

IN THE PROVINCIAL OFFENCES COURT

HER MAJESTY THE QUEEN

and

GURDEEP SAINI

P R O C E E D I N G S A T C O U R T

BEFORE THE HONOURABLE JUDGE MARTIN

ON SEPTEMBER 27, 1996 AT TORONTO

APPEARANCES

MS. THEROUX

COUNSEL FOR THE PROSECUTION

MR. R. WALIA
(Mr. Locke assisting)

AGENT FOR THE DEFENDANT

IN COURT ROOM NO. L

OLD CITY HALL

Part 3, akin to a criminal Information, which is what occurred in this particular case.

Now s.21 that my friend, I'm sure, is familiar with, probably more than I am, frankly, but I'll --

Perhaps you could just pass that copy up to Your Honour. You may have it, in any event, but I'll just show you the relevant page. If you look at s.21, in particular number Part 2, Your Honour. There has to be consent of the Attorney General of his agent in order to proceed with the laying of the Information and the summoning of a particular party.

I'm giving you a bit of the background at the same time, in terms of a log. As you'll see from the transcript momentarily, the officer gave some evidence - I'll touch on that in a moment - that he spoke to someone who he believed to be with the Provincial Prosecutors' office.

Now you'll note it doesn't say written consent there. I want to be clear about that. It's not in writing although the usual procedure, if I can just give you an example of it, the usual procedure that's followed on a totally separate matter and I'm just showing Your Honour so you can see it. If you look at the particular Information I'm showing you, see, there's

usually -- you'll see a stamp on there that's been highlighted for Your Honour.

Basically -- I suppose it's not written in a formal sense, but it's evidence that it was formally considered in all ways by the agent for the Attorney General. As Your Honour knows, akin to swearing an Information, it's not just a matter of going and getting a signature on something you pay no attention to. You don't have to go over the whole case but there has to be a certain basis before you can provide these consents. At least, a passing knowledge of what was occurring involving whom and what the offence is.

THE COURT: What's the purpose of --

MR. LOCKE: The purpose of this is because there is essentially -- once you lose jurisdiction, it's almost akin to a preferred indictment, if you will. In other words, if you're going to not follow the regular process, you're going to skip a process, you're going to start from scratch, it's got to be supervised by an agent for the Attorney General. So that -- I mean, the rule is if you're going to charge somebody, you get it filed within seven days. The notice goes out, everything falls into place so that if someone's charged they know that it's going to be filed with the court and the charge will be proceeding.

When there's a break in the system, if you will, I suppose it's akin to someone charged with a criminal offence having been given a promise to appear, the Information is -- they're not sworn, they're not before the court, there's certain ways in the Criminal Code, you have to then summon an individual. I think Your Honour's seen that section in the Criminal Code where there's a certain time frame of three months and you have to summons an individual on summary conviction matters and follow that process. So that there's some regulation to the process.

What happened in this particular case was that Mr. Walia attended at the court date and gave notice that this particular process had not been followed, and that there was no evidence on the face of the Information that there had been this consent. His Worship allowed the crown to call some evidence - and I'll get to -- Perhaps I'll tell you where I'm going here and then I can pull out the transcript. Evidence was called and the officer gets up and said he spoke to someone named Wendy, didn't know the last name, from the Prosecutors' office and she gave permission to proceed.

The trial then proceeded, and I think I can say without too much difficulty that the evidence indicates that the appellant

was travelling southbound on Kipling. Other cars were travelling north bound. For some unknown reason, he swerved into the -- he put his foot across the line and the cars met driver side to driver side and there was an accident.

What occurred here was that there was an *Ex Parte* trial in the absence of the accused, because he was not there that day believing there was no jurisdiction to proceed, and he was convicted. And we'll get momentarily to a rather significant point, that the evidence of identification here is entirely insufficient in law, and I'm going to point that out momentarily. The accident itself, in and of itself, I don't know if I can stand here and argue that it wasn't careless. On its face, it appears to be without an explanation from the driver -- without the appellant's explanation, *prima facie* it's careless. As he crossed over the line and hit the car. There's no evidence of alcohol, by the way, that ever came up in the officer's evidence or anyone's evidence, so just to allay any concerns that Your Honour may have in that small way. Every time I hear "swerve" I think of that.

But on its face, that's evidence of driving without due care and attention. If you swerve, unless there's an explanation given to -- my kid grabbed my ear, or

something, whatever it might be. So I don't come before you suggesting necessarily that there isn't some evidence of careless driving, although His Worship, who I know very well, with great respect, probably was a little brief in his reasons, as you shall see. He didn't really -- essentially said the case is made out. And maybe that is sufficient, but I -- the thrust of my argument doesn't deal with that. It deals with really two things. It deals with whether or not in fact there was jurisdiction to proceed. And, secondly -- well, perhaps we'll take you to that first because it may even be a stronger argument than the jurisdiction point. Although I thought I should start there because without jurisdiction, there's no need to really get to the bulk of it. But we'll see that the Information indicates that Mr. Gurdeep Saini of 5 Sandalwood (ph.) Drive is charged. You'll see that the officer, Officer Bagshaw gives evidence on page 19, that he spoke to the accused as the defendant before the court, a Mr. Gurdeep Singh. He confirmed at the bottom of page 19, "He indicated by pointing out to me the defendant Mr. Gurdeep Singh".

Now Mr. Gurdeep Singh is not Mr. Gurdeep Saini. I suppose that's the problem with *Ex Parte* trials. There becomes a problem here in that it's most

difficult, I submit, without any evidence before the court that he - that is the officer - and perhaps I'll just deal with this small point because I'm on it.

THE COURT: What page? Nineteen, you say?

MR. LOCKE: Page 19, Your Honour.

THE COURT: I'm sorry.

MR. LOCKE: Of the transcript.

The officer is giving evidence on page 18, indicating he attended the scene, he observed a Plymouth. He did not see any skid marks. Then on to page 19, he spoke with the accused and he said "or the defendant before the court". And just so Your Honour knows, he could not identify the defendant because there was an *Ex Parte* trial. And he said "Mr. Gurdeep Singh."

"He identified himself to me as the driver of the blue Ford Taurus."

Then he went on to speak with some other people. Another witness, he indicated to me by pointing out, he says, "again the defendant Mr. Gurdeep Singh." And then he said, "He identified himself to me with an Ontario Drivers' licence."

"Did you match the drivers' licence of...?"

"Yes, I did."

"And I take it, based on your investigation, you laid charges before the court?"

"That's correct."

Although the charges before the court was the second Information. The charge before the court dealt with someone named Gurdeep Saini, not Gurdeep Singh. And what is not on the face of the transcript is that Gurdeep Singh lived at 5 Sandalwood Drive, North York or anything else that ties the person named on the Information to the person who was convicted.

THE COURT: I'm looking at a correction here at the top of page 20.

MR. LOCKE: Where he says --

THE COURT: The examiner falls into the error too.

"So I take it as a result of him pointing, you then approached Mr. Singh?"

"Yes, I did."

Question: "Mr. Saini, sorry."

MR. LOCKE: Yes, he mentions that. But there is some -- there is a complete lack of particularities to compare these two people with -- we have a Gurdeep Singh and we have a Gurdeep Saini, and we have a Gurdeep Saini at 5 Sandalwood Drive. And there was no particularity given to a person named in an *Ex Parte* trial. The ones that I rarely get to, there's usually particular details given, name, address, date of birth, driver's licence number, et cetera, et cetera.

Now I know that on these *Ex Parte* trials matters move with some dispatch, and perhaps that's a bit of a problem with *Ex Parte* trials. But there is, Your Honour, some lack of detail here that ties Gurdeep Saini to the person here on the face of the transcript.

Now Your Honour may say that Saini does, that does indicate this person. But you've got two different names given. And frankly, that's put to him by the prosecutor. He didn't correct him and say, "Yes, I meant to say Mr. Saini not Mr. Singh."

I simply put this to you because it raises a real concern here that in an *Ex Parte* trial that detail that should have been there was not there.

THE COURT: Is there a copy of the Information? I don't have it in the file.

MR. LOCKE: I'll give you a copy of what I have, but it highlights it.

THE COURT: Well, perhaps there's one here but I can't see it in this wealth of documents. Thank you, Mr. Locke, I have it. Thank you. Yes, all right. Go ahead.

MR. LOCKE: His Worship, at the end, as I -- perhaps I should just take you through it. At the end, you see the judgment at the bottom of page 21. In brief -- but if I could take you back to the sufficiency of

the evidence with respect to Part 21, just for a moment. There's a couple of pages here that may be of some assistance.

Well, perhaps I should first of all on the transcript just finish with that, if we could. I don't know if it's me, but it seems pretty hot in here. But anyway -- could we open one of those windows, Your Honour.

...DISCUSSION RE AIR CONDITIONER

THE COURT: Yes. All right, go ahead.

MR. LOCKE: Thank you. Your Honour, at the bottom of page 7 the witness is sworn. I'm sorry --

...AIR CONDITIONER NOISE IMPAIRS HEARING OF COURT REPORTER

THE COURT: Yes, I can't expect the court reporter to -- you'd better unplug it. I'm sorry, Mr. Locke.

MR. LOCKE: That's all right, Your Honour.

At the bottom of page 4, the argument is raised on page 3,

"...where a summons or offence notice has been served under Part 1..."

And you'll see that at the bottom of page 3 where the argument is put to the court.

THE COURT: I don't think I can see that. Oh?

"...except with the consent of the Attorney General."

MR. LOCKE: Mr. Ganet (ph.) says, now he's the prosecutor. He's giving a little evidence here. Because he has no personal knowledge of it. He's informing the court that it's his belief that Wendy Ramroop as a provincial prosecutor and agent for the Attorney General gave consent. But he was going to call the officer to particularize who he saw and what was said. And that starts at the bottom of page 4.

I'll let Your Honour read it down here.

THE COURT: Yes.

MR. LOCKE: I'm not going to make too much out of prosecutor Wendy. He didn't know her last name. We are assuming it's the one that Mr. Ganet is referring to, the prosecutor. Again, the sufficiency of that is, without being critical of the officer, that's why they have formalities such as these stamps with names on it so that the formalities - I won't call it technicalities, because what is being done here is akin to other things. And I've got a couple of cases for Your Honour to consider. And I can provide my friend with some as well here.

Basically said, "I sought her permission and that's what she gave me."

Now there is, without written consent of the prosecutor, which infers some knowledge on behalf of the prosecutor that they'd paid particular attention to what

they're doing. That's why I've filed with you a copy of another one, involving another accused completely. To indicate that it shows "that someone who's directed their mind to the issue at hand..." And without getting too formal, it is - if I can just pass these to Your Honour. I got to tell you, some of these cases, and I can't take credit for finding them, date back in part some time but they set out the basic principles.

The King v. Wallard, (ph.) King's Bench Division, if your Honour has that. I'm not sure which one's in front of you first.

THE COURT: I've got it.

MR. LOCKE: You got it there? At the top, it would be 365. Formal proof of the director's consent was necessary as a condition to the charge being allowed to go before the jury. Your Honour can see this was the Habitual Criminal Section, which we don't see too much of now.

But if we go to the next page, if we flip over to the next page, the learned Justice in the middle says, in *Rex v. Turner*,

"We consider the degree of evidence necessary to prove consent in cases in which proof had been given."

And the relevant passage, just so Your Honour -- basically, my submission here,

and I'm going to point out certain passages, my submission here is there's got to be at least an evidentiary basis to show there has been -- the mind of the judicial officer or the agent for the Attorney General has been turned to what's going on here.

The top of page 367,

"It is the duty of the clerk of Assizes to satisfy himself before the bill is presented to the grand jury that all necessary steps preliminary to indictment have been taken."

And what I am suggesting here is that without some evidence, be it an affidavit, or some particularity as to what was told to Wendy, if it is an agent - we don't even have evidence under oath of that - as to what she was told. Whether she was told about the particularities of the offence, what had occurred, et cetera.

One that might be of a little more assistance and more to the point, I suppose, is *Brackenridge*, (ph.) and you'll see I have one that's actually in this decade, Your Honour. I'll come to that in a moment, but if you just look at *Brackenridge*, and on the second page of that decision - and really, what these cases do is describe a certain level, a

certain standard that has to be met. But see, in the middle of that page,

"The purpose of acquiring the consent was dealt with to prevent frivolous complaints being laid. In order to determine whether the consent should be given, it was necessary that the learned junior judge should be informed of the fact so that he might judge whether there was reasonable grounds for the prosecution, which it was desired should be authorized to be begun."

And at the bottom of the page,

"The written consent should, in my opinion, at least contain a general statement of the offence alleged to have been committed not necessarily in the technical form, which would be required in the Information or conviction, but mentioning the name of the person in respect of whom the offence is alleged to have been committed, and the time and place with sufficient certainty to identify the particular offence intended to be charged."

There is no evidence that that was done here. And that is really the standard. In a similar case, in the 1987 case *Camilla*, (ph.) if Your Honour has that, from the Nova Scotia Court of Appeal.

In that particular case, Your Honour, there had to be consent given. In that particular case, it was by Minister of

Justice Crosby at that time with respect to two accused charged with importing narcotics. And -- well, in this particular case, the defence lawyer didn't raise the issue at the beginning of trial. He found it at the last minute and raised it as a last ditch effort, and the court really didn't appreciate that too much. They thought it should be done at the beginning of trial.

At the top of page 301, you'll see that there was reference made to an affidavit which was filed. They allowed the affidavit on the appeal because the -- there was no opportunity given to the crown to call evidence. We did give an opportunity here. Mr. Walia did give notice up front, and that gave the crown the opportunity then to call evidence, which was done.

But this is another way that you can do it. So instead of having a written stamp on the Information, you'll see an affidavit was provided.

THE COURT: Wouldn't the provincial prosecutor at trial simply be able to do that?

MR. LOCKE: No. The prosecutor, before this particular Information is laid and the summons is then issued, the case essentially has to have been given some - screened, if you will - given a review.

And there's got to be an evidentiary basis for it.

THE COURT: What about *Nazaro*, (ph.) Number 2? It can be given at any time during the trial.

MR. LOCKE: It says that in that particular case that the -- that's generally speaking. But in this particular instance, the legislation dictates that no proceedings shall be commenced except with the consent.

So what I've done in giving you these cases, essentially giving you certain standards or thresholds that have to be met. And we all know the crown doesn't have to sit and read through the whole case and say, "Well, yeah, there's..." It doesn't have to be completely reviewed. But the court officer's mind has to be turned to what he or she is doing. And there's got to -- there's no evidence that that was done here. We're not even sure on the evidence, and I - reading between the lines - it must have been Wendy Ramroop, or whatever her name is, because that's what Mr. Ganet says. But there's no evidence from the officer. He didn't even know who he saw, when he saw them. No evidence of what they talked about, what she said to him, only, "I sought her permission, which she gave me."

THE COURT: Before you leave Nazaro No. 2, there is a s.12, the Official Secrets Act, as it then was.

MR. LOCKE: Yes.

THE COURT: The bottom of page 148.

MR. LOCKE: Yes.

THE COURT: "...shall not be instituted..."

MR. LOCKE: Right. Bottom of page -- sorry, Your Honour, 48?

THE COURT: The bottom of page 148 --

MR. LOCKE: Right.

THE COURT: -- says s.12 of the Official Secrets Act, as it then was.

MR. LOCKE: Uh-huh.

THE COURT: It says,

"The prosecution for an offence under this act shall not be instituted except by or with the consent of the Attorney General."

Now going back to the head note --

MR. LOCKE: Uh-huh.

THE COURT: -- I take it from that, that the consent of the Attorney General is sufficient if given at any time during a trial.

MR. LOCKE: I'm just reading the end of it. Yes, it says that consent can be proven any time during the course of the trial. Page -- if Your Honour looks at the last page of that judgment? It says,

"As I read the cases, it is sufficient if the fact of the

consent of the offence charged be proved by the crown..."

"...sufficient if the fact of the consent of the offence charged be proved by the crown at any time during a trial so that the record shows that the court has acted with jurisdiction. If at the conclusion of the case, the record does not show the court is possessed of jurisdiction, the Indictment should be quashed."

And of course what happened here is that the accused didn't come to court that day because there hadn't been sufficient notice, or there hadn't been the sufficient consent been given. There was an adjournment sought and it was denied, which is another matter that Mr. Walia may or may not want to address himself on that. Because after it was denied, the trial proceeded *Ex Parte*, and he was convicted in *absentia*. And I suppose what happened here -- of course, Your Honour, without being critical, because it is a -- I don't do a lot of appeals, I'm sorry, Provincial Offences Act, but the rules are there and they have to be followed. And what occurred here, with no disrespect to the officer was that he didn't have the sufficient Information. It's a sloppy record. And an insufficient record, in law, in my submission. Without trying to

hang it on a technicality, it's not -- the cases -- I was able to get some cases for you on this. It was the thrust of what was dealt with at that time. The crown could have held it down, asked for some time to get Wendy Ramroop, whom I assume was in the office and could have come to speak to this to either give evidence or file an affidavit. And you can tell from this one little paragraph that there is a lack of any particularity of the consent that was obtained. And it's not sufficient in law and therefore, in my submission, before moving on to the other issues, there was no jurisdiction in this particular matter for the court to proceed when other options were available to confirm that in fact there was jurisdiction.

THE COURT: Well, it's hot, as you agree. I think we should have a recess.

R E C E S S 4:00 P.M.

U P O N C O M M E N C I N G 4:15 P.M.

...AT THIS TIME OTHER MATTERS WERE DEALT WITH

THE COURT: Now I've been thinking about the jurisdictional matter, and maybe you can split your argument and stop at the jurisdiction. And I'll hear from the crown.

MR. LOCKE: Let me just make one point, because my friend was good enough during

the break to high light what they call curative provisions in here.

THE COURT: Oh, yes, they do.

MR. LOCKE: Where, you know, you can make mistakes and get away with it, provisions that they stick in the Provincial Offences Act. Section 25. I don't know whether Your Honour has one with you or not.

THE COURT: Provincial Offences Act, 25?

MR. LOCKE: Why don't I show you what I've got here, if it's of some assistance.

THE COURT: Oh, wait a minute. Maybe you'd better because I can't find it here.

MR. LOCKE: Why don't I just pass up --

THE COURT: Yes.

MR. LOCKE: If you look at the second page, as my friend was good enough to show me.

THE COURT: Twenty-five?

MR. LOCKE: Sub-seven.

THE COURT: Sub-seven? I've got it.

MR. LOCKE: Down to (h), I guess it is.

THE COURT: "...consent of the person..."

...COURT READS *SOTTO VOCE*

THE COURT: Well,

"...no count in the Information is insufficient...it does not with the consent of a person, official or...as required..."

Yes, okay, I see that. That's quite a hurdle for you to get over.

MR. LOCKE: It is, but I think the best way to deal with it is, that provision deals

essentially with -- that provision can't cure -- number one, can't cure a nullity. In other words, what it says is, you leave off some information. If there's certain mistakes made on there, they can be cured and if -- the matter is dealt with. But when the act particularises what has to be done, in other words, if you look at s.21, s.21 says, "Look, you need the consent, plain and simple." You can't then go to say, "Well, s.25 says you can get away without it." So what could really happen here is, a policeman could say, "Well, I need the consent of the prosecutor, but I'm going to lay this anyway because s.25 tells me, 'Hey, if this charge is laid, and I skip getting the consent, big deal. What's the court going to do about it? They can't do anything about it. There's s.25.'"

THE COURT: Well, if the consent had been obtained --

MR. LOCKE: Right.

THE COURT: It doesn't state that it's been obtained.

MR. LOCKE: Right.

THE COURT: Is --

MR. LOCKE: That's cured. That's cured.

THE COURT: It's cured?

MR. LOCKE: My point here is not to say because there isn't a stamp of a signature on it --

THE COURT: You're saying it hasn't been obtained?

MR. LOCKE: Hasn't been obtained in a proper fashion, is what I'm saying. In a sufficient fashion. In other words, when you want to get consent --

THE COURT: No, no, if your argument is, if it hasn't been obtained in a sufficient fashion, but it has been obtained in a slovenly fashion or insufficient fashion then I think this is curative. But if --

MR. LOCKE: Well, it is --

THE COURT: But if it hasn't been obtained at all, you then win.

MR. LOCKE: Well, it hasn't been obtained because on the evidence, and we may all sit here as we read the transcript, and assume --

THE COURT: Is Wendy -- is Wendy --?

MR. LOCKE: We may assume it's the person that Mr. -- the prosecutor says it was. But there's no evidence that Wendy is a crown under oath from the officer because Wendy doesn't even have a last name here. And there's nothing in terms of any evidence to confirm except his belief that she is a crown. "I sought her permission and obtained it."

THE COURT: I think your argument has some force. Wendy Ramroop -- Mrs. Ramroop I know to be a provincial prosecutor, but I do not know what is her first name and I,

as a matter of fact, I can't take judicial notice of that. That somebody named Wendy in an office said yes to the officer.

That's what the evidence says.

MR. LOCKE: That's it.

THE COURT: Wendy in the office, Mrs. Ramroop.

MR. LOCKE: That's not -- that's not good enough.

THE COURT: Can you get over that hurdle?

MS. THEROUX: Except that this officer under oath says, as indicated on page 5 --

THE COURT: "I went to the office..."

MS. THEROUX: Yes. "I served a person, Mr. Saini..." Leads to identification and later on, Mr. Saini, person named in the offence notice of careless driving, the exact date. I have no record in front of me. But I do know that that particular offence notice was returned to me,

"...therefore I came to see provincial prosecutor Wendy. I'm sorry, I don't know her last name. I sought her permission to proceed under Part 3, which she gave me and that's why we're here."

He mentions provincial prosecutor Wendy, not the baker next door, not a crown attorney down the hall, not his accountant Wendy, it's the provincial prosecutor Wendy.

The court later on says,



and I sign it. So yes, usually the proof is made in writing. However, 2.25 (h) --
THE COURT: It doesn't say that.

MS. THEROUX: -- doesn't say it has to be in writing. However, in this case, this Wendy, I submit --

THE COURT: I'll interrupt you for a minute and I'll sign this so that lady can get down there. Can she make it to the office?

...AT THIS TIME ANOTHER MATTER WAS SPOKEN TO

MS. THEROUX: In any event, we're in a situation where further evidence was not adduced regarding this matter because the court said,

"...in any event, consent was given by Miss Ramroop in accordance with the evidence of the officer. What do you wish to do?"

So he was satisfied as to the consent being secured, and that there's a presumption that it was done in a professional manner with all the details considered. And therefore, the prosecution was in a position to then adduce further evidence. Why would Mr. Ganet call Miss Ramroop? She probably was in the office or in another court room at that time, to give further evidence when the court at that point was satisfied. Now has the court

erred in law? Then I submit the proper remedy is that this matter go back for another trial date, and at that point the prosecution can give further evidence and have Miss Ramroop under oath give evidence as to how she actually proceeded in order to give her consent.

But obviously, on page 5, there is some evidence here that it was a provincial prosecutor by the first name of Wendy, which is -- the court himself then says, "She's an agent for the Attorney General." So he himself, the court himself is, I guess, taking judicial notice that it is Miss Wendy Ramroop of the East Mall Court, and then where is lack of jurisdiction?

THE COURT: I think, if I can respond, Your Honour?

THE COURT: Well, the question that comes to my mind is, how many times can something fall between the cracks? Number one, it falls between the cracks firstly when the officer - and I don't criticise him one bit - doesn't file the ticket, as I call it, within seven days, as he should have done.

It then falls between the cracks again when the officer goes to the office, and I am satisfied personally that he spoke with Mrs. Lameroux, who would have considered this matter carefully, because I have seen her in court and she's a most efficient and careful person. But again, without

criticising her, the statement is not made on the Information.

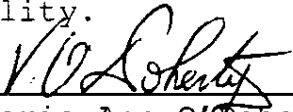
So it falls into another kind of technical crack. But there comes a time when you got to say, "Enough." In this case, I think that time has come and this is an appeal, isn't it? I'll grant the appeal. I think it's something that the civil courts can settle.

Now the fine has been paid, has it?

MR. LOCKE: Yes, Your Honour.

THE COURT: All right. The appeal is granted and the fine will be refunded. The court will enter an acquittal.

This is to certify that the foregoing is a true and accurate transcript of my recordings to the best of my skill and ability.



Valerie Ann O'Doherty
Official Court Reporter