Date: 1998 02 10
Docket: CR 03530

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JORDAN JOHN GROENEWEGEN

Appellant

- and -

HER MAJESTY THE QUEEN,
on the Information of By-Law Officer
D. Gillard of the City of Yellowknife

Respondent

Summary conviction appeal from conviction for speeding under a municipal by-law. Appeal dismissed.

REASONS FOR JUDGMENT OF THE HONOURABLE J.Z. VERTES

Heard at Yellowknife, NT, February 5, 1998

Judgment filed February 10, 1998

Counsel for the Appellant: Austin F. Marshall
Counsel for the Respondent: Geoffrey P. Wiest

NOTE: The style of cause is hereby amended as noted above.

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REASONS FOR JUDGMENT

[1] On December 2, 1997, in Justice of the Peace Court, the appellant entered a plea of guilty to a charge of speeding while operating a snowmobile. He now appeals to this Court and asks that his plea be set aside and that the charge be dismissed. The appellant does not dispute the fact that he was speeding. His appeal is based primarily on a highly technical point relating to the description of the charge.

[2] Recently, in another summary conviction appeal entitled *R v. Canadian Broadcasting Corporation* (N.W.T.S.C. CR 03328 and CR 03422; December 10, 1997), I said that reliance on highly technical points of pleading in criminal, or as here quasi-criminal, proceedings should be avoided. The emphasis is on whether the accused could or would have been misled or prejudiced in his defence. That approach applies as well to this case.

Facts:

[3] The appellant was charged on November 26, 1997. He was operating a snowmobile on Frame Lake, an area within the boundaries of the City of Yellowknife. The applicable speed limit, by virtue of Yellowknife Municipal By-Law No.3722, is 30 kilometres per hour. He was clocked at a speed of 106 kilometres per hour. The by-law officer issued an Information in the form of a summary conviction ticket. On it the offence was noted as being contrary to By-Law No.3722, and specifically section 27(1). In a box entitled “description of offence”, the officer wrote: “Speeding (106 km/h in a 30 km/h zone)”. The ticket required the appellant to appear in Justice of the Peace Court on December 2,1997.

[4] The appellant appeared in J.P. Court on the date set and entered a guilty plea. He admitted the facts of the offence. He appeared on his own without the assistance of counsel.

[5] In imposing sentence, the J.P. suspended the appellant's driver's licence for a period of 4 months and ordered him to perform 50 hours of community service work. However commendable these measures may be, they are not measures authorized by law for this offence. Counsel agree that they should be set aside. Curiously, although the J.P. talked about imposing a fine, he did not do so. That is the one measure that was open for him to impose.

Issues:

1. Sufficiency of the Charge:

[6] The first issue raised on behalf of the appellant relates to the sufficiency of the description of the charge. A corollary issue is the power of amendment to cure any deficiency. The appellant's argument rests on the assumption that no amendment can be made in these circumstances.

[7] The ticket charges an offence under s.27(1) of By-Law No.3722. It is common ground that the reference to subsection (1) is an error having regard to the facts of this case. Section 27(1) makes it an offence to operate a snowmobile on a highway at certain designated speeds. Frame Lake, the area where the appellant was operating his snowmobile, is not a "highway". Frame Lake, however, is designated as being in a certain "zone" and section 27(2) of the By-Law makes it an offence to speed "in other areas of the City not being a highway" but in one of the designated zones. There is no dispute that the appellant would have no defence if he had been charged under subsection (2).

[8] Appellant's counsel argues that, once the facts read in Court revealed that the offence did not occur on a highway, the J.P. should have rejected the guilty plea and acquitted the accused. He further argues that no amendment to the designation of the charge could have been made since to do so would charge a different offence. That cannot be done and, in support of this proposition, counsel relies on *R v. Elliott* (1970), 3 C.C.C. 233 (Ont.C.A.), a case I will discuss further in these reasons.

[9] I cannot agree with these submissions. In my opinion, the designation of the specific offence could and should have been amended and thus the appellant was properly convicted.

[10] The *Summary Conviction Procedures Act*, R.S.N.W.T. 1988, c.S-15, applies the summary conviction provisions of the *Criminal Code* to offences created by territorial statutes or municipal by-laws. Hence the provisions of the Code respecting the form of Informations apply. So too, however, does s.9(2) of this Act:

> (2) The use on a ticket of any word, figure, expression or device or any combination of them to designate an offence under an enactment or municipal by-law to which this Act applies is sufficient for all purposes to describe the offence designated.

[11] The ticket in this case specifies s.27(1) of By-Law 3722. But it also "describes" the offence: "Speeding (106 km/h in a 30 km/h zone)". It seems to me that this designation clearly informs the appellant of the offence. The facts reveal that the appellant was stopped on Frame Lake and charged. He therefore knew <u>what</u> he was charged with (speeding), <u>where</u> it took place (Frame Lake), and <u>when</u> it took place (November 26, 1997). No argument can be made that he was misled as to the act alleged to be the crime.

[12] The *Criminal Code*, s.581, requires generally that an Information contain sufficient details of the circumstances of the alleged offence so as to give to the accused reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to. Section 581 is applicable to summary conviction offences by virtue of s.795 of the *Code*. Only if a charge is so badly drawn up as to fail even to give the accused notice of the charge will it fail this minimum test. The kind of information that will be necessary to satisfy this test will vary depending on the circumstances and the nature of the offence charged.

[13] The *Code* also gives very broad powers of amendment to a trial judge. Section 601 of the *Code* (also applicable to summary conviction proceedings) identifies the relevant considerations in subsection (4):

> (4) The Court shall, in considering whether or not an amendment should be made to the indictment or a count thereof under subsection (3), consider
>
> (a) the matter disclosed by the evidence taken on the preliminary inquiry;
> (b) the evidence taken on the trial, if any;

> (c) the circumstances of the case;
> (d) whether the accused has been misled or prejudiced in his defence by a variance, error or omission mentioned in subsection (2) or (3); and
> (e) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.

[14] The emphasis in the *Code* is on amending the information if at all possible to do so without injustice being done. This point was made by Lamer J. in *R. v. Moore* (1988), 41 C.C.C.(3d) 289 (S.C.C.), at pages 311-312:

> Since the enactment of our *Code* in 1892 there has been, through case-law and punctual amendments to s.529 [now s.601], and its predecessor sections, a gradual shift from requiring judges to quash to requiring them to amend in the stead; in fact, there remains little discretion to quash...
>
> My understanding of s.529 [now s.601] when read in its entirety, is that it commands the following to the trial judge: Absent absolute nullity and subject to certain limits set out in s-s.(9), the judge has very wide powers to cure any defect in a charge by amending it; if the mischief to be cured by amendment has misled or prejudiced the accused in his defence, the judge must then determine whether the misleading or prejudice may be removed by an adjournment. If so, he must amend, adjourn and thereafter proceed. But, if the required amendment cannot be made without injustice being done, then and only then the judge is to quash. Therefore, a judge must not quash a charge, and it is reversible error of law if he does, unless he has come to that conclusion, namely, that "the proposed amendment" cannot "be made without injustice being done".

[15] The specification of the offence by reference to a statute and a section number is a question of the sufficiency of the charge, not its validity. This is made clear by s.581(5):

> (5) A count may refer to any section, subsection, paragraph or subparagraph of the enactment that creates the offence charged, and for the purpose of determining whether a count is sufficient, consideration shall be given to any such reference.

[16] The jurisprudence has long held that the designation of a specific section number is a non-essential element. That is because the section number need not be included. If it is used correctly, such a designation may cure defects in the description of the offence due to the omission of certain words, as in *R. v. Côté* (1977), 33 C.C.C.(2d) 353 (S.C.C.). But if it is used incorrectly it can be amended if the charge is otherwise sufficient. There is venerable case law to this effect, such as where a wrong section

number is used: *R. v. Sourwine* (1970), 72 W.W.R. 761 (Alta.D.C.); or where the wrong by-law is referred to: *Bell v. Parent* (1903), 7 C.C.C. 465 (Que.Sess.Ct.); or where a repealed statute is designated: *R. v. Moos* (1969), 4 C.C.C. 173 (Ont.Mag.Ct.); or, on appeal, where a wrong section number is replaced by the correct one: *R. v. Meggitt*, [1937] 1 W.W.R. 193 (B.C.Co.Ct.).

[17] The *Elliott* case (noted above) does indeed stand for the proposition that there is no power to amend an Indictment so as to charge an offence completely different from that originally charged. In that case the accused was originally charged with the offence of break and enter and commit an indictable offence. Prior to arraignment the charge was amended to break and enter with intent to commit an indictable offence. These are two distinct and different offences.

[18] In my opinion the *Elliott* case is distinguishable. The two charges in that case are different. They require different acts by the accused. One requires the actual commission of an indictable offence while the other requires merely the intent to commit one. Hence the *actus reus* to constitute one offence is different from that necessary to constitute the other offence (even the necessary *mens rea* differ). Here there is no different conduct required to constitute the offence. The charge is speeding. Both subsections (1) and (2) of section 27 make it an offence to drive a snowmobile at excessive speeds. The only difference is the location of the prohibited conduct. Subsection (1) specifies a highway while subsection (2) specifies off-highway areas. The appellant knew what he was charged with and where he was alleged to have committed the offence. The erroneous reference to s.27(1) could not have misled him.

[19] Since, in my opinion, the reference to s.27(1) was not in any way misleading, the J.P. could have amended the charge so as to designate the offence as being contrary to s.27(2) of the By-Law. The ticket sufficiently described the offence by the written description. Upon the amendment being made the conviction was properly entered. There was no prejudice to the appellant since, in any event, the potential penalty is the same under both subsections. The fact that the appellant did not have the assistance of counsel at the hearing in J.P. Court is irrelevant to this issue.

[20] Section 683(1)(g) of the *Criminal Code*, applicable to summary conviction appeals by virtue of s.822(1), provides that an appeal court may "amend the indictment, unless it is of the opinion that the accused has been misled or prejudiced in his defence or appeal". As previously stated, the appellant could not have been misled by the erroneous reference to s.27(1) of the By-Law. He cannot be prejudiced by an amendment now since his counsel addressed that point. Furthermore, I note that there is a six-month

limitation period on these prosecutions so, even if I were to set aside this conviction, there is nothing to prevent the issuance of a new Information designating the correct section of the By-Law.

[21] I hereby amend the ticket Information so as to specify s.27(2) of By-Law 3722 as the offence. Therefore the appeal from conviction is dismissed.

2. <u>Exercise of Discretion by the By-Law Officer:</u>

[22] The second issue raised on behalf of the appellant goes to the question of penalty.

[23] The By-Law provides for a general penalty of a fine of up to $5,000.00 (s.48). However, it also provides an alternative (in s.49) by the payment of a "voluntary penalty":

> 49. Pursuant to Section 48 of this By-law, an officer may issue a Summary Offence Ticket Information in the form prescribed by the *Summary Conviction Procedures Act* and Regulations, to any person who violates any provision of this By-law and such person may, in lieu of prosecution, pay the City the voluntary penalty set out in Schedule "D" of this By-law for the offence, prior to the court date specified on the ticket.

Schedule "D" of the By-Law specifies that the voluntary penalty payable for an offence under section 27, where one is speeding more than 30 kilometres over the limit, is $100.00.

[24] In this case the By-Law Officer did not give the appellant the option to pay the voluntary penalty. The space on the ticket to specify the voluntary penalty was crossed out and the word "Court" written in. The appellant had no option but to appear in court.

[25] On this appeal the appellant's counsel submitted that the By-Law Officer was obligated to give the voluntary payment option to the appellant. Section 49 refers to how an accused person <u>may</u> pay the voluntary penalty in lieu of prosecution. In addition, it was argued that the ticket issued to the appellant is the form of ticket authorized by the *Summary Conviction Procedures Act* and, if this form is used, then the appellant is entitled to pay the voluntary penalty. If there is any ambiguity or confusion in this regard, then, as with all penal statutes, the interpretation that is most beneficial to the appellant must be adopted.

[26] The "voluntary penalty" scheme is authorized by s.11 of the *Summary Conviction Procedures Act*:

> (2) The Commissioner, on the recommendation of the Minister, may prescribe a form of ticket summons under subsection 9(1) having an additional part or endorsement on it to the effect that the accused may pay out of court a specified sum if the accused wishes to plead guilty.
>
> (3) An accused is not required to appear in answer to a summons if, within the time stated in the summons, the accused:
>
> (a) signs the plea of guilty endorsed on the summons, and
> (b) delivers the summons and the specified penalty to the place stated in the summons,
>
> and on doing so, the accused shall be deemed to be convicted of the offence charged.

[27] The "additional part or endorsement" respecting the voluntary penalty must be included as part of the ticket. Section 9(1) of the Act specifies the contents of a ticket:

> 9.(1) A ticket must consist of the following parts:
>
> (a) information;
> (b) report of conviction;
> (c) police record;
> (d) summons;
> (e) any other parts either separate or attached to the ticket that may be prescribed, including the additional part or endorsement mentioned in subsection 11(2).

[28] These sections simply mean that if, for an offence, the voluntary penalty provision may be used, the part relating to that provision must be part of the ticket issued to the offender. Nothing in these sections imply that if the form of ticket contains a part relating to the voluntary penalty then that is the option that must be offered to the offender. It is not the form of ticket that determines that but the provision which authorizes the use of that option for the specific offence. That is to be found, in this case, in s.49 of By-Law 3722. This is so because the Act, in s.11(8), leaves to the municipal by-law making authority the power to designate the offences for which the voluntary option can be used:

> (8) A municipal council may, by by-law, provide for, in respect of a summons,

> (a) the offences under any by-law in respect of which a penalty may be paid out of court to the municipal corporation in place of appearing in answer to the summons; and
> (b) the amount of the penalty payable in respect of an offence provided for under paragraph (a).

[29] Section 49 of the By-Law (reproduced above) states that "an officer may issue" a ticket with the voluntary payment option. Ordinarily the use of the word "may" means a permissive power not a mandatory one. Here there is nothing to suggest otherwise. The voluntary payment option is one that may be extended to the offender but does not have to be given to him or her.

[30] In my opinion the discretion extended to by-law officers in this regard is consistent with the requirement to prosecute and penalize offenders in a manner appropriate to the gravity of the offence. The fact that the maximum penalty (under the voluntary payment schedule) for speeding is $100.00, regardless of the circumstances, implies that it is to be used in the normal, "run-of-the-mill" case. The fact that there is, however, a general penalty clause in s.48 providing for fines of up to $5,000.00 implies that the "voluntary penalty" option is not to be used for unusual or more serious situations. There is nothing inherently objectionable about giving by-law officers such a discretion. This discretion, of course, must be exercised in a *bona fide* manner but there is nothing in this case to suggest that the officer was acting arbitrarily or with an ulterior motive.

[31] An analogy can be drawn to the discretion extended to prosecutors in criminal cases to choose, for many types of offences, to proceed summarily or by way of indictment. That choice has significant ramifications for an accused both in terms of procedural options and the potential severity of penalties. The existence of such a discretion has been constitutionally validated: *R. v. Century 21 Ramos Realty Inc. et al* (1987), 32 C.C.C.(3d) 353 (Ont.C.A.), leave to appeal to S.C.C. refused (June 11, 1987).

[32] I have concluded that there is no obligation to extend the voluntary payment option to all offenders. The issuance of a ticket in the approved form does not predetermine the use of that option.

3. Sentence:

[33] Since the J.P. at trial did not impose a fine, counsel, in an effort to avoid sending the matter back to the J.P., made submissions as to an appropriate penalty should the appeal fail.

[34] The appellant was driving more than 70 kilometres per hour over the speed limit. The area he was driving in is within the urban area of the city. He was driving at dusk when visibility would ordinarily be impaired. He was driving in an area where there had been a previous fatality involving use of a snowmobile. Granted the appellant was a new resident in the municipality but, if he was going to operate a vehicle, it was incumbent upon him to familiarize himself with the applicable regulations. Those regulations are imposed for the safety of the public.

[35] Considering the excessively high rate of speed I do not think this can be classified as a "routine" case. As such I think it warrants a penalty higher than that set by the voluntary payment schedule. An appropriate fine would be $250.00.

Conclusions:

[36] The appeal from conviction is dismissed.

[37] The original sentence, that consisting of the licence suspension and the order for community service work, is hereby set aside. In its place there will be a fine of $250.00, payable in two months' time.

[38] There will be no costs of this appeal.

J.Z. Vertes,
J.S.C.

Dated at Yellowknife, NT
this 10th day of February 1998

Counsel for the Appellant: Austin F. Marshall

Counsel for the Respondent: Geoffrey P. Wiest

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