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R. v. Toukhi

Between
Her Majesty the Queen, and
Abdul Toukhi

[1996] O.J. No. 5321

Ontario Court of Justice (Provincial Division)
Scarborough, Ontario
Jogendra J.P.

February 20, 1996.
(39 paras.)

Charges: Section 144(18) Highway Traffic Act - Red light and fail to stop

Counsel:

C. Harrison and K. Nedelkopoulos, for the Crown.
O. Chambers, for the defendant.

¶ 1 **JOGENDRA J.P.**:— When this matter came up before Court on November 20, 1995 the Crown was represented by Ms. C. Harrison, but the Defendant Abdul Toukhi was not present, Mr. O. Chambers appeared as Agent for the Defendant and stated that he was making a motion to quash the certificate of offence before arraignment and pleading to the charge.

¶ 2 Mr.Chambers then submitted that in the Certificate of Offence although the date is given as March 25th the time is given as "617 p.m." and if one is using the hour clock 617, there should be a colon between the "6" and "17". That is, it should be "6:17". If not it should be "18:17" hours. There is no such thing as "617". There should be a colon (:) separating the minute and the hour.

¶ 3 In support of his contention he cited the case of REGINA v. CAMPBELL, where he said it was decided that when time is given in that way, it should be so given to avoid confusion and there should be a colon separating the "6" and the "17" to tell you it's "6:17" p.m.

¶ 4 In effect, Mr.Chambers was making a motion under the provisions of section 36(1) of the Provincial Offences Act to quash the Certificate of Offence for a defect apparent on its face.

> Section 36(1) of the P.O.A. reads thus:
> "An objection to an information or certificate for a defect apparent on its face shall be taken by motion to quash the information or certificate before the defendant has pleaded, and thereafter only by leave of Court"

¶ 5 In considering the stage at which this motion was made, the Court is satisfied that it has been made at the proper stage before plea by the Defendant but the matter has to be further considered on the merits of it, having regard to the law and the case law relating to it.

¶ 6 After Ms. Harrison, on behalf of the Crown responded to this, the matter was adjourned to February 08, 1996, to enable in the meantime for both parties to tender their written submission and the authorities they were relying on.

¶ 7 As agreed, Mr. Chambers filed his authority to wit the case of Regina v. Warren. M. Campbell dated June 27, 1989, the Judgment of His Honour Robert Perras, District Court Judge, Ontario; and Ms. Harrison filed her written submissions on January 15, 1996.

¶ 8 When this matter was returned on February 08, 1996, as further oral submissions were made by both parties the decision on it was reserved for February 20, 1996. Hence this comes up today (February 20, 1996) for delivery of Judgment.

¶ 9 Briefly stated the case of Regina v. Warren. M. Campbell Judge Robert Perras has stated as follows.

> "The only issue in the appeal is that in the certificate of analysis the times the samples were taken were specified as "220 A.M." and "237 A.M."
> In Regina v. Roger Toupin (June 25, 1984, Ont. Provincial Ct. Lunney Prov. C.J.) 12 W.C.B. 319 it was held that when time is given according to the 12 hour clock,there should be a colon separating the digits representing the hour from the digits representing the minutes so that the times given here on the certificate were at least ambiguous if not completely incomprehensible. The Certificate there fore failed to satisfy the requirement of s. 237 and the accused was acquitted."
> "In Toupin, he said, the times the samples were taken were specified as "342 a.m it and "359 a.m."

¶ 10 Applying Regina v. Toupin he allowed: the appeal, set aside the conviction and sentence and dismissed the charge.

¶ 11 Ms. Harrison on behalf of the Crown has filed her written submissions and cited the following 9 cases and gives also a synopsis of these cases (which incidentally include Regina v. Roger and Warren M. Campbell) and they are:

1. R. v. Charles R. Salter, [1982] A.J. No. 428, (January 21, 1982 Alta Queen's Bench, MacNaughton J) 7 W.C.B. 222 (hereinafter Salter);
2. R. v. Donald Walter Capowski, 39 A.R. 494, (September 3, 1982, Alta, Queen's Bench Hope J) 8 W.C.B. 313 (hereinafter Capowski);
3. R. v. Roderrick Fallon McLeod, 43 A.R. 220, (January 25, 1983 Alta. Queen's Bench, Quigley J) 9 W.C.B. 198 (hereinafter McLeod);
4. R. v. Toupin (June 25, 1984, Ont. Prov. Ct., Lunney Prov. Ct. J) 12 W.C.B. 319 (hereinafter Toupin)
5. Warren M. Campbell v. R. (June 27, 1989 Ont. Dist Ct., Perras Dist Ct. unreported (Hereinafter Campbell);
6. R. v. Lonnie Popoff, [1985] B.C.J. No. 1422, (April 10, 1985, B.C. County Ct., McTaggart Co. Ct. J.) 14 W.C.B. 290 (hereinafter Popoff);
7. R. v. Gary Francis Martin, [1986] N.B.J. No. 504, (November 20, 1986, N.B. Queen's Bench, McLellan J.) 17 W.C.B. 452 (hereinafter Martin);
8. R. v. Griffin, [1990] O.J. No. 2129, (October 31, 1990 Ont. Ct. (Gen Div), Forestell J.) 11 W.C.B. (2d) 290 (hereinafter Griffin);
9. R. v. Miehm, [1993] O.J. No. 2249, (May 7, 1993, Ont. Ct. (Prov Div), Blishen J.) 21 W.C.B. (2d) 288 (hereinafter Miehm)

¶ 12 All the above 9 cases, save and except Nos; 4 and 5, have taken a contrary view as to the view expressed in Nos; 4 and 5 and the contention advanced by the Agent for the Defendant - Mr. Chambers. They no doubt deal with the very question of stating time as in the case at bar.

¶ 13 It is not disputed, and it is common ground that the time given in the certificate of Offence does not have the colon separating the hour from the minute, namely it is given as "617 P.M." instead of "6:17 P.M."

¶ 14 But Ms. Harrison argues that the defect if any could be remedied by an amendment as provided for under section 34 of the Provincial Offences Act.

¶ 15 She further submits that in any event there is no prejudice to the Defendant and that the prejudice if any had not been demonstrated in this case.

¶ 16 On the question of amendment Mr. Chambers had submitted that to effect an amendment there should be evidence before the Court and that evidence cannot be led before arraignment of the Defendant. As such there is no evidence before Court. He relies on the provisions of section 36(1) of the P.O.A. which deals with a stage before plea-and arraignment.

¶ 17 In view of this, Court was of the opinion that since this is a motion expressly provided for under 36(1) as a preliminary issue to deal with the certificate "in limine", there was no provision to permit evidence to be led at this stage or else the right given under section 36(1) would be rendered futile and ineffective, if not incapable of being applied.

¶ 18 In considering the question of amendment under section 34, Court finds that it is governed and regulated by sub-section, (2) and (4) of section 34 which reads as follows:

Sec: 34(2) The Court may during the trial, amend the information or certificate as may be necessary if the matters to be alleged in the proposed amendment are disclosed by the evidence taken at the trial.

Sec: 34(4) The Court shall, in considering whether or not an amendment should be made, consider,

(a) the evidence taken on the trial, if any;
(b) the circumstances of the case;
(c) whether the defendant has been misled or prejudiced in the defendant's defence by a variance,error or omission; and
(d) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.

¶ 19 It is therefore abundantly clear that there should be evidence before Court to effect any amendment to the information or certificate and the mandatory provisions of sub-sections (2); and (4) encompassing all the sub-sections namely (a) to (d) in their entirety should be followed and considered by Court.

¶ 20 In such circumstances, the Court is unable to accede to the request made by Ms. Harrison. Thus, the Court will deal with the matter based upon the various authorities and case law and the submissions made by both parties.

¶ 21 The Court will now consider the various precedents submitted by Ms. Harrison in the first instance.

¶ 22 The cases referred to at Nos: 1, 2, and 3 are from Alberta, while the one, at No: 6 is from New Brunswick and only the ones at Nos: 8 and 9 are from Ontario of which the former is from General Division and the latter from the Provincial Division.

¶ 23 In the cases of 1, 2, 3 and 6 being out of the Province will not have binding effect and will be of persuasive authority to this Court. Additionally in 1, 3 and 6 there was other evidence, including viva voce evidence which pointed to the times and hence all these cases can also be clearly distinguished from than case at bar. Hence the Court is of the view that they do not apply to the case at bar. With regard to case No. 2 the facts are different and the colons are found to be there namely they were shown as "02:39 a.m." and "02:56 a.m." Thus this case also will not apply.

¶ 24 With the result the Court is now left to consider the cases at Nos: 8 and 9. In the case at #8 the colons did appear properly on the original and only the copy served on the accused failed to show the colons and the one served on the accused contained the essential ingredients, which is not the situation in the case at bar. The Court is therefore of the view that this case can be easily distinguished.

¶ 25 In case # 9 there was viva voce evidence to clarify the times on the certificate so that the "124 hours" clearly meant 1:24 a.m. Hence this case too could be easily distinguished and would not apply.

¶ 26 Ultimately the Court is now left with the case at Nos. 4 and 5 the latter of which had been cited by Mr. Chambers, and the Judge who decided this case had referred to the former case as also authority for his decision, while saying inter alia that:

> "When time is given according to the 12 hour clock, there should be a colon separating the digits representing the hour from the digits representing the minutes ------- The Certificate therefore failed to satisfy the requirement of sec; 237, and the accused was acquitted."

¶ 27 In this case at bar too the colon separating the hour from the minutes is not there and hence this case is on point and no question of any reference to any evidence either viva voce or otherwise is available. Hence this case appears to apply on all fours to the case at bar.

¶ 28 But the Court has now to determine, based upon this whether the Court is to grant the motion made by Mr. Chambers namely to quash the certificate, as provided for under section 36(1) of the P.O.A.

¶ 29 Before the Court can make an effective pronouncement on this question, the Court is of the view that it is necessary to consider the other relevant provisions of the P.O.A. following what Lord Reid had said in the matter of construing and interpreting a statute.

> Lord Reid in Inland Revenue Commissioners v. Hinchy [1960] A.C. 748 at 766 (1960) 1 All E.R. 505 (H.L.) said
>
> > "It is no doubt true that every Act should be read as a whole, but that is, I think, because one assumes that in drafting one clause of a Bill, the draftsman had id mind the language and substance of other clauses, and attributes to Parliament a comprehension of the whole Act."
>
> Further, "It is, "said JAMES L.J. in Re Florence Land Co. (1878) 10 Ch.D. 530, 544:
>
> > "a cardinal rule of construction that all documents are to be construed "ut res magis valeat quam perat" ------ which means that the intention of the Legislature may not be treated as vain or left to operate in the air.

¶ 30 Accordingly Court feels it is necessary to consider the provisions of section 3(2), the stage anterior to the filing of the Certificate in Court,namely the stage at which the Provincial Offences Officer believes that one has committed an offence, and issues the certificate by completing and signing the certificate and certifying that an offence has been committed. This section is the one that confers the power and/or authority to issue a certificate under Part I of the Y.O.A. and lays the conditions precedent to the exercise of that power or else expressly directs the compliance of pre-conditions to the exercise of the power to invade into the right of the citizen in order to put the machinery of law into operation in relation to an alleged offence.

¶ 31 It therefore follows as a corollary that power so vested by the legislature can be exercised, if and only if, the conditions precedent to its exercise are strictly complied with, otherwise any thing done would result in a failure of jurisdiction, or in the alternative it may be declared null and void by a Court.

¶ 32 Considering the above case laws by Lord Reid and James L.J. the Court is of the view that there is a necessary connection with the "completing" of the certificate and "quashing" the certificate for want of

completion, as contemplated by section 3(2) and 36(1) of the P.O.A. respectively.

¶ 33 In this connection Court is also assisted and guided by what MAXWELL says at page 372 in his book on "The Interpretation of Statutes" Ninth Edition:

> Section 3 - IMPERATIVE OR DIRECTORY
> "When a statute requires that something shall be done, or done in a particular manner or form, without expressly declaring what shall be the consequence of non-compliance, the question often arises: "What intention is to be attributed by inference to the Legislature? Where, indeed, the whole aim and object of the Legislature would be plainly defeated if the command to do the thing in a particular manner did not imply a prohibition to do it in any other, no doubt can be entertained as to its intentions
> at page 373:
> "The position is the same where compliance is made, in terms, a condition precedent to the validity or legality of what is done, ... The neglect of the statutory requisites in such cases would obviously be fatal."

¶ 34 It is clear from the nature of the language employed by the Legislature in sec: 3(2) of the P.O.A. that the requirement is imperative as regards the completing and certifying the certificate. In other words an absolute compliance is required to make it valid and/or legal. Otherwise it may suffer the consequences contemplated by Section 36(1) of the P.O.A.

> CRAIES ON STATUTE LAW - Seventh Edition - Sweet & Maxwell - 1971
> at page 260 (iii)(a) states:
>
> > Absolute enactment "If an absolute enactment is neglected or contravened, a Court of law will treat the thing done as invalid and altogether void."
>
> at page 229 states:
>
> > If an Act is mandatory, disobedience entails legal consequences, which may take the shape of a public or private remedy obtainable in a Court of Justice, or the avoidance of some contract, instrument, or document without the intervention of any Court."

¶ 35 In considering an information or certificate that is either not properly completed or done in a perfunctory manner, the Court is reminded and guided by what Henry J. has stated in R. v. Peavoy (1974), 15 C.C.C. (2d) 97 at 106 (Ont.H.C.) which are apposite to this matter:

> "Recognizing that the pressure of duties and administration upon Police forces may quite naturally cause them, when under pressure, to manage the laying of informations as a form of routine "paperwork", I feel obliged to add the following comments. A person swearing an information, particularly a law enforcement officer, is not at liberty to swear the information in a perfunctory or irresponsible manner with a reckless disregard as to the truth of his assertion. To do so is clearly an affront to the Courts and is at variance with the right of the citizen to be left alone by the authorities unless there is reasonable and probable grounds for invading his liberty by compelling his attendance before the Courts ..... Moreover, he must be prepared to so justify the Justice of the Peace who, in turn, has an obligation judicially, not arbitrarily, to hear and consider the allegations before endorsing the information."

¶ 36 Adopting these observations of Henry J, Wong Prov. J. in the case of R. v. MacLennan 12 M.V.R. page 30 at 34 had stated as follows:

> "I am satisfied that no authority in law requires this Court to accept perfunctory sworn informations as being valid. It should not be accepted and I so hold. The motion to quash is hereby granted."

¶ 37 Having carefully considered the various precedents, case law and the cannons of Interpretation of Statues and the facts of the case at bar and the submissions made by both the Crown and the Agent for the Defendant, this Court is of the view that no authority in law requires this Court to accept perfunctory certificates. It should not be accepted and I so hold.

¶ 38 Accordingly the motion to quash made by Mr. Chambers - the Agent for the Defendant is hereby granted and the certificate is quashed.

¶ 39 The Court wishes to express its appreciation for the valuable assistance given by Ms. Harrison and her deputy for the Crown, and Mr. Chambers, to Court, in this matter and directs that this judgment be made a part of this record and copies of same given to both parties.

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