ONTARIO COURT (PROVINCIAL DIVISION)

HER MAJESTY THE QUEEN

against

JEAN NOLET

****

APPEAL PROCEEDINGS

BEFORE THE HONOURABLE JUDGE M. F. WOOLCOTT
on JUNE 17, 1994, at BRAMPTON, Ontario

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CHARGES: Unsafe start - H.T.A.

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APPEARANCES:

P. JOHN, Ms. — Counsel for the Crown

G. BYRD, Esq. — Agent for the Accused

Friday, June 17, 1994

MS. JOHN: The next matter is number 20. Jean Nolet.

MR. BYRD: Yes, Your Honour, I also appear on behalf of the appellant, Nolet.

THE COURT: Just a moment. Can I get the paper work on that one.

MS. JOHN: There's a transcript also. This will be argued.

MR. BYRD: Although, I think it's very brief. It's one issue.

THE COURT: Well, you have about eight minutes for argument before the lunch recess. Is there any other matters we might deal with more appropriately. I am presuming that even one issue can not be argued in eight minutes.

MS. JOHN: Well, I take it Your Honour has read the transcript?

THE COURT: I have.

MS. JOHN: It is a situation....

THE COURT: Certainly, I've read all of them at once, so just let me have a quick look at this one to see.

MS. JOHN: It came down to identification when the agent in the courtroom he indicated he was appearing for this person.

THE COURT: Actually, could I hear from you, Ms. John, on this one first.

MS. JOHN: A civilian witness was called --a civilian witness gave evidence and at that point

the agent had made a motion to have non-suit because there was no identification. I don't know -- the only case I have, it will be Regina v. Keith Hunt. Although it is not directly on point, it is a situation....

THE COURT: Do you have a copy for me? Thank you.

MS. JOHN: Keith Hunt is from the Supreme Court of Ontario. In this instance the defendant was charged with speeding. The officer had stopped the defendant and identification was provided. At that time a motion was made that there was no identification by the officer. The trial Justice of the Peace denied that motion and was convicted. He appealed it and on appeal the Provincial Court Judge had granted the appeal and dismissed it at that stage. It went to the Supreme Court of Ontario. If you look at Page two and at the last paragraph on it where it says,

> "It appears from the record of the Court, which was before the trial judge...."

Page two,

> "that a police officer prepared and the person charged signed the Certificate of Offence, which was filed in the office of the court named in the certificate. At that time the officer certified on the Certificate of Offence that he personally served the offence notice on the person."

Once that offence notice is served on an individual, Your Honour, the offence notice is signed, returned to the court office. It is signed by the defendant indicating he wishes to plead not guilty and it is sent to the court office. The court office at that time sends him a notice of trial. Again, he hires an agent, although, it is called for in the Act, he hires an agent to attend court to act on his behalf. The agent does appear into court indicating I am such and such. I'm appearing for this individual.

The trial justice at that time conferred that there was sufficient identification and a conviction was entered. If you look at the last page of Keith Hunt, Page four, and the paragraph starts with,

> "In our respectful view the judge in the appeal was wrong. The court has at all times the power to look at it's records and take notice of their contents."

And if I go down to the second line,

> "Having regard to the evidence of the police officer, the records of the court and in the view of the provisions of the statute referred to, there was sufficient evidence to constitute prima facie proof of identification of the respondant as the driver when he appeared in response to the Notice of Trial to answer to the charge."

So I would submit, Your Honour, even though the Act provides for an agent to attend, you do have identification namely that the offence notice was signed, he got a trial notice, an agent appeared into court defending him. It would by submission, it is sufficient for prima facie of identification.
THE COURT: Okay. What is your response?
MR. BYRD: Well, my argument is that if you read the Section, obviously the crown has to prove the driver or operator of the vehicle. The only evidence in the transcript is, the prosecutor asked the civilian witness was it a male or a female driving and there's evidence there was a male driving the car.

The crown on that date didn't have a police officer to testify that he investigated at a later time and determined who was the driver of the vehicle and all that sort of business, which is usually the way the crown would prove identification because, of course, there's provisions to hear these matters ex parte.

Now, Madam Crown is saying well because the defendant appeared by way of agent, they've conceded identification. My submission is, when you plead not guilty, the crown is put to the proof of proving all the elements of the charge. The first element of this charge is the driver or operator of the vehicle. As far as I know, there's no provisions as coming with photo radar, where it's enough to be the owner and you will be

convicted and under this section you have to be proven to be the driver or operator.

There is no evidence, whatsoever, in this transcript with respect to the defendants name even being mentioned other than on arraignment in which a not guilty plea was taken. There is absolutely no evidence who the driver was. The problem the crown ran into is that they had no police officer or the investigating officer to say who was driving the vehicle and who was responsible or who was coming from where.

Obviously this Hunt is definitely distinguishable. It's an officer observing a vehicle speeding and I. D.'ing there -- it says right on Page two that the only viva voce evidence called was that of the police officer who stopped the driver in question. It goes on to say,

> "The driver identified himself and produced his valid Class "G", Ontario driver's licence issued as Keith D. Hunt."

That was in evidence. There's no such evidence in this case because there was no officer for the crown. The crown didn't have that essential witness. And I guess Madam Crown is suggesting to the Court, well, because you appear by agent -- I don't know if she was suggesting if it was ex parte, he still would have been convicted because his name appears on the ticket. I would submit

that that's -- it's not enough to have your name on the ticket the crown has to prove that he was the driver or operator of the vehicle. There is absolutely no evidence, whatsoever, in this transcript who the driver or operator was of that vehicle. And to say, well, the man's answered to the charge, therefore, he must be the driver or the operator, I don't think that's a reasonable inference that can be made. Those would be the grounds for the appeal.

THE COURT: Anything further, Ms. John?

MS. JOHN: No, Your Honour.

THE COURT: Well, having read the transcript, having reviewed the Keith Hunt case, which would definitely be binding upon me if it could be found to be applicable to the case before me, I am of the view that, indeed, there was not sufficient identification in this case. To get into the same basis as the Hunt case we would have needed, I think, the officer to have shown that indeed it was Mr. Nolet who signed the ticket and whether that person was in court or not would have been, I think, of significance.

But, in this case, we do not even know which Mercedes it was except by the brand name. I have no licence plate, no anything. So, in my view there was not identification in the case and the learned Justice of the Peace was in error in finding there was. So, the appeal is granted.

MS. JOHN: Thank you, Your Honour.

MR. BYRD: Thank you, Your Honour.

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THIS IS TO CERTIFY THAT the foregoing is a true and accurate transcription of my notes, to the best of my skill and ability.

Kim Ennis, Court Stenographer