

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

Respondent

- and -

ANDERSON SAHADEO

Appellant

Before Justice P.A. Schreck
Heard on February 26, 2016

REASONS FOR JUDGMENT

C. Mariuz agent for the Respondent
C. Walpoleagent for the Appellant

SCHRECK J.:

[1] Where a defendant charged with a provincial offence under Part I of the *Provincial Offences Act* (“*POA*”) fails to appear at the time and place appointed for trial, s. 9.1(2) of the *POA* allows the court to enter a conviction without a hearing. The scope of that section is the central issue on this appeal.

[2] The Appellant was charged with “unsafe lane change”, contrary to s. 154(1)(a) of the *Highway Traffic Act* (“*HTA*”). On the date his trial was scheduled to take place before His Worship Justice of the Peace Cotter, a paralegal acting on the appellant’s behalf (not Mr. Walpole) appeared and requested an adjournment. The request was denied, at which time the

paralegal advised the presiding Justice of the Peace that he was instructed not to participate in the proceedings any further. The Justice of the Peace proceeded to enter a conviction without a hearing pursuant to s. 9.1(2) of the *POA*. The appellant appeals his conviction on two grounds: (1) that the learned Justice of the Peace erred in failing to grant an adjournment, and (2) that the learned Justice of the Peace erred in proceeding pursuant to s. 9.1(2) of the *POA*.

[3] For the reasons that follow, I am of the view that it was within the Justice of the Peace's discretion to refuse the adjournment. However, I agree that it was not open to him to proceed by way of s. 9.1(2) in the circumstances as the appellant had, through an agent, appeared at his trial. As a result, the conviction is set aside and a new trial is ordered.

I. FACTS

[4] On October 10, 2014, following a motor vehicle accident, the appellant was charged with "unsafe lane change" contrary to s. 154(1)(a) of the *HTA*. The matter was originally scheduled for trial on March 28, 2015. The day before the trial, an agent acting for the appellant brought a motion for further disclosure. At that time, the prosecutor provided the agent with further disclosure and advised him that the balance of what he was seeking was not in the possession of the prosecution. On consent, the trial date was vacated and a new date was scheduled for April 22, 2015.

[5] On April 22, 2015, an agent representing the appellant appeared but the appellant was not personally present. The agent advised the court that he had been instructed to "ask for an adjournment based on some unsatisfied disclosure request". The disclosure said to be missing was a portion of a collision report that had been cut off when the document had been sent by way of facsimile transmission. While the record is not entirely clear, it appears that another paralegal was to have represented the appellant at trial but had cancelled at the last minute. The appellant, who was himself a paralegal, was in court in Orangeville.

[6] The presiding Justice of the Peace noted that the appellant would have known of the disclosure issue in advance and could easily have remedied it by requesting another copy of the report from the prosecutor. He had not done so, nor had he given the prosecution or the court any advance notice of his adjournment application. The request for the adjournment was denied.

[7] Given that the trial was to proceed, the paralegal representing the appellant was given an opportunity to seek further instructions. He responded as follows:

Thank you, Your Worship. I explained that this is likely what's going to happen this morning, reading between the lines earlier, and he's instructed me to just walk away from it at this point, Your Worship.

[8] The Justice of the Peace then directed that the appellant be paged. When there was no response to the page, the Justice of the Peace stated:

All, right, reviewing the certificate pursuant to s. 9.1(b) [sic], with no one appearing today, the certificate appears to be regular on its face. With no one appearing, deemed not to dispute; a conviction is registered

II. ANALYSIS

A. The Refusal of the Adjournment

[9] The decision to grant or refuse an adjournment is discretionary and an appellate court will interfere only where the discretion was not exercised judicially or where it has resulted in a miscarriage of justice: *R. v. Smith* (2001), 161 C.C.C. (3d) 1 (Ont. C.A.). In this case, as the Justice of the Peace observed, the need for the adjournment could easily have been obviated by the appellant far in advance of the trial. In my view, the Justice of Peace was correct to refuse the adjournment.

B. Section 9.1 of the POA

(i) *Relevant Statutory Provisions*

[10] Section 9.1 of the POA provides as follows:

9.1 (1) A defendant is deemed to not wish to dispute the charge where the defendant has been issued a notice of the time and place of trial and fails to appear at the time and place appointed for the trial.

(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 complete and regular on its face.

(3) The justice shall quash the proceeding if he or she is not able to enter a conviction.

[11] Section 9.1 only applies to charges that are commenced by way of a certificate of offence. Section 54 applies to charges that are commenced by the swearing of an information and provides as follows:

54. (1) Where a defendant does not appear at the time and place appointed for a hearing and it is proved by the prosecutor, having been given a reasonable opportunity to do so, that a summons was served, a notice of trial was given under Part I or II, an undertaking to appear was given or a recognizance to appear was entered into, as the case may be, or where the defendant does not appear upon the resumption of a hearing that has been adjourned, the court may,

(a) proceed to hear and determine the proceeding in the absence of the defendant; or

(b) adjourn the hearing and, if it thinks fit, issue a summons to appear or issue a warrant in the prescribed form for the arrest of the defendant.

(2) Where the court proceeds under clause (1)(a) or adjourns the hearing under clause (1)(b) without issuing a summons or warrant, no proceeding arising out of the failure of the defendant to appear at the time and place appointed for the hearing or for the resumption of the hearing shall be instituted, or if instituted shall be proceeded with, except with the consent of the Attorney General or his or her agent.

(ii) *Section 11(d) of the Charter and Presumed Waiver*

[12] Section 11(d) of the *Canadian Charter of Rights and Freedoms* guarantees anybody who is charged with an offence “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”. This guarantee applies to regulatory offences: *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, at para. 22.

[13] Like all *Charter* rights, the rights guaranteed by s. 11(d) can be waived. In the regulatory context, it is open to the legislature to statutorily permit a court to infer waiver from a defendant’s failure to appear at the time and place appointed for trial. This was made clear by the Supreme Court of Canada in its consideration of a similar New Brunswick provision in *R. v. Richard*, [1996] 3 S.C.R. 525 at para. 8:

Contrary to the opinion expressed by the Court of Queen’s Bench and the Court of Appeal, s. 16 of the *Act* does not infringe s. 11(d) of the *Charter*. In my view, an accused who fails both to pay the fine indicated in the ticket and to appear in court at the time and place stated therein waives the benefit of s.

11(d) of the *Charter*, and therefore the right “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”, in the same way as if he or she had, for example, decided to plead guilty. Although at common law, the silence of the accused is equivalent to a plea of not guilty rather than to one of guilty and therefore in a criminal context ss. 7 and 11(d) might require any waiver to be made only upon appearance (a question on which I express no opinion), it is entirely different in the context of regulatory offences for which imprisonment is not a possibility and which accordingly do not bring the liberty component of s. 7 into play. In such a context, I am of the view that s. 11(d) of the *Charter* in no way prevents the legislature from inferring from the accused’s failure to act a waiver on his or her part of the right to a fair and public hearing by an independent and impartial tribunal, provided that he or she is fully aware of the consequences of failing to act and that the procedural scheme in place provides sufficient safeguards to ensure that the conduct of the accused was not due to events over which he or she had no control. That is the case here.

That the reasoning in *Richard* applies to s. 9.1 of the *POA* was made clear by the Ontario Court of Appeal in *R. v. Jamieson* (2013), 118 O.R. (3d) 327 (C.A.). Thus, s. 9.1(2) of the *POA* is not inconsistent with s. 11(d) of the *Charter* because when a defendant fails to appear for trial, it can be inferred that he or she has waived the right to a trial.

(iii) *Application to the Case at Bar*

[14] In this case, it cannot be said that the appellant “fail[ed] to appear at the time and place appointed for trial”. He did appear by instructing an agent to attend, as permitted by s. 50 of the *POA*. The Respondent argues that since the agent subsequently withdrew after the adjournment request was denied, the appellant effectively failed to appear. In other words, the term “fail to appear at the time and place appointed for trial” should be interpreted to include situations where the defendant appears but subsequently leaves or declines to participate.

[15] In my view, the words of s. 9.1 of the *POA* must be strictly construed. The section permits an inference of waiver, and it is well established that any waiver of a *Charter* right must be clear and unequivocal: *R. v. Richard*, *supra* at para. 26. While it is open to the legislature to deem that a waiver exists when certain conditions are met, those conditions must constitute clear evidence of an unequivocal waiver: *R. v. Richard*, *supra* at paras. 27, 32. When the section is interpreted too broadly, there is a risk that it will apply in situations where there has been no unequivocal waiver.

[16] The point is illustrated in the case at bar. Section 9.1 provides that those who fail to appear at the time and place appointed for trial are “deemed to not wish to dispute the charge”. Ordinarily, where a defendant is aware of the time and place the trial is to take place but does chooses not attend, it is reasonable to infer that he has no wish to dispute the charge. However, in this case it was clear that the defendant did wish to dispute the charge. His adjournment application was for the purpose of obtaining disclosure that his agent stated was “crucial to his defence”. Notwithstanding the appellant’s lack of diligence in obtaining that disclosure, it cannot be inferred that he had no wish to dispute the charge. He clearly wanted to do so, which was why he sought an adjournment. It was clear that the appellant had not clearly and unequivocally waived his right to a trial. As the Court observed in *R. v. Richard*, *supra* at para. 18, “[t]he conduct of the accused person ceases to amount to a waiver as soon as he or she begins to exercise his or her rights”.

[17] The respondent points out that s. 54(1) of the *POA*, which allows for the trial of a defendant to proceed *in absentia*, also applies only in situations where the defendant “does not appear at the time and place appointed for a hearing”. It is argued that if s. 9.1 did not apply because the appellant appeared by agent, this section also could not apply. As a result, once the agent withdrew the court would not have been able to proceed with the trial. The effect is that the defendant can unilaterally force the court to adjourn the proceedings, a result the legislature cannot have intended.

[18] I agree that s. 54(1) did not apply in this case. However, there was no need to resort to s. 54(1). The defendant had appeared by agent, the prosecution was ready, and the trial should have proceeded. The fact that the appellant had instructed his agent to “walk away” does not mean that the agent had any right to do so. It is unclear on the record whether he in fact left the court room. If so, he should not have been permitted to do so. In my view, a paralegal, like counsel, can only withdraw with the leave of the court: *R. v. Cunningham*, [2010] 1 S.C.R. 331.

[19] I recognize that the agent had no instructions and was likely not in a position to cross-examine witnesses or make submissions. It is very likely that had the trial proceeded, the outcome would have been the same. However, the appellant had a right to a trial regardless of its likely outcome and he did not waive that right.

[20] Nothing in these reasons should be seen as condoning the conduct of the appellant or his agent. The appellant demonstrated a complete lack of diligence by failing to ensure that he had the necessary disclosure. He ought to have either appeared personally or else sent a properly instructed agent. The agent who appeared had not been properly instructed and was initially unable to articulate the reason for which he was seeking an adjournment. The application itself was entirely without merit and should not have been brought. For his part, the agent should not have agreed to act for the appellant without proper instructions.

III. DISPOSITION

[21] For the foregoing reasons, the appeal is allowed, the conviction is set aside and a new trial is ordered.

Justice P.A. Schreck

Released: March 9, 2016