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R. v. Khoshael

Between
Her Majesty the Queen, respondent, and
Ali Khoshael, appellant

[2001] O.J. No. 2110
No. 4811 999 00 51394586 00

Ontario Court of Justice
Toronto, Ontario
Libman J.

Heard: April 6, 2001.
Judgment: May 25, 2001.
(24 paras.)

On appeal against the conviction imposed by Justice of the Peace S. Kant, on 13 April 2000, at Toronto, Ontario.

Counsel:

Jamie L. MacPherson, for the Provincial prosecutor.
Todd Brown, for the appellant.

LIBMAN J.:—

Introduction

¶ 1 The issue in this appeal, and a number of like appeals argued with it, is whether an error or omission on the face of a certificate of offence issued under Part I of the Provincial Offences Act, R.S.O. 1990, c. P.33, should result in the quashing of the certificate, even though the defendant is deemed not to dispute the charge according to the terms of s. 9.1 of the Act respecting "default convictions".

¶ 2 This particular case presents the example of a certificate of offence which contains no certification of service by the provincial offences officer who issued the ticket. The defendant, however, subsequently gave notice of his intention to appear in Court. Other examples in the companion appeals include an erroneous amount indicated for the set fine or the total fine payable, or an omission to indicate either the set fine or the total fine payable, although the particulars of the fine, as given, are accurate.

¶ 3 For many people, the notion that a proceeding should be quashed, because the fine amount on a certificate of offence issued under the Provincial Offences Act, is in error by ten cents, or by reason of the

certificate of service box not being ticked off by the provincial offences officer, even though a notice of intention to appear at trial has been completed by the defendant, and a trial notice issued, represents a triumph of form over substance. I have concluded, however, that this result accords with the spirit and intent of the legislation.

Section 9.1 of the Provincial Offences Act

¶ 4 Where a certificate of offence is issued under Part I of the Act, special considerations apply since the defendant may be tried in his or her absence. More particularly, the defendant's failure to appear at trial is taken to represent that he or she "shall be deemed not to dispute the charge": s. 9.1(1).
¶ 5 Where this happens, s. 9.1(2) requires the Justice to "examine the certificate of offence". The Justice is further required to "without a hearing enter a conviction in the defendant's absence and impose the set fine for the offence if the certificate is complete and regular on its face" [emphasis added].
¶ 6 The only recourse open to the Justice where he or she is unable to enter a conviction is to quash the proceeding: s. 9.1(3).
¶ 7 Such a result is confirmed by Regulation 200 of R.R.O. 1990, governing Provincial Offences Proceedings. It precludes the amendment of a certificate of offence in such circumstances; it also imposes on the Justice who quashes a proceeding under s. 9.1 the requirement of endorsing on the certificate the decision and the reasons for the decision. See ss. 15, 22(1.1).

Analysis

¶ 8 The Provincial Offences Act strikes a balance between inferring from the failure of defendants to act, such that they are taken to have waived their right to be presumed innocent and their right to a hearing, thereby consenting to a conviction, while placing an overriding requirement on the Justice, as the independent judicial officer put in place as a safeguard, the task of examining the charge document which has initiated the proceeding, so as to prevent injustices from occurring. See R. v. Richard, [1996] 3 S.C.R. 525, 110 C.C.C. (3d) 385, 3 C.R. (5th) 1 at [C.C.C.] 400-401.
¶ 9 In this light, the power of the Justice to refuse to enter a conviction and quash the proceeding where the ticket or charge document has not been delivered to the defendant in accordance with the Act, or where there are irregularities on its face such that it is not complete and regular, constitutes an integral part of this pervasive regime in respect of regulatory infractions. The Court may proceed to impose fines of up to $500 upon convicting the defendant, without the necessity of a trial on the merits, or one in which the defendant appears. See s. 12(1).
¶ 10 It follows from the above that notwithstanding Ms. MacPherson's able arguments to the contrary, which she styles as touching on the issue of jurisdiction, I see no reason for departing from the long line of authority which holds that where defects appear in a certificate of offence under s. 9.1, such that it cannot be said to be complete and regular on its face, the result must be a quashing order. See, for example, in this regard: R. v. Xinos (February 9, 1996) (Ont. Prov. Div.); R. v. Deangelis (November 10, 1994) (Ont. Prov. Div.) [Bokusky J.]; R. v. Rose (October 5, 1999) (Ont. C.J.) [Zabel J.]; R. v. Rodriguez (November 14, 1999) (Ont. C.J.) [Hawke J.]; R. v. Singh (April 13, 2000) (Ont. C.J.) [Duncan J.]; R. v. Singh (January 14, 2000) (Ont. C.J.) [Blacklock J.].

¶ 11 Different considerations apply where the defendant appears at trial and the Act's broad amendment powers under s. 34 may be invoked and the grounds for quashing are circumscribed by s. 36. Technical objections, it has been stated, ought not to impede an impartial trial on the merits, contrary to the spirit of the Act which requires Courts to look at substance, and not procedural irregularities. See R. v. Salim, [2000] O.J. No. 507 (S.C.) (MacKinnon J.] at para 7.

¶ 12 I see nothing inconsistent in the statement of principles which applies to the disposition of technical deficiencies arising in the course of the trial setting, as opposed to those in respect of the "default conviction" provisions under s. 9.1 of the Act. See W. Douglas Drinkwater and J. Douglas Ewart, Ontario Provincial Offences Procedure (Carswell: 1980), p. 62; Sheilagh Stewart and Janine Macey, Provincial Offences Procedure in Ontario (Earlscourt: 1998), p. 28.

¶ 13 Defects which arise in respect of the latter, that is, involving a certificate of offence or charge document which is the subject of examination under s. 9.1, go to the very jurisdiction of the Court to conduct a hearing in the defendant's absence and enter a conviction, the defendant having been deemed not to dispute the charge. Hence, a premium is rightly placed on the form of the document, since matters of substance are not engaged by s. 9.1. The absence of an amendment power while providing for one of quashing under s. 9.1(3), whereas s. 36(2) provides for both powers at trial, confirms, in my respectful opinion, this distinction.

¶ 14 Blacklock J., in R. v. Singh, supra, p. 13, succinctly explained the unique ambit of s. 9.1 in a similar manner, stating:

> That section is an exceptional section, in that it permits the justice of the peace without any evidence at all to convict an accused person who does not appear and it seems to me that to invoke that exceptional power and section requires compliance with its terms.

¶ 15 This is not to say that any irregularity will result in a quashing order under s. 9.1.

¶ 16 The recent case of R. v. Baldasare (November 9, 2000), Doc. Windsor 00-CR-05944 (Ont. S.C.) [Daudlin J.] illustrates this point. There it was held that in the circumstances of Highway Traffic Act offences, the addition of the words "of Ontario" or "Ontario", at its highest, can only be taken as surplusage and cannot be a ground upon which the offence notice itself can be found to be in error. Such surplusage, as Daudlin J. put it at p. 3, "in no way confuses or in any manner raises the issue of the notice being inappropriate, incomplete or in any manner failing to meet the necessities of the legislation".

¶ 17 In summary, errors in respect of the quantum of fine, certificate of service, and the like, deprive the Court of jurisdiction to enter a "default conviction" under s. 9.1 since the certificate, upon examination, cannot be said to be complete and regular on its face, which is a condition precedent under s. 9.1(2).

¶ 18 Indeed, the recording of an erroneous set fine amount may give rise to adverse administrative results, as where the amount recorded constitutes an under-payment, thereby subjecting the defendant to the risk of being suspended from driving due to non-payment of the correct amount of the fine. Likewise, where a trial notice is sent out to the defendant despite an error respecting the certification of service, and s. 9.1 is engaged, the re-opening provisions under s. 11 of the Act strictly prescribe the circumstances under which the Justice is to strike out the conviction, should the defendant attempt to move against the conviction in this manner. See Provincial Offences Procedure Act, s. 38 Re (1990), 110 A.R. 323 (Prov. Ct.); R. v. Hanna, [2001] A.J. No. 215, (February 24, 2001), Doc. Calgary 0001-0373-S2 (Alta. Q.B.).

¶ 19 Conversely, errors which touch on matters of surplusage, or omissions in such regard, as illustrated by R. v. Baldasare, supra, fall into a different category, and ought not to result in a quashing order. They do not impede the jurisdiction of the Court to enter a conviction in accordance with s. 9.1(2).

¶ 20 In this case, the certificate of offence contained no certification of service.

¶ 21 The fact that the defendant completed a notice of intention to appear and arranged for an agent to appear on his behalf does not confer jurisdiction upon the Court to proceed to enter a conviction, in the face of the clear language set forth under s. 9.1. Indeed, subsection (1) specifically refers to, in this regard, a defendant who "has given notice of an intention to appear [and] fails to appear at the time and place appointed for the hearing", thereby recognizing this very situation.

¶ 22 Stated shortly, the defendant did not appear on the date selected for his trial, and must therefore be deemed not to dispute the charge, as mandated by s. 9.1(1). The Justice was therefore required to act in the defendant's absence under s. 9.1(2) and examine the certificate of offence to determine whether it was complete and regular on its face.

¶ 23 The omission of the certification of service is fatal to the certificate of offence being "complete and regular on its face" within the meaning of s. 9.1(2) of the Provincial Offences Act. It ought to have been quashed in the circumstances.

Disposition

¶ 24 The appeal is allowed and the certificate of offence quashed.

LIBMAN J.

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