Case Name:

R. v. Marroquin-Pineda

IN THE MATTER OF the Highway Traffic Act, R.S.O. 1990, c. H.8

Between
Her Majesty the Queen, and
Andres J. Marroquin-Pineda, defendant

[2002] O.J. No. 2249

Ontario Court of Justice
Provincial Offences Court - Toronto, Ontario
Quon J.P.

Heard: March 26, 2002.
Judgment: June 3, 2002. Released: June 7, 2002.
(47 paras.)

Charge: Drive while under suspension - s. 53(1) H.T.A.

Cases Considered or Referred to:

R. v. Buchholz (1976), 32 C.C.C. (2d) 331 (O.C.A.) per Arnup, Dubin and Blair, JJ.A.
R. v. Canning, [1996] O.J. No. 2769 (Ont. Ct. (Gen. Div.)), per Platana J. at Thunder Bay.
Re Chiappetta and The Queen, (1980), 57 C.C.C. (2d) 556 (O.H.C.) per Callon J.
R. v. Hall (1968), 67 W.W.R. 133 (B.C.S.C.).
R. v. Jannetta, [1998] O.J. No. 3292 (Ont. Ct. (Prov. Div.)), Hackett J. at Toronto.
R. v. Perlett, [1998] O.J. No. 5521 (Ont. Ct. (Gen. Div.)), per Platana J. at Thunder Bay.
R. v. Pheasant, [2000] O.J. No. 4817 (O.C.J.) per Lane J. at Toronto.
Re The Queen and Jassman (1975), 27 C.C.C. (2d) 271 (B.C.S.C.) per Andrews J.
R. v. S.(R.D.) (1997), 118 C.C.C. (3d) 353 (S.C.C.).

Statutes, Regulations and Rules cited:

Highway Traffic Act, R.S.O. 1990, c. H.8, ss. 52, 53(1), 57(1)(g).
Provincial Offences Act, R.S.O. 1990, c. P.33, ss. 111, 111(2), 116(2).
Red Tape Reduction Act, 2000, S.O. 2000, c. 26, Sched. O, s. 4.
Ontario Regulation 340/94 (made under the Highway Traffic Act) - Drivers' Licenses, ss. 5, 9(1).
Ontario Regulation 723/94 (made under the Courts of Justice Act) - Rules of the Ontario Court (General Division) and the Ontario Court (Provincial Division) in Appeals under Section 116 of the Provincial Offences Act, rule 9(2) [s. 1.1 of Courts of Justice Act, R.S.O. 1990, c. C.43, as amended by S.O. 1996, c. 25, s. 9, deems any regulation referring to the old name of the Courts to be continued under the new names of the Superior Court of Ontario and the Ontario Court of Justice].

Exhibits entered:

Exhibit "1" -- Certified Ministry of Transportation document regarding notice to Andres J. Marroquin-Pineda, born on December 1, 1966, whose latest address of 46 Panorama Court, Apt. #2010, Etobicoke, Ontario of suspension of driver's license for breaching novice driver conditions effective on August 22, 2000. The document also certified that a notice of this suspension was forwarded by registered mail on August 14, 2000 to the defendant's then latest address of 46 Panorama Court, Apt. #2010, Etobicoke, Ontario. The suspension number was 0109286.
Exhibit "2" -- [it appears Exhibit #3 was incorrectly labelled and should have been marked Exhibit #2].
Exhibit "3" -- photocopy of illegibly dated post office receipt with a signature.

Counsel:

C. Sweeney, Provincial Prosecutor.
P. Monticciollo, agent for the defendant.

QUON J.P.: —

1. INTRODUCTION

¶ 1 This proceeding has suddenly taken on a different course. It began ordinarily as a new trial ordered by the Provincial Offences Appeal Court. Now, it has turned into a decision of whether a mistrial should be declared to ensure a fair trial. The trial for the offence of driving while under suspension contrary to s. 53(1) of the Highway Traffic Act, R.S.O. 1990, c. H.8 ("H.T.A.") was completed pending judgment. However, after the court reserved judgment, it noticed a document that had not been properly entered as evidence attached to the information or court record. It had been part of the record put before the Appeal Court and had not been removed from the information for the new trial. This document misreceived by the court contained the defendant's signature. After being viewed by the court, the document appeared to be highly prejudicial to the defendant's case, in that it potentially contradicts the defendant's testimony.

¶ 2 One of the issues at trial had been whether the defendant had signed a post office acknowledgment receipt indicating he had received the notice of the suspension of his driver's license. The defendant had denied that it was his signature that was on the illegibly dated acknowledgement. However, his signature on the misreceived document appears to match the signature on the acknowledgment receipt. This revelation would obviously repudiate the defendant's claim of not receiving the notice of the suspension and impeach his credibility. Thus, this court is confronted now with deciding whether a mistrial on its own motion should be declared because of the misreception of prejudicial evidence.

¶ 3 The trial was completed on March 26, 2002. My judgment was reserved and the matter was adjourned until June 3, 2002 for my decision. On reconvening, the prosecution and the defence were notified about the issue of declaring a mistrial and given an opportunity to make submissions. This therefore, are the reasons for whether a mistrial should be declared and a new trial ordered.

2. FACTUAL BACKGROUND

¶ 4 The defendant was stopped by a police officer on September 1, 2000, at 12:15 a.m. at westbound Eglinton Avenue West at Snider Avenue in the City of Toronto and charged for committing the offence of driving while under suspension contrary to s. 53(1) under the H.T.A, R.S.O. 1990, c. H.8.

¶ 5 Exhibit #1, the certified Ministry of Transportation documents under seal, verified that the defendant's drivers license had been suspended by the Ministry of Transportation. The details of the suspension are that Andres J. Marroquin-Pineda a male person born on the December 1, 1966, whose latest address is 46 Panorama Court, Apt. #2010, Etobicoke, Ontario had his drivers license suspended effective August 22, 2000 under the H.T.A., for violating conditions applicable to novice drivers. Exhibit #1 also certified that the notice of this

suspension was forwarded by registered mail on August 14, 2000 to the defendant at his latest known address, and that on September 1, 2000 the suspension was still in effect.

¶ 6 The Notice of Suspension in Exhibit #1 commanded that the defendant return his driver's license to the Ministry either in person or by registered mail. This notice informed the defendant that if he returned his license by August 22, 2000 his driving privilege would be reinstated 30 days from that date.

¶ 7 When the defendant was stopped by the police officer on September 1, the defendant had proven his identity by showing his social insurance number card to the officer. He did not produce his driver's license to the officer. Under cross-examination on this point, the defendant said that he had left his driver's license at work.

¶ 8 The defendant, who was born in Mexico City, testified that he moved into #2010 -- 46 Panorama Court five months after arriving in Canada on April 19, 1998 and has lived at that address since that time. He also testified that he resides there with a 55-year old man and an 80-year old woman.

¶ 9 The defendant states that this 80-year old woman controls the mail. He also contends that she has the only key to the mailbox. The defendant testified that his family would send him letters but that he would not actually receive his mail until six months later. He said that this woman would visit her family in St. Catherines and not return for months at a time. He states that he would have never driven if he had received the registered letter containing the suspension notice.

¶ 10 To discredit or rebut the defendant's testimony on not receiving the notice by registered mail, the prosecution had shown him a photocopy of the "Acknowledgement of Receipt" from the post office with a signature on the addressee line. The defendant denied the signature on the Acknowledgment of Receipt card was his signature.

¶ 11 The misreceived document that has caused the court to consider declaring a mistrial is a recognizance entered into by the defendant. It contained his signature. It was still attached to the information after it had come back down from the Provincial Offences Appeal Court. The recognizance indicates that the signature of the person entering into the recognizance was that of the defendant's and the signature on the recognizance appeared to match the signature on the post office acknowledgment card.

3. ISSUES

¶ 12 Is there evidence that the defendant received the notice of the suspension before September 1, 2001?

¶ 13 Would the defendant still receive a fair trial if the court ignored the misreceived document?

¶ 14 Should this court on its own motion declare a mistrial based on the misreception of a prejudicial document or is there another remedy available to the court?

4. ANALYSIS OF FACTS AND LAW

¶ 15 In a situation prior to December 6, 2000, where a person's drivers license is administratively suspended by the Ministry of Transportation for violating novice driver conditions, the Ministry was obliged to give notification of the suspension by registered mail sent to the person's last known address or to notify by personal service. In the present case, the Ministry sent the notice of suspension by registered mail. However, the defendant denies receiving it through no fault of his own. His defence is based on the fact that his landlady had sole control of the mailbox key, and as a result, he did not receive his mail for several months. He also denies that he had signed for receiving the notice of suspension sent by registered mail and that the signature on the post office receipt was not his signature.

¶ 16 The defendant was charged under s. 53(1) of the H.T.A., for driving under suspension:

> 53(1) Every person who drives a motor vehicle or street car on a highway while his or her driver's licence is suspended under an Act of the Legislature or a regulation made

thereunder is guilty of an offence and on conviction is liable,

(a) for a first offence, to a fine of not less than $1,000 and not more than $5,000; and
(b) for each subsequent offence, to a fine of not less than $2,000 and not more than $5,000,

or to imprisonment for a term of not more than six months, or to both.

¶ 17 The power to suspend a novice driver's license for contravening novice driver conditions is contained in s. 57(1)(g) of the H.T.A and s. 9(1) of O. Reg. 340/94. Those sections provide:

57(1) The Lieutenant Governor in Council may make regulations in respect of novice drivers,

...

(g) prescribing circumstances under which the driver's licence of a novice driver shall be cancelled or suspended and the length of the suspension or suspensions; ...

9(1) The Registrar shall, after giving notice, suspend the driver's licence of a person who is convicted of violating any of the conditions specified in section 5, 6, 7 or 8.

¶ 18 Section 5 of O. Reg. 340/94 lists the novice licence conditions that novice drivers have to abide by.

¶ 19 The procedure for serving the notice of suspension on the defendant is contained in s. 52 of the H.T.A. On August 14, 2000, the date the notice was sent out, the procedure that was in force obliged the Ministry to give notice by registered mail or personal service:

52(1) Notice to a person of the suspension of his or her driver's license is sufficiently given if delivered personally or sent by registered mail addressed to the person to whom the license was issued at the latest current address of the person appearing on the records of the Ministry and where notice is given by registered mail it shall be deemed to have been given on the fifth day after the mailing unless the person to whom notice is given establishes that he or she did not, acting in good faith, through absence, accident, illness or other cause beyond his or her own control, receive the notice.
(2) On a day to be named by proclamation of the Lieutenant Governor, "registered" is struck out in subsection (1) wherever it appears.

¶ 20 Notice by regular mail was not allowed until December 6, 2000, when it was changed by s. 4 of Schedule O of the Red Tape Reduction Act, 2000, S.O. 2000, c. 26.

¶ 21 The prosecution evidence according to Exhibit #1 is that the defendant was sent the notice of suspension by registered mail on August 14, 2000. The defendant was then deemed under s. 52(1) of the H.T.A. to have received this notice on the fifth day after it was mailed. Ergo, he was deemed to have received the notice on August 19, 2000 unless he can establish that, by acting in good faith, through absence, accident, illness or other cause beyond his control, he did not receive the notice. The notice indicated that the suspension would become effective on August 22, 2000.

¶ 22 The defendant testified that he did not receive the notice of suspension because he does not control the key to the mailbox of the apartment where he rents a room. The woman that controls the key leaves on lengthy visits out of town and the defendant does not receive his mail until she returns. This is what the defendant was

attempting to establish as his legal excuse under s. 52(1), that it was some other cause beyond his control for not receiving the notice of suspension.

¶ 23 However, the prosecution submitted Exhibit #3, a photocopy of a post office acknowledgment receipt containing a signature, indicating that someone had in fact received the notice of suspension. Unfortunately, the date stamp on the post office receipt is not legible or decipherable. Hence, this acknowledgment does not indicate when the person who had signed for it had actually received the notice. Nonetheless, the defendant testified that the signature on the receipt was not his signature.

¶ 24 Even if there were no dispute concerning the signature on the post office receipt, the receipt does not prove beyond a reasonable doubt that the defendant had received the notice of suspension prior to the offence date of September 1, 2000. Specifically, the receipt does not clearly indicate whether someone signed it before or after the offence date. Normally a post office receipt would rebut a person's testimony that he or she did not receive the notice; it would also reveal that the notice was received before the actual date he or she had been charged for driving while under suspension. However, the prosecution has been unable to show in the present case that the notice was received before September 1, 2000.

¶ 25 Thus, the issue to decide up to this point was whether the defendant's excuse for not receiving the suspension notice had been through no fault of his own. However, that changed with the misreception of the prejudicial document.

¶ 26 This prejudicial document was the recognizance entered into by the defendant on March 27, 2001 under s. 111 of the Provincial Offences Act, R.S.O. 1990, c. P.33. The document was entitled "Order for Recognizance and Recognizance". In order to file an appeal, an appellant is required to pay the fine first before the appeal would be accepted for filing, unless he or she obtains an order to enter into a recognizance instead of paying the fine. Under s. 111(2) of the Provincial Offences Act, an appellant may apply to a judge for that order to enter into a recognizance instead of paying the fine. This procedure ensures the attendance of the appellant at the hearing of the appeal. The form of the recognizance is governed by rule 9(2) of O. Reg. 723/94 respecting Part III appeals under s. 116(2) of the Provincial Offences Act. This rule requires the recognizance to be in Form 4. There is no requirement under that Act or the rules under O. Reg. 723/94 to forward or provide it to the trial court.

¶ 27 The defendant was required to sign such recognizance in order to have his appeal heard. Therefore, this document is reliable proof of the defendant's actual signature. After the court viewed the defendant's recognizance, it realized that the presence of this document would raise questions about the defendant's credibility, as the signature on the recognizance appeared to match the signature on the post office receipt. As a consequence, this untendered document used in conjunction with the post office receipt would undoubtedly contradict the defendant's testimony about not receiving the notice. Thus, the misreceived document is highly prejudicial to the defendant's case.

¶ 28 Although, the court is mandated to disabuse itself of the existence of this document and decide the case on only the evidence before it, that is not so easily done in this particular case. Essentially, the defendant's evidence was that he did not receive the notice. The issue of obtaining a fair trial rests on whether the court is impassionately able to still rely on the defendant's statement as being credible, after seeing the defendant's signature on the recognizance, which appears to match the signature of the post office receipt. The dilemma arising is that if the recognizance and the signature of the defendant on the recognizance are ignored then it is implicit that the defendant may be exonerated on false evidence. However, if the court is unable to disregard the prejudicial document, then it is not unreasonable to conclude that the court might convict the defendant unfairly by relying on evidence that was not properly entered. In deciding whether this misreceived document has caused unfairness and irremediable prejudice to the defendant, the court has to also consider the notion of declaring a mistrial in order to ensure there is a fair trial.

MISTRIAL FOR THE MISRECEPTION OF PREJUDICIAL EVIDENCE

¶ 29 The likeness of the signature on the recognizance document to that on the post office receipt raises questions obviously about the defendant's credibility and puts his testimony into the realm of disbelief. Hence, the defendant's denial of signing the post office acknowledgment card as proof he received the suspension notice now becomes dubious. On the other hand, if the court had not been made aware of the existence of the defendant's signature on that recognizance document, then the court would have been just left with the issue of deciding whether the defendant had established a valid excuse for not receiving the notice. In which case, has this court in viewing the defendant's recognizance document compromised the defendant's right to a fair trial? If it has been, then is declaring a mistrial the only remedy available to the court?

¶ 30 To begin, mistrials are aborted trials. A mistrial may be declared when the court is satisfied that there is a reasonable apprehension that either party will not have a fair trial if the current trial continues, but a fair trial would be possible if it began anew before a different trial judge. In the present case, the misreception of this prejudicial document raises this reasonable apprehension.

¶ 31 In R. v. Jannetta, [1998] O.J. No. 3292 (Ont. Ct. (Prov. Div.)), Hackett J. at para. 31, in ruling against a defence request for a mistrial stated:

> given that a mistrial should only be granted when no other remedy will preserve the fairness of the trial ...

¶ 32 Furthermore, in R. v. Perlett, [1998] O.J. No. 5521 (Ont. Ct. (Gen. Div.)), Platana J. at para. 45 held that if the impairment of the defendant's right to make full answer and defence could not be remedied then a mistrial should be declared [emphasis is mine below]:

> The proper test of an application for a mistrial is, of course, whether the accused's ability to make full answer and defence has been impaired. ... However, a trial judge must declare a mistrial if a determination is made that the right to full answer and defence cannot be cured by a remedy short of a mistrial.

¶ 33 In R. v. Pheasant, [2000] O.J. No. 4817 (O.C.J.), Lane J. at paras. 22 and 23 summarized the legal principles applicable to mistrials and recusals [emphasis is mine below]:

> the legal principles that apply in motions for mistrials or for recusal of a judge.
>
> 1. The test for bias is as set out in R. v. S. (R.D.), supra. Impartiality is a state of mind in which the adjudicator is disinterested in the outcome, and open to persuasion by the evidence and submissions. Bias refers to a predisposition to a particular result, or closed to consideration of particular issues. Actual bias need not be established; the test is whether the particular conduct gives rise to a reasonable apprehension of bias. The person considering the alleged bias must be a reasonable, informed person with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that judges swear to uphold. The apprehension of bias itself must also be reasonable in the circumstances of the case. There is a presumption that judges will carry out their oath of office, which can be displaced with cogent evidence that something the judge has done gives rise to a reasonable apprehension of bias. The threshold for a finding of real or perceived bias is high.
> 2. Judges who have dealt with an accused in some earlier proceeding are not, by that fact alone, barred from hearing the trial: R. v. Rowbotham (1988) 41 C.C.C. (3d) 1 (Ont. C.A.) at pp. 52-53.
> 3. Disqualification is required where a judicial officer has made a finding of fact or statement in a legal proceeding from which it can reasonably be inferred that he or she has arrived at some conclusion on such issues as the guilt or innocence of the accused, or the credibility of important witnesses who may be required to testify at subsequent trial proceedings: R. v. Lacombe [1986] O.J. No. 328 (Ont. H.C.) p. 3; R. v. Wassilyn [1968] O.J. No. 125 (Ont. H.C.) pp. 157-158; Re. Downer and the Queen re. McPhee

and the Queen (1977) 35 C.C.C. (2d) 198 (Ont. H.C.); R. v. Storey [1971] O.J. No. 150 (Ont. H.C.); R. v. Tucker (1980) 27 Nfld. & P.E.I.R. 167 (Nfld. S.C.).

4. Mistrials are appropriate where a judge has clearly indicated that he or she has prematurely prejudged the matter: R. v. Kindylides (1990) 57 C.C.C. (3d) 257 (B.C.C.A.) at p. 267-268; R. v. Coreas (1997) 115 C.C.C. (3d) 353 (S.C.C.); R. v. Ontario Corp. 844781, [1996] O.J. No. 4496 (Ont. Gen. Div.); R. v. Foisy, [2000] O.J. No. 4322, (Ont. C.A. November 17, 2000 Docket #C33391).
5. Where the record as a whole does not indicate any jeopardy to the fairness of the trial and the appearance of impartiality, isolated intemperate, "worrisome" or "troublesome" remarks by a presiding judge do not warrant a mistrial. R. v. G.(A.) (1998) 130 C.C.C. (3d) 30 (Ont. C.A.) at pp. 47-52; R. v. S.(R.D.) supra; R. v. Tortone (1993) 84 C.C.C. (3d) 15 (S.C.C.) at pp. 28-29 varg. (1992) 75 C.C.C. (3d) 50 (Ont. C.A.)

...

I am satisfied that nothing has occurred during the course of the pretrial motions to jeopardize either the fairness of the trial or the appearance of impartiality.

¶ 34 In R. v. Canning, [1996] O.J. No. 2769 (O.C.J.), Platana J. at para. 36 summarized the test for finding a reasonable apprehension of bias would not exclude unintended bias:

> The respondent argues that the test as to what constitutes a reasonable apprehension of bias is as set out by Rand J. of the Supreme Court of Canada in Szilard v. Szasa [1955] S.C.R. 3. That decision, in essence, determined that a reasonable apprehension of bias is the probability or reasoned suspicion of biased appraisal and judgment, unintended though it may be.

¶ 35 Triers of fact are required in law to disabuse their minds of everything except the admissible evidence heard at trial: R. v. Pheasant, [2000] O.J. No. 4817 (O.C.J.) at para. 20. The misreception of evidence by the trier of fact is not sufficient as the only factor to declare a mistrial. It must include the trier of fact's inability to disabuse his or her mind of that evidence. In Re The Queen and Jassman (1975), 27 C.C.C. (2d) 271 (B.C.S.C.), Andrews J., at p. 275, referred to a decision that had held it is better to go through another trial than to subject an accused to any possible prejudice or unfair trial [emphasis is mine below]:

> Further, every accused is entitled to a fair trial. Surely, a County Court Judge, who conscientiously states that he cannot give the defendant a fair trial, must have the power to declare a mistrial. I find support for this position from my unqualified agreement with the statement of Mackoff, J., in R. v. Reinson (1973), 16 C.C.C. (2d) 415 at p. 418 (B.C.S.C.), where he states:
>
> > Under our system of jurisprudence anything that is said in a Court that in the view of the presiding Judge may result in prejudice to the accused, will result in their being a mistrial, and at a new trial the Crown starts afresh and the prejudice in the first trial is totally removed. It is better to go through another trial rather than to subject an accused person to any possible prejudice or unfair trial.

¶ 36 Cory J. of the Supreme Court of Canada considered an accused's right to a fair trial and an unbiased adjudicator in R. v. S.(R.D.) (1997), 118 C.C.C. (3d) 353, at para. 91-92 and 94 [emphasis is mine below]:

> A system of justice, if it is to have the respect and confidence of its society, must ensure that trials are fair and that they appear to be fair to the informed and reaso nable observer. This is a fundamental goal of the justice system in any free and democratic society.
> It is a well-established principle that all adjudicative tribunals and administrative bodies owe a duty of fairness to the parties who must appear before them. See for example Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), [1992] 1 S.C.R.

623 at p. 636, 89 D.L.R. (4th) 289. In order to fulfil this duty the decision-maker must be and appear to be unbiased. The scope of this duty and the rigour with which it is applied will vary with the nature of the tribunal in question.

...

Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. If the words or actions of the presiding judge give rise to a reasonable apprehension of bias to the informed and reasonable observer, this will render the trial unfair.

¶ 37 Cory J. also discussed the meaning of bias at para. 104 and 105 in R. v. S.(R.D.):

In Valente v. The Queen, [1985] 2 S.C.R. 673 at p. 685, 23 C.C.C. (3d) 193, 24 D.L.R. (4th) 161, Le Dain J. held that the concept of impartiality describes "a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case". He added that "[t]he word 'impartial' ... connotes absence of bias, actual or perceived". See also R. v. Généreux, [1992] 1 S.C.R. 259 at p. 283, 70 C.C.C. (3d) 1, 88 D.L.R. (4th) 110. In a more positive sense, impartiality can be described -- perhaps somewhat inexactly -- as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions.
In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues.

¶ 38 In Northey v. The King (1948), 91 C.C.C. 193 reversing 89 C.C.C. 254 (S.C.C.). Taschereau J. at p. 201 commented on how the admission of illegal and prejudicial evidence would seriously affect the defence strategy and may influence the trial judge:

Illegal evidence of a very damaging character was admitted at the trial, which was highly prejudicial to the accused. It is quite problematical to value all the effects of the admission of this illegal evidence, but it may safely be said, I think, that it may have seriously affected the cross-examination of the Crown witnesses, held out other evidence, and possibly changed the whole strategy of the defence. It may also, and this is quite natural and understandable, have seriously influenced the learned trial Judge, in the reaching of his conclusions, as it would have undoubtedly impressed unfavourably upon the minds of 12 jurors.

¶ 39 In R. v. Buchholz (1976), 32 C.C.C. (2d) 331, Arnup J.A. writing for the Ontario Court of Appeal, at pp. 333 to 334, held that the power for a judge to disqualify himself for good reason exists apart from the provisions of the Criminal Code. He also referred to the Re The Queen and Jassman decision where it was held that a judge must have the power to declare a mistrial if the judge is unable to conscientiously give a defendant a fair trial:

We are all of the opinion that the power of a Judge to disqualify himself for good and sufficient reason is one which exists apart from the express provisions in s. 499 of the Criminal Code. Certain obvious examples were posed to counsel during the course of the argument. ...
In Re McRitchie and The Queen (1974), 23 C.C.C. (2d) 255, [1975] 2 W.W.R. 383, Gould, J., granted an order in the nature of mandamus directed to a County Court Judge ordering him to proceed to adjudication of a trial in respect of which the County Court Judge had purported to declare a mistrial on the ground that in his view he had improperly granted to the Crown leave to call rebuttal evidence, as a result of having heard which the trial Judge regarded himself as "unable to dispose of the case in an unprejudiced way appropriate to the concepts of justice".
However, in the following year Andrews, J., of the same Court, in Re The Queen and Jassman (1975), 27 C.C.C. (2d) 271, referred to the decision in the McRitchie case, supra, and to the fact that the Crown had there conceded that the declaration of a mistrial had been without jurisdiction. Andrews, J., held at p. 275 that a County Court Judge who conscientiously states that he cannot give the defendant a fair trial must have the power to declare a mistrial.

¶ 40 Moreover, in Re Chiappetta and The Queen, (1980), 57 C.C.C. (2d) 556 (O.H.C.), Callon J. in deciding not to grant a Crown application for mandamus compelling the trial judge to continue with the trial found that the trial judge could declare a mistrial if he could not disabuse himself of evidence later ruled inadmissible. At p. 561, Callon J. also discussed the trial judge's reasoning that hearing the inadmissible evidence put a Crown witness' credibility at issue before the witness had testified:

> The final result was that a mistrial was declared. Judge Beaulne was of the view that because of his hearing evidence that he later felt was inadmissible, he had put Mousseau's credibility in issue before she testified. He stated that he was unable to divorce his mind of this evidence.

¶ 41 After reviewing these cases, it is evident that the court's ability to ensure trial fairness to the defendant and the prosecution is of utmost importance. In addition, they confirmed the court's jurisdiction to declare a mistrial to ensure a fair trial when there has been the misreception of prejudicial evidence. The reception by the court of the defendant's recognizance containing his signature was accidental. However, receiving this prejudicial evidence is not the sole factor in deciding whether a mistrial should be declared. It must also be coupled with the court's inability to disabuse itself of that evidence or the inability to still give both sides in this matter a fair trial. As such, because the misreceived evidence effectively impeaches the defendant's credibility, this court finds itself unable to conscientiously disabuse itself of the prejudicial evidence of the defendant's actual signature, and is therefore unable to give the defendant a fair trial. Therefore, the defendant's ability to make full answer and defence has been impaired by the misreception of this prejudicial evidence, and there is no remedy short of declaring a mistrial that can remedy this unfortunate situation.

5. CONCLUSION

¶ 42 At the date the defendant's driver's license had been suspended for breaching novice driver conditions, s. 52 of the Highway Traffic Act, R.S.O. 1990, c. H.8, still allowed service of this notice of suspension on the defendant by being personally delivered or by being sent by registered mail. The Ministry of Transportation certified that it had sent this notice by registered mail on August 14, 2000 to the defendant at his last known address (Exhibit #1). Under s. 52, the defendant would have been deemed to have received this notice on the fifth day after the mailing unless he could establish, while acting in good faith, that through no fault of his own he did not receive the suspension notice. To establish that he did not receive the notice, the defendant submitted that he did not have access to the mailbox for his apartment because someone else controlled the key, and he therefore would not receive his mail until months later. He further attests that he did not receive the suspension notice sent out by the Ministry of Transportation, nor did he sign any post office acknowledgement receipt that he had received this notice. He even denied that the signature on the illegibly dated post office receipt (Exhibit #3) shown to him was his signature.

¶ 43 The prosecution had submitted this post office receipt to prove the defendant had received the notice or that he was not credible in saying that he did not receive the notice. However, because there was no discernible date on the receipt, it was not by itself proof beyond a reasonable doubt that the defendant had received the notice before September 1, 2000, the date the defendant was charged for driving while under suspension.

¶ 44 In spite of the prosecution's failure to prove the defendant had actually received the notice before September 1, 2000 in face of the defendant's assertion of not receiving the notice, the court had yet to reach a final decision in this case when it noticed attached to the information or court record a recognizance signed by the defendant under s. 111 of the Provincial Offences Act, R.S.O. 1990, c. P.33. This document was signed in front of a judicial officer, and therefore would be a reliable document containing proof of the defendant's signature. The signature on this recognizance was virtually identical to the signature on the post office acknowledgement card.

¶ 45 The problem facing the court, therefore, was that the recognizance was not entered into evidence. Nor should it have been attached to the information. The court, after viewing the defendant's signature on the recognizance and comparing it to the post office receipt, realized that the defendant's credibility was now suspect. Although the court is required to disabuse itself of this misreceived prejudicial evidence, it could not purge itself of seeing the signature on the recognizance. If the court were to ignore the recognizance and the

defendant's signature contained in it, and permitted the defendant to rely on his testimony of not receiving the notice of suspension and not signing the post office receipt, then the defendant would invariably be rewarded for making a prevarication. Therefore, the misreceived document is clearly prejudicial to the defence and adversely affects the court's ability to view the defendant's credibility in a positive way. Since credibility is at the heart of the defendant's effort to establish the legal excuse of not receiving the notice, it would be unfair to proceed further with the trial if the court cannot disabuse itself of viewing the prejudicial evidence.

¶ 46 In conclusion, because the court is unable to disabuse itself of the persuasive effect of this prejudicial document, its ability to give the defendant a fair trial has been impaired. Therefore, the only remedy available to ensure that the defendant can make full answer and defence which has been impaired by the prejudicial document is to allow the defendant to have a new trial before a different trier of fact.

6. DISPOSITION

¶ 47 I find that the reception of a document not properly entered as evidence has seriously prejudiced the defendant and can be neither remedied nor its contents disabused of by the court. In order to ensure that the defendant will have a fair trial and be able to make full answer and defence, it is necessary therefore to declare a mistrial in these proceedings and have the matter start afresh before a different trier of fact.

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