

ONTARIO COURT OF JUSTICE

IN THE MATTER OF an appeal under subsection 135(1) of the
Provincial Offences Act, R.S.O. 1990, c. P.33, as amended;

B E T W E E N :

HER MAJESTY THE QUEEN
Respondent

— AND —

SERGIO NOVELO
Appellant

Before Justice Richard Blouin
Heard on February 26, March 23 and May 28, 2009
Written Reasons for Judgment released on July 29, 2009

Lorinda Angus for the prosecution
Paul Andrews, Licensed Paralegal for the defendant Sergio Novelo

On appeal from conviction entered by Justice of the Peace P. Solomon on June 19, 2008.

BLOUIN J.:

[1] The defendant appealed his conviction dated June 19, 2008 after a trial before the presiding Justice of the Peace. Mr. Novelo represented himself at the trial. At the conclusion of the appeal, I granted the appeal and ordered a new trial. Since the matter had been before me for a few months, I gave a brief oral ruling, indicating that I would provide written reasons before July 31, 2009. These are my reasons.

[2] The defendant entered a not guilty plea after arraignment on a charge that he disobeyed a stop sign and did not stop, contrary to s. 136(1)(a) of the *Highway Traffic Act*.

[3] Constable Arniel testified that at the intersection in question, the defendant's vehicle, according to the officer, did not stop and went through the intersection at approximately 30 kilometres per hour.

[4] The defendant testified that he stopped for three seconds and therefore had committed no offence.

[5] After reading the trial transcript, and hearing submissions of the prosecution and the defendant's agent, I ordered a new trial as I am entitled to do under s. 138(1) of the *Provincial Offences Act*. I concluded that the ends of justice required me to do so for the following two reasons.

Inadequate explanation of trial process

[6] Firstly, an adequate explanation of the trial process by the trial justice to an unrepresented defendant did not occur. In fact, there was no explanation. In my view, every defendant is entitled to be made aware, even in the most basic language, of the procedure involved in a trial. That explanation need not take more than a few minutes outlining the basic concepts of burden of proof, sequence of witnesses, relevant questions, and option of testifying or not. Here, there was no explanation.

[7] In addition, throughout the trial issues arose such as the defendant's photograph evidence, and the defendant's option to testify or not, that were not adequately dealt with.

[8] Mr. Novelo was instructed by the trial justice at the beginning of cross-examination of the police officer to "hang on to your side of the story until you come up and take the stand." Not only does that statement potentially mislead the defendant as to what type of questions he could ask (i.e. none regarding the defendant's version of events), it also suggests that he must testify. That potential misperception was furthered at the end of the case for the prosecution, when the trial justice states, "Mr. Novelo, do you wish to call any witnesses or do you want to come up and testify on your own behalf?" It was not explained to the defendant that he could rely on the position that the Crown had not proven beyond a reasonable doubt the prohibited act, as is their obligation, and that he did not have to testify.

Insufficient reasons

[9] Secondly, in his reasons for judgment, the trial justice essentially reviewed the evidence of the police officer, concluding that the defendant failed to indicate where he had stopped and that he may have been thinking of another intersection. The trial justice then reasoned that the officer wasn't doing anything else but enforcing stop sign violations and, as a result, he was "inclined to put more weight on the officer's statement with respect to what occurred that day." Aside from inadequately articulating why he put more weight on the officer's observations, the trial justice did not deal with the issue of whether or not a reasonable doubt was created by the defendant's evidence that he did not commit the *actus reus* of this offence.

[10] Even if the trial justice "put more weight" on the prosecution evidence, the defendant would still be entitled to an acquittal if, although not believed, a reasonable doubt was created by his evidence.

[11] As a result, I am of the view that a new trial is necessary to satisfy the ends of justice.

Application of *R. v. W.D.*

[12] Counsel asked me to address the issue of how this case fits into the analysis set out in *R. v. W.D.*, (1991) 63 C.C.C. (3d) 397. Both counsel were of the view that previous appellate law had established this offence to be one of absolute liability. Even if it were strict liability, which could be the case applying *R. v. Kanda*, [2008] O.J. No. 80 (Ont. C.A.), the result is the same.

[13] On the issue of the application of *R. v. W.D.*, *supra*, to provincial offences matters, I have been referred to seemingly contradictory decisions from the Ontario Court of Justice. In summary, Justice Duncan in *R. v. Defaria*, [2008] O.J. No. 5427 concludes that *W.D.* has no application to regulatory offences, where the defence of due diligence is to be assessed by the trial court, whereas Justice Bradley in *R. v. Vercammen*, unreported, November 10, 2005 entered an acquittal where the trial justice did not apply *W.D.* In my view, they are both correct, and not contradictory.

[14] When the issue concerns the *actus reus* of a provincial offence wherein the prosecution must prove the prohibited act beyond a reasonable doubt, *W.D.* applies to the analysis. In other words, any reasonable doubt as to whether the defendant committed the act, raised by defence evidence, or by the evidence as a whole, must be resolved in favour of the defendant. On the other hand, if the offence is categorized as strict liability, which it was in *Defaria*, and which requires the defendant to establish due diligence on a balance of probabilities, the defendant must do more than raise a reasonable doubt on that issue.

Released: July 29, 2009

Signed: “Justice Richard Blouin”