

C A N A D A
PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX

To wit:

C.H. 44626

I N T H E C O U N T Y C O U R T
O F D I S T R I C T N U M B E R O N E

BETWEEN:

HER MAJESTY THE QUEEN, on
the information of William
Beamish, Constable,

Appellant

- and -

DARRELL K. MUSOLINO,

Respondent

Ms. M. E. Donovan, for the appellant.
Simon L. Gaum, Esq., for the respondent.

1984, April 12, O Hearn, J.C.C.:— This is a prosecution
appeal against a dismissal of a charge under Motor Vehicle Act
s.87(2), which reads as follows

87 (2) The driver of a vehicle involved in an
accident resulting in injury or death to any person
or damage to property shall also give his name,
address and the registration number of his vehicle
and exhibit his driver's license to the person struck
or to the driver or occupants of any vehicle collided
with or to a witness and shall render to any person
injured in the accident reasonable assistance, in-
cluding the carrying of such person to a physician
or surgeon for medical or surgical treatment if it
is apparent that such treatment is necessary or is
requested by the injured person.

At the conclusion of the prosecution's case defence counsel
moved while reserving the right to call evidence that there was
absolutely no case to answer, and the learned trial judge held
'There is absolutely no evidence that the accused was the driver'
and dismissed the charge.

The evidence indicated that the complainant, Mr. Cant, while
driving in the left lane of the outgoing lanes on Bayers Road was

struck in the rear by a brown four-wheel drive truck which was passing on the right lane. Mr. Cant's car was driven into the rear of a car driven by Mr. MacInnis. MacInnis saw the truck go by, driven by a man with a beard, but paid no particular attention to it because he thought that the accident was caused by Cant. Cant was able to make an immediate note of the license number of the truck and this corresponded to a truck owned by one Paul Musolino. The truck owned by Musolino was described by Constable William Beamish as corresponding in description to that observed by MacInnis and Cant, and he actually took pictures of the vehicle. Constable Beamish, who had fifteen years experience in body work on motor vehicles, said that in his opinion the front bumper had been recently replaced and repainted and that this had been done within a couple of days of when he saw it because there were no marks on the fresh paint. In fact, he gave considerable detail to indicate that the changeover was very recent.

Paul Musolino testified that the truck was actually being used extensively and, by inference, exclusively, by his nephew, the accused.

Ms. Donovan, in her submission on behalf of the appellant, laid considerable weight on the definition of 'driver' in Motor Vehicle Act s.1(k), which reads

(k) "driver" means a person driving or in charge of a vehicle and includes the operator of a motor vehicle;

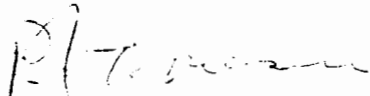
She presented considerable research to show that the expression 'in charge of a vehicle' is unique in Canada, and argued that it meant that a person could be in charge of a vehicle and, hence, a driver in that sense although not present.

I held and I hold that the term 'driver' as used in s.87(2) while it includes a person 'in charge of' the vehicle must mean someone who is actually present so as to be able to perform the

duties required under that section, and must be so construed in that particular provision at least. It may have a wider meaning in other parts of the Act. It is obviously the context that tells what is meant by 'driver' in s.87(2).

On the other hand, I hold that the learned trial judge was in error in saying that there was absolutely no evidence that the accused was the driver. There was a circumstantial case, the weight of which could not be in issue at that point. Any suggestion that somebody else was driving would require at least some evidence to support it, in view of the fact that the defendant was normally in charge of the vehicle and the evidence indicating an attempt to cover up evidence of the previous condition of the front bumper. Since the question of reasonable doubt did not arise at that point the trial judge, I believe, was not correct in holding that there was no evidence fit to submit to a jury. There is nothing in the record to suggest whether or not, of course, the accused had a beard on this occasion.

The appeal must be allowed with the usual order as to costs, and a new trial will be directed before another magistrate.



A Judge of the County Court
of District Number One