THE WITNESS: I had conversation with her, received a statement from her, and also, as part of my investigation, I obtained the Ministry information on the vehicle that had left the scene based on the information provided to me by the witnesses. I....

MR. PETTY: Q. Did you contact them?

A. Yes, I did. I contacted the registered owner of that vehicle as listed with the Ministry of Transportation, that being a William Goodman.

MR. BROWN: Excuse me, Your Worship. I don't know if this is being offered for its truth or not, but I'm certainly not prepared to consent to this evidence in the sense that, if it's being offered to demonstrate who the registered owner of the vehicle was, I think it would be improper for the officer to relate to the Court the fruits of his investigation, i.e. information that he received from the Ministry of Transportation.

THE COURT: That's not hearsay.

MR. BROWN: I only put it to you, Your Worship, because if the Ministry of Transportation has given Officer Dempster the information as to who the registered owner of the vehicle is, then I think the Crown would be obliged to prove that in the appropriate fashion.

THE COURT: I disagree.

MR. BROWN: Thank you, Your Worship.

MR. PETTY: Q. Thank you, Your Worship. You were mentioning the Ministry. What information....

A. That - that the registered owner of the vehicle that had - that was not present at the time of my investigation belonged to a Mr. William Goodman of Toronto and there was also a Toronto address as part of that information. Through my investigation, I obtained a phone number for that address in Toronto and for that person.

I spoke to a person who identified themself as the same via telephone here in Kingston and received information as to who the driver was, and then, as part of my investigation, I received information that would assist me in completing my accident report, for example, the driver's name, driver's licence number, the insurance company and the insurance policy.

Q. And you laid the charge?

A. At that point in time, I did not ask to speak to the driver because there were charges pending and it would - would have had to have been a caution statement.

Q. In the conversation you had with the registered owner of the vehicle - Your Worship, for the fact of it having been said, not for the truth of its

contents - who did he indicate....

MR. BROWN: Your Worship, I have to object. I can't see how that could possibly be relevant if it's not being offered for the truth of its contents. I think that it's highly prejudicial.

THE COURT: I don't know where you're going with that either. I agree.

MR. PETTY: Q. All right. We got to the point where you laid the charge, do you have anything to add before I....

A. No, just like I said, just that I - that I only spoke to Mr. Goodman via the telephone, obtained the information that I needed to complete my accident report which includes the driver's name, address and driver's licence number. I did not speak to the driver because charges were pending at that time and I didn't want to - I didn't want to - it would have been a caution statement. I didn't want to complicate the matter by having them say anything that they wouldn't want repeated.

Q. Did you charge?

A. Florence Goodman, and that was from information provided to me, including the driver's licence number.

Q. If we could return to your inspection of the accident site, where was the car located?

A. The Volkswagen was in a marked parking space. The lines on the pavement were visible. It was....

Q. Where was the....

A. The front end - the front end of the Volkswagen was protruding somewhat from the front of the

parking space. There was no damage, no physical evidence on the ground from either vehicle.

Q. It was protruding by how much?

A. From the front tires to the front of the vehicle was protruding beyond the marked lines out in - out into the lane used for vehicles to travel between the parking spaces.

Q. Where was it in relation to other... First of all, were there other vehicles in the parking lot?

A. Yes, there were. The parking lot was - there were lots of other vehicles in the parking lot at that time.

Q. Were there vehicles on either side?

A. I believe there were. This, the accident, my arrival was possibly 30 minutes after the accident occurred and I do believe there were vehicles parked on both sides of the Volkswagen when I arrived.

Q. Now, you said that you had a look at the vehicle and noticed damage. What did it appear like, did it appear....

A. I did a walk-around of the vehicle and it was the only damage that I observed on the Volkswagen, and just behind the right, the rear passenger tire, the fender had kind of buckled outward so that there was a crease or - or, like, it was in kind of the shape of a V, and where the rear fender connects to the - the main body of the car just behind the rear passenger tire, there was some separation between the two pieces.

Q. How many accidents do you think you've investigated?

A. I've been a police officer for seven years and

I can tell you, in the last two months, January and halfway through February, I've probably done half a dozen or more in the last month and a half, half a dozen to a dozen in the last month and a half.

MR. BROWN: I have to object to the relevance, Your Worship. I can guess where my friend is going with this, but even the officer's evidence wouldn't be relevant. He's talking about investigations he has embarked on after.

THE COURT: Why don't we wait to see where it's going.

MR. BROWN: Thank you.

MR. PETTY: Q. What did you estimate the damage as being?

A. I believed it was a reportable accident, so the damage being more than $1,000.

Q. Did you consider any other charges other than the one you laid?

A. I - I had two options available - available to me in this circumstance. If - if charges were to be laid, I either could have laid a criminal fail to remain or a *Highway Traffic Act* fail to report.

MR. BROWN: Again, Your Worship, I don't see the relevance of this. It seems to be prejudicial in my view.

THE COURT: I don't think so.

A. Through my - through my investigation, including a background check of Florence Goodman, I determined this charge to be more - more appropriate for everybody involved.

MR. PETTY: Q. Did Mrs. Goodman ever contact you?

A. No, not personally, no. I was never contacted by her.

Q. Are you aware of any contact with KPF in regards to this incident?

A. Not as the officer in charge. I don't - it wasn't brought to my attention.

MR. PETTY: Those are all the questions I have at this time, Your Worship.

THE COURT: Mr. Brown?

CROSS-EXAMINATION BY MR. BROWN:

Q. Thank you, Your Worship. Officer, you obviously weren't in the parking lot when this accident was alleged to have taken place.

A. No, I wasn't.

Q. So, clearly, you didn't see it happen.

A. No, I didn't.

Q. And you hadn't viewed the vehicle with the damage on it ever prior to the date of your investigation?

A. No, I hadn't.

MR. BROWN: Thank you. Those are my questions, Your Worship.

THE COURT: Any other witnesses to call?

MR. PETTY: I'd like to ask some clarification questions.

THE COURT: All right.

RE-EXAMINATION BY MR. PETTY:

Q. The damage you observed, did it appear recent?

A. I....

MR. BROWN: Excuse me, it sounds like expert evidence to me, Your Worship. I would object to

that.

THE COURT: Well, I don't know that it is expert evidence. I disagree there.

A. I - I can testify that it was the only damage I saw on the vehicle. The rest of the vehicle was in good condition and the rest, the information I required, was obtained by speaking with the owner, Ms. Annette Kemper.

MR. PETTY: That's all the questions I have.

THE COURT: Your next witness?

STAN MacLELLAN Jr.: SWORN

EXAMINATION-IN-CHIEF BY MR. PETTY:

Q. Good morning, Mr. MacLellan. I understand that you had occasion to observe an accident on the 24th of May, 2002?

A. That's correct.

Q. Could you tell us what you saw?

A. I saw a vehicle pull into a parking spot, lurch forward and hit another vehicle, and push it halfway out of the parking spot.

Q. What did the vehicles look like?

A. The vehicle pulling out of the parking spot appeared to be a red vehicle, the other was a Volkswagen four-door.

Q. Do you remember any colours?

A. Of the....

Q. I'm sorry, of the Volkswagen.

A. It was a darker colour if I recall correctly.

Q. Do you remember the model of the red vehicle?

A. I thought it appeared to be a Ford Focus-type of car, but I couldn't really tell.

Q. What did you do then?

A. I witnessed the driver and the passenger get out of the car and the passenger, the gentleman, got out, walked around the front of the vehicle, looked at the two vehicles. The driver, the female, got out of the car, peered at both vehicles, and then they went into the grocery store which was in the - the strip mall there. Later on, came out of the grocery store, got in their vehicle and proceeded to pull away. At that point in time, my father and I approached and took the licence plate.

Q. Do you remember what the licence plate was?

A. I'd have to refer to my statement if I could.

MR. PETTY: Is that acceptable to the Court?

THE COURT: Go ahead, Mr. Brown.

MR. BROWN: Thank you, Your Worship, could I interrupt? I wonder if I could see the statement that is being provided?

THE COURT: His statement is what I assume it is.

MR. BROWN: I've never actually seen a copy of that before, Your Worship. I wonder if I can have your indulgence for a moment. Oh, I see, this is the typed statement, Your Worship. I believe this is the statement that may have been disclosed.

MR. PETTY: I'm more than willing to give the handwritten statement to Mr. MacLellan.

MR. BROWN: Thank you. Just a few comments, Your Worship. I take it that my friend is attempting to refresh his witness' memory with the document that has been held out as being Mr. MacLellan's statement. I think it's incumbent....

THE COURT: What I think he wants to do is get the licence plate number down, and unless this gentleman is a whiz at numbers, I don't think anyone would remember from May 24th, 2002, a licence plate number, and that's what he needs to see, the licence plate number.

MR. BROWN: I agree entirely, Your Worship. That, in fact, wasn't the substance of my objection. If my friend wishes to refresh the witness' memory with a statement, there's typically not going to be a problem with that, but I think that it's incumbent on the Crown to lay the appropriate evidentiary foundation before it's done. The witness indicated that he would like to refer to his statement. There has been no evidence elicited before you as to who took the statement, who recorded it, whether or not it was reviewed for accuracy, whether it was signed, whether it was adopted by the witness as being accurate at that time. So, in an attempt to put an *aide memoire* or a statement in front of the witness, there is an evidentiary foundation that has to be laid and it hasn't been done.

THE COURT: I don't think you have to go all that far, but perhaps you could ask him a few questions about the statement. I disagree with where this is going, but for the matter of just getting a licence plate number, I find this is perhaps somewhat different.

MR. PETTY: Q. Did you give a statement?

A. The verbal statement, yes, I did.

Q. Who did you give it to?

A. The officer there.

Q. Do you recognize this document?

A. Yes.

Q. Have a look at it.

A. I've read it the last time I was here.

Q. Is that the substance of what you told?

A. That's correct, yes.

MR. PETTY: Satisfactory to the Court?

THE COURT: Yes.

MR. PETTY: Q. Now, the licence plate number?

A. Ontario 160 RBK.

Q. What happened then?

A. After the - after the car drove away?

Q. Well, I think we've gotten to the point where you've got the licence number.

A. Right, and so, at that point in time, the vehicle left the parking lot. Very shortly after, the officer appeared in the parking lot. We flagged him over and relayed the information.

Q. What happened then?

A. He took the information from us, contact info, then he proceeded to examine the vehicle. He went into various locations, we assumed to see if he could track down the R.O., registered owner of the vehicle.

Q. Did you get a look at the Volkswagen?

A. Yes.

Q. Could you tell us its condition?

A. It had been pushed, so it was pushed halfway out of its parking spot. You could see the right rear bumper had been stoved in and there was some debris on

the ground, just paint chips or things like that.

Q. Did you recognize the paint chips?

A. Well, they were dark in colour which would appear to match the vehicle that was there.

Q. Describe the damage to the vehicle again, please.

A. The rear bumper, right side, appeared to be stoved in, so, the passenger side, so, pushed in and under, and that was the most apparent damage in terms of on the vehicle.

Q. Any damage to the lights?

A. Nothing that stood out. The nature of the bumper is what stood out.

Q. Now, when the red vehicle, the Ford, was pulling in, what happened?

A. Just appeared to be pulling in then lurched forward, so.

Q. Did you see the driver of the vehicle?

A. Of the - the red vehicle?

Q. Of the red vehicle, yes.

A. Yes, when the driver exited the vehicle.

Q. What did the driver look like?

A. Female, dark hair, appeared to be the lady sitting right there.

MR. PETTY: Indicating the accused, Your Worship.

THE COURT: Indicating Mrs. Goodman.

MR. PETTY: Q. What do you do for a living?

A. I'm the human resource manager for the Ottawa Police.

Q. The condition of the occupants of the vehicle, were they injured?

A. The two that struck the vehicle didn't appear to be, not from my vantage point.

Q. Did they seem upset?

A. Not to what I could tell from where I was.

Q. Did you ever see the driver of the dark vehicle, the Volkswagen?

A. No.

Q. No?

A. Not during that time.

Q. Ever have any contact with the driver of the Volkswagen?

A. Afterwards, just here in the Court. I appeared back in the fall.

Q. Any contact with the passengers of the red vehicle?

A. No.

MR. PETTY: I believe that's all the questions I have at this time.

THE COURT: Mr. Brown?

CROSS-EXAMINATION BY MR. BROWN:

Q. Thank you, Your Worship. Sir, I take it you were in the parking lot when you made your observations?

A. That's correct, just out front of one of the stores in the strip mall next to the grocery store.

Q. And how far would you have been when you made the observations of the accident?

A. Twenty feet, 30 feet maybe, at the most.

Q. What brought your attention to what had actually taken place?

A. The loud bang and the fact that the car moved forward.

Q. So, I would suggest to you that after you heard the bang, you turned around to ascertain what caused the bang, is that right?

A. No, actually I was facing the parking lot at the time, for the parked cars. There was a group of us standing around chatting, so I was facing the vehicles that were parked in the lot.

Q. Right, and I thought you had said you had heard a bang?

A. That's correct.

Q. And that's what drew your attention to what had happened?

A. Correct, but I didn't turn around because I was already facing that direction.

Q. I see, but you weren't paying any particular attention to these two vehicles, were you?

A. Well, no more than you would any car pulling into a parking spot.

Q. There was nothing substantial going on that would attract your interest until you heard the bang, isn't that right?

A. That's correct, until the car moved forward.

Q. What were you doing in front of the store?

A. Having a conversation and waiting for our significant others.

Q. Now, you had spoken with Officer Dempster about this incident I gather?

A. This officer?

Q. Yes.

A. That's correct.

Q. I take it that you were aware that the driver

of the Focus, as you called it, would be charged or was charged, is that right?

A. After I attended Court here in the fall, that's correct.

Q. So, when you attended Court, was that in November, was that the November 8th appearance for this matter?

A. That - that would have been around the time. It was in November I believe it was, yeah.

Q. And you became aware of course, at that time, that what you would understand to be the driver of the Focus was charged as a result of the accident?

A. Correct.

Q. Now, were you in Court, in the actual courtroom, on November 8th?

A. Yes.

Q. You recall that the matter had been adjourned to today's date?

A. That's correct.

Q. Do you know why?

A. Because your client wasn't here.

Q. I would suggest to you that the driver of the Focus had been charged.

MR. PETTY: Your Worship, relevance?

MR. BROWN: Well, I'm in a bit of a precarious position, Your Worship, because if I were to respond to my friend's objection, we would really lose the effectiveness of the cross-examination. I'd be happy to respond. I would request that Mr. MacLellan be asked to step outside in the course of my doing so.

THE COURT: Well, first of all, I'm not sure where you're going either because if, in fact, he got a subpoena to come to Court, he obviously would know that someone was charged. I just don't know where that is going either, if it's necessary for him to leave the courtroom because of that. It only puts one and two together that if you get a subpoena, oh, yes, someone has been charged. I have a hard time trying to understand why he has to leave the courtroom to justify that question.

MR. BROWN: I understand precisely what you're saying, Your Worship, and I had anticipated that you would probably have no idea of what is going on in my mind. That's obvious, because....

MR. PETTY: And the reason for my objection.

MR. BROWN: Because my friend doesn't know what's going on in my mind, that's understood, Your Worship, but my friend's objection, mind you, does have merit. I think it warrants a response. For me to respond at this time in the presence of the witness would seriously impugn my ability to test the evidence and I don't want to split hairs, Your Worship, but.

THE COURT: Could you please step outside of the courtroom.

MR. BROWN: Thank you for that, Your Worship. I think that you've probably gathered at this point that identification is in issue. It's a contested matter; it's not conceded. I was in Court on November 8th, as was Mr. MacLellan. I think what took place in Court on that day, while Mr.

MacLellan was in Court, could very well have the effect of tainting the in dock identification of the evidence that was offered when he indicated that this appeared to be the lady sitting right there, was the driver.

Now, I know what took place on that day, Your Worship, and Mr. MacLellan was, unfortunately, in the courtroom when Your Worship and I embarked on an exchange with regards to having Ms. Goodman here. There were comments made to the effect that she would have to be identified by the Crown witnesses and I don't think it's an illogical step from the defence perspective that, when Mr. MacLellan then comes to Court and identifies Ms. Goodman as the driver, that that is evidence that should certainly be scrutinized under cross-examination and what took place in Court on the last occasion I think is very, very relevant to the veracity of Mr. MacLellan's evidence as it relates to Ms. Goodman being the operator of the motor vehicle.

THE COURT: Mr. Petty?

MR. PETTY: I'm a little at a loss. Ms. Goodman wasn't here, so he didn't view her on that day.

THE COURT: No, and I think he has made it clear that that was the reason why it was put over because he said your client wasn't here, so I don't know where the....

MR. BROWN: And my friend, in his submissions....

THE COURT: Anyway, I'm not going to prolong this anymore because we're not going to get through this

and I want to get through this today. So, let's call him back in and I'll let Mr. Brown go ahead because I don't wish to have Ms. Goodman have to come back another day to attend for the continuation of this. Mr. MacLellan, sir, you are still under oath.

MR. BROWN: So, I may continue, Your Worship?

THE COURT: Yes, go ahead.

MR. BROWN: Q. Mr. MacLellan, I'm going to suggest to you that on the last appearance you learned that you, as one of the Crown witnesses, would be required to attend Court again, being today, and that you would be put in a position where you are asked to identify the driver of the motor vehicle.

A. Is that a question?

Q. I'm suggesting that to you. Would you agree or would you disagree?

A. I knew I would be coming here to testify today.

Q. Did you know that part of your role as a witness in these proceedings would be to identify Ms. Goodman as the driver of the vehicle?

A. I would have assumed that.

Q. And just for clarity, there are no other people in this courtroom who are involved in these proceedings, is that correct?

A. I would assume not.

Q. Nobody in the body of the Court.

A. Pardon me?

Q. There's nobody in the body of the Court.

A. No, it's empty.

Q. Now, when you made your observations, you would agree with me that this incident in the parking lot took place about nine months ago?

A. Yeah, May 24th.

Q. And over what period of time did you get to view the driver and the passenger of the vehicle?

A. The time it took them to get out of the vehicle, look at their car, the other car, walk into the grocery store then walk back out, whatever time period that would be.

Q. Did you approach them?

A. No.

Q. Did you speak to them?

A. No.

Q. Did you write down a description of either one of them?

A. No.

Q. Did you provide the officer with the description?

A. Yes.

Q. What was the description you provided the officer?

A. Elderly couple, gentleman, grey hair, five ten; female, dark hair, five two, five four, something to that effect.

Q. You gave a statement to Officer Dempster? I think you agreed to that earlier.

A. Yes.

Q. Is that statement still in front of you?

A. Yes.

Q. Is that an accurate recount of what you

provided Officer Dempster?

A. Yeah.

Q. The portion of that document that you hold there has - and you would agree with me - the details of the description that you provided the officer. Do you see that?

A. Um hmm.

Q. Well, you'd agree with me that it doesn't say anything about the driver having dark hair or being five one or five two?

A. No, that's correct. It says, "Saw older female get out of driver's side, older male get out the passenger side."

Q. Right. I'm going to suggest to you that that was the extent of the identification that you had offered to Officer Dempster.

A. I guess I suggest that my recollection was otherwise.

Q. What was your recollection?

A. Just what I said that there was an older female with dark hair getting out of the driver's side; older male, grey hair, getting out of the passenger side.

Q. When you provided that statement to the police officer, did you get an opportunity to review it?

A. When I gave him my verbal....

Q. Yes, I understand that you gave the officer an oral statement.

A. That's correct.

Q. And he reduced it to writing?

A. Right.

Q. In your presence?

A. Pardon me?

Q. While you were present, was that....

A. He - he took the notes down, yes, in my presence, that's correct.

Q. And at the completion of the statement, were you given the opportunity to review the statement?

A. I didn't review it, no, at that time.

Q. The evidence that you had offered earlier with regards to the lady to my right being the driver of the motor vehicle, you had indicated that it appeared to be the lady sitting right there.

A. That's correct.

Q. What does "appeared to be" mean?

A. Means it was nine months ago, but to the best of my recollection, that appears to be the individual.

Q. You'd agree with me that to be able to identify somebody nine months after an occurrence when you've only had the opportunity to view them for a very short period of time is very difficult to do?

A. Yes.

Q. And is there any way that you would be able to describe to the Court just how certain you are or are not?

A. In terms of what?

Q. In terms of the person sitting to my right as being the person that you saw operating the motor vehicle given it was nine months ago and you viewed her for a short period of time?

A. So, you - you mean....

Q. Are you relatively certain?

A. It - it appears to be. Would I say with 100 percent certainty? No, I couldn't say that.

MR. BROWN: Those are my questions, thank you, Mr. MacLellan.

THE COURT: Thank you, sir. There has been an order for exclusion of witnesses, sir. If you go out into the main waiting room, please don't discuss anything that has gone on in Court with anyone yet to be called. Will either of you gentlemen need Mr. MacLellan again?

MR. PETTY: I think Mr. MacLellan has been all finished.

MR. BROWN: I didn't hear you, Your Worship, I'm sorry. I was writing.

THE COURT: Will either of you need Mr. MacLellan again?

MR. BROWN: I do not.

MR. PETTY: I think Mr. MacLellan has been examined to death.

THE COURT: You can leave the building as well, sir, or you can sit in the body of the Court, whichever you choose to do.

THE WITNESS: I can stay?

THE COURT: Yes, you can stay or you can leave the building altogether if you wish. Any other witnesses?

MR. PETTY: Annette Kemper.

MR. BROWN: Your Worship, could I interrupt. I don't know what my friend is going to attempt to prove by Ms. Kemper's evidence. If I could have a moment of your time, I might be able to shorten

this.

THE COURT: Do you want a moment of his time or my time?

MR. BROWN: Yes, my friend's time. I know she's the owner of the vehicle that was struck; I know she didn't see the accident.

THE COURT: So, do you want me to rise for a minute?

MR. BROWN: Perhaps, if I could just have a moment.

THE COURT: As I say, we're running short and I don't want to have to bring Ms. Goodman back.

R E C E S S

U P O N R E S U M I N G:

MR. PETTY: Good morning, Your Worship. I believe we have an agreed upon statement of facts.

MR. BROWN: Yes, Your Worship, we've agreed on, and I'll accept as true and accurate, the evidence that Mrs. Kemper would have offered. We've agreed on some points: One, that her motor vehicle that belongs to her was not damaged when she parked it in the material parking lot, that it was damaged when she returned, that the damage was in excess of $1,000, and that the vehicle was not in the same position in the parking spot as it was when she left it on that day. So, if that shortens things a bit, Your Worship.

THE COURT: Yes, that's fine.

MR. PETTY: Thank you, Your Worship.

THE COURT: So, is that the evidence for the Crown then?

MR. PETTY: I have no further witnesses.

THE COURT: Are you calling Ms. Goodman or any witnesses?

MR. BROWN: I'm not. If that's the case for the Crown, Your Worship, I'm not calling Ms. Goodman, no.

THE COURT: Submissions?

MR. PETTY: Your Worship, the provisions of the *Highway Traffic Act* require that someone report - I'll just read them, "Every person in charge of a motor vehicle or a street car, directly or indirectly involved in an accident shall, if the accident results in personal injuries or damaged property apparently exceeding an amount described in the regulations," that's $1,000, "report the accident forthwith to the nearest provincial or municipal police officer and furnish him or her with information concerning the accident as may be required by the officer under subsection 3," and subsection 3 is name, address. I can read that in if you would like as well.

Now, "forthwith" has received some judicial interpretation. It means as soon as practicable. You take into consideration all the circumstances including whether or not the driver of the vehicle was injured. Obviously, they can't report forthwith if they are physically prohibited from doing so.

We've heard evidence today that a red Ford Focus pulled into a parking spot and struck the vehicle immediately in front of it, being a Volkswagen. Two occupants got out, appeared to

inspect the damage, then entered a store, came back, left the scene. The evidence of the officer was that the first he had contact with, as he figured out later, the suspect, Ms. Goodman, was when he called the registered owner. I'm sorry, he didn't have contact, he called the registered owner and determined the driver of the vehicle.

Under this section of the *Highway Traffic Act*, the vehicles do not have to be on a highway within the definition of the *Highway Traffic Act*. The occupants of the vehicle must be aware that they were involved in an accident. The car was pushed halfway out. I can't help but assume that the occupants knew that they were in an accident. We've heard evidence that there was a female driver, that she was elderly, that she had black hair. She was seen leaving the driver's side of the motor vehicle. She did not appear to be injured, she appeared to go about her normal business and then leave.

Injuries and damages are, by agreed upon submission of facts, exceeding $1,000 and there's been no report. Regarding identification, Mr. MacLellan was subjected to, I would say, pressing cross-examination. He gave evidence that, to the best of his recollection - he was testifying to the best of his recollection - and identifying the accused on the basis of his best recollection. He gave evidence of memory at the time of the incident of an elderly woman with black hair, and he identified Ms. Goodman as the person he observed.

If Your Worship finds fault with this or feels in some way that his evidence has been tainted, I submit that it goes to weight on his in dock identification. I believe that's the extent of my submissions.

THE COURT: Mr. Brown?

MR. BROWN: Thank you, Your Worship. I have some cases that I would like to refer to, Your Worship. I have copies for my friend. Two things, Your Worship, two issues in my view, one is relatively simple. I think my friend would probably agree that the gradient of this offence is that the operator of the motor vehicle failed to report it, and I know that it puts the Crown in a difficult position to attempt to prove that somebody didn't do something or to prove a negative, but nonetheless, it's a hurdle and the Crown can typically get around that by asking the officer if he had taken any steps to ensure that the police department had received a report of the accident, et cetera, et cetera.

My friend touched on the issue, asked Officer Dempster, and he said that there was nothing brought to his attention with regards to whether or not a report had been filed by the defendant in this matter, so I think that the evidence in that regard would fall short of establishing beyond a reasonable doubt that no report was filed.

The second issue, Your Worship, is identification. Now, the issue of in dock identification is something that the concepts and

the weight that is to be assigned to that evidence has been evolving over the years. There have been decisions from the Supreme Court of Canada right down to Provincial Offences Appeal Court decisions. I've brought several of them to Court today to refer you to.

The first is Regina v. Samuels. This is a decision of Justice Rutherford, sitting in Ottawa, and I'd like to refer your attention to paragraph 7. It says, "I believe that the evidence of identification of the accused as the perpetration of the crime charged must come from events that take place prior to trial. Dock identification, both at the preliminary enquiry and at trial, are primarily for the purpose of supporting the essential averments in the information or in the indictment and not for the purpose of making substantial identification of the accused as the person who committed the alleged crime."

Paragraph 8, Your Worship, is also helpful. "At preliminary and at trial, the identification from a dock is primarily to identify the accused as the person caught up in these judicial proceedings, the person subjected to the charge or the subject of the indictment."

What has taken place in this case, Your Worship, and I don't want to fault Officer Dempster, but he indicated in his evidence that he elected not to speak to the person that he suspected as being the operator of the motor vehicle. He knew, in his mind, that charges were

pending and he didn't want it to be a caution statement. I think that his words were that he didn't want to complicate the issue.

I think that the fault in the Crown's case really started there because it seems that what the Crown is attempting to do is to use the Court's process, not the Court's process in the sense that Ms. Goodman would have to attend Court to be identified, that may, in my view, supplement some type of prior identification or may supplement the identification made by witnesses who give evidence to the police officer or perhaps a statement from the accused, but to use the Court's process and in dock identification as the sole and only identification of the defendant as the operator of the motor vehicle, in my respectful view, is highly improper.

I have read the relevant passages of Samuels to you. That is, of course, the Ontario Court of Justice, that is the General Division. The Ontario Court of Appeal has considered the identical issue in Regina v. Izzard. I believe that I've handed you a copy. This is one of the....

THE COURT: I'm sorry, which one did you say?

MR. BROWN: Izzard, Your Worship.

THE COURT: All right.

MR. BROWN: Ontario Court of Appeal. Now, I don't like when they do this, the paragraphs aren't numbered, but on the fourth page - the pages aren't numbered either, Your Worship.

THE COURT: No, but I think I'm with you. At the

top of my page 4, it starts, "Wright, in honesty and fairness..."

MR. BROWN: Yes, that's correct, Your Worship.

THE COURT: So, I'm on the right page.

MR. BROWN: But my friend is on the wrong page. Now, he's on the correct page.

MR. PETTY: I'm sorry which one? Thank you.

MR. BROWN: Could I direct your attention, please, Your Worship, one, two, three, four, the fifth paragraph down, it starts with the word "Further."

THE COURT: Right, I'm with you.

MR. BROWN: "Further, with respect to the matter of pre-trial identification, the trial judge placed weight on the fact that the witness identified the appellant at the preliminary hearing "without difficulty." He did not appreciate that "an identification of an accused as the offender made for the first time when the prisoner is in the dock possesses particular frailties over and above the normal frailties attached to identification evidence."

The Ontario Court of Appeal cited Regina v. Williams, I think I may have handed a copy of that up to Your Worship. I'll continue, "It is generally agreed that dock identification is undesirable and unsatisfactory." Just at the bottom of that paragraph, I'm skipping the citations, Your Worship, it says, "The trial judge also appears to have attached weight to the dock identification of the appellant at the trial - which is subject to the same weaknesses as the

earlier identification and, also, tainted by it." That again, Your Worship is from our Ontario Court of Appeal. It's from 1990.

In my view, there has been a general trend away from in dock identification as being offered as substantive proof of anything, and I think probably to oversimplify it, in this case with Mr. MacLellan, who else was he going to point at. That really is the substance of my position, and it seems to be the substance of the authorities that are coming right from the Supreme Court of Canada.

I've handed up the Reitsma decision, it's Reitsma v. The Queen. This is our Supreme Court of Canada, it's from 1998. The judgement was delivered by the Honourable Justice Cory. Now, the way the decision is laid out, it starts out at the bottom of the first page as citing Prowse, J.A. Now, that is a Justice of the British Columbia Court of Appeal and I know it's a little confusing, but because the Supreme Court of Canada adopted the reasons of the dissenting judge from the B.C. Court of Appeal, they reproduced the judgment of the B.C. Court of Appeal first. So, this is not the ruling of the Supreme Court that you see immediately at the beginning of the decision, it's at the end, and I'd like to note that the disposition of this appeal by the Supreme Court of Canada was that the conviction was set aside and an acquittal was entered.

Now, thankfully, this decision, the paragraphs are numbered and I would like to direct your

attention to paragraph 59 if I could. I'll just read that quickly, Your Worship. It says that, "The identification of an accused person for the first time "in the dock" is generally regarded as having little weight. In a dock identification, the witness is obviously not required to pick out the person whom he claims to have seen from among a number of other persons of similar age and size and general physical appearance. In a courtroom identification, there is also the danger of the witness anticipating that the offender will be present. That danger is accentuated when an accused is readily identifiable in the courtroom as the person accused of the crime. Identification of an accused for the first time in the dock is analogous to a police "show up" in which the only person shown to the identifying witness is the suspect, and for that reason it is open to the same criticism. Generally, anything which tends to convey to a witness that a person is suspected by the police or is charged with the offence has the effect of reducing or destroying the value of the identification evidence."

That is, of course, Your Worship, what I styled my cross-examination on. That's also why Mr. MacLellan was asked to leave the courtroom. Of course, paragraph 60 is the disposition, "Given the circumstances in the case, the courtroom identification which was made could not reasonably be afforded much weight," and the last page, "Cory J.: We are all in agreement with the minority

reasons given by Madam Justice Rowles. The appeal is therefore allowed, the conviction is set aside and an acquittal entered." I think that the Supreme Court decision is strikingly on point, Your Worship.

I think I've handed you the decision of Smeirciak also. I know we're running out of time and this decision isn't as on point as the others that I've referred you to, but it's very analogous and I think it's helpful and it's also from our Ontario Court of Appeal. It's very old and the principle has been around for a long time. I'll just read from the head note, "Where police authorities showed a single photograph of a suspect to prospective identification witness, and subsequently, the suspect having been arrested and charged, was convicted on the evidence of identification of the witness, **held**, on appeal the conviction must be quashed."

Essentially, what happened in this case, Your Worship, is that the police officer tainted the identification evidence by showing the prospective identification witness one picture and, as soon as that happens, in my view the identification becomes irreversibly tainted and the criticisms and admonishments have come from every level of Court directed at the law enforcement agencies, that appropriate line up identification procedures have to be employed on a regular basis if their identification evidence is to have any weight at all.

It seems, and again, not to cast aspersions on Officer Dempster, it seems that the case was actually laid out for the purposes of having Ms. Goodman identified as the driver of the vehicle. It was almost intentional that the Court's process would be used for the purposes of that identification, and in closing, Your Worship, we cannot forget Mr. MacLellan's evidence.

He initially in-chief offered evidence that said it appeared to be the lady sitting right there. Under cross-examination, he said that he could not say 100 percent, and in all of the decisions that I've referred you to, Your Worship, there was an absolute honestly held belief by the identifying witness that the person sitting there was the accused and there was a certainty about their evidence, and the convictions were ultimately all set aside.

Taking the authorities on the point, Your Worship, taking Mr. MacLellan's evidence at face value, he indicated that after nine months, it would be very, very difficult to identify somebody that he had seen in a parking lot. I think that's common sense. All that would have sufficed or all that had to have been done, Your Worship - I don't think that I'm going too far in saying that Ms. Goodman wasn't running from the police - all somebody had to do was call her, talk to her, ask her, interview her, the case may have unfolded entirely differently. I think in this instance, Your Worship, if the charge is to be dismissed,

then it's only going to fall back on the investigatory technique employed. I think that it was improper, it's ultimately unfair. We know who they're going to point at, Your Worship, she's the only person in the courtroom. I leave that with you. I'm sorry for taking so long, Your Worship.

THE COURT: No, no, I'm fine with time, but I just didn't want to have to have her come back if it went on past one o'clock.

MR. BROWN: Subject to your questions, those are my submissions. Thank you.

THE COURT: Mr. Petty, anything further?

MR. PETTY: Yes, Your Worship, some points of clarification. My memory of Mr. MacLellan's answers on cross-examination was not that it was very difficult, but that memory fades, as it happens over nine months. I think he has admitted that he is at fault, at the same level of fault as anyone else in that position. This is just delay due to trial, so I don't think anything hangs on that. That's more about how someone's memory works as opposed to any of this case law.

My friend has rightly pointed out that in dock identification is suspect. Fortunately, we are not relying solely on that evidence. Your Worship has to consider all of the evidence before her including what led Cst. Dempster to lay the charges as he did. I don't mean to suggest in any way that my friend is employing you to not consider all of the evidence.

The offence for which Ms. Goodman is charged

is, as a requirement, an accident must be reported unless the exception conditions are met. None of those exception conditions were met. What we have then is witnesses observing an accident, giving a description of their memory at that time, of a woman, an elderly woman, a dark-haired woman, taking down the licence plate number, providing it to Cst. Dempster along with a description of the events that occurred. Cst. Dempster then runs the plate, gets the registered owner, contacts the registered owner and is told something by the registered owner that leads him to charge Ms. Goodman, presumably, that she was driving.

This is, as I say, a strict liability or an absolute liability offence. Her duty is to report. There has been no report. The Crown's office and the KPF believe that she was driving because of the information received. The defence has offered no evidence stating that she was not the driver, they only state that in dock identification is suspect. If it were the case that Ms. Goodman wasn't in the vehicle, had sometime out, the defence could lead that evidence. They have not. They're not under an obligation to, I realize, but that goes to the evidence that's before the Court. The only reasonable presumption then, given the way defence has proceeded, is that Ms. Goodman was the driver of the vehicle that pulled into the parking spot and pushed the Volkswagen forward. Thank you, Your Worship.

MR. BROWN: Your Worship, could I respond really

briefly? I have great difficulty with just one issue that has unfolded, if I may, really quickly?

THE COURT: Go ahead.

MR. BROWN: My friend is relating to you the evidence that Officer Dempster received from who he said was Mr. Goodman on the phone and I objected to that evidence, and it was agreed that it was simply part of the narrative. So, if somebody told, if Mr. Goodman told the officer that some person was driving the vehicle, it's clearly hearsay and the evidence went in as part of the narrative only. I objected to it and my friend actually conceded that it is not being offered for its truth. Now, he seems to be inviting you to accept that as evidence, and I have difficulty with that portion.

THE COURT: I am going to rise for a minute.

R E A S O N S F O R J U D G M E N T

HICKLING, J.P., (Orally):

Ms. Goodman, you do not have to stand if you do not wish to. In respect to the charge against Florence Goodman, the Court has had the opportunity to hear the evidence of the officer who attended upon being dispatched to an accident that had occurred in a parking lot in Kingslake Plaza at 1201 Division Street. His evidence was that he examined a vehicle that had been hit, a Volkswagen. He indicated what damage he saw on the vehicle, spoke to a couple of witnesses, and subsequently he contacted the Goodman residence and spoke with Mr.

Goodman. Charges, ultimately, were laid.

Mr. MacLellan indicated that he was in the strip mall and was chatting with some people in the mall; there was a bang. He clearly said that he was looking at the parking lot and did not have to turn around. He saw the vehicle hit the Volkswagen and push the Volkswagen ahead. Then his evidence was that he saw the people, a woman, an elderly woman with dark hair get out of the car. He described her as, I believe, five foot two or three. Also, a gentleman got out, they looked around the vehicle, examined the vehicle, then went into a grocery store, came back out of a grocery store, got back into the car and left the area.

It was agreed by defence and Crown that the particulars in respect to the vehicle, the Volkswagen that got hit, had not been damaged prior to, was damaged after the lady returned to her car, and that the value did exceed $1,000. Those facts were agreed upon by defence and the Crown.

The argument that is being put before the Court is that there is no evidence that the accident was not reported when, in fact, the officer indicated that he was the officer in charge and that the accident was never reported to him or Kingston Police. If, in fact, I accept the evidence of defence or the submissions of defence in respect to that point, defence could have brought some evidence to the

Court and indicated here is a report that we sent in or we faxed in or we mailed in indicating, yes, that this accident was reported. So, I do not put any weight on the argument by the defence in respect to the accident that was not reported. It is clear that the accident was not reported.

The submissions then go to the identity of the driver of the motor vehicle and Mr. MacLellan said in his evidence that he worked in Human Resources with the Ottawa Police - and has perhaps, other than for a lay person who comes in for the first time in Court, has perhaps some knowledge of the Court, the judicial system, having worked with the Ottawa Police. In any event, he is on the stand and he describes the woman, points to Mrs. Goodman and said that this was the woman that was driving the motor vehicle, that got out of the driver's side of the motor vehicle. Defence is saying no, that that identification is not satisfactory because of the documents that have been put in, the stated cases.

This is not an identification where the car is driving down the road and hits a car and ricochets off the vehicle and then continues on down and leaves, this is a situation where these people got out of the car, looked at the damage, went into a grocery store and came back out. There is no evidence that they were not the same people. He just watched them get out, watched them go into the

grocery store, and watched them come back into the car and drive away. This is not one fleeting glance at these people.

It was clear he did observe the people and I am satisfied he clearly identified Mrs. Goodman as the driver and this Court clearly finds from the evidence before this Court that, in fact, Mrs. Goodman was the driver of the vehicle and did fail to report as required under the *Highway Traffic Act* and this Court finds you guilty as charged. Any comments respecting penalty?

MR. PETTY: I believe it's a set fine of $90 and three points.

THE COURT: I don't know about the points.

MR. BROWN: Just briefly, Your Worship, obviously Ms. Goodman is an elderly lady. She is in her senior years. She doesn't drive anymore and she attended here from Toronto. She took a train, I think? A train, Your Worship. She stayed in a hotel last night. She has acted responsibly in response to this charge and she is here. She is on a fixed income and has not worked in many, many years. So, I leave that with you.

THE COURT: Well, I am certainly prepared to give her a lengthy time to pay, but the minimum of $90 I find is an appropriate way to deal with it and the fine will be $90 with the additional victim surcharge. At this point, I can give her three months to pay.

A D J O U R N E D

THIS IS TO CERTIFY that the foregoing is a true and accurate transcription of the record made by electronic sound recording apparatus to the best of my skill and ability.



Delia Manis
Certified Court Reporter