Indexed as:

R. v. Panchal

Between
Her Majesty the Queen, appellant, and
Sangita Panchal, respondent

[1995] O.J. No. 3149

Ontario Court of Justice (Provincial Division)
Weagant Prov. J.

October 18, 1995.
(7 pp.)

On appeal from the decision of His Worship Justice of the Peace R. Romain, June 30th, 1995.

Criminal law — Provincial offences — Procedure — Nonattendance by provincial offences officer, effect of.

Appeal from the decision of a Justice of the Peace dismissing a charge against the respondent. The latter was charged with turning left at an intersection across the path of a vehicle approaching from the opposite direction contrary to section 141(5) of the Highway Traffic Act. As required by the Provincial Offences Act, she duly filled out a Notice of Intention and indicated that she wished to challenge the evidence of the provincial offences officer who completed the Certificate of Offence. When the matter came on for trial, the prosecutor informed the court that the officer was engaged in another matter. However, the court was informed that the Crown's case would not rest in any way on the testimony of the officer as a result of which the prosecutor asked to be able to proceed with the evidence of the civilian witnesses only. The Justice of the Peace dismissed the charge taking the view that the failure of the Crown to have the provincial offences officer present was a violation of the rights of the respondent, the Crown's ability to prove its case notwithstanding.

HELD: Appeal allowed. Section 5.2 of the Provincial Offences Act did not mandate that the provincial offences officer's testimony form part of the Crown's case in every prosecution. Such an additional substantive requirement would be a fundamental change in criminal procedure. To effect such a profound change, the new provision of the Act would have to do so with the clearest of language which revealed such an intention.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 7. Highway Traffic Act, s. 141(5).
Provincial Offences Act, S.O., s. 5.2(1), 5.2(2).

Counsel:

P. John, for the appellant.
G. Burd, for the respondent.

¶ 1 **WEAGANT PROV. J.**:— Sangita Panchal was charged pursuant to s. 141(5) of the Highway Traffic Act, R.S.O. 1990, c. H.8.:

> No driver or operator of a vehicle in an intersection shall turn left across the path of a vehicle approaching from the opposite direction unless he or she has afforded a reasonable opportunity

to the driver or operator of the approaching vehicle to avoid a collision.

¶ 2 Since 1994, persons charged with such a provincial offence are required to give notice to the court of an intention to appear. If a defendant wishes to dispute the evidence of the provincial offences officer, there is an additional pre-trial obligation to inform the court of such an intention. S. 5.2 of the Ontario Provincial Offences Act reads as follows:

> (1) A defendant who gives notice of an intention to appear in court for the purpose of entering a plea and having a trial of the matter shall indicate on the notice of intention to appear or offence notice if the defendant intends to challenge the evidence of the provincial offences officer.
> (2) If the defendant indicates an intention to challenge the officer's evidence, the clerk of the court shall notify the officer.

¶ 3 In the present case Ms Panchal duly filled out the Notice of Intention and indicated that she wished to challenge the evidence of the provincial offences officer who completed the Certificate of Offence. When the matter came on for trial the Crown prosecutor informed the court that the officer on the case was detained in another matter. However, the court was informed that the Crown's case would not rest in any way on the testimony of the officer and asked to be able to proceed with the evidence of the civilian witnesses only. Justice of the Peace Romain dismissed the charge. He was of the view that the failure of the Crown to have the Provincial Offences Officer present was a violation of the rights of Ms Panchal, the Crown's ability to prove its case notwithstanding.

¶ 4 The Crown appeals the ruling of the learned Justice of the Peace. Ms John, for the Crown, argues that the prosecutor has carriage of the Crown's case and as such is entitled to call any and all witnesses to prove the matter beyond a reasonable doubt. The case may not turn, in any way, on the evidence of the Provincial Offences Officer and therefore as a matter of course, the officer would not ordinarily be called. Ms John further argues that when a defendant indicates on the Notice of Intention that he/she intends to challenge the evidence of the officer, notice is being given that the defendant seeks to challenge the Crown's case in its entirety. Ms John urged me to rely upon the ruling of His Honour Judge Stone in the case of Regina v. Chatterton. Confronted with a comparable situation, Judge Stone ruled that where the defendant wishes the Provincial Offences Officer to attend and is prejudiced by the non-attendance of the officer, appropriate remedy would be an adjournment.

¶ 5 Mr. Burd, for the Respondent, urged me to follow the reasoning of the Justice of the Peace. He argued that the non-attendance by the officer would in every case be prejudicial because the defendant would be unable to make enquiries into the reasons for the charge originally being laid.

¶ 6 It is my view that this Appeal must succeed.

¶ 7 I begin with the following proposition from R. v. Kennedy (1971), 3 C.C.C. (2d) 58 (Ont. C.A.) Per Kelly J.A. at 60:

> In my view, one vital objective of criminal procedure is to ensure that no person exposed to prosecution shall be found guilty otherwise than by the instrumentality of a trial conducted in a manner which will not prejudice him in making his full answer and defence to the charge against him; accordingly, the gravity of any alleged procedural deviation is to be assessed in relation to the extent to which that object may thereby be impeded.
> While I would not countenance any departure from the rigidity with which I believe that this principle should be applied in favour of the accused, I am firmly of the opinion that the importance of departures from the traditional form of procedure from which no prejudice arises should not be so escalated as to result in the invalidity of the proceedings where a Court is satisfied that the result would have been the same had the trial proceeded in the manner in which it is alleged it should have.

In Kennedy the procedural deviation was not a rule of law but a rule of practice developed in the Courts regarding the soundness of a trial where two different accused persons were tried jointly even though they were accused on two separate indictments. The above-quoted approach to criminal procedure was adopted with favour by the Supreme Court of Canada in R. v. Clunas (1992), 70 C.C.C. (3d) 115.

¶ 8 The question arises as to whether or not Justice Kelly's approach to procedural irregularities can be employed where the irregularity concerns more than a judge-developed rule or practice, but concerns a procedure set out in statute, as is the case here.

¶ 9 In the case of R. v. Jason Edgar B. (unreported, Ontario Court of Appeal, June 29, 1993), our Court of Appeal heard an appeal of an order of Mandamus. The trial judge had stayed the charges against the young person in that case because it became clear on the date of trial that the young person had never been read the charge against him, a mandatory procedure under the Young Offenders Act. The Court of Appeal agreed with Mr. Justice Goodearle who ordered the trial judge to hear the matter in spite of the irregularity. The order of mandamus was granted on two grounds, one being that there had been effective waiver of the irregularity on a subsequent appearance. In addition, the Court of Appeal found favour with the "modern approach to criminal procedure" which seeks to avoid decisions on procedural grounds where no prejudice has been suffered.

¶ 10 With that authority in mind, I will approach the problem in this case having regard to gravity of the irregularity, the prejudice to the accused, the effect the irregularity on the outcome of the proceedings and the array of remedies available should the irregularity be found to be prejudicial.

¶ 11 Where the defendant in a Provincial Offences matter fills in the appropriate Notice of Intention, the defendant obviously anticipates that certain things will happen. First, the defendant is indirectly being told that the Provincial Offences Officer's evidence will necessarily be part of the case. Second, the defendant is alerted to the fact that the Officer will be in attendance at the hearing of the matter, and although no substitute for proper disclosure, would afford the defendant an opportunity to speak with the officer before the proceeding commences.

¶ 12 What the section of the Act does not do is establish a new mandatory element of the Crown's case, without which the prosecution cannot ever succeed. The section does not mandate that the provincial offences officer's testimony will form part of the Crown's case ill every prosecution under a provincial statute. Such an additional substantive requirement would be a fundamental change in criminal procedure. It is my opinion that to effect such a profound change, the new provision would have do so with the clearest of language which revealed such an intention. There is a presumption of stability in law, which presumption embraces the notion that the legislature is deemed to be aware of the existing law and the effect of any new legislation is limited to express enactments. Pigeon J., in R. v. Drybones, [1970] S.C.R. 282 at 305 (dissent), concisely summarized this principle: [As there is a] "... presumption against implicit alteration of the law, Parliament must not be presumed to have intended to depart from the existing law any further than expressly stated." See also: Cote, Pierre-Andre, The Interpretation of Legislation in Canada, 2nd ed., 1991, page 417.

¶ 13 It is my opinion that the failure to summons the provincial offences officer when requested by the defendant should trigger an enquiry by the Provincial Offences Court. That enquiry should focus on the value of the officer to the defendant, either as a witness or for the purpose of disclosure. If there is no ascertainable value to the defendant in having the officer in person in the building, that would end the matter. If there is prejudice in any amount arising out of the non-attendance of the officer, then a range of remedies might be considered.

¶ 14 If there is prejudice shown, then the procedural fairness of the hearing would be at risk if the matter were allowed to proceed. As with any situation where a defendant's s. 7 (Charter) rights are potentially compromised, the court should exercise its discretion in a judicial manner to remedy the situation. It may be that an adjournment is warranted; it may be that an adjournment coupled with some relief on sentencing is appropriate (R. v. Cardinal (1985), 21 C.C.C. (3d) 254 Alta. C.A. at 260); it may be that a stay is warranted. Each remedy would have to fit the particular facts and reflect the amount of prejudice to the defendant.

¶ 15 In the instant case, I am allowing the appeal and remitting the matter back to Justice of the Peace Romain for proper disposition. The transcript of this case puts me in no position to assess the prejudice to the defendant and therefore I can give no guidance on remedy. However, the complete array of remedies, including adjournment, might be considered by the court.

¶ 16 The Crown is entitled in this case to a new trial of the issue, although given the nature of the charge and the history of this matter from the point of view of the defendant, the Crown might want to consider whether it would be in the best interests of justice to proceed with this matter.

WEAGANT PROV. J.

QL Update: 951101
qp/s/mii/DRS/mxp