Her Majesty the Queen ex rel. the Regional Municipality of York v. Weber

[Indexed as: R. v. Weber]

64 O.R. (3d) 126
[2003] O.J. No. 1491
Docket No. 999-00-68792748-00

Ontario Court of Justice,
Lampkin J.

April 9, 2003

Criminal law — Provincial Offences Act and Highway Traffic Act — Sentence — Defendant charged with speeding 49 km over limit filing notice of intention to contest evidence and obtaining trial date — Accused pleading guilty on date of trial to speeding 15 km over limit with joint submission made for fine about six times amount of set fine for speeding 15 km over — Justice of peace concluding she had no jurisdiction to increase fine from set fine — Once defendant filing notice of intention to contest evidence and obtaining trial date provisions of s. 128(4) of Highway Traffic Act governed amount of fine payable and fine cannot be increased or decreased — Defendant filing such notice must pay costs and surcharge under Provincial Offences Act even if entering guilty plea on trial date — Highway Traffic Act, R.S.O. 1990, c. H.8, s. 128(14) — Provincial Offences Act, R.S.O. 1990, c. P.33.

The defendant was charged with speeding 99 kilometres per hour in a 50 kilometre per hour zone. A certificate of offence under the Provincial Offences Act was issued setting out the set fine of $299 payable by those who acknowledge their guilt and pay the fine without filing a notice stating they would contest the ticket. The defendant filed a Notice of Intention to Appear and indicated that he intended to challenge the evidence of the provincial offences officer who completed the certificate of offence. At trial, the prosecutor indicated that she was anticipating a guilty plea to an amended certificate alleging that the defendant was speeding at the rate of 65 kilometres per hour in a 50 kilometre per hour zone with a joint submission as to sentence. The defendant was arraigned on the amended certificate and pleaded guilty. The joint submission was for a fine of $299, the original set fine for speeding 99 kilometres per hour in a 50 kilometre per hour zone. The justice of the peace refused to accede to the joint submission, expressing the view that it was beyond her jurisdiction to do so. Instead, she imposed a fine of $42.50, the set fine for speeding 65 kilometres per hour in a 50 kilometre per hour zone for those who don't file a notice of intention to contest the evidence. The prosecutor appealed.

Held, the appeal should be allowed.

The fines payable by those who pay a fine without attending court or who enter a guilty plea in a "walk-in guilty plea court", without filing notice of intention to contest evidence, pay either the set fine or, in the walk-in court, they may seek a reduction from the set fine amount. Once a defendant files a notice of intention to contest the evidence, regardless of whether the defendant later pleads guilty on the trial date, slightly higher fixed fines apply in order to encourage early guilty pleas and lower administration costs. For those who have filed such a notice, s. 128(4) of the Highway Traffic Act provides for a fixed fee depending on the number of kilometres over the speed limit the accused was speeding, whether the accused pleaded guilty on the trial date or is found guilty after a trial. These specified fines couldn't be raised or lowered. Thus, the basic fine payable was $45. In addition, pursuant to general provisions in the Provincial Offences Act, costs and surcharges applied for a total fee payable of $60. ***[page127]***

Statutes referred to

Highway Traffic Act, R.S.O. 1990, c. H.8, ss. 128(14), Sched. B
Provincial Offences Act, R.S.O. 1990, c. P.33, ss. 1(1) "set fines", 5.1, 5.2(1), 6, 7(1), 8(1), 9, 9.1, 12(1), 45, 46, 60, 60.1, 61

Rules and regulations referred to

O. Reg. 161/00 ("Provincial Offences Act"), s. 1 R.R.O. 1990, Reg. 950 ("Provincial Offences Act") R.R.O. 1990, Reg. 945 ("Provincial Offences Act"), s. 1

APPEAL by the Crown from a fine for speeding.
Hans J. Saamen, for appellant.
No one appearing for respondent.

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[1] **LAMPKIN J.**: — The purpose of this appeal is to seek a judicial interpretation of certain sections of the Provincial Offences Act, R.S.O. 1990, c. P.33 and the Highway Traffic Act, R.S.O. 1990, c. H.8 with respect to sentences traditionally imposed in the Provincial Offences Court on persons found guilty of speeding offences. Although served with the Notice of Appeal, neither the respondent nor anyone on his behalf appeared on the hearing of the appeal. Counsel for the appellant has advised that if the appeal is successful, there is no intention to have the fine imposed at trial varied in accordance with the court's judgment.

[2] A brief overview of the facts is necessary.

[3] On the 14th day of October 2002, the respondent was charged with speeding 99 kilometres per hour in a 50 kilometre per hour zone. A Certificate of Offence under the Provincial Offences Act was issued to him setting out inter alia the set fine of $299.

[4] The respondent filed a Notice of Intention to Appear and indicated that at trial he intended to challenge the evidence of the provincial offences officer who completed the Certificate of Offence. The trial was fixed for January 15, 2003.

[5] At trial, the prosecutor indicated that she was anticipating a guilty plea to an amended Certificate alleging that the respondent was speeding at the rate of 65 kilometres per hour in a 50 kilometre per hour zone with a joint submission as to sentence. The respondent was arraigned on the amended Certificate and pleaded guilty thereto.

[6] The joint submission was for a fine in the sum of $299, the original set fine for speeding 99 kilometres per hour in a 50 kilometre per hour zone. The learned justice of the peace refused to accede to the joint submission, expressing the view that it was beyond her jurisdiction to do so. Instead she imposed a fine of ***[page128]*** $42.50, the set fine for speeding 65 kilometres per hour in a 50 kilometre per hour zone.

[7] The learned justice of the peace indicated that she had heard that argument before by other prosecutors but she was not persuaded that it was a valid argument having regard to the fact that the prosecutor, of her own volition, decided to reduce the speed to 65 kilometres per hour in a 50 kilometre per hour zone.

[8] Counsel for the appellant argues that both the position taken by the prosecutor at trial (not Mr. Saamen) and the learned justice of the peace were wrong. In my opinion, he is correct. In fairness to the learned justice of the peace, the error is understandable when one considers the interplay between various sections of the Provincial Offences Act (hereinafter referred to as the "POA") and the Highway Traffic Act (hereinafter referred to as the "HTA"). Additionally, it is an error into which perhaps all other justices of the peace and judges, including me, sitting on appeals from justices of the peace in these matters, have fallen because the argument has never been presented before.

[9] The term "set fine" is defined in s. 1(1) of the POA as "the amount of fine set by the Chief Judge of the Ontario Court of Justice for an offence for the purpose of proceedings commenced under Part I or II".

[10] The set fines with respect to speeding offences are set out in Schedule B under the HTA and are as follows:

Schedule B

HIGHWAY TRAFFIC ACT

SPEEDING

Kilometres	Set Fines
a) 1-19 kilometres per hour over the maximum speed limit	$2.50 per kilometre plus costs of $5.00
b) 20-34 kilometres per hour over the maximum speed limit	$3.75 per kilometre plus costs of $5.00
c) 35-49 kilometres per hour over the maximum speed limit	$6.00 per kilometre plus costs of $5.00
d) 50 kilometres per hour or more over the maximum speed limit	No out of court settelement

[page129]

[11] Part I of the POA deals with proceedings by way of Certificate of Offence by which the present proceedings were commenced. Part II deals with proceedings for parking infractions and has no relevance to the present appeal.

[12] Ontario Regulation 950, R.R.O. 1990 made under the POA regulates the form of offence notice, and the notice of intention to appear in those parts of Ontario designated for the purposes of s. 5.1 of the POA. The Regional Municipality of York, where the Certificate of Offence was served in the case at bar, is one of the designated parts of Ontario where s. 5.1 of the POA applies.

[13] Under the POA, when served with an offence notice, a defendant has certain options open to him. He may plead guilty with representations. Section 7(1) of the POA enacts as follows:

7(1) Where an offence notice is served on a defendant who does not wish to dispute the charge but wishes to make submissions as to penalty, including the extension of time for payment, the defendant may attend at the time and place specified in the notice and may appear before a justice sitting in court for the purpose of pleading guilty to the offence and making submissions as to penalty, and the justice may enter a conviction and impose the set fine or such lesser fine as is permitted by law.
(Emphasis added)

In the vernacular, this is known as the "walk-in guilty plea court". In this instance, the justice may impose the set fine or such lesser fine as is permitted by law.

[14] But a defendant need not attend in court at all. He may make an out-of-court payment. Section 8(1) of the POA is to the following effect:

8(1) Where an offence notice is served on a defendant who does not wish to dispute the charge, the defendant may sign the plea of guilty on the offence notice and deliver the offence notice and amount of the set fine to the office of the court specified in the notice.
(Emphasis added)

[15] The procedure is entirely different where a defendant decides that he wants to have a trial. It was by a combination of ss. 5.1(3), 5.1(5) and 5.2(1) that the respondent found himself before the learned justice of the peace in the case at bar. The option he chose was for a trial -- even though on the trial date he pleaded guilty.

[16] Section 5.1(3) of the POA enacts as follows:

> 5.1(3) A defendant who is served with an offence notice may give notice of intention to appear in court for the purpose of entering a plea and having a trial of the matter by attending in person or by agent at the court office specified in the offence notice and filing a notice of intention to appear with the clerk of the court. ***[page130]***

[17] Section 5.1(5) of the POA enacts as follows:

> 5.1(5) If a defendant files a notice of intention to appear under subsection (3), the clerk of the court shall inform the defendant and the prosecutor of the time and place of the trial.

[18] A defendant who wants a trial must indicate whether he intends to challenge the evidence of the provincial offences officer. Section 5.2(1) of the POA is to the following effect:

> 5.2(1) A defendant who gives notice of an intention to appear in court for the purpose of entering a plea and having a trial of the matter shall indicate on the notice of intention to appear or offence notice if the defendant intends to challenge the evidence of the provincial offences officer.

[19] Although a defendant may file a dispute, he need not appear or be represented at the trial. Section 6 of the POA provides for the hearing and disposition in such a case.

> 6(1) Where an offence notice is served on a defendant whose address as shown on the certificate is outside the county or district in which the office of the court specified in the notice is situate, and the defendant wishes to dispute the charge but does not wish to attend or be represented at a trial, the defendant may do so by signifying that intention on the offence notice and delivering the offence notice to the office of the court specified in the notice together with a written dispute setting out with reasonable particularity the defendant's dispute and any facts upon which the defendant relies.
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> (2) Where an offence notice is delivered under subsection (1), a justice shall, in the absence of the defendant, consider the dispute and,
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> (a) where the dispute raises an issue that may constitute a defence, direct a hearing; or
> (b) where the dispute does not raise an issue that may constitute a defence, convict the defendant and impose the set fine.
>
> (3) Where the justice directs a hearing under subsection (2), the court shall hold the hearing and shall, in the absence of the defendant, consider the evidence in the light of the issues raised in the dispute, and acquit the defendant or convict the defendant and impose the set fine or such lesser fine as is permitted by law.
>
> (4) This section applies in such part or parts of Ontario as are prescribed by the regulations.

(Emphasis added)

It does not appear that the regulations prescribe any part of Ontario where this section applies but I set it out for the sake of consistency.

[20] Failure to respond to an offence notice has the same effect as payment out of court as set out in s. 8(1) of the POA, provided that the certificate is complete and regular on its face. That is the net effect of s. 9(1) of the POA. ***[page131]***

> 9(1) Where at least fifteen days have elapsed after the defendant was served with the offence notice and the offence notice has not been delivered in accordance with section 6 or 8 and a plea

of guilty has not been accepted under section 7, the defendant shall be deemed to not wish to dispute the charge and a justice shall examine the certificate of offence and,

(a) where the certificate of offence is complete and regular on its face, the justice shall enter a conviction in the defendant's absence and without a hearing and impose the set fine for the offence; or

(b) where the certificate of offence is not complete and regular on its face, the justice shall quash the proceeding.
(Emphasis added)

[21] Similarly, failure to appear at trial has the same effect as payment out of court provided that the certificate is complete and regular on its face. This is covered in s. 9.1 of the POA.

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, s. 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)

[22] It will be noted that the sections dealing with dispute without appearance (s. 6(1)), a plea of guilty with representations (s. 7(1)), payment out of court when the plea of guilty is signed (s. 8(1)), failure to respond to the offence notice when the defendant is deemed not to dispute the charge (s. 9(1)), and failure to appear at trial when the defendant is again deemed not to dispute the charge (s. 9.1(1)), all impose the penalty of the set fine -- or less in the case where a justice holds a hearing and convicts the defendant in the circumstances contemplated by s. 6(3) or of a plea of guilty with representations, where a lesser fine may be imposed.

[23] Sections 45 and 46 of the POA regulate the procedure when a defendant applies for a trial.

45(1) After being informed of the substance of the information or certificate, the defendant shall be asked whether the defendant pleads guilty or not guilty of the offence charged therein.
(2) Where the defendant pleads guilty, the court may accept the plea and convict the defendant.
(3) Where the defendant refuses to plead or does not answer directly, the court shall enter a plea of not guilty.
(4) Where the defendant pleads not guilty of the offence charged but guilty of any other offence, whether or not it is an included offence, the court may, ***[page132]*** with the consent of the prosecutor, accept such plea of guilty and accordingly amend the information or substitute the offence to which the defendant pleads guilty.
46(1) Subject to s. 6, where the defendant pleads not guilty, the court shall hold the trial.

The other subsections of s. 46 give the defendant the right to make full answer and defence and the right to the prosecutor and the defendant to examine and cross-examine witnesses.

[24] If there is a conviction after a trial or a plea of guilty at trial, the general penalty prescribed under the POA is to be found in s. 61 which enacts as follows:

61. Except where otherwise expressly provided by law, every person who is convicted of an offence is liable to a fine of not more than $5,000.
(Emphasis added)

[25] It is to be noted that except for s. 61, which provides for a general penalty upon conviction, there is no section that provides for a penalty where the defendant selects the option of a trial, whether or not he goes through a full blown trial or pleads guilty on the day of trial.

[26] The POA regulates the procedure for all provincial offences, be they offences under the HTA, the Environmental Protection Act or any other Act of the Legislature of Ontario. Those Acts may well provide penalties for infractions thereof. In those cases, s. 61 of the POA does not apply.

[27] Section 128 of the HTA regulates the rates of speed in the Province. Section 128(14) provides the penalty for contravening the section. It enacts as follows:

> 128(14) Every person who contravenes this section or any by-law or regulation made under this section is guilty of an offence and on conviction is liable, where the rate of speed at which the motor vehicle was driven,
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> (a) is less than 20 kilometres per hour over the maximum speed limit, to a fine of $3 for each kilometre per hour that the motor vehicle was driven over the maximum speed limit;
> (b) is 20 kilometres per hour or more but less than 35 kilometres per hour over the maximum speed limit, to a fine of $4.50 for each kilometre per hour that the motor vehicle was driven over the maximum speed limit;
> (c) is 35 kilometres per hour or more but less than 50 kilometres per hour over the maximum speed limit, to a fine of $7 for each kilometre that the motor vehicle was driven over the maximum speed limit; and
> (d) is 50 kilometres per hour or more over the maximum speed limit, to a fine of $9.75 for each kilometre per hour that the motor vehicle was driven over the maximum speed limit. ***[page133]***

[28] Thus, when a defendant charged with a speeding offence opts to go to trial and is found guilty or pleads guilty at trial, it is s. 128(14) of the HTA that determines the fine and not the provisions of the POA under which "set fines" are provided. The subsection does not provide a range of fines. The fines are specific. There is no discretion provided for imposing a lesser fine than the subsection stipulates. Imprisonment is not an option.

[29] Notwithstanding the provisions of s. 128(14)(d) of the HTA, there is an upper limit to the fine that may be imposed on a charge of speeding. This is provided for in s. 12(1) of the POA if the proceedings are commenced by way of certificate of offence and the serving of an offence notice. The section enacts as follows:

> 12(1) Where the penalty prescribed for an offence includes a fine of more than $500 or imprisonment and a proceeding is commenced under this Part, the provision for fine or imprisonment does not apply and in lieu thereof the offence is punishable by a fine of not more than the maximum fine prescribed for the offence or $500, whichever is the lesser.

If, therefore, a defendant is served with an offence notice charging him with speeding 160 kilometres per hour in a 100 kilometre per hour zone, under s. 128(14)(d) of the HTA his fine upon conviction after trial or upon his plea of guilty at trial would be 60 x $9.75 for a total of $585. But by reason of s. 12(1) of the POA, the fine would be limited to $500.

[30] In the case of the respondent who elected a trial and pleaded guilty at trial to speeding 65 kilometres per hour in a 50 kilometre per hour zone, that is 15 kilometres per hour over the maximum speed limit, his fine is calculated at the rate of $3 for each kilometre per hour over the maximum speed limit, amounting to $45. That, however, is not an end of the matter. There are costs and a surcharge payable under the POA.

[31] Section 60 of the POA enacts as follows:

> 60(1) Upon conviction, the defendant is liable to pay to the court an amount by way of costs that is fixed by the regulations.

Section 60.1 of the POA is to the following effect:

> 60.1(1) If a person is convicted of an offence in a proceeding commenced under Part I or III and a fine is imposed in respect of that offence, a surcharge is payable by that person in the amount determined by regulations made under this Act.

These costs and the surcharge are deemed to be a fine for the purpose of enforcing payment. What is more, under s. 60(2) a defendant convicted at trial may be ordered to pay costs of witnesses limited to the sum of $100. I doubt that this provision has ever been invoked. ***[page134]***

[32] Ontario Regulation 945, R.R.O. 1990 as amended made under the POA sets out the costs payable. Section 1, so far as it is relevant to the present appeal, is to the following effect:

> 1. The following costs are payable upon conviction for the purposes of subsection 60(1) of the Act:
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> 1. For service of offence notice or summons $5.00

[33] Ontario Regulation 161/00 made under the POA sets out the surcharges payable upon conviction. The surcharges are on a graduated scale and the higher the fine, the greater the surcharge. I set out three fine ranges as an example but subject thereto, s. 1, so far as is relevant to the present appeal, is as follows:

> 1. The fine surcharges set out in Column 2 of the Table are prescribed for the range of fines set out in Column 1 of the Table for the purposes of s. 60.1 of the Act.
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> . . . . .
>
> TABLE

COLUMN 1 Fine Range	COLUMN 2 Surcharge
$	$
0-50	10
. . . . .	
251-300	60
. . . . .	
501-1000	110

[34] In the circumstances, the appropriate fine that ought to have been imposed on the respondent upon his plea of guilty, having chosen the option of a trial -- or indeed after a full blown trial -- is $45 (the basic fine) + $5 (costs) + $10 (surcharge), for a total of $60.

[35] It will be observed that the fine payable after trial or upon a guilty plea at trial is greater than the set fine. If the respondent had been served with an offence notice for speeding 65 kilometres per hour in a 50 kilometre per hour zone and had pleaded guilty pursuant to ss. 6, 7 or 8 or deemed not to dispute the charge pursuant to s. 9 of the POA, the set fine of $42.50 ($2.50 x 15 = $37.50 + $5 costs) would have been imposed. To this the surcharge of $10 ***[page135]*** would have been added for a total fine of $52.50 as opposed to $60 as calculated above. Similarly, if he had pleaded guilty to speeding 99 kilometres per hour in a 50 kilometre per hour zone, his set fine would have been $299 ($6 x 49 = $294 + $5 costs). To this the surcharge of $60 would have been added for a total fine of $359. On the other hand if he had opted for a trial, the fine at conviction would have been $348 ($7 x 49 = $343 + $5 costs). To this the surcharge of $75 would have been added for a total of $423.

[36] Quaere if a defendant served with an offence notice charging him with speeding 160 kilometres per hour in a 100 kilometre per hour zone who elects a trial and is found guilty, the fine under the HTA being $585 as previously pointed out but limited to $500 by virtue of s. 12(1) of the POA, are the costs and the surcharge waived? The costs and surcharge are each "deemed" to be a fine but only for the purpose of enforcement. Strictly speaking, they are not "fines" as the term is generally understood. It would appear therefore that there should be no waiver and the total payable would be $500 (the fine) + $5 (costs) + $110 (surcharge), for a total of $615.

[37] It may be inferred, therefore, that the set fine provides a discount for an early plea which is a similar approach taken in criminal matters. On the other hand, since there is no discretion to increase or lower the fine, a defendant who continues to be convicted for speeding time and again, will be fined on the same basis as a first-time offender -- which is unlike the situation in the criminal court.

[38] The appeal is therefore allowed and the fine varied in accordance with these reasons. As already stated, since this is a test case brought to interpret certain provisions of the POA and the HTA and on the statement of counsel, I expect that the appellant would not enforce payment of the increased amount.

[39] I wish to extend to counsel my appreciation for his assistance in this matter.

Appeal allowed.