

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

DORIS KATHLEEN TOEG

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

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**Appeal of a conviction of failing to report an accident. Appeal allowed. New trial ordered.**

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**REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE V.A. SCHULER**

Heard at Yellowknife, Northwest Territories  
on April 9, 1996

Reasons filed: May 10, 1996

Counsel for the Appellant: Gerald McLaren

Counsel for the Respondent: Diane Sylvain

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**REASONS FOR JUDGMENT**

1           This is an appeal from a conviction after trial before a Justice of the Peace. The Appellant was convicted of failing to report an accident, contrary to s. 262(1) of the *Motor Vehicles Act*, R.S.N.W.T. 1988, c. M-16.

2           The Appellant was not represented by counsel at the trial; her husband acted as her agent.

3           The Appellant seeks to quash the conviction on four grounds:

1. Failure of the Crown to disclose information regarding evidence of the charge.
2. Error of the Justice of the Peace in examining the Appellant when the Appellant was represented by an agent at trial.
3. Error of the Justice of the Peace in refusing to allow the Appellant's agent to examine the witness but subsequently allowing the Crown to examine the witness.
4. Error of the Justice of the Peace in refusing to allow the Appellant to testify as to her location at the time of the evidence (*sic*).

4           For the reasons that follow, I have decided that there must be a new trial and in that regard need consider ground 4 only, which really refers to a refusal or failure by the Justice of the Peace to allow the Appellant time to present further evidence.

5           The Crown's case rested on the evidence of a witness who was parked on the road where the accident was alleged to have occurred, adjacent to the Canadian Tire parking lot in Yellowknife. The witness testified that he heard a loud bang and then noticed a large red pickup truck driven by a woman who looked startled and sped away. The witness testified that this occurred at approximately quarter to five in the evening on August 22, 1995. He wrote down the licence plate number of the red pickup and eventually gave it to the police. He also inspected the vehicle which had been hit and noted damage. He left a note of the plate number of the red pickup on the vehicle which had been hit.

6           The licence plate number noted down by the witness was that of the Appellant's vehicle. It was distinctive, being TOEG.

7           The Appellant testified that at the time in question she was on her way from Rae-Edzo, where she had been in a meeting all day, to Yellowknife. She said that the only time that day that she had parked in the area near Canadian Tire was at 9:30 in the morning.

8           The Appellant testified that when she was originally contacted by the police, at approximately 7:00 the same evening as the events occurred, she was under the impression that she was being questioned about hitting another vehicle when she was at the Canadian Tire parking lot at 9:30 in the morning. She testified that she thought she might have grazed another vehicle in backing out of the parking stall.

9           The Appellant also testified that when she spoke to Constable Carpenter, the investigating officer, she asked him for information about the name of the person she had hit and the damage done. She said he told her that he could not give her that information. Constable Carpenter did not recall such a conversation. The Appellant did, apparently after talking to a lawyer friend, call Constable Carpenter the day before the trial to request copies of witness statements, which she received on the day of trial.

10           It seems clear from the Appellant's evidence, that up until the day of the trial, she was under the impression that the accident was alleged to have occurred while she was at the Canadian Tire parking lot on the morning of August 22, 1995. She did, however, indicate to the Justice of the Peace, when asked at the commencement of the proceedings, that she was ready to proceed with trial.

11           It soon became clear that the Appellant was not in fact prepared for the trial, specifically that she was not prepared to present evidence that would confirm her testimony that at the relevant time she was on her way from Rae-Edzo to Yellowknife. She suggested in her evidence that the Justice of the Peace could call Rae-Edzo to

confirm that the Appellant was there and was properly reminded by the Justice of the Peace that it was up to the Appellant to present the evidence.

12           At the end of the evidence and the submissions, the Justice of the Peace was clearly troubled by the fact that she was faced with evidence from the witness who identified the Appellant's distinctive licence plate number and, in contrast, the evidence of the Appellant that she was on her way from Rae-Edzo to Yellowknife at the time in question i.e. that she had an alibi.

13           The Justice of the Peace addressed the absence of any evidence confirming that the Appellant was in Fort Rae, as follows:

THE COURT: (Few words unclear) appear that I have problems wondering where the licence plate number came up without (few words unclear) whole thing. With the parking at Canadian Tire, Ms. Toeg stated that she parked there to go and get a file from her office. Mr. Toeg stated that she does not remember going around that area after she came from Fort Rae. There's no verification that she was in Fort Rae all day. There's no documentation here showing that she was in Fort Rae from nine thirty, ten o'clock in the morning until four thirty, five o'clock that day. I have no documentation. Whatever length of time it takes to go from Fort Rae, for the length of time to drive there and back, it's documentation that should have been here. To be prepared for this matter tonight, you could have contacted Legal Aid, a lawyer, like anything to be properly prepared for this.

I'm looking at the time factor of Ms. Toeg saying nine thirty. I'm also looking at Ms. Toeg stating that she doesn't remember going through there after she came back from town at five thirty, six o'clock supposedly, if she was in Fort Rae all day, and I have to say if because there's no documentation in this court room right now (few words unclear) that she was out of town all day. It's a very important factor in this.

(Transcript, page 34)

And further:

With the licence plate and then the time factor of nine thirty in the morning and five thirty in the afternoon, I have to say there is a big stretch in this. That Ms. Toeg can't remember if she was around that area at that time of night, and she's got nothing to prove that she was in Rae that day.

(Transcript, page 35)

14           It should be noted that the Appellant did not testify that she could not remember if she was near the area in question at the time of the accident. Her response to the prosecutor's question as to where she was at approximately five o'clock, was that she was driving back from Rae-Edzo. In her evidence in chief, she stated that she was in a meeting in Rae-Edzo the whole day and came home at about five thirty, quarter to six. She did not give any evidence, nor was she asked any questions, about the route she took once she arrived in Yellowknife. In submissions, her husband, acting as her agent, stated that the Appellant did not remember coming through the area of the accident. I assume that is what the Justice of the Peace was referring to when she stated that "Ms. Toeg can't remember if she was around that area at that time of night". That was not, however, the Appellant's evidence.

15           After making the comments referred to above, the Justice of the Peace indicated that she would reserve judgment on the issue of guilt. The Appellant's husband, acting as her agent, asked whether any documentation was needed and pointed out again that the Appellant had been under the impression that the charge involved an incident in the morning. The following exchange took place:

MR. TOEG:    Do you need any documentation about this. See, Your Honour, like, what happened is we just found out about this four-fifty, we're always thinking

about the nine o'clock. We told the officer it's nine o'clock. When we found out it's four fifty--

THE COURT: Well - no, what I'm going to do is I'm reserving my judgment until November the 23rd, and I'll go and look at this and think a little bit about it before I do anything. And at that time I'll decide.

MR. TOEG: Then you don't need any documentation from the Friendship Centre about, you know, what time and all that.

THE COURT: I'll look into all those matters. So November 23rd, seven p.m., be here and I'll let you know what I decide.

MR. TOEG: Okay.

(Transcript, pages 36 - 37)

16 In effect, the Appellant was seeking that she be allowed to re-open her case and present evidence in support of her alibi. The Justice of the Peace seems to have declined, although what she said might be interpreted as meaning that she was going to consider whether she would permit further evidence and let the Appellant know on the return date.

17 In light of the Appellant's misunderstanding about the time of the accident and her late receipt of the witness statements, all of which was in evidence before the Justice of the Peace, the Appellant's proposal to present further evidence ought to have been granted.

18 On the return date, two weeks later, the Justice of the Peace gave judgment without hearing any further evidence or submissions, as follows:

With going through all the evidence and documentation that was given during the trial, I find you guilty as charged, or Ms. Toeg guilty as charged. First off, there was no documentation that she was in Fort Rae for

that day. Your licence plate is distinct. It's a lettered licence plate, and the day of - from what I could gather through the testimony, the accident was not reported, or you were not into the RCMP until a day or two after the accident. The testimony seemed to have centred on the day of the accident. And it would - the RCMP were not there the day of the accident, it was a day or two after. So it's on my grounds - my judgment that due to no documentation of her being in Rae, the distinct lettering on the licence plate, I find her guilty as charged.

It's a five hundred dollar fine. A surcharge of seventy-five dollars, total of five hundred and seventy-five. Do you need time to pay?

(Transcript of Verdict, page 2)

19           The Justice of the Peace appears to have put a burden on the Appellant to prove her alibi by way of documentation. It is not clear whether by documentation, she simply meant other evidence, although I note that she differentiated between the two, evidence and documentation, at the beginning of her reasons for conviction.

20           Crown counsel on the appeal argued that the comments by the Justice of the Peace should be interpreted as a concern that there was no corroboration of the Appellant's alibi. She argued that the inference should be made that the Justice of the Peace did not believe the Appellant's testimony.

21           While this argument is somewhat compelling, I note that there is no reference at all to credibility in the reasons of the Justice of the Peace. At no time did she refer to her assessment of credibility or state that she found the Appellant not to be a credible witness. There is no indication that the Justice of the Peace considered whether the Appellant's testimony raised a reasonable doubt. Instead, her comments lead to the

conclusion that she place the burden on the Appellant to prove by way of documentation that she was where she said she was.

22           The emphasis placed by the Justice of the Peace on documentation of the Appellant's alibi makes it clear that this was the crucial issue in the case. The lateness of disclosure (for which, in the circumstances, I need not attribute responsibility) the fact that the Appellant was clearly under a misapprehension as to the time when it was alleged the accident had occurred, the question put by the Appellant's agent as to whether prior to the return date, documentation should be obtained and submitted, and the rejection by the Justice of the Peace of that proposal, all lead me to the conclusion that the Appellant's right and ability to make full answer and defence was impaired.

23           Further, as I have indicated, I am not satisfied that the Justice of the Peace correctly considered the burden of proof.

24           In the result, the appeal is allowed and a new trial ordered.

V.A. Schuler  
J.S.C.

Dated at Yellowknife, Northwest Territories  
this 10th day of May, 1996.

Counsel for the Appellant:           Gerald McLaren

Counsel for the Respondent:       Diane Sylvain

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