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2002 CarswellOnt 5812, [2002] O.J. No. 4850

R. v. Lorenzo

In the Matter of the Highway Traffic Act, R.S.O. 1990, c. H.8 and the Provincial Offences Act, R.S.O. 1990, c. O.33

Corporation of City of Toronto, prosecutor and Armulfo A. Lorenzo, defendant

Ontario Court of Justice

Quon J.P.

Judgment: December 10, 2002
Docket: None given.

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Counsel: E. Luca -- Prosecutor

J. Little (Agent), for Defendant

Subject: Public; Criminal

Motor vehicles.

Criminal law.

***Quon J.P.*:**

1. Background

1 The defendant's vehicle had struck a pedestrian within a crosswalk. As a result, the defendant had been charged for failing to yield to a pedestrian under s. 140(1)(a) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 ("*H.T.A.*"). Once the prosecution had closed its case, it requested the Certificate of Offence be amended. It sought to have the section number for the offence s. 140(1)(a) replaced with s. 144(7). The prosecution's purpose in seeking to correct the Certificate had been so that the proposed section number would make the offence match the facts presented. Section 144(7) is also an offence of failing to yield to a pedestrian.

2 At first glance, both offences under s. 140(1)(a) and 144(7) appear to be identical offences. However, s. 140(1)(a) refers to an offence that occurs at a pedestrian crossover, while s. 144(7) concerns an offence at a ped-

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estrian crosswalk. The evidence from the prosecution witnesses disclosed the accident occurred at a pedestrian crosswalk controlled by traffic and pedestrian control signals, which is appropriately described under s. 144(7). This necessitated the request to amend the certificate to a s. 144(7) offence.

3 The prosecution suggests if there is any prejudice to the defence by the defective section number, it can be remedied by an adjournment. The defence disagrees and argues that the defence had prepared to defend a specific charge and submits that it is unfair to allow the amendment, as it would be prejudicial to their defence.

4 The trial began on November 13, 2002. My ruling on the amendment request was adjourned until December 10, 2002. The defence was additionally informed that if the amendment request were granted the recess between appearances would also serve to alleviate any prejudice to the defendant.

2. Prosecution Evidence

5 The defendant had been charged for failing to yield to a pedestrian contrary to s. 140(1)(a) of the *H.T.A.* while he had been driving westbound on Eglinton Avenue West to southbound Oakwood Avenue in Toronto. The defendant had been driving a vehicle that struck a pedestrian on January 1, 2002, at 1:30 p.m.

6 The pedestrian, Anton Alpio, had been crossing Oakwood Avenue in an easterly direction. He had started from the west curb on the southside of Eglinton Avenue West. Alpio testified that a light brown Chevrolet Cavalier had struck him in the southbound lane. He first saw the Cavalier over his left shoulder when it had been one meter away from him. He said that the Cavalier had been travelling fast.

7 Alpio also stated that the traffic light for him was green. He said that he had waited for about five seconds for the traffic light to change from red to green. The walk signal faced toward him. He also stated there were two lines that indicated for where he could walk when crossing the road. He said that he was walking between these two lines at a regular pace when he was struck by the defendant's vehicle. Alpio stated that he was halfway through the southbound lane of Oakwood Avenue when he was struck.

8 The defendant's vehicle has struck Alpio's left side. Alpio stated that when the vehicle struck him he rolled over the vehicle and fell on the right side of the vehicle. He suffered pains to his left knee and elbow. Alpio also stated that he did not see the driver of the vehicle right away. The vehicle that hit him had continued passed him for three meters and then stopped. The driver then exited his vehicle from the driver's side. An ambulance was called and he was checked over by its medical staff.

9 After a police officer arrived, Alpio stated that the officer took his and the defendant's statement. Alpio identified the defendant in the courtroom as the person that exited the vehicle that struck him.

10 The second prosecution witness, Robert Bavmanber, testified that at the time of the accident involving the pedestrian and the defendant's vehicle, Bavmanber had been in his vehicle stopped in the left turn lane northbound on Oakwood Avenue. Bavmanber had been facing a red light. He had been planning to drive westbound on Eglinton Avenue. He stated he had been either the first or the second vehicle in the left turn lane. He conceded that there might have been one vehicle ahead of him. However, he stated that he had a clear and unobstructed view.

11 Bavmanber testified that the east-west pedestrian signals were flashing "don't walk" when he observed a person run onto the road and struck by the defendant's vehicle. He also confirmed that the pedestrian had been

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between the two white lines about five to six feet across the road. Furthermore, Bavmanber testified that as the pedestrian ran onto the road, the defendant's vehicle quickly turned southbound into the intersection and hit the pedestrian. He saw the pedestrian bounce off the vehicle. He first observed the defendant's vehicle moving westbound making a left-hand turn to go southbound on Oakwood Avenue. He also said there was only one lane for southbound traffic. In addition, he stated that the defendant's vehicle had made a very fast left turn. After striking the pedestrian, the defendant's vehicle went past the intersection before he stopped. The defendant did not have an advance left turn signal. The traffic lights for east-west traffic were a solid green. The defendant's vehicle had advanced into the intersection to make a left turn. The defendant's vehicle was at the head of the line. It had been sitting and waiting to make a left turn.

12 Bavmanber identified the defendant as the driver of the vehicle that struck the pedestrian by pointing him out in the courtroom.

3. Issues

13 Would the incorrect section number on the Certificate for the offence of failing to yield to a pedestrian mislead or prejudice the defendant's defence?

14 If there is prejudice to the defendant's ability to make full answer and defence, can it be remedied to ensure a fair trial for the defendant?

15 If the prejudiced could be remedied, would there be injustice caused by the proposed amendment, based on the merits of the case?

4. Discussion of Issues and Law

16 The provisions of the *H.T.A.* relevant to the original charge under s. 140(1)(a) follow:

> 140(1) Subject to subsection (2), when a pedestrian or a person in a wheelchair crossing a roadway within a pedestrian crossover,
>
> (a) is upon the half of the roadway upon which a vehicle or street car is travelling; or
>
> (b) is upon half of the roadway and is approaching the other half of the roadway on which a vehicle or street car is approaching so closely to the pedestrian crossover as to endanger him or her,
>
> the driver of the vehicle or street car shall yield the right of way to the pedestrian or a person in a wheelchair by slowing down or stopping if necessary.

17 The "pedestrian crossover" mentioned in s. 140(1) is defined in s. 1 of the *H.T.A*:

> "pedestrian crossover" means any portion of a roadway, designated by by-law of a municipality, at an intersection or elsewhere, distinctly indicated for pedestrian crossing by signs on the highway and lines or other markings on the surface of the roadway as prescribed by the regulations; ("passage pour piétons")

18 The term "crosswalk" is also defined in s. 1 of the *H.T.A.*:

> "crosswalk" means,

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> (a) that part of a highway at an intersection that is included within the connections of the lateral lines of the sidewalks on opposite sides of the highway measured from the curbs or, in the absence of curbs, from the edges of the roadway, or
>
> (b) any portion of a roadway at an intersection or elsewhere distinctly indicated for pedestrian crossing by signs or by lines or other markings on the surface; ("passage protégé pour piétons")

19 A pedestrian's duty at a pedestrian crossover is found in s. 140(4). That section provides that a person approaching a pedestrian crossover has the duty not to leave the curb if it would be impracticable for a driver of a vehicle in the area close to the pedestrian to yield the right of way:

> 140(4) No pedestrian or person in a wheelchair shall leave the curb or other place of safety at a pedestrian crossover and walk, run or move the wheelchair into the path of a vehicle or street car that is so close that it is impracticable for the driver of the vehicle or street car to yield the right of way.

20 On the other hand, the proposed amendment to a charge of failing to yield to a pedestrian under s. 144(7) states that:

> 144(7) When under this section a driver is permitted to proceed, the driver shall yield the right of way to pedestrians lawfully within a crosswalk.

21 The term "intersection" as referred to in s. 144 is defined in s. 144(1):

> 144(1) In this section,
>
> . . .
>
> "intersection" includes any portion of a highway indicated by markings on the surface of the roadway as a crossing place for pedestrians; ("intersection")

22 A driver's or a pedestrian's actions at a controlled intersection with crosswalks are directed by the following provisions within s. 144:

> . . .
>
> 144(5) A driver who is directed by a traffic signal erected at an intersection to stop his or her vehicle shall stop,
>
> (a) at the sign or roadway marking indicating where the stop is to be made;
>
> (b) if there is no sign or marking, immediately before entering the nearest crosswalk; or
>
> (c) if there is no sign, marking or crosswalk, immediately before entering the intersection.
>
> . . .
>
> 144(12) A driver approaching a traffic control signal showing a circular green indication and facing the indication may proceed forward or turn left or right unless otherwise directed.

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. . .

144(22) Where portions of a roadway are marked for pedestrian use, no pedestrian shall cross the roadway except within a portion so marked.

144(23) Subject to subsections (24) and (27), a pedestrian approaching a traffic control signal showing a circular green indication or a straight-ahead green arrow indication and facing the indication may cross the roadway.

144(24) No pedestrian approaching a traffic control signal and facing a flashing circular green indication or a solid or a flashing left turn arrow indication in conjunction with a circular green indication shall enter the roadway.

144(25) No pedestrian approaching a traffic control signal and facing a red or amber indication shall enter the roadway.

144(26) Where pedestrian control signals are installed and show a "walk" indication, every pedestrian facing the indication may cross the roadway in the direction of the indication despite subsections (24) and (25).

144(27) No pedestrian approaching pedestrian control signals and facing a solid or flashing "don't walk" indication shall enter the roadway.

144(28) Every pedestrian who lawfully enters a roadway in order to cross may continue the crossing as quickly as reasonably possible despite a change in the indication he or she is facing and, for purposes of the crossing, has the right of way over vehicles.

. . .

144(30) The "walk" or "don't walk" pedestrian control indications referred to in this section may be shown as symbols as prescribed by the regulations. R.S.O. 1990, c. H.8, s. 144(20-30).

23 When the provisions of s. 140 are compared to s. 144, the most obvious difference between them, is that s. 144 provides for crosswalks and intersections controlled by automatic traffic lights and pedestrian control signals. Section 140 appears to apply to crosswalks that are not controlled by automatic traffic lights or pedestrian control signals. Therefore, the use of s. 144(7) is triggered by the presence of automatic traffic lights and pedestrian control signals.

24 The procedural rules governing the trial of *H.T.A.* **offences** are contained in the ***Provincial Offences Act***, R.S.O. 1990, c. P.33. The jurisdiction of the court to amend an information is contained in s. 34 of that **Act**:

34(1) The court may, at any stage of the proceeding, amend the information or **certificate** as may be necessary if it appears that the information or **certificate**,

(a) fails to state or states defectively anything that is requisite to **charge** the **offence**;

(b) does not negative an exception that should be negatived; or

(c) is in any way defective in substance or form.

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(2) the court may, during the trial, amend the information or **certificate** as may be necessary if the matters to be alleged in the proposed amendment are disclosed by the evidence taken at the trial.

(3) A variance between the information or **certificate** and the evidence taken on the trial is not material with respect to,

(a) the time when the **offence** is alleged to have been committed, if it is proved that information was laid or **certificate** issued within the prescribed period of limitation; or

(b) the place where the subject-matter of the proceeding is alleged to have arisen, except in an issue as to the jurisdiction of the court.

(4) The court shall, in considering whether or not an amendment should be made, consider,

(a) the evidence taken on the trial, if any;

(b) the circumstances of the case;

(c) whether the defendant has been misled or prejudiced in the defendant's defence by a variance, error or omission; and

(d) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.

25 The prosecution's argument for the amendment is supported by sections 34(1)(c) and 34(2). Those provisions permit the court to amend the certificate of offence during the trial if the matters to be alleged for the proposed amendment are disclosed by the evidence taken at the trial. The Certificate of Offence may be either amended for a formal or substantive defect. The evidence from the prosecution witnesses Alpio and Bavmanber did disclose that the pedestrian had been struck within a pedestrian crosswalk at an intersection controlled by traffic lights and pedestrian control signals as provided for under s. 144. On the other hand, s. 140 does not specifically refer to any pedestrian control signals or automatic traffic lights. Therefore, the elements of the s. 144(7) **offence** needed to be alleged to support the proposed amendment have been disclosed by the evidence given by both prosecution witnesses.

Had the defence been misled or prejudiced by the wrong section number for the offence?

26 Consequently, the court must now consider the first **part** of the test under s. 34(4)(c) to determine whether the **Certificate** should be amended. The primary **part** of the test is whether the defendant has been misled or his defence prejudiced by the police officer's error in **charging** the defendant under s. 140(1)(a) instead of s. 144(7). The defence argues that they were prepared to proceed and defend their case for an **offence charged** under s. 140(1)(a) and an amendment to a different **charge** would prejudice their defence. However, the prosecution counters that any prejudice that results from the defective section number can be remedied with an adjournment, after the **certificate** has been amended.

27 In considering whether to amend the **certificate**, the court must first look upon the philosophy and intent of the ***Provincial Offences Act*** which governs the prosecution and trials of regulatory matters in Ontario. The underlying theme of that governing **Act** is that substance prevails over form. As a result, a regulatory matter

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such as the instant case should be decided on its merits instead of letting technicalities prevail over justice being served. In the textbook, Stewart and Macey on Provincial Offences Procedure in Ontario (Toronto, Canada: Earlscourt Legal Press, Inc., 1998), the authors at pp. 77-78, aptly describe the Act's inherent theme:

> The purpose of the Act, as stated in s. 2(1), is to preserve a distinction between provincial offences and criminal offences. The desire to deal with matters on their merits, as opposed to technicalities, is clearly reinforced by the statement contained in the Rules of Court, that they be interpreted liberally "so as to obtain as expeditious a conclusion of every proceeding as is consistent with a just determination of the proceeding". This philosophy is inherent to the **Act**, particularly when one considers the provisions governing sufficiency, powers of amendment, remedies for defects, and the limited powers to quash.

28 The general rule concerning amendments of **certificates** and informations is that there is a bias in favour of amending. See *R. v. J.F. Brennan & Associates Inc.* (1981), 61 C.C.C. (2d) 1 (O.H.C.).

29 Moreover, that bias to amend is found in the ***Provincial Offences Act***. It can be seen in s. 37(2), which addresses defective informations or **certificates**. That section directs the court not to quash a **Certificate** of **Offence** unless an amendment would fail to satisfy the ends of justice:

> 37(2) The court shall not quash an information or **certificate** unless an amendment or particulars under section 34, 35 or 36 would fail to satisfy the ends of justice.

30 In determining if the proposed amendment as directed by s. 34(4)(c) would mislead or prejudice the defendant's defence, the court must consider the sufficiency of the original charge laid against the defendant. The defendant had been initially informed that he was being charged for failing to yield to a pedestrian contrary to s. 140(1)(a) of the *H. T. A.* Before being presented with the traffic ticket, the defendant had just been involved in an accident with a pedestrian. It follows therefore that the defendant would not have been confused about what would have been the substance of the charge that he would be facing.

31 In *Thermoset Thermoplastic Custom Moulder Ltd. v. Ontario (A.G.)*, [1992] O.J. No. 2455 (Ont. Ct. (Gen. Div.)), the court found that the wrong section number for the offence on the information had been a typographical error. Therefore, it was held that the incorrect section number for the breached regulation could be amended without prejudice to the defence. The court had held that the wording for the offence had been sufficient to describe the offence in spite of the wrong section number. Caswell J. in *Thermoset* stated that:

> Counsel has also argued that the applicant is prejudiced because the information sets out the wrong regulation. It is my view that this is not so since the particulars on the information are set out in sufficient detail so that the accused is able to make a full defence at trial. The information meets the test set out by de Grandpre J. in *R. v. Cote*....

32 The test for determining the sufficiency of an information is found in *R. v. Cote* (1977), 33 C.C.C. (2d) 353 (S.C.C.) at p. 357:

> the golden rule is for the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial. When, as in the present case, the information recites all the facts and relates them to a definite offence identified by the relevant section of the Code, it is impossible for the accused to be misled. To hold otherwise would be to revert to the extreme technicality of the old procedure.

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33 Furthermore, in the Stewart and Macey textbook, at pp. 78-79, the authors discussed whether someone would in fact receive sufficient notice of the substance of a charge when either the description of the offence or the section number is incorrect or defective. They concluded that the section number and the wording of an offence are both amendable, as long as the offence related to the section number or description of the offence is known in law:

> The offence must be stated on the information, and pursuant to s. 25(4) of the Act, this may be done in plain language, in the words taken from the offence-creating statute, or in "words sufficient to give the defendant notice of the offence with which the defendant is charged". This should be considered in conjunction with s. 25(3), which states that if the description of the offence is insufficient, it is deemed to be sufficient if there is reference on the information to the breached section of the statute. If either the description of the offence or the section number is wrong, either can be amended to correct the defect. If both are wrong, however, no offence in law is stated on the information, and the information would be a nullity.

34 In the present case, I find that the defendant would not have been misled by the incorrect section number. The substantive wording for an offence under both s. 140(1)(a) and s. 144(7) would include the phrase of "fail to yield to pedestrian". The original wording on the Certificate did not particularize the offence to have occurred at a "pedestrian crossover". In addition, just before the defendant was charged with an offence, his vehicle had struck a pedestrian. A person receiving a traffic ticket immediately after that unfortunate event for the offence of failing to yield to a pedestrian would not be misled by what he had been charged with, even with the incorrect section number. The proposed amendment does not force the defendant now to defend against a different offence. Neither the incorrect section number nor the proposed amendment refers to a substantially different charge. For example, the original or the proposed section number does not refer to a speeding infraction. The charge the defendant would have to defend after the proposed amendment would remain the same offence of failing to yield to a pedestrian. Besides, the proposed amendment does not change the offence from apples to oranges but is more akin to changing the offence from Granny Smith apples to Royal Gala apples.

35 Furthermore, in finding that the defendant had not been misled or that his ability to make a full defence prejudiced, I note that the defendant is represented by a paralegal. Particularly, upon being reminded of the circumstances and location of his accident involving a pedestrian, the defendant would have informed his representative about the presence of automatic traffic lights, pedestrian crosswalks and pedestrian control signals. Thus, the defendant and his representative would have prepared their defence based on those specific circumstances present at the location of the accident.

36 Therefore, since the description of the offence in the case at bar sufficiently informed the defendant of the offence of failing to yield to a pedestrian at the intersection of Eglinton Avenue West and Oakwood Avenue and is an offence known in law, the incorrect section number can be amended.

37 In sum, even if the incorrect section for the offence of failing to yield to a pedestrian would cause the defendant to be misled or prejudiced in preparing his defence, the prejudice would be minor. This minor prejudice could be easily remedied with an adjournment. As a consequence, this first hurdle of prejudice to overcome in order to amend the **Certificate** has been completed and any prejudice that may have arisen has been remedied by the actual adjournment. Now, the second hurdle of injustice has to be considered as the remaining **part** of the amendment test. The second **part** of the test is contained in s. 34(4)(d) of the ***Provincial Offences Act***. The question provided in that section is whether the proposed amendment to the **Certificate** of **Offence** would cause an injustice to occur when the merits of the case are considered.

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Would an injustice be caused by the proposed amendment when the merits are considered?

38 It is clear that if the defence were aware of the error made by the police officer in laying the charge under the wrong section, that the defence could not have been successful in pre-trial motion to have the certificate quashed on the ground that the defendant had been charged under the wrong section. That defensive maneuver by the defendant would have likely failed for two reasons. First, a motion to quash based on the use of the wrong section would be premature as no facts or evidence would have been before the court to substantiate that it is in fact the wrong charge. Secondly, the prosecution would be still entitled to request an amendment if indeed there has been an error in the section number stated. See *R. v. Salim* (2000), 45 W.C.B. (2d) 595 (Ont. S.C.J.).

39 In considering whether any injustice would result from the proposed amendment, the court has to now consider the circumstances of the offence and the evidence presented by the prosecution. The accident involved a pedestrian being struck by the defendant's vehicle. In this case, the severity of the circumstances favours amending the certificate unless injustice would be caused by the amendment.

40 While the defence may have been fully aware of the officer's error in laying the fail to yield to pedestrian offence under the incorrect section and had been simply waiting patiently to make a motion for a directed or non-suit verdict based on missing elements needed to prove the charge under s. 140(1)(a), the prosecution had strategically requested the amendment first. This prosecution request may therefore have usurped the defendant's opportunity to seek a directed verdict under the s. 140(1)(a) offence for missing elements. The defendant's inability to seek a directed verdict would obviously be affected by amending the section number. That is, the defence's possible strategy of seeking a directed verdict based on an incorrect section number had been contingent on the prosecution resting its case and not requesting an amendment to the Certificate of Offence. However, since the defendant's ability to seek a directed verdict is only realized or crystallizes after the prosecution has closed its case, this change in circumstances would not be classified as an injustice to the defendant.

41 Although at this juncture the court is prevented from weighing the prosecution evidence, it should be noted that the independent witness's testimony contradicted the testimony from the pedestrian. The independent witness Bavmanber stated that the pedestrian had ran out when the pedestrian control signal had been flashing "don't walk". On the other hand, the pedestrian Alpio had stated he was crossing on a "walk" or green signal. This apparent contradiction of what transpired obviously favours the defence. Thus, based on the merits of the case, no injustice would be caused by amending the section number.

42 Furthermore, when s. 140(1)(a) and s. 144(7) are compared to each other for the elements that the prosecution would have to prove, it appears that the prosecution's burden under s. 144(7) is more onerous than under s. 140(1)(a). First, there is the added burden of proving the proper functionality of the traffic signals and pedestrian control signals. Secondly, the prosecution has to prove what the automatic traffic lights and pedestrian control signals were displaying at the time the pedestrian entered upon the crosswalk. Thirdly, s. 144(7) refers to the pedestrian being "lawfully" within the crosswalk, which requires proof the pedestrian had not entered the crosswalk on a "don't walk" indication. To reiterate, the independent witness's evidence appears to weaken the prosecution's case on this required element. This further shows the proposed amendment would not cause an injustice if it were allowed.

5. Conclusion

43 The bipartite test for deciding whether the **Certificate** should be amended is found in ss. 34(4)(c) and (d) of the ***Provincial Offences Act***, R.S.O. 1990, c. P.33. The general principle underlying the amendment of defect-

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ive **certificates** of **offence** and informations governed by the ***Provincial Offences Act*** is that they should be amended unless the proposed amendment does not overcome the two constraints of prejudice and injustice. For the first hurdle of the test, if the defect or error on the **Certificate** of **Offence** irremediably prejudices the defence then the court should not make the amendment. For the second, if the prejudice could be remedied but injustice would result from the proposed amendment based on the merits of the case, then the **Certificate** should also not be amended.

44 In the case at bar, the prosecution requested that the section be amended from s. 140(1)(a) of the *Highway Traffic **Act***, R.S.O. 1990, c. H.8, to s. 144(7), in order that the evidence would match the actual **offence**. The prosecution's argument for the amendment is supported by sections 34(1)(c) and 34(2). Those provisions permit the court to amend the **certificate** of **offence** during the trial if the matters to be alleged for the proposed amendment are disclosed by the evidence taken at the trial. The **Certificate** of **Offence** may be either amended for a formal or substantive defect. The evidence from the prosecution witnesses Alpio and Bavmanber did disclose that the pedestrian had been struck within a pedestrian crosswalk at an intersection controlled by automatic traffic lights and pedestrian control signals. These control devices are provided for in s. 144. Therefore, the elements of the s. 144(7) offence needed to be alleged to support the proposed amendment have been disclosed in the prosecution evidence.

45 When either the description of the offence or the section number is incorrect, either is amendable, as long as the offence related to the section number or description of the offence is known in law. Both sections correspond to the same offence of failing to yield to a pedestrian. When the provisions of s. 140 are compared to s. 144, the most obvious difference between them is that s. 144 provides for crosswalks and intersections controlled by automatic traffic lights and pedestrian control signals. Section 140 appears to apply to crosswalks that are not controlled by automatic traffic lights or pedestrian control signals. Therefore, the use of s. 144(7) is triggered by the presence of automatic traffic lights and pedestrian control signals.

46 The prejudice, if any, to the defence from the incorrect section number would have been slight. The defendant had been charged for failing to yield to a pedestrian after striking a person in a crosswalk. He would not have been misled by an incorrect section number, especially since s. 140(1)(a) also describes the same offence as that described in s. 144(7). Moreover, the defendant had been represented by a paralegal. Hence, in preparing for trial the defendant would have told his representative about the presence of automatic traffic lights, crosswalks and pedestrian control signals. Therefore, the defence would have prepared for an offence that occurred at an intersection controlled by these devices. The prosecution's requested amendment would not have caught the defence unaware.

47 The proposed amendment does not force the defendant now to defend against a different offence. Neither the incorrect section number nor the proposed amendment refers to a substantially different charge. The charge the defendant would have to defend after the proposed amendment would remain the same offence of failing to yield to a pedestrian. Moreover, amending the section numbers does not change the offence from apples to oranges but is more like modifying the offence from Granny Smith apples to Royal Gala apples.

48 Although an amendment to the section numbers may effectively disable the defence's opportunity to seek a directed verdict or dismissal for failing to prove an element of the offence under s. 140(1)(a), the defence's ability to seek a dismissal had been contingent upon the prosecution closing its case and not requesting an amendment to the Certificate of Offence. Only when the defendant's opportunity had become vested could he then seek a dismissal for non-suit. In addition, the defendant on a pre-trial motion could not have successfully

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obtained an order to quash the Certificate on the ground that it was the wrong charge. That defensive maneuver would have been premature since no evidence would have been led at the pre-trial stage. In any event, the prosecution would have had the right to request an amendment to the Certificate of Offence at the pre-trial stage and during the trial to conform the section number to the evidence.

49 As such, even though s. 140(1)(a) concerns pedestrian crossovers while s. 144(7) relates to pedestrian crosswalks, the incorrect section number would not have caused prejudice to the defendant's ability to make full answer and defence that could not have been remedied by the court. In this case, an adjournment remedied any prejudice that may have resulted from the incorrect section number.

50 In considering the circumstances of the offence, the severity of a pedestrian being struck by the defendant's vehicle favoured the amendment request, except if an injustice based on the merits of the case would have occurred from the proposed amendment. On considering the merits of the case however, there were factors that indicated there would be no injustice occurring if the Certificate were amended. First, the prosecution would have had a more onerous burden to prove an offence under s. 144(7) then under s. 140(1)(a). The prosecution would have had to prove the traffic signals and pedestrian control signals were functioning properly. It also had to prove what the automatic traffic lights and pedestrian control signals were indicating when the pedestrian entered the crosswalk. Finally, the prosecution had to prove that the pedestrian had not entered or was in the crosswalk unlawfully. Without weighing the evidence, it is of significance that the prosecution witnesses had given contradictory evidence about whether the pedestrian had been lawfully within the crosswalk before he was struck. Therefore, these factors show the proposed amendment would not have caused an injustice to occur.

6. Order

51 As any misleading or prejudicial affect to the defendant's ability to make full answer and defence has been remedied by an adjournment, and the court's conclusion that an injustice would not occur from the proposed amendment, the section number of s. 140(1)(a) on the certificate shall be amended and replaced with s. 144(7).

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