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*Case Name:*

# Sajan v. York (Regional Municipality)

**Between**
**Samana Sajan, Appellant, and**
**The Regional Municipality of York, Respondent**

[2019] O.J. No. 2507

2019 ONCJ 315

Newmarket Court File No.: 4961-9470375B

Ontario Court of Justice

**J.F. Kenkel J.**

Heard: May 10, 2019.
Judgment: May 10, 2019.

(10 paras.)

**Counsel:**

Ms. J. Gallin, counsel for the Respondent.

Mr. P. Swales, agent for the Appellant.

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**PROVINCIAL OFFENCE APPEAL**

**1** J.F. KENKEL J.:-- Ms. Sajan was convicted of Careless Driving contrary to s.130 of the *Highway Traffic Act* on October 23, 2017.

**2** There's one issue for decision -- whether the Justice of the Peace erred in not granting a "non-suit" motion at the close of the prosecution case regarding the identification of the driver.

**3** Ms. Sajan was represented by an agent at trial. At the close of the prosecution case the agent Mr. Kinapen brought a motion for non-suit submitting that "there's no evidence of careless driving". The agent also questioned whether there was sufficient identification of the driver. With respect to identification the prosecutor conceded, "The issue of identification ...is a sketchy one".

**4** The driver of the vehicle that had been hit testified that he saw the "young lady" who was the driver of the car that hit him (p.13). When asked if he would recognize that person again he said, "It's one year. I-I-vaguely, yeah." He then identified the accused, "I think it's her" (p.14) The witness was not cross-examined on this point.

**5** The court correctly stated the general legal test to be applied on a motion for non-suit. Her Worship found that "while identification may be weak" there was sufficient evidence which if believed could result in a conviction.

**6** It's not plain why the prosecution would seek to continue a trial where they found the evidence of their one witness "sketchy" on the central issue of identification. The witness expressed doubt about his ability to identify the other driver after a year had passed and described his recollection on this point as vague. Even knowing that the person who appeared in court must have been the person charged by the police in this matter his identification was expressly uncertain. The prosecution did not call the investigating officer so there was no other evidence on this point.

**7** This is not a case of direct identification where the consideration of any frailties in the evidence must be left to the trier of fact to determine on the whole of the evidence. This case involves the situation described in *R v Hay* 2013 SCC 61 at para 41 -- "Where the Crown's case consists solely of eyewitness testimony that would necessarily leave reasonable doubt in the mind of a reasonable juror, the trial judge must direct an acquittal upon a motion for directed verdict."

**8** On appeal the prosecution submits that the accused is bound by statute to provide an accident report and the court could infer that information from that report including the identification of the driver was placed into the Certificate of Offence. There are several problems with that submission. First, this argument was not made at trial and was not the basis for the court's ruling. Second, the Crown did not call any officer to testify so there is no evidence that the accused provided any report pursuant so statute. Third, even if the accused provided such a statement it would not be admissible at trial to prove a central element of the offence. The Supreme Court has held that motor vehicle accident reports cannot be used in that way without violating s7 of the *Charter* -- *R v White* [1999] S.C.J. No. 28.

**9** The learned Justice of the Peace erred in dismissing the motion for directed verdict. There was no identification evidence upon which a properly instructed trier of fact could find guilt. The failure to dismiss the case on that basis resulted in an unfair trial.

**10** The appeal is allowed. This is not an appropriate case to order a new trial. A verdict of acquittal is entered.

J.F. KENKEL J.