COURT FILE No.: 1211-999-07-7113-04
DATE: November 30, 2012
Citation: *Ontario (Ministry of Labour) v. 679052 Ontario Ltd. (c.o.b. Auction Reconditioning Centre)*, 2012 ONCJ 747

ONTARIO COURT OF JUSTICE

IN THE MATTER OF an appeal under 116 (2) (a) 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 IN RIGHT OF ONTARIO (Ministry of Labour)
Respondent

— and —

679052 ONTARIO LIMITED, c.o.b.

AUCTION RECONDITIONING CENTRE
Appellant

Before Justice R. Zisman
Heard on October 4, 2012
Reasons for Judgment released on November 30, 2012

Michael Nicol ..... for the prosecution
Robert W. England..... for the defendant 679052 Ontario Ltd., c.o.b. as Auction Reconditioning Centre

On appeal from the conviction by Justice of the Peace L.M. Mills on September 15, 2009 and from the sentence imposed on February 16, 2010.

Zisman, J.:

Introduction

[1] The appellant was convicted of two breaches of the *Occupational Health and Safety Act ("OHSA")* resulting from an accident that occurred at its workplace on May 1, 2006.

[2] The charges are that the appellant on May 1, 2006:

1. …failing, as an employer, to provide information, instruction or supervision to a worker at a workplace located at 8277 Lawson Road, Milton Ontario contrary to section 25 (2)(a) of the *OHSA*.
   Particulars: The defendant failed to ensure that a worker or workers received information, instruction and/or supervision in the safe operation and/or parking of vehicles in the workplace.

2. …failing, as an employer, to take every precaution reasonable in the circumstances for the protection of a worker at a workplace located at 8277 Lawson Road, Milton, Ontario, contrary to section 25 (2)(h) of the *OHSA*.
   Particulars: The defendant failed to take the reasonable precaution of ensuring that a worker who drove a car at the workplace had a valid driver's licence and/or was sufficiently trained in the safe operation of a motor vehicle.

[3] The appellant was found guilty of both offences. A conviction was entered on count 1 and a stay was registered on count 2, pursuant to *R. v. Kienapple* [1975] 1 S.C.R. 729 (S.C.C.). The appellant was fined $50,000.00 to which was added the mandatory 25% victim impact surcharge.

Summary of Relevant Evidence

[4] The majority of the facts are not disputed. The appellant is in the business of cleaning automobiles at its facility in Milton, Ontario for leasing and car rental companies prior to those vehicles being sold at auction by its customer.

[5] Cars that are delivered to the appellant's building for cleaning are parked on the west side of the building in a large parking lot prior to being cleaned. After the cars are cleaned they are parked on the east side of the building. In the building itself there are three lanes- north, centre and south lane.

[6] Cars moving from the west to the east parking lot go through the following stages:

1) a worker trained as a driver examines the car to determine if it can go directly into the building to be cleaned or whether or not it needs to be pre-vacuumed;
2) a trained driver, who is also a supervisor, drives the car to the wash bay, either directly or after the pre-vacuuming. That supervisor was Mark Logan;
3) while still in the western parking lot and prior to entering the building, the cars are pre-vacuumed, if necessary, and chemical are applied by an employee trained as a cleaner. That employee was Trevor Howden; he had no other duties and his supervisor was Mr. Logan;
4) after cleaning, the cars are driven, by employees specifically assigned to drive, from the outside the wash bay into the building;
5) the vehicles are then washed by cleaners in the wash bay; the keys are left in the ignition of the cars in the wash bay so that the car engines can be run to allow the engines to be cleaned;

6) four workers, all of whom are trained in driving, work in the wash bay; two of the workers drive the vehicles from the pre-wash area outside the building inside the building and two of the workers drive the vehicles to the cleaning area; Kevin Christie is the supervisor for the wash bay and the other supervisor was Bill Rodger;
7) as the vehicles exit the wash area they proceed to one of the cleaning lanes; the keys are then removed from the ignition and placed in the door lock of the vehicle for safety reasons; the vehicles are cleaned by another group of workers also known as cleaners who are supervised by Sam Brush;
8) after the vehicles are cleaned they are then driven by trained drivers from the cleaning area of the building, outside and into the eastern parking lot.

[7] On the day of the incident, May 1, 2006, Trevor Howden who was 18 years old had only worked for the appellant for four days. He initially stated he worked there three weeks and then changed his evidence. He drove a vehicle into the wash bay area setting off a chain of collisions between two other cars and injured another worker, Kathy Holmes who was further up the line. She suffered a pulled ligament and bruising to her leg along with two arm fractures.

[8] Mr. Howden was hired as a cleaner and was told by Martin Pugh, one of the co-owners and managers of the company twice not to drive, initially when he was hired and again on the day of the incident.

[9] Mr. Howden was not required or authorized to drive a vehicle but he admitted that he aware of the safety policy of the appellant that in order, "To drive a vehicle on the property you must have a valid driver's licence."

[10] When questioned about the details of the appellant's policy with respect to driving vehicles, he responded that none of the policy mattered to him because he was aware that he was not to drive cars. He stated that he had never received any training in the safe operation of vehicles nor was training in the safe operation of vehicles provided.

[11] Mr. Howden testified that he currently had no recollection of the events of May 1, 2006 but assumed that the statements he made at the time of the incident were accurate.

[12] He admitted that he moved the car "in the heat of the moment". He testified that the car needed to be moved so he moved it. At the time of the incident, there were no supervisors in the wash bay as all of the workers had gone on a break.

[13] However, Mr. Pugh testified that there was no reason for Mr. Howden to leave the area he worked in and enter into the wash bay area. There was no necessity for any car to be moved from the pre-wash area into the cleaning area because the cleaning lane already had the required number of cars in place to be cleaned in that lane.

[14] Mr. Howden testified that he had never moved a car only cleaned them. He then testified that he had moved cars "once- couple of times".

[15] He testified that his supervisors, Mr. Orr or Mr. Brush had no reason to think that

he was driving a vehicle. He then testified that he wasn't directed by anyone to move a vehicle but if there was a vehicle to be moved, it was anybody's job was to move it. When asked who told him to move the car he responded, "Just people in the wash bay". He also testified that he was directed by Mr. Orr and Mr. Brush not to move any cars.

[16] Kathy Holmes, the injured party, testified that cleaners did not drive cars.

[17] Mr. Howden testified that at the time of the incident he did not have a driver's licence in any form. He also testified that Mr. Orr told him that if he didn't have a licence he could lose his job.

[18] But in cross-examination, he admitted that had never mentioned this evidence in either his statement to the police or to the Minister of Labour inspector. In fact, he conceded that what Mr. Orr said to him was that he would need a driver's licence if his job involved driving a car. Furthermore, it turned out that Mr. Howden did in fact have a driver's licence based on the driver's abstract shown to him in cross-examination.

[19] Mr. Pugh gave uncontradicted evidence that he was not aware of any prior occasion when a cleaner, who was not authorized to drive a vehicle, had driven and there had never been any occurrence when one vehicle struck another one.

[20] He also testified that the appellant had in place a Joint Occupational Health and Safety Committee and conducted monthly workplace inspections. He had been on the Joint Occupational Health and Safety Committee since 1990's when the appellant's system had been put into place and no issue has ever been raised with respect to training of cleaners in driving.

[21] With respect to supervision, there are three area specific supervisor- Mr. Logan in the area outside of the wash bay, Mr. Christie in the wash bay and Mr. Brush in the area of the cleaning lanes. In addition, Mr. Pugh and Mr. Orr are supervisors responsible for all three of those areas and who, throughout the day, constantly monitor the work in those areas.

[22] Mr. Howden testified that it was the function of Mr. Brush and Mr. Orr in connection, with his job to "supervise, make sure everybody was tiptop. Make sure that everything was in order and nobody got hurt."

Legal Framework of the *Occupational Health and Safety Act*

[23] The convictions under appeal are for offences of strict liability which fall somewhere between *mens rea* offences and absolute liability offences. Once the prosecution proves the *actus reus* of the offence beyond a reasonable doubt, the onus shifts to the defendant to prove, on a balance of probabilities, that he took all reasonable care, or acted with due diligence, applying a reasonable man test. See *R. v. City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353 (S.C.C.).

[24] The defence of due diligence has been incorporated into the *Occupational Health and Safety Act* in section 66(3), as follows:

> Defence
>
> (3) On a prosecution for a failure to comply with,
>
> (a) subsection 23 (1);
>
> (b) clause 25 (1) (b), (c) or (d); or
>
> (c) subsection 27 (1)
>
> it shall be a defence for the accused to prove that every precaution reasonable in the circumstances was taken.

[25] Section 120 (1) of the *Provincial Offences Act* ("POA"), provides that an appellate court may allow the appeal from conviction where it is the opinion that,

> the finding should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
>
> the judgement of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> on any ground there was a miscarriage of justice.

Position of the Appellant

[26] It is submitted by the appellant that the trial justice erred in law namely, by finding that the Crown did not have to prove the particulars of the offences and that accordingly the onus then shifts to the Crown to prove the error did not result in a miscarriage of justice.

[27] It is submitted that the trial justice erred in concluding that the prosecution met its burden of proving the factual elements of the offence.

[28] It is submitted that the trial justice did not explain the basis for her conclusion and therefore the reasons for judgment do not permit meaningful appellate review.

[29] It is submitted that the trial justice made ten errors in finding that the Crown had proved the factual elements of the offence beyond a reasonable doubt.

[30] It is further submitted that if this court finds that the Crown did prove the actual elements of the offence that the trial justice failed to apply the proper standard of care to which the defence of due diligence related.

Position of the Crown

[31] The prosecution concedes that the trial justice erred in holding that the prosecution did not need to prove the particulars of each charge. But it is submitted that the elements of the charges and the particulars were in any event proven beyond a reasonable doubt.

[32] It is submitted that the trial justice's conclusion was reasonable, that she gave adequate and reasonable reasons for her decision and that deference should be given to the lower court's decision and that to the extent that there was an error law, no substantial miscarriage of justice occurred that would warrant this court substituting its decision for the verdict be-

low.

[33] It is also submitted that just because the trial justice did not systematically go through each element of the offences does not rise to a deficient judgement.

Proof of factual elements of the offence and proof of charges as particularized

[34] In the reasons for judgment the trial justice summarizes the Crown's evidence without any reference to the defence evidence and concludes that, "on the foregoing evidence the Crown has proven the factual elements beyond a reasonable doubt and therefore met its onus." There is no explanation as to why the defence position that the Crown had failed to prove the factual elements of the offence beyond a reasonable doubt was rejected. There is no explanation as to why the defence evidence is rejected where the defence evidence contradicts the Crown's evidence or why one version of the evidence is preferred over the other version of events.

[35] For example, the justice of the peace accepts Mr. Howden's evidence that even though he knew that it was not his job to move cars, that he did it because it was "everyone's job to really move it." There is no mention of the uncontradicted evidence of Kelly Holmes, the injured party, that there were a separate group of workers who drove cars or the evidence of Mr. Pugh or Mr. Logan that there were very specific jobs assigned to each worker. Their evidence was clear that cleaners did not drive cars.

[36] The failure of a trial judge to address whether or not the Crown had proven the factual elements of an offence has been held to be a serious error of law that requires appellate intervention. See *R. v. Brown* [2004] O.J. No. 3106 (O.C.J.) at paras. 25 to 27.

[37] The trial justice rejected the defence contention that Mr. Howden had been hired to just clean cars and not drive them and therefore would not need specific instruction in the operation of vehicles. The trial justice held that she had to look at the "lack of information, instruction, supervision in a broader sense. The particulars are just that. Particulars to assist defence in preparation of the case. They are mere surplusage and need not be proven." She applied the same reasoning to the second charge.

[38] It is the obligation of the Crown to prove the offence, including the particulars. See *R. v. Brampton Brick Ltd.*, [2004] O.J. No. 3025 at para. 24 (C.A.); *Ontario (Labour) v. Enbridge Gas Distribution Inc.* 2011 ONCA 13, (2001) 328 D.L.R. (4th) 343 at para. 353.

[39] In this case, the Crown was required to prove, beyond a reasonable doubt, as part of the *actus reus*, that all reasonable precautions were taken as set out in the particulars of both offences. That is, the Crown was required to prove that the precautions particularized in the information were reasonable precautions in the circumstances of this case for the protection of this worker.

[40] By erring in law in finding that the prosecution did not have to prove the particulars as alleged the trial justice committed an error of law and as a result does not in her reasons

review the facts that would support that the prosecution had proved these elements as they pertain to this particular charge before the court.

[41] If the trial justice had applied the law properly it is difficult to understand on what basis she could have found that an individual whose job it was not to drive should have received information, instruction and/or supervision about the safe operation of a vehicle or that a worker, who was not hired to drive a vehicle at the workplace, should have a valid driver's licence and/or be sufficiently trained in the safe operation of a vehicle.

[42] This fundamental error in law resulted in the trial Justice holding that she could look at this issue in a general and broad sense and that in turn resulted in her finding that the prosecution had proven the *actus reus* beyond a reasonable doubt.

[43] As previously indicated, the Crown concedes the justice of the peace erred in law, but submits that despite this error of law that there has not been a miscarriage of justice that would require either a new trial or a substitution of verdict.

[44] I reject this submission. The failure of the trial justice to fundamentally understand or address the defence position is a serious error of law.

Misapprehension of evidence

[45] The trial justice then made several further errors in both fact and law.

[46] It is submitted that the trial justice misconstrued the evidence in finding that "one of the troubling aspects about this testimony is that the court had been left with the impression at the close of the Crown's case that Mr. Rodger was not a driver, that he was a cleaner just the same as Mr. Howden."

[47] It is conceded by the Crown that this was an error as Mr. Rodger was in fact a driver but it is submitted that this was a forgivable error. However, if this misapprehension of the facts led the trial justice to conclude that there was evidence that other cleaners were permitted to drive or that this is evidence upon which she could rely in support of Mr Howden's testimony that everyone drove the cars, regardless of their job, then it is clearly a serious error.

[48] It is further submitted that that trial justice also made an error in finding that at the time of the occurrence no one was supervising Mr. Howden, that he was "…completely unsupervised, for some period of time" and that he should not have been unsupervised for any period to time. She went on to find that the supervision was inadequate because Mr. Howden was able to "circumvent this observation and supervision and drive the motor vehicle" because everyone had gone on break and therefore the system failed.

[49] The trial justice thereby erred in imposing a requirement that the worker be contemporaneously supervised at all times. There is no such legal requirement in workplaces under the *OHSA* that a worker must be given such information, instruction and warnings every time a task is assigned. I adopt the observation of the court in *R. v. Inco* [2001] O.J. No.

4938 (S.C.J.) that to ask the court to accept that an employer should be required to contemporaneously supervise an employee for each task is an "absurd result".

[50] Mr. Howden was instructed about cleaning cars and he was told it was not his job to drive the vehicles. This was a simple job that did not require elaborate information, instruction or ongoing instructions.

[51] Mr. Howden admitted that he knew he was not supposed to drive and that he did this on the spur of the moment. The trial justice then makes a finding that this demonstrates that, "the worker did not have a clear understanding of the company policy. An employer has to ensure issue recognition and ensure policies are being adhered to." There is no evidentiary basis on which the trial justice could have come to such a conclusion.

[52] There is conflicting evidence on the issue of whether there was any need to move the car, Mr. Howden testified that no one was around and the car had to be moved whereas Mr. Pugh testified that there was no reason to move the car. The reasons of judgement do not refer or reconcile this contradictory evidence.

[53] The trial justice committed several further errors in law by imposing standards of care on the appellant for which there was no evidentiary basis. She held that there was a lack of effective supervision because no one spoke to the issue of disciplinarian processes inplace for those who do not follow the directions. But there was no evidence in this case of any prior incidents of a failure to comply with the appellant's safety policies with respect to driving.

[54] The trial justice also found that in addition to the lack of supervision there was no evidence about disciplinarian measures taken in the event of a violation and no evidence of newsletters, safety checklists, written tests etc. She held that other safety precautions should have been taken. However, her findings related to general precautions unrelated to the specific offence before the court.

[55] The trial justice misconstrued the defence evidence by holding that it was trying to shift the burden onto the Ministry of Labour by pointing out that the precautions suggested by the prosecution were not ordered by the Ministry of Labour. The defence's evidence that the Ministry of Labour has never issued orders against the company and evidence about the industry standards was tendered by the defence to illustrate that these are relevant considerations though conceded not to be determinative. See *R. v. Adomako* [2002] O.J. No. 3050 at para. 92 (O.C.J.); *R. v. Petro-Canada* [2008] O.J. No. No. 4396 at para. 187 (O.C.J.).

Credibility findings

[56] Although great deference should be shown to findings of credibility by the trial justice, where there are serious credibility issues it is incumbent on the justice to explain the inconsistencies in the evidence and why the witness was still to be believed.

[57] In this case, Mr. Howden was the primary witness for the Crown. His evidence

was contradictory in several important instances but the justice simply states that although the defence tried to impugn his credibility, "I believe he was trying his best to recall events which had occurred some 8 months earlier which can occur over such a lengthy time period. Therefore, notwithstanding his demeanour presenting as a little shaky, I believe he was being truthful with the Court."

[58] The trial justice speculates that Mr. Howden may have believed he was allowed to drive because he was only at the workplace for a short time and may have not been able to distinguish between who could and could not drive. But Mr. Howden admitted that he knew he was not to drive and that his job was only to clean cars. He admitted he was told by Mr. Pugh, Orr and Brush that he was not entitled to drive.

Evidence of forseeability

[59] The trial justice does not explain how she could find that it was completely foreseeable that Mr. Howden would drive when his evidence was clear and unequivocal that he was told and was aware that he was not supposed to drive and that his supervisors would have no reason to believe that he would drive.

[60] The trial justice relies on the fact that earlier that day Mr. Howden was seen in the driver's seat in a car apparently just listening to music. Despite Mr. Pugh again reminding him that he was not to drive, the trial justice held that this should have "set off some alarm bells" in Mr. Pugh's mind about the importance of ensuring that this young man needed to be adequately supervised. However, even this recitation of the evidence is not entirely accurate as Mr. Pugh testified that he saw Mr. Howden with his legs outside of the car and the engine was not turned on.

[61] Further, it must be considered that this is not a workplace where there are complex safety instructions or procedures. The supervisors told Mr. Howden a number of times that it was not his job to drive, he understood his job was to clean cars and therefore to hold that it was foreseeable that Mr. Howden, because of his young age or because he had only worked for a short time, might drive is in my view impermissible speculation and has no evidentiary basis.

Conclusion

[62] Unlike the other cases referred to on this appeal or cited by the justice of the peace that generally involve the use of highly specialized and complex equipment, Mr. Howden was simply hired to clean cars, he was instructed about his job, he understood what it entailed and further understood that the job did not involve driving any cars. There was no reason for an employer to ensure that he was supervised for every minute he was working.

[63] As it was not Mr. Howden's job to drive nor was there any reason for his employers to suspect he would drive, there is no requirement for the defendant in these circumstances to provide him with information, instruction or supervision in safe operation or parking of vehicle. For the same reasons, there was no requirement for the appellant to take reasonable pre-

cautions to ensure a worker who was not required and not hired to drive a car at a workplace should have had a valid licence and/or should have been sufficiently trained in the safe operation of a motor vehicle.

[64] I am mindful and have considered the standard of review of an appellate court. The test to be applied is whether or not a properly instructed jury acting judicially could reasonably have rendered the verdict. I am mindful that an appellate court should not retry the case and substitute its view of the matter for that of the trier of fact. However, I must also consider that the defendant must not be left in doubt as to why he was convicted and that the reasons for judgement should allow a meaningful appellate review. A defendant should be entitled to an analysis of his evidence, alone and in the context of the evidence as a whole and know why his evidence was rejected. See *R. v. Sheppard* [2002] 1 S.C.R. 869

[65] I find that the Justice of Peace erred in finding that the Crown had satisfied its burden of proving the *actus reus* of the offences as particularized beyond a reasonable doubt and I would grant the appeal and enter a finding a not guilty.

[66] As a result of this finding, I have not reviewed the grounds of appeal with respect to whether or not the defendant exercised due diligence in the particular circumstances of this case. However, I wish to add that if I had found it necessary to do so, in my view the appellant should not be held responsible for the isolated act of misconduct by Mr. Howden as the appellant had taken every reasonable means to instruct him about his job and that due diligence by the appellant did not require that a supervisor be present for the entire time he worked.

Order

[67] The appeal is allowed and the conviction set aside.

Released: November 30, 2012

Signed: "Justice Zisman"