Date: 2010 07 14
Docket: S-1-CR-2010000026

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

GLEN VILLEBRUN

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

MEMORANDUM OF JUDGMENT

[1] The Appellant was convicted of offences under s. 119 of the *Motor Vehicles Act*, R.S.N.W.T. 1988, c. M-16 and s. 40 of the *Liquor Act*, S.N.W.T. 2007, c. 15 after an *ex parte* trial before a Justice of the Peace.

[2] The Appellant, who is self-represented, appeals the convictions and the sentences imposed.

[3] I need not deal with the grounds of appeal put forward by the Appellant as the transcript of the *ex parte* trial reveals a fatal flaw in the proceedings. The prosecution's sole witness, an adult, was not sworn in nor did he give a solemn affirmation before testifying. This is not a case of refusal to be sworn or affirm; the witness was simply not asked to do either.

[4] The requirement that a witness testify under oath comes from the common law. The fundamental rule of the common law is that no evidence can be given in the absence of an oath: *R. v. Antrobus*, [1946] B.C.J. No. 86; [1947] 2 D.L.R. 55 (B.C.C.A.).

[5] As the offences the Appellant was charged with are territorial offences, the Northwest Territories' *Evidence Act*, R.S.N.W.T. 1988, c. E-8 applies. It provides that a witness may also testify on affirmation instead of an oath: s. 23. For criminal offences, s. 15 of the *Canada Evidence Act*, R.S.C. 1985, Chap. C-5 also permits an affirmation instead of an oath.

[6] There are also certain exceptions to the rule that evidence must be given under oath or affirmation in the case of children (s. 25 of the N.W.T. *Evidence Act*; s. 16.1 of the *Canada Evidence Act*) and adults whose mental capacity is in question (s. 16 of the *Canada Evidence Act*).

[7] Where none of the exceptions apply, and an adult witness does not testify under oath or affirmation, the result is that there is no evidence.

[8] The fact that there was an *ex parte* trial does not change things. Crown counsel argued that in these circumstances, the absence of an oath or affirmation should only go to the weight of the evidence. However, s. 4(1)(g) of the *Summary Conviction Procedures Act*, R.S.N.W.T. 1988, c. S-15 states that upon an accused failing to appear as required, the justice may "proceed *ex parte* to hear and determine the proceedings in the absence of the person as fully and effectually as if he or she had appeared". This clearly indicates that the trial is to proceed just as it would had the accused been present. The rules of evidence still apply.

[9] The Ontario Court of Appeal recently reviewed procedures in *ex parte* trials in *R. v. Jenkins*, 2010 ONCA 278; (2010), 253 C.C.C. (3d) 269. Referring to the statutory provision that permits *ex parte* trials in Ontario, the Court said (at paragraph 27):

> A defendant who does not appear for his trial is still presumed innocent. In the *ex parte* proceedings, the prosecutor must prove the defendant's guilt beyond a reasonable doubt according to the generally applicable evidentiary and procedural rules.

[10] In this case, albeit no doubt through inadvertence, the rule that no evidence can be given in the absence of an oath or affirmation, except in certain circumstances, was not followed.

[11] For the reasons set out above, the convictions and sentences are quashed and these matters are remitted for a new trial. Should the Crown intend to proceed with a new trial, the Appellant is to be served with a summons to appear.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
14th day of July 2010

The Appellant was self-represented.
Counsel for the Respondent: Marc Lecorre

S-1-CR 2010000026

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

GLEN VILLEBRUN

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

MEMORANDUM OF JUDGMENT OF
THE HONOURABLE JUSTICE V.A. SCHULER
