Indexed as:

R. v. Violetis; R. v. Dimovsky; R. v. Hickey

Between
Her Majesty the Queen, and
Amanasics Violetis, Bale Dimovsky and Terence Hickey

[1997] O.J. No. 5491
DRS 99-00177

Ontario Court of Justice (Provincial Division)
Toronto, Ontario
Shamai Prov. J.

March 3, 1997.
(23 pp.)

Motor vehicles — Offences — Prosecutions — Notice of intention to appear — Non-attendance of accused after filing — Justice of peace — Discretion re conviction.

This was an appeal by the Crown with respect to acquittals of three accused entered in three Highway Traffic Act matters. A certificate of offence was issued on August 24, 1994 to the accused, Dimovsky, for failure to wear a complete seat-belt assembly. Dimovsky filed a notice of intention to appear and intended to challenge the evidence of the provincial offences officer who completed the certificate of offence. Neither the officer nor Dimovsky appeared at the trial, which was held on May 23, 1995. The officer did not appear because of illness. Hickey was charged with the same offence as Dimovsky on September 2, 1994. He filed a similar notice of intention to appear and his trial was scheduled for May 23, 1995. Again neither the officer nor Hickey attended. Violetis was charged with a failure to stop at a red light and failure to stop at a stop sign. Both allegations arose on November 8, 1994. He filed the same notice of intention and his trial was scheduled for the same day. However, he did not attend the trial. The justice of the peace concluded that since notices of intention had been filed, it indicated that the accused intended to dispute the Crown's allegation that an offence was committed. Acquittals were entered. The justice overrode section 9.1 of the Provincial Offences Act but concluded that section 9.1(2) had to be read in the context of the Charter, section 54 of the Provincial Offences Act, and the mischief that section 9.1 was intended to cure. The Crown asked for a finding that the justice erred when he required that the provincial offences officer, who issued the certificate of offence, had to attend at court, even if the accused failed to attend, before a conviction could be entered and a set fine imposed.

HELD: Appeals allowed. The acquittals were set aside. Fines were imposed on Dimovsky and Hickey. In Violetis' case, the certificate of offence was quashed because there was nothing on it that indicated the province of his plate number. The offences in question were not criminal in nature. The word "shall" in section 9.1 of the Highway Traffic Act had to be interpreted in light of section 29(2) of the Ontario Interpretation Act, which regarded "shall" as imperative. Thus, the justice had no discretion to ignore section 9.1 and should have convicted Dimovsky, Hickey and Violetis.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 11(d), 52. Courts of Justice Act, R.S.O. 1990, ss. 9(1), 109(1). Highway Traffic Act, R.S.O. 1990, s. 9.1. Interpretation Act, R.S.O. 1990, c. I-11, ss. 1(1), 29(2). Provincial Offences Act, R.S.O. 1990, ss. 2(1), 2(2), 5.1(3), 5.2(1), 9.1, 9.1(1), 9.1(2), 11, 54.

Counsel:

C. MacDonald, for the Crown.
No counsel mentioned for the defendants.

¶ 1 **SHAMAI PROV. J.**:— Good morning. I am, as I say, prepared to deliver the judgment on this. I hope that I might just file a document. However, I've referred to a number of statutes and decisions of other benches.

¶ 2 MR. MacDONALD: However you choose to do it is fine with me.

¶ 3 **THE COURT**: I propose to deal with the matter of the Crown appeal in three Highway Traffic Act matters, The Queen and Violetis, The Queen and Hickey, and The Queen and Dimovsky.

¶ 4 The Crown appeals against acquittals entered in these three matters. Each one of them is a separate matter. Justice of the Peace Shantora expounded his reasons in the case of Violetis, and adopts his reasoning in the other two cases. It is appropriate, therefore, that the Crown brings together these three appeals.

¶ 5 They first came before me on May 27th, 1996. I required that a new Notice of Appeal and notice of the hearing date be properly served, and that proof of such notice be provided to the Court, in order to ensure that the respondents to these appeals be properly notified.

¶ 6 Notwithstanding that the step was taken by the Crown, we've had no attendance by the respondents in these matters.

¶ 7 Now, the factual underpinnings of the cases are straightforward for my purposes. In the case of Dimovsky, a Certificate of Offence was issued on August 24th, 1994, to Bale Dimovsky, for an offence, namely, failing to wear complete seat-belt assembly.

¶ 8 The defendant filed a notice of intention to appear, indicating his intention to challenge the evidence of the provincial offences officer who completed the Certificate of Offence.

¶ 9 Neither the officer nor the defendant appeared at the trial, which occurred on May 23rd, 1995, although the prosecutor advised that the officer was ill at the time.

¶ 10 In the case of Hickey, the defendant was charged with the same seat-belt offence as Dimovsky on September 2nd, 1994. He too filed a notice of intention to appear indicating his intention to challenge the evidence of the provincial offences officer. His trial was scheduled ultimately for May 23rd, 1995 also. Neither defendant nor office attended.

¶ 11 Justice of the Peace Shantora entered acquittals in both cases, referring to reasons he would render later that same day in the case of Violetis.

¶ 12 Mr. Violetis was charged under the Highway Traffic Act with two offences: failing to stop at a red light and failing to stop at a stop sign. Both allegations arose on November 8th, 1994.

¶ 13 A notice of intention to appear for trial was filed, as was his intention to challenge the evidence of the officer. Mr. Violetis did not attend for his trial.

¶ 14 In entering an acquittal in this case too on May 23rd, 1995, the Justice of the Peace expounded reasons for his acquittal.

¶ 15 A brief overview of the pertinent procedural provisions of the Provincial Offences Act is necessary to place these reasons in context.

¶ 16 In proceedings under Part I of the Act, as these ones are, commenced by Certificate of Offence, a defendant may indicate his or her intention to appear in court "For the purpose of entering a plea and having a trial of the matter." Section 5.1, subsection 3. The defendant who does this "shall indicate if the defendant intends to challenge the evidence of the provincial offences officer." Section 5.2, subsection 1. Notwithstanding such notice, the statute provides further for the non-attendance at trial of a defendant who was filed notice. Section 9.1, subsection 1 reads:

> "If a defendant, who has given notice of an intention to appear, fails to appear at the time and place appointed for hearing, the defendant shall be deemed not to dispute the charge."

Subsection 2:

> "If subsection 1 applies, Section 54 does not apply, and a justice shall examine the certificate of offence and shall, without a hearing, enter a conviction in the defendant's absence, and impose the set fine for the offence, if the certificate is completed and regular on its face."

Section 54 is in Part IV of the Act, which Part is entitled Trial and Sentencing, and provides procedural options in the absence of the defendant. The heading for that section is "Conviction in the absence of the accused - Proceeding arising from failure to appear."

¶ 17 Section 11 provides for the striking out of a conviction without a hearing, if the defendant appears within 15 days of the learning of the conviction, and satisfies the Justice of the Peace that the non-attendance was for stated reasons excusable.

¶ 18 Justice of the Peace Shantora chose to override the provisions of Section 9.1 and enter a plea of not guilty for the defendants herein. His reason are the following:

> "The Notice of Intention should not be taken lightly. I take judicial notice of the fact that the defendant or the defendant's agent is required to attend at the court office to complete, sign and file the Notice of Intention To Appear.
>
> Considering the Notice of Intention to Appear form and the surrounding circumstances in their entirety, it shows an obvious intention on the part of the defendant to dispute the Crown's allegations that an offence had been committed.
>
> I am satisfied that this evidence is sufficient in this case to rebut the statutory presumption that the defendant is deemed not to dispute the charge.
>
> The statutory presumption having been rebutted, the onus remains on the Crown to prove the allegations. The Crown has failed to do so."

¶ 19 His worship continues by way of conclusion in his reasons.

> "Section 9.1, subsection (2) must be read in the context of the Charter, Section 54 of the Provincial Offences Act, the facts of the case and the mischief that Section 9.1 of the Provincial Offences Act is intended to cure.
>
> I am satisfied that the subsection is not imperative, but only directory in nature."

¶ 20 Among the grounds for appeal put forward, the Crown cites the entering of a plea of not guilty on behalf of the respondent in absentia, and the dismissal of charges in all three cases because, having entered a plea on behalf of the defendant, the Justice of the Peace observes the absence of evidence on the part of the Crown, and dismisses on that basis.

¶ 21 The Crown further submits that the Justice of the Peace erred by taking judicial notice that the Notice of Intention to Appeal filed by the respondent was evidence sufficient to rebut the statutory presumption that the respondent was "so deemed not to dispute the charge."

¶ 22 The Crown asks for a finding that the Justice of the Peace erred in ruling that the provincial offences officer who issued the Certificate of Offence must attend at court, even if the respondent fails to attend at the time and place of hearing, before a conviction can be entered and a set fine imposed.

¶ 23 The Crown submits error in the characterization of Section 9.1, subsection (2) as not imperative.

¶ 24 I was asked, during the argument of the appeal, to await the decision of the Supreme Court of Canada in the case of R. v. Richard (1996), S.C.J. No. 43, as the court was considering the constitutional validity of "deemed not to dispute" provisions of the analogous legislation in New Brunswick. I did so, as any ruling which I might render regarding the legislation would be quite academic, if the Supreme Court were to find this legislative scheme to be an abridgment of an individual's fair trial rights.

¶ 25 Reasons were rendered by the Supreme Court of Canada on October 31st, 1996. The Court took the view that the analogous New Brunswick legislation amounted to a sufficient waiver of the benefit of Section 11(d) of the Charter.

¶ 26 Further, while a person is guaranteed the right not to be deprived of liberty, without the benefit of presumption of innocence, and the right to a fair and public hearing as guaranteed by Section 11(d), in schemes such as the New Brunswick one, the penalties are limited to fines, and can in no case result in imprisonment.

¶ 27 The Court stated:

> "The possibility of waiving certain constitutional rights, the manner in which such a waiver may be made, the extent to which such rights can be waived, and the effect of a waiver may vary with the nature and scope of the right in question."

I am citing the QUICKLAW report of the case at page 28.

¶ 28 The key to the limited waiver, given the nature of the offences, and the penalties attached to them, is in that an accused be fully aware of the consequences of failing to act in furtherance of the stated wish for a trial.

¶ 29 The Supreme Court reiterated a distinction between criminal and regulatory offences, particularly those which do not jeopardize a liberty interest. That distinction is easily gleaned from the circumstances under consideration in this case, particularly in light of Subsection 2(2) of the Provincial Offences Act. Subsection 2(1) states as follows:

> "The purpose of this Act is to replace the summary conviction procedure for the prosecution of provincial offences, including the provisions adopted by reference to the Criminal Code of Canada, for the procedure that reflects the distinction between provincial offences and criminal offences."

¶ 30 The analysis of valid waiver by failure to act, given a scheme like the New Brunswick or Ontario deemed not to dispute provision, hinges, as a matter of fact, on whether the defendant knew that failing to act would bring about a conviction and fine.

¶ 31 In the New Brunswick scheme, each ticket contains the following wording. This was considered sufficient to put the defendant in Richard on notice of the consequences of non-action.

> In Ontario, in these cases before me, the Notice of Intention, upon which the defendant must check off boxes to indicate whether the defendant intends' to challenge the evidence of the provincial offences officer, among three other questions about a trial, also indicates in bold capital letters, just about the place for the signature of the defendant, the following.
>
> "NOTE: IF YOU FAIL TO APPEAR AT THE TIME AND PLACE SET FOR YOUR TRIAL, YOU WILL BE DEEMED NOT TO DISPUTE THE CHARGE AND A

> CONVICTION MAY BE ENTERED AGAINST YOU IN YOUR ABSENCE, WITHOUT FURTHER NOTICE."

¶ 32 This is the same notice whose very execution so persuaded the Justice of the Peace in the cases before me on appeal, that in deference to the defendant, checking off the appropriate boxes, signing the form and fling it, the Justice of the Peace refused to follow the clear statutory language of Section 9.1, subsection (1), outlined as it is on this same Notice of Intention to Appear, that ends with the passage I quoted above.

¶ 33 Based on what he characterized as a rebuttal of a statutory presumption by checking off those boxes and filing the notice, the Justice of the Peace entered a not guilty plea on behalf of the defendant.

¶ 34 I am of the view the manner in which the waiver provisions of Section 11(d) rights are implemented in relation to the "deemed not to dispute" provisions of the Provincial Offences Act, are ample for the purpose of the test under Richard. It is clear to me that the scheme is not a violation of Section 11(d) rights.

¶ 35 I would specifically state that, although the Justice of the Peace uses the word "Charter" in the reasons section of his ruling, there is no proper notice of an issue, pursuant to the Charter.

¶ 36 It is my view that, if the learned Justice of the Peace purports to strike down a section of the Provincial Offences Act, pursuant to Section 52 of the Charter of Rights and Freedoms, he is as much bound, as a party to the litigation would be, to provide notice to the Attorney General for Canada and the Province of Ontario.

¶ 37 Section 9 of the Courts of Justice Act provides in subsection (1):

> "Notice of a constitutional question shall be served on the Attorney General of Canada and the Attorney General of Ontario in the following circumstances:

Subsection (1):

> The constitutional validity or constitutional applicability of an act of the Parliament of Canada or the legislature of a regulation or bylaw made under such ..."

And the section continues to provide for the form of such a notice.

¶ 38 However, this Court has an obligation to deal with Charter issues, even in the absence of proper notice.

¶ 39 The Court of Appeal in the case of Kutynec [1992] O.J. No. 347, 7 O.R. 3d 277 is clear on that point. I refer to the Quicklaw report of that case at pages 30, 31.

¶ 40 Given the circumstances of a legislative scheme in terms of "deemed not to dispute" provisions in a regulatory and/or procedural code, which the Supreme Court of Canada has recently ruled on, I cannot but acknowledge that a constitutional concern arises on the face of the legislation.

¶ 41 Formally, I will not deal with the issue, in the absence of compliance with Section 109, subsection (1) of the Courts of Justice Act. However, it is perhaps fair to comment that, having regard to the reasons of the Supreme Court of Canada in Richard, I am satisfied that any concern about infringement of fair trial rights is conclusively answered in favour of the validity of the scheme, by application of the analysis set up in Richard.

¶ 42 The Justice of the Peace in his reasons for entering acquittals in the cases of Dimovsky, Hickey and Violetis refers to the rebuttal of a presumption with respect to the "deemed not to dispute" section.

¶ 43 However, in light of what, in my view, is the determinative issue in this case, I will not deal with whether that deemed provision constitutes a presumption, whether it is a rebuttable one and whether there was evidence which might constitute a rebuttal of the presumption.

¶ 44 There is, in my estimation, only one issue for this Court to determine. That is whether the terms of Section 9.1, subsection (2) give a discretion or a direction to the Justice of the Peace confronted with a Notice of Intention to Appear, the subsequent non-attendance of the defendant and the facial regularity of the certificate of offence.

¶ 45 Does the presiding jurist have any option to not impose a conviction in those circumstances?

¶ 46 Section 29, subsection (2) of the Ontario Interpretation Act, R.S.O. 1990, chapter I-11, states:

> "In the English version of an Act the word shall 'shall be construed as imperative and the word may' as permissive."

Section 1, subsection (1) of that Interpretation Act determines the act's application. It states:

> "The provisions of this Act apply to every Act of the legislature contained in these Revised Statutes or hereafter passed, except insofar as any provision:
>
> (a) is inconsistent with the intent or objection of the Act;
> (b) would give to a word, expression or provision of the Act an interpretation inconsistent with the context; or
> (c) is in the Act declared not applicable thereto."

¶ 47 The jurisprudence which has reviewed this provision confirms a strict interpretation of it. See Dingman versus Fort Erie, reported at the (1993), 15 O.R. (3d) page 315, a decision of the Ontario Court (General Division) and Hamilton Wentworth Credit Union Limited versus Courtcliffe Parks Limited, [1995] O.J. No. 1482 at p. 29.

> "I see no reason to read the mandatory "shall" found in the various foregoing provisions to read the permissive "may". Section 29(2) of the Interpretation Act R.S.O. 1990, c. 1-11, as amended, states that the word "shall" is to be construed in the imperative, and while there are circumstances in which the word may be given a different annotation, the court should assume that the legislature when it uses "shall", intends the provision to be imperative, unless such an interpretation would be inconsistent with the context or, under the clause in question, irrational or meaningless ..."

¶ 48 The use of the word "shall" in criminal law context is capable of some flexibility. On a prima facie basis, however, again, the Federal Interpretation Act provides, as does the provincial one, that "shall" has a mandatory and not merely directory application.

¶ 49 I am mindful that while the provisions of the Highway Traffic Act may be characterized in some cases as having a quasi-criminal nature, Section 2, subsection (1) of the Provincial Offences Act steers the interpretation of the statutes it governs towards the civil character of the Act.

¶ 50 Moreover, an analysis of the Act in light of Richard demonstrates that in the absence of penal consequences, and having regard in particular to the regulatory nature of the offences I am considering in these appeals, they are not offences of a truly criminal character.

¶ 51 I recall that the offences under consideration in this appeal are failing to wear complete seat-belt assembly, failing to come to a stop at a red light and failing to stop at a stop sign. Therefore, I am of the view that jurisprudence and statutory authority for interpreting the word "shall" in Section 9.1 of the Highway Traffic Act flows from the Provincial Interpretation Act.

¶ 52 There is, therefore, nothing to support the interpretation by Justice of the Peace Shantora rendering unto himself a discretion in the application of the "deemed not to dispute" provisions of Section 9.1.

¶ 53 The legislative purpose, as interpreted in context of the predecessor "deemed not to dispute" provision was clearly set out by our Court of Appeal in the case of Carson. More recently, a detailed review of the social context of the provisions was conducted by my colleague, The Honourable Judge Blacklock, sitting as a Provincial Offences Appeal Court, in the case of Her Majesty versus Pilipovic, [1996] O.J. No. 3139, (1996), 23 M.V.R. (3d) 282.

¶ 54 Although his endeavour in determining whether Section 1(c) is an infringement of Section 11(d), having regard to the "deemed not to dispute" charges is probably academic, given the decision of Richard, it is a very useful survey of the context in which the "deemed not to dispute" provisions are enacted, I find it helpful in interpreting Section 9.1, in terms of whether it is a mandatory or discretionary power.

¶ 55 Given the context of the absence of jurisdiction, and the constitutional validation of the legislation which I have set out, I am setting aside the acquittals entered by the Justice of the Peace at trial in these three matters.

¶ 56 Having regard to the limited issues remaining under Section 9.1 and, moreover, the continued failure to respond even to these appellate proceedings, I invite the prosecutor to have these matters dealt with by me at this time.

¶ 57 Do you wish them remitted to the Justice of the Peace, or do you want me to deal with them under Section 135?

¶ 58 MR. MacDONALD: It would be fine if Your Honour would like to deal with them at this stage it's fine with me, or they can be remitted. I'm really easy on that subject. Either way is fine.

¶ 59 **THE COURT**: Do you have the documents before you, Mr. MacDonald?

¶ 60 MR. MacDONALD: Which documents? The actual certificates?

¶ 61 **THE COURT**: Yes. No, I have the original certificates.

¶ 62 MR. MacDONALD: Yes. They will be up.

¶ 63 **THE COURT**: Do you want to take a look at them and give me an indication as to whether, in your view, they are valid?

¶ 64 MR. MacDONALD: Absolutely. The one I'm looking at now in relation to the Violetis case, the disobey red light and fail to stop, everything appears to be complete and regular on its face in terms of the certificate of offence, Your Honour.

¶ 65 I am now looking at the Bale Dimovsky certificate of offence in relation to driver fail to wear complete seat-belt assembly. Once again, this certificate, everything appears to be complete and regular on the face of the document.

¶ 66 **THE COURT**: I don't find the certificate of offence on the Hickey file.

¶ 67 MR. MacDONALD: I have found it, Your Honour. For Terence James Hickey, driver fail to wear complete seatbelt assembly, issued 2nd of September 1994. Everything appears complete and regular on its face.

¶ 68 **THE COURT**: Mr. MacDonald, on the Violetis certificate I don't see anything indicating the province of the plate number.

¶ 69 MR. MacDONALD: I'm sorry?

¶ 70 **THE COURT**: There is nothing indicating the province of the plate number on the Violetis certificate. You'll note the boxes on the front of it.

¶ 71 MR. MacDONALD: I mean, I see that now that you've pointed that out. I wouldn't submit that that's a fatal flaw at all in relation to the completion of the certificate of offence. All of the -- anything that would vitiate or nullify the certificate of offence is there. Everything seems to be proper. I realize what you're saying. That's lacking, but I would submit that that wouldn't have any affect on the validity of the certificate of offence being on its face and being found to be proper or improper.

¶ 72 **THE COURT**: Okay. Well, I thank the prosecutor for his review of the certificates. I am of the view that Section 9.1(2) requires that a review of the certificate show it to be regular and complete on its face and, again, given that this is an ex-parte proceeding, in light of the jurisprudence I've reviewed here, I think that section requires strict application. I am, therefore, quashing the certificate of offence in relation to Violetis, alleging disobeying a red light and failing to stop. I note that -- Mr. MacDonald, do you know what would have happened with the fine originally payable in this case?

¶ 73 MR. MacDONALD: Pardon me? Your Honour, I didn't hear that.

¶ 74 **THE COURT**: There was no fine initially paid because of the entry of an acquittal.

¶ 75 MR. MacDONALD: Correct.

¶ 76 **THE COURT**: So that stands as it is. And having regard to the other two certificates of offence, they do appear to be regular on their face, and as I understand the statutory scheme upon entering the conviction with respect to Hickey and Dimovsky, the set fine is applicable, is it not?

¶ 77 MR. MacDONALD: That's correct.

¶ 78 **THE COURT**: So in the case of Terence Hickey, I am entering a conviction for the offence of not wearing a complete seatbelt assembly and imposing a fine of $90.00. That is the set fine which appears on the face of the certificate of offence.

¶ 79 And in regard to the offence of not wearing a complete seatbelt assembly in the case of Dimovsky, that certificate appears to be regular and complete on its face, and the set fine indicated on the certificate is $90.00. I am imposing that fine.

¶ 80 Is there anything further in these matters?

¶ 81 MR. MacDONALD: There are two matters for Violetis; correct?

¶ 82 **THE COURT**: That's right.

¶ 83 MR. MacDONALD: One was quashed and was the other the same?

¶ 84 **THE COURT**: They are both on the same certificate. Maybe you can assist me there, but if you want to look at it, the same certificate says disobey red light, fail to stop.

¶ 85 MR. MacDONALD: I thought there were two separate certificates. Okay. That's the disobey red light. Here is the other certificate of offence. It's the same. It's the same. So I take it then, Your Honour would quash that?

¶ 86 **THE COURT**: I'm sorry. You're quite right, there is a separate one for disobey stop sign, fail to stop, and it shows the same problem, not stating the province for the plate number, and I'm quashing that certificate also.

¶ 87 I want to thank the prosecutor for all his assistance at this time.

¶ 88 MR. MacDONALD: Well, I want to thank Your Honour as well. That judgment is valuable, and it would be very much assisting in lower courts for direction. I really appreciate that. Thank you, Your Honour.

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