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# R. v. Hilaire

Between
Her Majesty the Queen, and
Pascal Hilaire

[1999] O.J. No. 898
Doc. No. 907185

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

March 11, 1999.
(4 pp.)

**Counsel:**

Mr. Bryan, for the appellant.
J. MacPherson, for the respondent.

¶ 1 **LIBMAN PROV. J.** (endorsement):— On 28 February 1997 the appellant was charged by way of information with operating a motor vehicle without insurance, contrary to s. 2(1)(a) of the Compulsory Automobile Insurance Act.

¶ 2 The information was sworn on 8 May 1997 before a justice of the peace. The summons, as recorded in the text of the information, was made returnable for 25 June 1997.

¶ 3 The summons itself sets out the 25 June 1997 return date. However, the affidavit of service on the back of the summons was not completed by a provincial offences officer.

¶ 4 It is therefore common ground that there is no proof of service of the summons on the appellant.

¶ 5 This deficiency in the summons was, not noticed in the proceedings below. Hence, on 25 June 1997 when the appellant did not attend in court, the matter was adjourned to 14 November 1997 for an ex parte trial.

¶ 6 On 14 November 1997 the appellant again did not appear for his trial. The court was "satisfied with the jurisdiction" and proceeded to try the appellant in his absence. At the conclusion of the Crown's case a finding of guilty was entered. Thereafter the matter proceeded to sentencing and the minimum fine of $5,000 was imposed.

¶ 7 The appellant appeals against his conviction pursuant to s. 116 of the Provincial Offences Act on the basis that he was never informed of the 25 June 1997 and 14 November 1997 trial dates.

¶ 8 It appears that the appellant actually appeared in court on 29 April 1997 but was advised that there was no information before the court and that there was a lack of jurisdiction to deal with his matter

on this date.

¶ 9 The Crown concedes that there was no basis for the appellant's trial to have commenced in his absence, given the lack of proof of service of the summons. In view of this non-compliance with s. 26 of the Provincial Offences Act, the process was fatally flawed.

¶ 10 It is the Crown's further position, however, that the proper route for the appellant to attack the validity of these proceedings is not by way of appeal proceedings, but by the review provisions (eg., certiorari) under s. 140 of the Provincial Offences Act.

¶ 11 With respect, I do not think that the Crown's position is supported by the authorities or the wording of the legislation. In my respectful opinion, the appellant has properly challenged his conviction by way of appeal and is entitled to appellate intervention by this court. My reasons for so concluding are as follows.

¶ 12 Appeals under Part III of the Provincial Offences Act may be brought in proceedings, which have been commenced by information, by the defendant against a conviction: s. 116(1). Where the appeal is from a decision of a justice of the peace, the appeal is to be brought to the Ontario Court (Provincial Division) presided over by a provincial judge: s. 116(2)(a).

¶ 13 The fact that the justice of the peace acted on the erroneous belief that there was jurisdiction to try the appellant on an ex parte basis, notwithstanding the lack of proof of service of the summons, does not impact upon the statutory right of parties to appeal convictions or dismissals under s. 116: Ontario (Minister of Labour) v. NMC Canada Inc. (1995), 25 O.R. (3d) 461 (C.A.).

¶ 14 Indeed, the availability of the appeal process will ordinarily preclude recourse to prerogative remedies: R. v. Tucker (1992), 9 O.R. (3d) 291 (C.A.).

¶ 15 To put it shortly, no application to quash a conviction may be made to the superior court pursuant to s. 140 of the Provincial Offences Act where an appeal is available: R. v. Anderson (November 28, 1985), Doc. No. 2716/85 (Ont. S.C.); R. v. Murray (1983), 22 M.V.R. 66 (Ont. H.C.); R. v. Barker, [1992] O.J. No. 545, 15 W.C.B. (2d) 504 (Gen. Div.).

¶ 16 This is not a case, then, like R. v. Mladenoff (1997), 34 O.R. (3d) 464 (Gen. Div.) where the validity of the summons (to a witness) was put in issue prior to the matter proceeding to trial on the merits. In such a case the summons issued by the justice of the peace was properly challenged by an application for certiorari.

¶ 17 Certiorari is a remedy to review jurisdictional errors by lower courts in circumstances where there is no effective right of appeal. Section 141(3) of the Provincial Offences Act expressly provides that certiorari is not available "to quash a conviction, order or ruling from which an appeal is provided by this Act, whether subject to leave or otherwise".

¶ 18 This provision appears to be modelled upon s. 776 of the Criminal Code which prohibits the removal by certiorari of a conviction where an appeal has been taken - whether or not it has been carried to a conclusion. Neither does s. 776 permit certiorari to obtain in circumstances where the defendant appeared and pleaded, the merits were tried, and the defendant did not appeal. Section 141(3) of the Provincial Offences Act is thus considerably broader than its Code counterpart in proscribing the availability of certiorari applications.

¶ 19 Hence, in R. v. Gronka (1996), 31 W.C.B. (2d) 118 (Ont. Gen. Div.), the accused's application for certiorari to quash his conviction for a provincial driving offence was quashed upon application by the Crown. The accused had chosen not to appeal and s. 141(3) therefore prohibited the proceedings, s. 141(3) providing that no application shall be made to quash a conviction from which an appeal was provided by the Act.

¶ 20 This interpretation of the relationship between appeals and reviews under the Provincial Offences Act corresponds, in my view, with the holding that an appeal, as opposed to an extraordinary remedy, lies from a nullity, that is, a proceeding involving jurisdictional error which resulted in a conviction or acquittal.

¶ 21 In R. v. Saunders, [1970] 2 C.C.C. 57 (S.C.C.) at 87-88, Martland J., for the majority, explained this principal thusly:

> A person who challenges the jurisdiction of a tribunal which proposes to try him can take objection to the jurisdiction and refuse to plead, in which event certiorari is available to him. But, if he does plead, and the case then proceeds to a trial of the merits, and if he has a right of appeal, his challenge to the jurisdiction can then only be made by way of appeal.
> There can be no doubt of the power of Parliament thus to limit the exercise of an extraordinary remedy, and it has done so in clear terms. Nor is there room here for implying a presumed intention that certiorari be available to compel an inferior tribunal to keep within its powers, because the obvious intention of s. 682 [now s. 710] is that it is the procedure by way of appeal, and not certiorari, that, where available, should be used for that purpose.
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> ...
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> My interpretation of s. 682 does not necessarily involve the conclusion that Parliament intended that that which was a nullity should be validated. Even proceedings which are a nullity, as in the Crane case, can only be shown to have been a nullity by means of some procedure before a higher court. Parliament can prescribe the nature of such a procedure, and, in my view, in s. 682 has stated, in clear terms, that, in any case falling within its provisions, that procedure must be by way of appeal, and by that means only.

¶ 22 The fact, then, that the accused appears before the court and enters a plea, followed by an act which results in a loss of jurisdiction, such as the judge refusing to grant an adjournment, does not oust the appeal provisions in the Code: R. v. Mearns; R. v. Kreutziger, (1970) 5 C.C.C. 226 (B.C.C.A.). Nor does the fact that the section under which the accused was convicted was subsequently determined to be ultra vires render relief by certiorari available: R. v. Beaupre (1981), 61 C.C.C. (2d) 92 (Man. C.A.). See further in this regard R. v. Brown (1970), 2 C.C.C. (2d) 528 (Ont. C.A.); R. v. Granberg (1973), 11 C.C.C. (2d) 117 (Alta. C.A.).

¶ 23 I therefore conclude that the characterization of the proceedings before the justice of the peace as a nullity, on account of the lack of service of the summons by a provincial offences officer, does not preclude the appellant from challenging his conviction on appeal.

¶ 24 In the result, the appeal is allowed, the Conviction is set aside, and a verdict of acquittal is substituted in its place.

LIBMAN PROV. J.

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