

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 —

ANA STUPARAYK; BRUNO FIRMINIO

Appellants

Before Justice J.W. Bovard

Heard on June 8, 2009

Reasons for Judgment released on August 28, 2009

Ms. Janet Stoeckl for the prosecution
Mr. V.H.S. Manoukian for the defendants Ana Stuparayk and Bruno Firminio

On appeal from convictions by a Justice of the Peace pursuant to s. 9.1 of the *Provincial Offences Act* R.S.O. 1990, chapter p.33, as amended, as a result of being deemed not to dispute the charge on October 9, 2008 (Ana Stuparayk) and on October 22, 2008 (Bruno Firminio).

Bovard J.:

[1] Both of these appeals are practically identical factually and deal with exactly the same question of law, therefore, they were heard together and this judgment will apply to both equally.

Background

[2] The appellants were charged as follows

Ana Stuparayk – “Driver – Fail to wear complete seat belt assembly contrary to *Highway Traffic Act* s. 106 (3)”

Bruno Firminio - “Driver – Fail to wear complete seat belt assembly contrary to *Highway Traffic Act* s. 106 (6)”

[3] The only factual difference between the appellants’ cases is that Ms. Stuparayk was charged under subsection 3 of s.106 of the *Highway Traffic Act* and Mr. Firminio was charged under subsection 6 of s.106 of the same Act. The difference in the subsection number of the charges is not significant for the purpose of the appeals. The subsections are as follows:

- (3) Every person who is at least 16 years old and is a passenger in a motor vehicle on a highway shall,
 - (a) occupy a seating position for which a seat belt assembly has been provided; and
 - (b) wear the complete seat belt assembly as required by subsection (5). 2006, c. 25, s. 1.

- (6) Subsections (2) and (3) do not apply to a person,
 - (a) who is driving a motor vehicle in reverse;
 - (b) who holds a certificate signed by a legally qualified medical practitioner certifying that the person is,
 - (i) for the period stated in the certificate, unable for medical reasons to wear a seat belt assembly, or
 - (ii) because of the person’s size, build or other physical characteristic, unable to wear a seat belt assembly; or
 - (c) who is actually engaged in work which requires him or her to alight from and re-enter the motor vehicle at frequent intervals and the motor vehicle does not travel at a speed exceeding 40 kilometres per hour. 2006, c. 25, s. 1.

[4] Both appellants requested a trial, but failed to appear on their trial date. The Justice of the Peace registered convictions against both of them pursuant to s.9.1 of the *Provincial Offences Act*. Section 9.1 states that:

- 9.1 (1)** If a defendant who has given notice of an intention to appear fails to appear at the time and place appointed for the hearing, the defendant shall be deemed not to dispute the charge.
- (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. (Emphasis added)
- (3) The justice shall quash the proceeding if he or she is not able to enter a conviction. 1993, c. 31, s. 1 (3).

The Issue

[5] The issue in both appeals is whether the Certificates of Offence were complete and regular on their faces.

The Law

[6] Several courts have adjudicated on the issue of the definition of the phrase “complete and regular on its face.” In *R. v. Montone* [2007] O.J. No. 2230 (Ont. Ct. Justice), Justice Lampkin noted in paragraphs 21-24 that:

21 The plain meaning of the word 'complete' in The Concise Oxford Dictionary (Ninth Edition) is 'having all its parts; entire; finished; of the maximum extent or degree'. Black's Law Dictionary is more expansive. It defines 'complete' as 'full; entire; including every item or element of the thing spoken of, without omissions or deficiencies; perfect; consummate; not lacking in any element or particular'.

22 The Concise Oxford Dictionary gives the meaning of 'regular', *inter alia*, as 'conforming to a rule or principle; systematic; harmonious; correct; not defective or amateur; complete; thorough'. Black's Law Dictionary gives the meaning as 'conformable to law; steady or uniform in course, practice or occurrence; not subject to unexplained or irrational variation'.

23 Black's Law Dictionary says that 'process is "regular on its face" when it proceeds from a court, officer, or body having authority of law to issue process of that nature, and is legal in form and contains nothing to notify or fairly apprise any one that it is issued without authority'.

[7] Livingstone J. found similarly in *R. v. Wilson* [2001] O.J. No. 4907 (Ont. Ct. Justice).

[8] Considering the power that s. 9.1 gives to a Justice of the Peace to “without a hearing enter a conviction in the defendant’s absence and impose the set fine for the offence”, Libman J. observed in *R. v. Khoshael* [2001] O.J. No. 2110 (Ont. Ct. Justice) at paragraph 13, that defects in a Certificate of Offence that are dealt with under s. 9.1 “go to the very jurisdiction of the Court to conduct a hearing in the defendant’s absence and enter a conviction...”. He found that as a consequence, “a premium is rightly placed on the form of the document, since matters of substance are not engaged by s. 9.1.” Blacklock, J. ruled similarly in, *R. v. Singh* (unreported, January 14, 2000) (Ont. Ct. Justice). In *R. v. York (Regional Municipality) v. Billinger* [2005] O.J. No. 2627 (Ont. Sup. Ct. of Justice), Clark J. held that, “on a fail to respond docket, the concept of the ticket being regular on its face is to be strictly construed and where it is not regular, the only power is to quash.”

[9] Matters of surplusage do not trigger the quashing provision in s.9.1. See: *R. v. Baldasare* [2000] O.J. No. 5515 (Ont. Sup. Ct.).

[10] The parties referred me to many appellate decisions that concern appeals from s. 9.1 convictions by Justices of the Peace. These cases considered Certificates of Offence under the *Highway Traffic Act* that described the correct offence, and either cited the wrong section number, or omitted the section number. I will review the decisions that I find relevant to the issue in the cases before me in order to determine the direction of the jurisprudence regarding this issue.

Cases where the offence is described properly on the Certificate of Offence, but the wrong section number is cited

[11] In *R. v. Maniccia* [2004] O.J. No. 5566 (Ont. Ct. Justice), the police charged the defendant with “fail to yield to traffic on through highway” and incorrectly stated the section number as s. 136 (1) (a), which is the offence of failing to stop at a stop sign, instead of the correct section, s. 136 (1) (b). Nevertheless, the Justice of the Peace convicted the defendant under s. 9.1. The defendant appealed and Bennett J. allowed the appeal and quashed the conviction. He held that the Justice of the Peace erred in registering a conviction under s. 9.1 because the citing of the wrong section number resulted in the Certificate not being “complete and regular on its face”.

[12] In *R. v. Bargis* [2004] O.J. No. 5565 (Ont. Ct. Justice), Armstrong J. allowed the defendant’s appeal from a conviction under s. 9.1 because the Certificate of Offence cited the wrong section number. The police charged the defendant with “driver fail to wear complete seatbelt assembly” and stated the section number incorrectly as s. 106 (2) instead of s. 106 (3). In allowing the appeal the court held at paragraphs 11 and 12 that:

As Justice Daudlin noted in *Regina v. Baldasare*, [2000] O.J. No. 5515, November 9, 2000, Doc. Windsor 00-CR-05944 Ont. S.C., some of the information for which there are boxes to be completed on the certificate of offence is surplusage, which “in no way confuses or in any manner raises the issue of the notice being inappropriate, incomplete or in any manner failing to meet the necessities of the legislation.” Therefore, the omission of the words “Ontario” or “of Ontario” from the description of the Highway Traffic Act would also appear to me to be surplusage that would not require a quashing of the information.

However, in this case the section number contained an error. It specifically stated s. 106(2) instead of 106(3). I find that this error was something that was in conflict with the description, and cannot be said to be - and here I am quoting Justice Daudlin's phrase, “surplusage” [which] “in no way confuses.” I find that the conflict was something which could not be said to in no way confuse. And given the scheme of the Provincial Offences Act and the premium that is put on the form in the context of default conviction proceedings, this conviction cannot stand. (Emphasis Added)

[13] Young J., considered this issue in *R. v. Rodrigues Dasilva* 2008 CarswellOnt 4949 (Ont. Ct. Justice). In that case the police charged the defendant with the offence of “amber light – fail to stop”, but cited the section number that pertained to the offence of disobeying a traffic signal, “amber light arrow”. It is not completely clear from the report of the decision, but it can be reasonably inferred that the Justice of the Peace convicted the defendant pursuant to s. 9.1 and that the defendant appealed on the basis that the Certificate of Offence was not “complete and regular on its face”. In allowing the appeal, Young J. relied on *Bargis* (supra) and on *Maniccia* (supra). He found that in the case before him the two offences, “amber light – fail to stop” and “amber light arrow” were quite similar. He said, “...if there is an apparent ambiguity on the face of it, one charge is described and another section is given, I don’t know how anyone could be sure what the actual charge was meant to be...”. (Emphasis Added)

[14] In *Billinger* (supra) Clarke J. held that, “the failure to set out the proper section

number or in the alternative to set out the proper section in a fashion so sloppy as to cause the Justice of the Peace to conclude, as she did, that the wrong section number had been written on the ticket, was a shortcoming that invalidated the ticket.”

Cases where the offence is described properly on the Certificate of Offence, but the section number is omitted

[15] The following cases decided that where the offence is described properly on the Certificate of Offence, but the section number is omitted, as long as no confusion arises as to which offence is charged, the Certificate is valid: *R. v. Fang* [2004] O.J. No. 3683 (Ont. Ct. Justice)¹; *R. v. York (Regional Municipality)* [2000] O.J. No. 2627 (Ont. Sup. Ct. Justice); *R. v. Hargan* [2009] O.J. No. 776 (Ont. Ct. Justice); *R. v. Khoshael* [2001] O.J. No. 2110 (Ont. Ct. of Justice)

Position of the Appellants

[16] The Appellants argued that the Certificates of Offence were not complete and regular on their faces because the section numbers cited do not correspond to the offences described on the Certificates of Offence. Consequently, the learned Justice of the Peace erred in failing to quash them and in registering convictions.

Position of the Respondent

[17] The Respondent argued that all the required information appears on the Certificates of Offence and that the inaccurate subsections are surplusage. Furthermore, the Appellant was not prejudiced or misled in anyway by this error.

[18] However, the authorities on which the Respondent relied are distinguishable from the case at bar. I will mention only two in particular as they come the closest to being germane to the present appeals.

[19] In *Fang* (supra) the court found that there was no confusion caused by the wrong section number. As I will explain below, I do not find that this can be safely said in the cases before me.

[20] In *R. v. McGuire* (unreported decision of Lane J., June 3, 2004, Ont. Ct. of Justice) s. 9.1 was not in issue. The defendant received a speeding ticket and then failed to do anything with it because he lost it. Justice Lane held that in these circumstances it did not matter that the section number was not written on the Certificate of Offence. She said that the defendant was required to exercise one of the options given on the back of the Certificate of Offence and that his failure to do so was fatal to his appeal. At page three of the transcript she told the defendant that the section number was surplusage and that “when you get a ticket you have to act on it... There are certain things that you have to do... And if you do not

¹ It is not clear from the report of the decision whether this was an appeal from a conviction entered pursuant to s. 9.1 *Provincial Offences Act* or after trial. However, it would be a reasonable conclusion, judging from the authorities cited by Ready J., that it was a s. 9.1 conviction, because those cases dealt with s. 9.1.

do it, then you have no basis for an appeal.”

Analysis

[21] The case law cited above indicates that the provisions of s. 9.1 of the *Provincial Offences Act* are exceptional in that they allow a Justice of the Peace to register a conviction against a defendant without the necessity of calling any evidence. Section 9.1 allows this solely on the strength of the charging document, the Certificate of Offence, on the condition that it is “complete and regular on its face”.

[22] In addition, although some of the cases refer to the factor of confusion more directly than others, I find that the Judges’ holdings in the above s. 9.1 cases place great importance on the degree of confusion caused to the defendant and it forms a crucial element in their determination of whether the omission of, or the erroneous citing of a section number on the Certificate of Offence renders it not “complete and regular on its face”. Thus, in cases where the citing of an erroneous section number caused confusion, notwithstanding that “an offence” was described correctly and clearly, the court found that the Certificate of Offence was not “complete and regular on its face.”

[23] Conversely, where the offence was properly and clearly described, and the omission or erroneous citing of a section number did not cause confusion, the courts held that the Certificate of Offence was “complete and regular on its face”. In *Billinger* (supra), Clark J. pointed out that R.R.O. 1990, Regulation 950, s.5, provides for the description of *Highway Traffic Offences* in words prescribed by the Regulation. The Regulation is as follows:

5. (1) The words or expressions set out in Column 1 of a Schedule may be used in a certificate of offence, offence notice or summons to designate the offence described in the provision set out opposite in Column 2 of the Schedule under the Act or regulation set out in the heading to the Schedule. R.R.O. 1990, Reg. 950, s. 5.

[24] Thus, I conclude from the above jurisprudence and the Regulation cited, that what the Justice of the Peace must do in properly exercising his or her jurisdiction under s. 9.1 is to determine whether the combination of the description of the offence, and or the omission or improper citing of the section number, would in all of the circumstances cause confusion in the mind of a reasonable person as to what offence is being charged. It is important to note that it is not only confusion in the mind of the defendant that is important. The Justice of the Peace must be able to determine clearly the offence for which he or she is registering a conviction pursuant to the powers granted under s. 9.1 and to clearly indicate this so that the records that are kept by the Ministry of Transport are clear.

[25] Convictions under the *Highway Traffic Act* carry a host of different consequences depending on the offence of which one is convicted. This makes it important that it be clear of what offence a defendant is convicted. See *Khoshael* (supra) at paragraph 18, where Libman J. commented on the consequences of a conviction for the wrong offence.

Indeed, the recording of an erroneous set fine amount may give rise to adverse administrative results, as where the amount recorded constitutes an under-payment, thereby subjecting the defendant to the risk of being suspended from driving due to non-payment of the correct amount of the fine. Likewise, where a trial notice is sent out to the defendant despite an error respecting the certification of service, and s. 9.1 is engaged, the re-opening provisions under s. 11 of the Act strictly prescribe the circumstances under which the Justice is to strike out the conviction, should the defendant attempt to move against the conviction in this manner. See Provincial Offences Procedure Act, s. 38 Re (1990), 110 A.R. 323 (Prov. Ct.); R. v. Hanna, [2001] A.J. No. 215, (February 24, 2001), Doc. Calgary 0001-0373-S2 (Alta. Q.B.).

Disposition - Ana Stuparayk

[26] Ana Stuparayk was charged as follows: “Driver – Fail to wear complete seat belt assembly contrary to *Highway Traffic Act* s. 106 (3)”. S. 106 (3) reads as follows:

- (3) Every person who is at least 16 years old and is a passenger in a motor vehicle on a highway shall,
- (a) occupy a seating position for which a seat belt assembly has been provided; and
 - (b) wear the complete seat belt assembly as required by subsection (5). 2006, c. 25, s. 1. (Emphasis Added)

The description of the offence is clearly at odds with the section number. I find that the difference is a significant one; that of being a driver not wearing a complete seat belt assembly as opposed to being a passenger not wearing a complete seat belt assembly.

[27] I find that this discrepancy is one that would likely cause confusion in the mind of a reasonable defendant and in the mind of a reasonable Justice of the Peace with regard to exactly what the police officer meant: was the defendant driving without a seat belt, or was she a passenger without a seat belt? It is true that the set fine is the same, but there is more to it than that. If one is going to mount a defence to the charge it helps to know if the case one is going to have to meet is that one was driving without a seat belt, or that one was a passenger without a seat belt. Moreover, in deciding whether to register a conviction under s. 9.1 what will the Justice of the Peace do? Will he or she convict the defendant of driving without wearing a seat belt, or of being a passenger without a seat belt? It is reasonable to surmise that the consequences of being found guilty as a driver would likely be that the defendant’s insurance would go up, whereas being found guilty as a passenger might not have the same results. This type of ambiguity and confusion is unacceptable and it cannot form the basis of a conviction under s. 9.1.

[28] For the above reasons I find that the Certificate of Offence was not complete and regular on its face and that the learned Justice of the Peace erred in registering a conviction

against **Ana Stuparayk** pursuant to s. 9.1 of the *Provincial Offences Act*. The appeal is allowed and the conviction and the Certificate of Offence are quashed.

Disposition - Bruno Firminio

[29] Bruno Firminio was charged as follows: “Driver – Fail to wear complete seat belt assembly contrary to *Highway Traffic Act* s. 106 (6)”. Section 106 (6) of the *Highway Traffic Act* is as follows:

- (6) Subsections (2) and (3) do not apply to a person,
- (a) who is driving a motor vehicle in reverse;
 - (b) who holds a certificate signed by a legally qualified medical practitioner certifying that the person is,
 - (i) for the period stated in the certificate, unable for medical reasons to wear a seat belt assembly, or
 - (ii) because of the person’s size, build or other physical characteristic, unable to wear a seat belt assembly; or
 - (c) who is actually engaged in work which requires him or her to alight from and re-enter the motor vehicle at frequent intervals and the motor vehicle does not travel at a speed exceeding 40 kilometres per hour.
- 2006, c. 25, s. 1.

The section cited clearly does not apply to the description of the offence. I find that the discrepancy is a significant one in that it would likely cause confusion in the minds of a reasonable defendant and of a reasonable Justice of the Peace exercising his or her jurisdiction under s. 9.1 of the *Provincial Offences Act*.

[30] On the one hand, Mr. Firminio is described in the Certificate of Offence as having committed the offence of driving without a seatbelt, and on the other hand, he is directed to a section that does not charge that offence, but provides exemptions from wearing a seatbelt. Again, one is left wondering by the form of the charge. Why would the officer charge Mr. Firminio with driving without a seatbelt, but refer to s. 106 (6), which exempts one from having to wear a seatbelt? The section number cited does not disclose an offence, whereas the description of the offence does. I find that a reasonable defendant would be confused as to exactly how to mount a defence in this situation. I also find that, although not as confusing as the case of Ms. Stuparayk, the way the Certificate of Offence is written puts the Justice of the Peace who has to adjudicate the matter under s. 9.1 in the position of assuming and guessing what the officer meant and what the facts are on which he or she has to decide to quash the Certificate of Offence or to convict the defendant.

[31] The law is clear that the procedure under s. 9.1 of the *Provincial Offences Act* is an exceptional one that relies on strict adherence to form, and that in order to invoke it the state has to be clear as to what it is alleging that the defendant did. It is not a procedure that countenances convictions based on guess work or “filling in the gaps” by Justices of the Peace.

[32] For the above reasons I find that the Certificate of Offence was not complete and regular on its face and that the learned Justice of the Peace erred in registering a conviction against **Bruno Firminio** pursuant to s. 9.1 of the *Provincial Offences Act*. The appeal is allowed and the conviction and the Certificate are quashed.

Released: August 28, 2009

Signed: “Justice J.W. Bovard”