SUPREME COURT OF NOVA SCOTIA
Citation: *Senan v. R.*, 2024 NSSC 129

Date: 20240507
Docket: Hfx. No. 529470
Registry: Halifax

Between:

Brahim Senan

Appellant

v.

His Majesty the King
in Right of the Province of Nova Scotia

Respondent

Judge: The Honourable Justice D. Timothy Gabriel

Heard: March 11, 2024

Counsel: Andrew Christofi for the Appellant
Jim Janson for the Respondent

By the Court:

[1] Brahim Senan appeals the decision of adjudicator Debbi Bowes ("the adjudicator") rendered on November 16, 2023 ("the hearing"), in which she convicted him of failing to immediately stop at the scene of an accident, contrary to Section 97(1) of the *Motor Vehicle Act*, RSNS 1989, c. 293, as amended ("the MVA"). He argues that the elements of the offence were not proven. The Respondent says that the adjudicator correctly stated and applied the elements of the offence, and that the appeal should be dismissed. In the alternative should this Court disagree, the Respondent asks the Court to amend the charge and enter a conviction under Section 97(3) of the MVA.

Background

[2] On April 23, 2022, the Appellant was in the Bayers Lake Walmart parking lot. Intending to back up, he heard a sound, and, on his account, realized that the driver of another vehicle (Melissa Aucoin) had backed into him. The adjudicator, at the hearing, concluded that the Appellant had backed into her.

[3] The Appellant exited his vehicle. He approached Ms. Aucoin in her vehicle and, according to his counsel's brief, "... chastised her for being at fault (in his mind); and stayed there for 15 to 20 minutes" (para 7). In oral submissions, counsel indicated that "chastised" was too strong a word, rather he characterized what took place as analogous to the Appellant explaining to her why he felt he had not been at fault for the two vehicles having come into contact.

[4] The Appellant was told by Ms. Aucoin that they were required to exchange driver information. Mr. Senan advised that he was not prepared to provide his information and told her, in effect, that she should take care of herself, and he would take care of himself *(Decision, Appeal Book, Tab 3, p. 37)*. She wrote down his license plate number as he left the parking lot and drove away.

[5] In the course of providing her reasons for convicting the Appellant, the adjudicator clearly was of the view that the charge of failure to immediately stop his vehicle at the scene of an accident, set forth in s. 97(1), also encompassed his obligation under the other subsections as well. This included those set forth in s. 97(3) *(Decision, Appeal Book, Tab 3, pp. 38-39)*.

[6] The issues follow:

(a) Did the adjudicator err when she concluded that the Crown had proven the essential elements of an offence pursuant to s. 97(1) of the MVA?

(b) If yes, should I grant the Respondent's motion to amend the charge, and enter a conviction pursuant to s. 97(3) of the MVA?

The Standard of Review

[7] In *R. v. Nickerson*, 1999 NSCA 168, the Court said this:

> [6] The scope of review of the trial court's findings of fact by the Summary Conviction Appeal Court is the same as on appeal against conviction to the Court of Appeal in indictable offences: see sections 822(1) and 686(1)(a)(i) and **R. v. Gillis** (1981), 1981 CanLII 3294 (NS CA), 60 C.C.C. (2d) 169 (N.S.S.C.A.D.) per Jones, J.A. at p. 176. Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in **R. v. Burns**, 1994 CanLII 127 (SCC), [1994] 1 S.C.R. 656 at 657, the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was <u>some</u> evidence to support the trial judge's conclusions nor a new trial on the transcript.

[8] Consequently, I agree with the respondent that findings of fact (*simpliciter*) will attract deference by this court. However, this deference does not extend to legal questions. Mistakes in the interpretation or application of the law constitute reversible error.

Analysis

(a) *Did the adjudicator err when she concluded that the Crown had proven the essential elements of an offence pursuant to s. 97(1) of the MVA?*

[9] To begin with , I reproduce Section 97 below:

> Duty to stop at accident and to report

> 97 (1) The driver of a vehicle directly or indirectly involved in an accident shall immediately stop the vehicle at the scene of the accident.
>
> (2) Where a person violates subsection (1) and there is injury or death or damage to property resulting from the accident, the person violating subsection (1) shall upon conviction be punished as provided in Section 298.
>
> (3) 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, including 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.
>
> (4) When an accident results in damage to an unattended vehicle or to property upon or adjacent to a highway, the driver of every vehicle involved in the accident shall take reasonable steps to locate and notify the owner of, or a person who has control over, the unattended vehicle, or the property, of the circumstances of the accident, and give to him the name and address of the driver, the registration number of the vehicle and the number of the driver's license.
>
> (5) If the driver of the vehicle involved in an accident is unable to locate and notify the owner or person who has control over the unattended vehicle or the property, he shall within twenty-four hours after the accident give to the chief of police or any regular member of the police force, in the case of an accident occurring in a city or town, or the nearest detachment of the Royal Canadian Mounted Police, in the case of an accident occurring elsewhere, the information required by subsection (4) together with a description of the unattended vehicle or the property. R.S., c. 293, s. 97; 2002, c. 10, s. 11.
>
> [emphasis added]

[10] It is uncontroverted that the Appellant received one ticket for failing to stop immediately at the scene of an accident, contrary to s. 97(1) of the MVA. At no time prior to this appeal did the Crown request an amendment to that charge.

[11] Evidently, the adjudicator interpreted the above section to include a requirement on the part of the Appellant to provide information. In *R. v. Poteri* (1980), 39 NSR (2d) 250 (Co. Ct.), Judge Peter OHearn had occasion to consider s. 87 of the MVA, which was the predecessor to the Section with which the Appellant was charged in this case. In effect, the wording of (then) s. 87(1) was very similar to the current s. 97(1) of the MVA. As the Respondent has pointed out "the dollar amounts in 87(1A) and (1B) have since been removed and those subsections have been replaced by 97(2). Section 87(2) is now section 97(3)" *(Factum, para 16)*.

[12] The wording of Section 87, when *Poteri* was decided, is reproduced below:

> 87(1) The driver of a vehicle directly or indirectly involved in an accident shall immediately stop the vehicle at the scene of the accident.
>
> (1A) Where a person violates subsection (1) and there is damage of two hundred dollars or less to property, resulting from the accident, then the person violating subsection (1) shall upon conviction be punished as provided in Section 263.
>
> (1B) Where a person violates subsection (1) and there is injury or death, or damage in excess of two hundred dollars to property, resulting from the accident, then the person violating subsection (1) shall upon conviction be punished as provided in Section 265.
>
> (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, including 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. (*Poteri*, para 7)

[13] In *Poteri* the driver acknowledged hitting a lamppost. Electrical wires fell to the ground. Because of the collision, the vehicle necessarily had come to a stop for a short period of time. Mr. Poteri promptly drove away. At trial, he was acquitted because the Crown had failed to prove the amount of damage. Judge OHearn concluded that the dollar amount of damage was a condition which merely affected the quantum of penalty, rather than whether the offence itself had been constituted. The appeal was allowed, and a new trial ordered.

[14] In the course of his reasons for so deciding, Judge OHearn noted at paragraph 14:

> The purpose of s. 87(1) appears to be to require a stop, so that the driver involved may ascertain whether he has an obligation to comply with the other provisions of s. 87, and if he has, to stay after the stop long enough to comply with them. Depending upon how he read the statement of the defendant, the learned trial Judge could have concluded on the evidence either for or against the view that the defendant stopped in this sense. The manner in which he disposed of the argument, however, suggests rather that he took the meaning of "stop" to be that complained of in the third ground of appeal [i.e. he was stopped by the force of the collision, rather than having made a conscious decision to stop]. Such construction would clearly frustrate the intent of the provision. Such would be the result, indeed, in any case where the driver was stopped by the collision, rather than stopping after it.

[emphasis added]

[15] The parties have made reference to another decision of Judge OHearn, that of *R. v. Roach* (1980), 39 NSR (2d) 276. In *Roach*, the accused had been driving a motorcycle (with a passenger) when he collided with a stationary vehicle. After that collision, Mr. Roach temporarily lost control of his motorcycle, and his passenger fell off the motorcycle injuring his leg. Crown evidence was led to show that the accused (driver of the motorcycle) remained at the scene for several minutes after the collision, until such time as the passenger had been transported to hospital.

[16] The accused left the scene on his motorcycle without having had any conversation with either the driver of the vehicle or his passenger, who had been injured. The police evidence (in *Roach*) indicated that an officer had attended the Victoria General Hospital an hour after the accident, in search of the operator of the motorcycle. That officer had a conversation with the accused, and in a statement, which was admitted as voluntary at trial, the accused said that he was, in fact, the driver, that he knew the parties involved, and it was "taken care of". The driver was charged and tried on a ticket information alleging that he "failed to stop in the event of an accident over $200 or injury, contrary to section 87 subsection 1(B) of the MVA." The defendant was acquitted.

[17] On appeal, the Crown argued that where the conditions set out in s. 87(2) (now s. 97(3)) existed and were proven, the defendant should have been convicted, although charged under s. 87(1B). This was because of the existence of the word "also" in s. 87(2) (which also appears in s. 97(3)). Section 87 (the argument continued) formed a complex of interrelated duties and any breach of the duty prescribed by ss. (2) was equally violation of ss. (1A), as well as ss. (1B). Alternatively, as here, the Crown sought an amendment to the charge so as to conform to the evidence.

[18] Judge OHearn, although conceding that the point was an interesting one, observed at paragraph 6:

> ...the general principle is that where the Crown charges a specific act as the way in which an offence was committed, then that is what it has to prove. And if the thing proved against the accused is something distinct from that and not merely a sort of overlap or slight, let us say, misdescription of what was done, then the court should give very careful consideration before granting an amendment even at the request of the prosecution.

[19] He went on to add at paragraph 7:

> ... I am inclined to the view, however, the subs. (1) and (2) set up distinct offences under this total scheme for dealing with reporting accidents and stopping at the scene of an accident. Now, when you contrast it with the parallel provision in the *Criminal Code*, you can see that is very detailed, not only in the way it is broken up into subsections, but in the way it is dealt with in the penalty sections, because the penalty applies, of course, to (1B) and (2). But they are specifically named as distinct. Whether that is the case or not, whether they are distinct offences or not, it seems to me that the trial court was fully justified in taking the information on its face as describing a failure to stop as the event to be proved, and the failure to prove that to the satisfaction of the trial court means that the verdict and judgment were justified and that the appeal, accordingly, has to be dismissed.
>
> [emphasis added]

[20] In the present case, the adjudicator heard evidence that the appellant did exit his car and speak to the driver of the other vehicle, Ms. Aucoin. The latter felt like he was admonishing her, and that he was angry with her. She explained to him that she felt that she was not at fault, and that they needed to exchange their names, addresses, insurance companies, and other relevant information.

[21] The Appellant, when he testified (through an interpreter) took the position that, after he had seen her in her vehicle with her insurance certificate in hand, he contented himself with simply explaining to her that she needed to be more careful, and that he had "forgiven her" for causing the accident *(Appeal Book, Tab 7, p. 33)*.

[22] There was evidence of damage to Ms. Aucoin's vehicle. She said as much:

> So, the rear … on the rear driver's side above the wheel was all dented. And that part following my bumper needed to be replaced ... there's part of the bumper, like a plastic part, that all had to be replaced.
>
> *(Appeal Book, Tab. 7, p. 14)*

[23] Moreover, there was evidence of damage to the Appellant's vehicle as well. Constable Peroni testified that when she visited the Appellant's home the following day, she observed damage to his vehicle that corresponded to the damage that she had observed on Ms. Aucoin's vehicle.

[24] Constable Peroni also explained that when the Appellant requested that a French-speaking officer attend, she contacted Constable Zimon. The two of them

spoke to Mr. Senan at his home, at the conclusion of which, after obtaining his version of events, she testified:

> ... I wrote that gentleman a ticket for failing to remain at the scene of the collision and exchange the information with the other driver.
>
> *(Appeal book, Tab 7, p.18)*

[25] Constable Zimon added that the Appellant had stated to him that "after the collision he didn't feel like there was much damage, so he didn't feel like there was a need for a report" *(Appeal Book, Tab 7, p. 26)*.

[26] In her decision, the adjudicator accepted that the Appellant and Ms. Aucoin remained in the parking lot for about 15 to 20 minutes after their vehicles had collided. She added this:

> I feel that based on the way and the demeanor that the witness gave her testimony that she was surprised by his angry behaviour toward her. It is clear over the span of time, and I find as a fact, that the Defendant was not prepared to exchange information. I found it particularly disturbing that Mr. Senan – whose duty is to know the law and to know what should happen in an accident as part of his driver – responsibilities of a driver – I find it very surprising that somebody just came – passed along and said, "Oh, yeah, report it some other time," and he's acting on this information. Other people walking – miscellaneous people walking around in a parking lot do not dictate the responsibilities of other drivers. To keep referring to this matter as a scratch on the vehicle, it doesn't matter how much damage is done. There can be thousands of dollars to repair a scratch.
>
> His duty was to remain on the scene, exchange information before he left. That did not happen. And he left the scene without providing that information. It is not reasonable to conclude he should act on miscellaneous stranger's comments.
>
> I am satisfied beyond a reasonable doubt that the Defendant failed to stop at the scene. A guilty finding will be entered.
>
> *(Appeal Book, Tab 7, p. 39)* [emphasis added]

[27] I am of the view that each of the subsections of s. 97 (of the MVA), although interrelated, create separate offences. In ss.(1) we see that the driver of a vehicle involved in an accident is required to immediately stop at the scene thereof. In ss.(2) we see that if he fails to comply with the directive in (1), and there had been injury or death or damage to property caused by the accident, he is to be punished as provided in s. 298. In ss. (3) we see that there is an additional requirement upon the driver of the vehicle involved in accident which has resulted in injury or death to any person or damage to property. In such a case, he "...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 ...". Subsections (4) and (5) deal with the obligations of a driver in circumstances where an accident results in damage to an unattended vehicle, and/or where the driver of the vehicle involved in an accident is unable to locate and notify the owner or a person who has control over the unattended vehicle or property, respectively.

[28] Although the wording and structure of what is now s. 97 has been (somewhat) altered over the years vis-à-vis its predecessor (s. 87) (with which Judge OHearn was dealing in *Poteri* and *Roach),* the obligations upon a driver of the vehicle involved in an accident nonetheless clearly varies depending on the different scenarios described in each of the subsections. If we envision the obligations created by s. 97, collectively, upon such a driver, in chart form, we see the following:

Section 97	**"Scenario"**	**Required Action**
Subsection 1	Accident	Stop vehicle
Subsection 2	Accident + injury or death or property damage	Stop vehicle
Subsection 3	Accident + injury or death or property damage	Stop vehicle, give name, address, registration number of vehicle, show driver's license.
Subsection 4	Accident + damage to unattended vehicle	Take reasonable steps to locate the owner or person having control over the unattended vehicle.
Subsection 5	Accident + damage to unattended vehicle	In scenario above, if can't locate the owner or person having control over the vehicle, notify either municipal police or RCMP, as the case may be.

[29] It is not until we arrive at ss. (3) that the obligation to produce name, address, vehicle registration number, and show driver's license is mentioned. In order to do that, obviously, the driver must first stop their vehicle pursuant to s. 97(1). There is no length of time specified as to how long that "stop" must last. However, in the circumstances described in s. 97(3), it is obvious that they interrelate with the obligation to stop in the manner described by Justice OHearn in *Poteri* and *Roach*.

[30] As the driver of a vehicle involved in an accident with another, Mr. Senan was required to first stop his vehicle. He did so. He was easily stopped long enough (15 to 20 minutes) in ordinary circumstances to ascertain that there had been damage done to both his vehicle and that of Ms. Aucoin.

[31] In such a situation, I agree with the adjudicator that "[for Mr. Senan] to keep referring to this matter as a scratch on the vehicle, it doesn't matter how much damage is done. There can be thousands of dollars to repair a scratch" *(Appeal Book, Tab 7, p. 38)*. However, having stopped his vehicle for what was clearly an adequate time interval, and having presumably observed the damage to both vehicles, his obligations became greater. He now bore the additional responsibilities set out in s. 97(3). It is these responsibilities with which he did not comply.

[32] Simply put, in my view, Mr. Senan was charged and convicted under the wrong section of the MVA. The adjudicator committed reversible error when she concluded that the elements of an offence pursuant to s. 97(1) had been made out.

(b) Should I grant the Respondent's motion to amend the charge and enter a conviction pursuant to s. 97(3) of the MVA?

[33] The Crown likens what it is asking the court to do, in this case, to the curative provisions of the *Criminal Code*, which enable it to amend an indictment or a count in order to make the indictment, count or particular, conform to the evidence. Indeed, the law pertinent to that curative proviso has been stated and restated many times. For instance, to focus first upon the example cited by the Crown, in *R.* v. *Irwin* (1998), 123 CCC (3d) 316 (ON CA), Doherty, JA. noted:

> [29] *R. v. St. Clair, supra,* also offers support for the view that it is the effect of the proposed amendment on the accused's ability to meet the charge, and not the effect of the proposed amendment on the charge itself which is determinative. In St. Clair, the accused was charged with aggravated assault arising out of a stabbing. The trial judge instructed the jury that assault with a weapon was an included offence in the charge of aggravated assault. The jury acquitted of aggravated assault and convicted of assault with a weapon.
>
> [30] On appeal, it was conceded that the aggravated assault charge as worded in the indictment did not include the offence of assault with a weapon and that the trial judge had erred in so instructing the jury. This court did not, however, allow the appeal. Instead, it amended the aggravated assault charge to add a reference to the use of a knife, thereby, making assault with a weapon an included offence in the aggravated assault charge. Osborne J.A. described s. 683(l)(g) as providing "broad" amendment powers and said, at p. 410:

> In the circumstances, if the amendment sought is granted, it will not result in the accused being misled or prejudiced. ' I would, therefore, amend the indictment to set out the means by which the appellant committed the alleged offence of aggravated assault.
>
> Having amended the indictment, the jury's verdict of guilt of the included offence established in s. 267(l)(a) [assault with a weapon] should be sustained.

[31] If as *St. Clair* holds, s. 683(1)(g) is broad enough to permit an amendment which adds an offence to an indictment, it must be broad enough to permit an amendment which substitutes one charge for another. I would hold that s. 683(1)(g) permits an amendment on appeal where the amendment cures a variance between the charge laid and the evidence led at trial regardless of whether the amendment materially changes the charge, substitutes a new charge for the initial charge, or adds an additional charge.

[32] In holding that the amendment power, even on appeal, can extend to the substitution of a different substantive offence, I must acknowledge the policy implication of that holding. As Laskin C.J.C. so clearly put it in *Elliot*, *supra*, at p. 199, it is the responsibility of the Crown and not the court to settle the charge which will be brought against the accused. While I accept the force of that observation, I am moved by a different policy consideration. If there is no power to make the amendment, even in the total absence of prejudice, there can be no impediment to a new prosecution on the substituted charge. That prosecution would involve a re-litigation of exactly the same issues on presumably exactly the same evidence. I see no value from the point of view of the due administration of justice in a second trial in those circumstances. Witnesses would be inconvenienced and resources spent for no purpose other than to give an accused a second chance to litigate issues which had been fully canvassed at the first trial. I go even a step further. I think the possibility of a different assessment of the same issues and the same evidence on a second trial does a disservice to the due administration of justice. In my view, denying the power to amend to substitute a new charge where the substitution could not prejudice the accused would be akin to ordering a new trial where there had been an error in law at trial which could not have caused any prejudice to the accused. In both situations, the result strikes me as an unwarranted windfall for an accused.

[33] My conclusion as to the scope of the amending power addresses only the first of two issues which an appellate court must face in deciding whether to make an amendment. Having found that the power exists, the court must go on and determine whether it should be exercised in a given case. The amending power can be exercised only if the accused will not be "misled or prejudiced in his defence or appeal." The nature of the proposed amendment and the stage of the proceedings at which it is sought will be important factors in determining whether an accused has been misled or prejudiced. The risk of prejudice is particularly great where it is proposed to materially amend an indictment on appeal and affirm the conviction on

the basis of that amendment. As Cory J. said in *R.* v. *Tremblay* (1993), 84 C.C.C. (3d) 97 at 114 (S.C.C.):

> It is, I think, an extraordinary step for an appellate court to amend the charge materially and then to enter a conviction on the basis of the charge as amended . ...

[34] Therefore, while I am satisfied that this court has the power to make the amendment requested by the Crown, the nature and timing of the proposed amendment demand a cautious approach and a thorough consideration of the potential prejudice to the accused flowing from the amendment.

[emphasis added]

[34] And, having said that, Doherty, JA concluded:

[42] Cases where an amendment substituting a different offence for the offence charged at trial can be properly made on appeal will be few and far between. I think this is one of those rare cases where the amendment can be made. While the amendment changes the substantive offence from assault causing bodily harm (s. 267) to unlawfully causing bodily harm (s. 269), the amendment does no more than put a new label on the appellant's culpable conduct. The substance of the allegation remains unchanged. I would amend the indictment to charge the appellant with unlawfully causing bodily harm to Andrew Behling and dismiss the appeal.

[emphasis added]

[35] In *R.* v. *Brownson*, 2013 ONCA 619, the court noted:

[20] Section 683(1)(g) explicitly authorizes an appeal court to amend an indictment (and, by analogy, an information):

> 683(1) For the purposes of an appeal under this Part, the court of appeal may, where it considers it in the interests of justice,
>
> ….
>
> (g) amend the indictment, unless it is of the opinion that the accused has been misled or prejudiced in his defence or appeal.

[21] Under this section, the scope of permissible amendments at the appeal stage is wide. As expressed by Doherty J.A. in *R. v. Irwin* (1998), 1998 CanLII 2957 (ON CA), 38 O.R. (3d) 689 (C.A.), at 699-700, "s. 683(1)(g) permits an amendment on appeal where the amendment cures a variance between the charge laid and the evidence led at trial regardless of whether the amendment materially changes the charge, substitutes a new charge for the initial charge, or adds an additional charge."

[22] However, caution must be the watchword when an appeal court considers a Crown request to amend an indictment or information and enter a conviction for a person who would be acquitted on the basis of the un-amended indictment or

information. As explained eloquently by Cory J. in *R. v. Tremblay*, 1993 CanLII 115 (SCC), [1993] 2 S.C.R. 932, at 956-57:

> It is, I think, an extraordinary step for an appellate court to amend the charge materially and then to enter a conviction on the basis of the charge as amended. The unfairness that results from such a procedure was aptly described by Zuber J.A. in *R. v. Geauvreau* (1979), 1979 CanLII 83 (ON CA), 51 C.C.C. (2d) 75 (Ont. C.A.). At p. 84 he wrote:
>
> > It is part of our law of criminal procedure that a person accused of crime is entitled to know the charge against him, whether contained in an information or an indictment, in reasonably specific terms and he is tried on that charge. This principle retains its vitality even though the formalism of an earlier era has been diminished and trial Courts now possess reasonably wide powers of amendment. However, even though criminal procedure has become less technical and more flexible, the concept of an amendment at an appellate stage involves difficult considerations. An amendment at trial contemplates a continuing ability by the accused to meet an amended charge; the appellate stage occurs long after the evidence has been led, arguments made and facts found. In my view, it would be an extraordinary step for an appellate Court to materially amend the charge and uphold a conviction based on the charge as amended.
>
> [23] When considering a Crown request to amend an indictment or information at the appeal stage of a criminal proceeding, the court must focus carefully on the precise qualifying words of s. 683(1)(g) of the *Criminal Code*, and ask this question: has the accused been misled or prejudiced in his defence or appeal?
>
> [24] In my view, the answer to this question in this case is "Yes", especially in the defence (trial) context, but also in the appeal context.
>
> [emphasis added]

[36] Later on, the Court in *Brownson* further explained:

> [29] It is impossible to know what questions defence counsel might have asked of Constable Williams if the information had simply stated the offence without particularization or with the correct particularization (the continuing three year suspension by operation of provincial law). Presumably, he would have explored the facts relating to the provincial suspension and, perhaps, the administrative structure tying together s. 259 of the *Criminal Code* and the provincial law imposing the additional suspension. In any event, defence counsel's very focussed cross-examination aimed squarely at the incorrect particularization in the information. He almost certainly would not have solely addressed this issue if he had been faced with an information containing accurate or no particularization. Thus, to the extent that the appellant relied on the information when formulating his defence at trial, he has been prejudiced.

> [30] In short, I do not think that the prejudice bar should be set very high in a case where the Crown seeks to amend an information on appeal, especially on a second appeal. For the above reason, I conclude that the appellant has cleared the prejudice bar in this case. Moreover, I observe that the problem the Crown faces in this case is easily solved. The solution, as the Crown points out in its factum, at para. 4, is to "simply state that the driver was disqualified period and then lead evidence of either mode at trial."
>
> [emphasis added]

[37] In this case, the Appellant was unrepresented at trial. He conducted his cross-examination with the assistance of an interpreter. His defence, at least in part, seemed to focus on the requirement of a driver to stop their vehicle at the scene of an accident. I say this because one of the only questions that he asked Ms. Aucoin on cross-examination consisted of: "so, when I, according to you, hit you, did you stay where you were, or did you move your car somewhere?" To which Ms. Aucoin responded, "When I got hit, I stayed where I was. And then after I got hit, then I moved forward" *(Appeal Book, Tab 7, p.15)*. After receipt of this answer, Mr. Senan concluded his cross-examination.

[38] Had the Appellant been correctly charged at first instance, more attention would likely have been given to the nature and extent of the damage, what he observed or did not observe, and whether there was anything beyond his control that would have prevented him from observing the extent of the damage to the vehicles, despite the length of time for which he was stopped. I am not saying that this necessarily would have resulted in an available defence to a s. 97(3) charge. However, I am likewise not prepared to speculate as to what might or might not have been said, or of what his evidence might have consisted, had the Appellant been correctly advised of the charge that he had to meet, and had he been provided with the corresponding opportunity to respond to what went on at the scene of the accident in light of the components of that charge.

Conclusion

[39] The appeal is allowed. The charge against the Appellant, pursuant to s. 97(1) of the MVA is dismissed. Correspondingly, the Crown motion to amend the charge and confirm the conviction under s. 97(3) is dismissed.

Gabriel, J.