ONTARIO COURT OF JUSTICE
TORONTO REGION
OLD CITY HALL

IN THE MATTER OF
an appeal under subsection 135(1) of the
Provincial Offences Act, R.S.O. 1990, c.P. 33, as amended

B E T W E E N :	)	
	)	
HER MAJESTY THE QUEEN	)	**CHRISTOPHER SWEENEY,**
RESPONDENT	)	**Provincial Prosecutor for the**
	)	**Respondent**
— AND —	)	
	)	
	)	
DARELL WELLS	)	**TODD BROWN,**
APPELLANT	)	**Agent for the Appellant**
	)	
	)	
	)	
	)	

JUDGMENT

Lane J.

Mr. Wells was charged on August 15, 2001 with driving while under suspension contrary to the Ontario Highway Traffic Act, R.S.O. 1990 c. H.8 as amended, s. 53(1). On February 28, 2002, he was convicted in Provincial Offences Court, and sentenced to fifteen days in jail. The appellant appeals both the conviction and the sentence. I gave judgment with respect to this matter on October 16, 2002 with reasons to follow. These are those reasons.

The Evidence of the Crown

Mr. Wells' driver's licence expired naturally on May 19, 1992. Six months later, his driver's license was suspended for default in payment of a fine, effective November 27, 1992. The Registrar of Motor Vehicles certified that notice of this suspension was forwarded to him by registered mail at 362 Harvie Avenue, Toronto, his latest address on the records of the Ministry of Transportation.

On August 15, 2001, Mr. Wells was stopped for an alleged turn on an amber light while operating a motor vehicle. His address at that time was 544 Quebec Ave., Toronto. The Registrar certified that the original 1992 suspension was still in effect on that date. At that time, he was charged with the offence before this court.

The Proceedings in the Provincial Offences Court

Mr. Wells was unrepresented at trial. He was arraigned on the charge and asked for his plea. The following exchange occurred with respect to the driving while under suspension charge.

Clerk of the Court:	*How do you plead to this charge, guilty or not guilty?*
Mr. Wells:	*Can I address the court?*
Clerk of the Court:	*Guilty or not guilty?*
The Court:	*What do you want to say, sir?*
Mr. Wells:	*Well the thing is: I was before this court about a year ago with the same charge. Now I took care of the fines. And I paid the fine the court gave me. And then about a year later, I get pulled over, turning on an amber light. And the officer says that I have a suspended...*
The Court:	*What I don't want to do is to get into the case right now.*
Mr. Wells:	*Oh*
The Court:	*Nor can I give you advice with regard to how you plead to this matter, sir.*
Mr. Wells:	*Oh.*
The Court:	*I thought this is some sort of a qualified plea that you had.*
Mr. Wells:	*Oh*
The Court:	*Okay. So you know how you are pleading to this charge, sir: Guilty or not guilty?*
Mr. Wells:	*I guess I am pleading guilty.*
....	
Mr. Nicol	*The facts supporting the matter are as follows. On Wednesday, August 15th, in the year 2001, at approximately 5:23 PM, Mr. Wells was operating a motor vehicle, a Ford product, eastbound on Dundas Street West at Keele Street, here*

	in the City of Toronto. He was stopped by Officer Hughes, for a traffic violation, at which time it was determined that his driver's licence was under suspension, effective November 27th, in the year 1992, as a result of....
Mr. Wells:	*That's.......*
Mr. Nicol:	*....as a result of the default of the payment of a fine. The said suspension was in effect on August 15th, in the year 2001........*

(CERTIFIED COPY OF NOTICE OF SUSPENSION OF DARRELL WELLS' DRIVER'S LICENCE entered as Exhibit 1)

The Court:	*Okay. Before I take a look at that, Mr. Wells, are those allegations substantially correct? I don't want to look at it.*
Mr. Wells:	*The thing is, Your Honour, when I was pulled over, I was informed that I had a 10-year-old ticket that was outstanding. The thing is: when I paid the fine the year before that, I assumed that all my fines were paid. And I thought everything is okay until the officer pulled me over for the amber light.*
The Court:	*Okay. Is that all you wish to say?*
Mr. Wells:	*True*
The Court:	*All right. Plea guilty; be a conviction in this matter.*

The hearing then shifted to sentencing. The crown entered as Exhibit 2 Mr. Wells' driving record as of August 24, 2001. That record indicated that his licence expired naturally in 1992, and the status of his licence was "suspended, cancelled, unlicensed and unrenewable." The only notation on the record was the November 1992 suspension for unpaid fines. The crown indicated that he would leave to the discretion of the court what sanctions he felt appropriate. Thereafter the following occurred.

The Court:	*Now, Mr. Wells, is there something you want to say, sir?*
Mr. Wells:	*No, that's pretty much it. It's a 10-year-old ticket, came back to bite me.*
The Court:	*Could I see your driver's licence, please?*
Mr. Wells:	*I don't have the whole thing. All I have is the old picture.*
The Court:	*Okay. Where is your driver's licence, sir?*
Mr. Wells:	*I don't have it.*
The Court:	*Okay. Any good reason why you don't have it, sir?*
Mr. Wells:	*Well, it was under suspension. And then after that, I moved a few times, and...*
The Court:	*How much money did you owe, Mr. Wells?*
Mr. Wells:	*I believe it's a $96 ticket, something to that effect. I think it's a $96 ticket. I haven't paid it, because I knew I was coming to court, so...*
The Court:	*Okay. Is there any reason why you haven't paid it, sir?*
Mr. Wells:	*Because I just found out about it, your Honour.*
The Court:	*Okay. Mr. Wells, you've known about it for a long time, sir*
Mr. Wells:	*The 10-year ticket, sir, I did not.*
The Court:	*Okay. Mr. Wells, sir, let me try to explain something to you. Okay? When you have your licence suspended, you don't have a licence. And when you drive your car, you should have in your pocket a valid Ontario driver's licence.*
Mr. Wells:	*I understand that.*
The Court:	*And when you don't have a valid Ontario driver's licence in your pocket, that should be a good indication to you, sir, that there is something wrong with your*

	driving privileges.....Now, you have not had a driver's licence in your possession for seven or eight years. Okay? Now you are driving a car without a driver's licence. Who do you think you are?
Mr. Wells	*Well...*
The Court:	*Your licence has been suspended for 10 years, for $90.*
Mr. Wells:	*Yeah.*
The Court:	*And guess what? You continue to allow your licence to be suspended for $90.*
Mr. Wells:	*M'hm*
The Court:	*Because you refused to pay the fine.*
Mr. Wells	*As I.......*
The Court:	*Don't stand there and tell me you didn't refuse it, sir. You have been driving the car for 10 years without a driver's licence.*
Mr. Wells:	*Well....*
The Court:	*Correct?*
Mr. Wells:	*I haven't been driving for 10 years, sir.*
The Court:	*Mr. Wells, I wasn't born yesterday.*
Mr. Wells:	*No, I realize that, your Honour*
The Court:	*Okay? So how many years have you been driving without a licence?*
Mr. Wells:	*I actually haven't been driving, your Honour. I moved.....*
The Court:	*Mr. Wells, you know, I love to believe something about you, sir. You are driving a car. You are stopped by Mr. Hughes through an amber light. You have no driver's licence in your possession.*
Mr. Wells:	*Yes, I realize that, your Honour.*
The Court:	*Okay. So why don't you try to come straight with me, sir?*
Mr. Wells:	*I basically am, your Honour. The vehicle sat there for the longest time. I got stupid. I moved it. The one day I did move it. That's what happened.*
The Court:	*I am sorry. Do I have "stupid" written on my forehead?*
Mr. Wells:	*No, sir*
The Court:	*Did I not get rob of (sic) before I came in here? You know, you really get into this thing about "See, I really didn't know, Your Honour." You see, I can't believe this sort of stuff "I didn't know." And then the other hand, "See, my car sat there for a longest time. And it was just that one day I moved it." You see, you can't have it both ways. You can't say you didn't know. And on the other hand, "I did know." Mr. Wells, why can't you just be honest?*
Mr. Wells:	*Your Honour, I am being honest about that ticket.*
The Court:	*All right. No problem. Anything you want to say with regard to sentencing?*
Mr. Wells:	*No*
The Court:	*Okay. You will be sentenced to jail, obviously, because you obviously refused to pay any fines.*
Mr. Wells:	*Your Honour, I paid my fines*
The Court:	*Sir. You didn't pay your fines. They are outstanding for 10 years. You still haven't paid it.*
Mr. Wells:	*What I am saying, your Honour....*
The Court:	*Okay. Sir, you see the problem with all this is you don't seem to get it. You don't seem to get it and you can't even be honest with me today....*
Mr. Wells:	*I, I, Your Honour.....*
The Court:	*Okay. What else do you want to say, sir?*
Mr. Wells:	*To be very honest with you, I did not know about that 10-year-old ticket. I thought I had paid all my fines when I came before this court, a little more than a year ago. I have documentation in my wallet to prove that.*
The Court:	*Okay. Is that all you wish to say now?*
Mr. Wells:	*Yes*
The Court:	*All right. As I've indicated, Mr. Wells, I have no idea what you are doing, sir, and what you are up to at this particular point. But all the things you've told me, sir, are just not true.*

> *You have not had a driver's licence for nearly 10 years. Now you want this court to believe that the only possible time that you drove was when Mr. Hughes stopped you for going through an amber light. You were just making a mistake. The other side of it all, you want this court to believe that you had no knowledge whatsoever that your licence was under suspension. So you can't have it both ways, sir.....*
>
> *You come back before this court, sir. You want this court to believe that you've paid fines. Your record shows only one entry, sir. It shows one entry: in 1992, your licence suspended for non-payment of fine.*
>
> *You've known about it a long time. You've made no inquiries whatsoever with regard to your driver's licence. You continue to drive a motor vehicle. And you stand here today, still not having paid the fine, with that look on your face like, "What is this guy talking about? He has no idea."*
>
> *Sir, you've taken a position. And it's a very foolish position. No way, sir, this is going to continue in this way, sir. All right. You will be sentenced to imprisonment for 15 days.*

Grounds of Appeal

The appellant set out ten different grounds of appeal. These grounds can be consolidated and summarized as follows:

1) That the Justice of the Peace erred in law in not striking the guilty plea as it was equivocal, and raised a potential defense.
2) That the sentence imposed by the Justice of the Peace violated fundamental principles of sentencing.
3) That the conduct of the hearing by the Justice of the Peace raised a reasonable apprehension of bias, and thereby violated s. 7 and s. 11(d) of the Charter.
4) That an appropriate remedy in the circumstances is a stay of proceedings and an order for solicitor and client costs payable to the applicant.

For the purposes of analysis, I will deal with these grounds in the order indicated above.

Analysis

1) Striking the Plea

Section 7 of the Provincial Offences Act provides that a defendant who does not wish to dispute the charge but wishes to make submissions as to penalty, "including the extension of time for payment," may attend for trial, plead guilty to the offence and make submissions as to penalty. The justice is given the discretion to enter a conviction and then hear submissions under oath, orally or by affidavit. Where the "explanation" tendered by the defendant under section 7, however, is incompatible with a guilty plea such that it may constitute a defense to the charge, the justice should strike the plea, and advise him of his right to a trial on the merits: *R. v. Adgey, [1975] 13 C.C.C. (2d), 177 (S.C.C.); and R.v Brosseau, [1969] 3 C.C.C. 129 (S.C.C.).*

That Mr. Wells, like many defendants in the provincial offences trial courts, was unrepresented by counsel or a professional agent imposes a duty on the Justice of the Peace to ensure that his plea of guilt was a valid guilty plea at common law. The Supreme Court of Canada in *Brosseau, supra.* indicated that when a plea of guilty is entered and there is any reason to doubt that the accused understands what he is doing, the judge is obliged to make inquiry to ascertain that he does. If it appears that the accused did not fully appreciate the nature of the charge, or the effect of his plea, or if the matter is left in doubt, failure to make due enquiry may be grounds for which an appeal court will allow the plea of guilty to be withdrawn.

The requirements for a valid guilty plea have been set out more recently by the Ontario Court of Appeal in *R. v. Theriault (1992), 17 C.R.(4th) 247.* The guilty plea must be voluntary, unequivocal, and informed. Voluntariness is assumed unless there are circumstances indicating otherwise. Pressure from counsel or a person in authority, offer of a "plea bargain" or other inducement, intoxication, mental disorder, limited intelligence are all factors that can affect voluntariness. The plea cannot be qualified, modified, or uncertain. The accused must be aware of the nature of the charge, the effect of the guilty plea, and its consequences. To meet this requirement, the charges and the facts relied on by the crown should be read to the accused and he should be given an opportunity to comment. He should also be informed that there will be no trial and that

he will be sentenced by the judge then presiding. He must also be aware that the plea will result in a conviction, and the nature of the potential penalty.

The Ontario Court of Appeal in *R. v. Dallaire [2001] O.J. No. 1722* endorsed the *Theriault* procedure, and held that failure to follow it did not invalidate the guilty plea, unless the court's failure to do so resulted in genuine prejudice to the accused. *The Criminal Law Amendment Act, 2001, S.C. 2002, c. 13 (Bill C-15A, in force September 23, 2002)* now mandates criminal courts to conduct a guilty plea enquiry. The court may accept a guilty plea only if satisfied the accused is making the plea voluntarily, and understands that the plea is an admission of the essential elements of the offence, the nature and consequences of the plea, and that the court is not bound by any agreement between the accused and the prosecutor. Again, there is a saving provision indicating that failure to fully inquire whether these conditions are met does not affect the validity of the plea.

Notwithstanding the distinctions which exist between provincial offences and criminal offences, judicial interpretation of and corresponding practices under the Criminal Code (Canada) carry significant weight. The utility of a guilty plea enquiry has been recognized at common law for several decades particularly with respect to unrepresented defendants. The recent statutory amendment under the Criminal Code now extends that enquiry to guilty pleas from all defendants, represented or not. In the Provincial Offences courts, where defendants do not have the advantage of disclosure in advance and where there are no duty counsel to provide summary assistance, the duty falls on the presiding Justices to ensure that guilty pleas are valid. Conducting a guilty plea enquiry as done in the criminal courts provides a means of discharging that duty.

In this case, Mr Wells told the Justice of the Peace, prior to taking his plea, that at the time of the alleged offence, he thought that he had paid the outstanding fine and that he had no knowledge that his licence was still suspended. His immediate explanation should have alerted the Justice of the Peace to the obvious fact that his proposed guilty plea was not unequivocal. When the facts were read in by the crown, he still did not

admit them, but reiterated that, when he was pulled over, he had assumed all his fines were paid. Prima facie, driving while suspended is a strict liability offense, where no proof of mental element is required, although a defendant can avoid liability by proving that he took all reasonable care or exercised "due diligence:" *R. v. Sault Ste. Marie (City) (1978) 40. C.C.C. (2d) 353 S.C.C.).* Where an accused has paid the outstanding fines before being stopped by the police, however, the charge could potentially be dismissed because the actus reus of the offence has not been proven: *R. v. Zembal (1987), 1 M.V.R. (2d) 335 (Ont. Prov. Ct.).* In that case, the licence was pending reinstatement as opposed to under suspension. Notwithstanding Mr. Wells' equivocation, the Justice of the Peace entered a conviction against him.

Having heard an indication that there could be a potential defence to the charge, the Justice of the Peace was duty-bound to halt the proceedings and refer the matter for trial. I do not accept the submission of Mr. Sweeney that Mr. Wells' plea of "I guess guilty" was "a manner of speech which could well indicate resignation rather than equivocation." Nor do I accept that a defendant who does not explicitly accept the facts read in by the crown, but gives an explanation that could raise a potential defense, can be said "not to disagree." In this case, the record is clear that the guilty plea entered by Mr. Wells was qualified and uncertain. The refusal of the Justice of the Peace "to get into the case right now" and his refusal to make any further enquiries, effectively forced Mr. Wells to enter a plea which on its face was clearly equivocal.

The fact that Mr. Wells later made a number of statements to the court during his sentencing which Mr. Sweeney submitted were contradictory and could not be said to raise a defence to the charge is, to my mind, irrelevant. I shall deal with the conduct of the sentencing hearing in greater detail later. For the purposes of whether the guilty plea should be struck, it is sufficient to say that when an unrepresented accused raises a potential defence in entering a guilty plea, he or she is entitled to have that defence considered before conviction is entered. The best procedure to ensure fairness is for the presiding jurist to strike the plea and refer the matter for a new trial before someone else.

The fact that there may be conflicts in the jurisprudence as to defences that can be raised to a driving while suspended charge is also irrelevant to the validity of the initial guilty plea. Although I am inclined to agree with the reasons of my brother Fairgrieve J. in *R. v. Bellomo [1995] O.J. No. 313 (Ont. Ct. Prov. Div.)*, it is unnecessary for me to determine whether his decision is correct. Nor need I make any comment on the other cases cited by the crown such as *R. v. Lowe (1991) 104 N.S.R. (2d) 283 (N.S.C.A.) and R. v. L'Hirondelle [1993] A.J. No. 449 (Alta. Q.B.)* as to the need for due diligence. In the present case, there is no evidentiary foundation for any judicial determination as to the validity or not of whatever defence Mr. Wells sought to assert. Mr. Wells had no opportunity to make full answer and defence through evidence before the court. The questions put to Mr. Wells and the answers given by him during the course of the sentencing hearing cannot be used retroactively to bolster a guilty plea which was defective on its face.

For the reasons set out above; I find that the guilty plea entered by Mr. Wells must be struck, and his conviction set aside.

2) Appropriate Sentence?

S. 53(1) of the Highway Traffic Act, R.S.O. 1990, c. H.8 as amended provides that the penalty for driving while license is suspended is, for a first offence, a fine of not less than $1,000 and, for each subsequent offence, a fine of not less than $2,000 and, in both cases, a maximum fine of not more than $5,000, or imprisonment for a term of not more than six months. The only record filed by the crown referred to a single suspension for an unpaid fine in November 1992. After the conclusion of his inquiries, the Justice determined that Mr. Wells woulu be sentenced to jail for fifteen days "because you obviously refused to pay any fines."

There are three problems with this sentence. These relate to the conduct of the sentencing hearing, the basis on which the justice made his sentencing decision, and the sentencing principles which he did not appear to consider.

The conduct of the sentencing hearing raises significant concerns. The crown made no submissions as to sentence, and put forth no aggravating facts upon which sentence should be based. As the appellant was unrepresented, the presiding Justice proceeded to ask questions on which to base his sentence. As required by s. 57(1) of the Provincial Offences Act, he asked the defendant if he had anything to say before sentence is passed. Section 57(3) of the P.O.A. also provides that

> *"the court may make such inquiries, on oath or otherwise, of and concerning the defendant as it considers desirable, including the defendant's financial circumstances, but the defendant shall not be compelled to answer."*

Although the Justice clearly has jurisdiction to "make inquiries" as indicated, his power to do so is not unconstrained. Questions can be asked about the defendant, but not about the offence: *Drinkwater and Ewart, Ontario Provincial Offences Procedure, Carswell, 1980, p. 218.* This is an important distinction. Questions about the offence are inappropriate as they can (as they did in this case) lead to the defendant "volunteering" additional information which can place him or her in greater jeopardy. This violates the fundamental principle that, at all stages in the court process, the defendant has a right to remain silent, and cannot be made a compellable witness against himself, or be required to incriminate himself. The statute itself makes it clear that the defendant cannot be compelled to answer questions put to him.

The power under s. 57(3), furthermore, is directed particularly to the financial circumstances of the defendant, so that his capacity to pay can be considered in imposing an appropriate sentence. It has been found, for example, that it is an error in principle to impose a fine without an investigation into the defendant's ability to pay, or to impose a fine which he or she lacks the means to pay within a reasonable time: *Czumak v. Etobicoke (City), unreported, September 16, 1994, Fairgrieve J., Ont. Prov. Ct.*

In this case, the presiding jurist made no inquiries about Mr. Wells, nor about his financial circumstances. At the conclusion of the sentencing hearing, we know nothing about who he is, what his circumstances were since 1992, what he does for a living, nor

how much (if anything) he earns. The presiding Justice explicitly imposed a custodial term on his own assumption that Mr. Wells "had obviously refused" to pay any fines for ten years. Mr. Wells repeatedly denied this assertion. Nor was it proven in proper evidence before the court. Mr. Wells said that he was unaware of the outstanding fine, and then that he had thought he had paid all his fines when he was before the court a year ago. Although he said that he had documentation in his pocket to prove it, the court did not ask to see the documents he sought to tender.

Equally important, Mr. Wells' position was not contradicted by any submissions or evidence of the crown. Even if his guilty plea were a valid guilty plea, the Supreme Court of Canada in *R. v. Gardiner (1982), 68 C.C.C. (2d) 477* has indicated that a plea of guilty carries with it only an admission of the essential legal ingredients of the offence, and no more. Failure to pay fines imposed on previous occasions can be taken as an aggravating factor: *R. v. Mellstrom (1975), 22 C.C.C. (2d) 472 (Alta. C.A.)* When that factor is disputed, however, the prosecution must prove the existence of that factor beyond a reasonable doubt. In the present case, the presiding justice asserted the existence of an aggravating factor without the required proof. Jumping to the conclusion he did, and using it to justify a custodial term, was an error in law.

Another problem is that recourse to a custodial term on the facts in this case appears inconsistent with fundamental principles of sentencing in criminal and quasi-criminal courts. Although there was an official record filed from the Ministry of Transportation indicating a license suspension in 1992 for unpaid fines, there was no record before the court of any convictions under the Highway Traffic Act, the Criminal Code, nor any other provincial statute. The onus of proving a prior record rests on the crown. Absent such proof, Mr. Wells was in law a first offender.

That a custodial term is permitted under s. 53(1) P.O.A. does not mean that a custodial term should be imposed. Historically, criminal courts have been slow to sentence any first offender to imprisonment. The position has been that the proper sentencing of first offenders requires the sentencing judge to exhaust all other

possibilities before concluding that imprisonment is required: *R. v. Stein (1974), 15 C.C.C. (2d) 376, at p. 377 (Ont. C.A.); R. v. Biron (1991), 65 C.C.C. (3d) 221 (Que. C.A.).*

This use of imprisonment only as a last resort has now been codified in s. 718.2(d) and (e) of the Criminal Code (Canada) and extended to all defendants in criminal courts: *R. v. Gladue (1999), 133 C.C.C. (3d) 385 (S.C.C.)* These provisions, enacted by Parliament with respect to criminal matters in 1995, require that "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances," and that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders....." Where Parliament or the Legislature has imposed no statutory minimum sentence, and the liberty of the defendant is at issue, jurists in all courts, including the provincial offences courts, should adhere to the principles of sentencing which are well-established at common law and now codified, with respect to criminal matters, in the Criminal Code (Canada). To do otherwise would be to impose more stringent penalties for quasi-criminal provincial offenses than those customary in criminal matters.

For these reasons, the appeal with respect to sentence is granted.

3) Apprehension of Bias?

The right to a fair trial before an impartial judge is protected at common law and by sections 7 and 11(d) of the Charter. Regardless of the correctness or not of the actual decision made by the trial judge, if a reasonable apprehension of bias arises from either words or conduct of the judge, it colours the entire trial proceedings. The Supreme Court of Canada in *R. v. S. (R.D.) (1997), 118 C.C.C. (3d) 353* reviewed the importance of this principle. As Corey J. indicated at para. 104-105:

> *"Impartiality can be described...as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions..... In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues."*

The test is not whether actual bias exists, but whether there is a reasonable apprehension that it does. In other words, the presiding judge must not only be impartial, but must also appear to be so.

Proof of actual bias is not required, nor is mere suspicion enough. The test was articulated by de Grandpre J. in *Committee for Justice and Liberty v. Canada (National Energy Board), [1978] 1. S.C.R. 369* at p. 394, affirmed *by R. v. S (R.D.), supra.* at para. 111, and, most recently by the Ontario Court of Appeal in *R. v. Brown (April 16, 2003)* at paras 37-39:

> *,,,the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information...[The] test is: What would an informed person, viewing the matter realistically and practically--and having thought the matter through--conclude?"*

As Corey J. indicated, the test has a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. There is a "strong presumption of impartiality that applies to judges," and the threshold for a finding of real or perceived bias is high. The onus of demonstrating bias, or a reasonable apprehension of bias, lies with the person who is alleging its existence, and "a finding of a reasonable apprehension of bias should not be made except on the basis of cogent evidence:" *Brown, supra, para. 105.*

Whether a reasonable apprehension of bias arises will depend entirely on the facts of the individual case. Apprehension of bias could arise in several ways. Examples are contact or conversation between one of the parties and the judge once a trial is under way; or previous findings of credibility by the judge in a related matter. Where a plea of guilt is struck after the presiding judge hears admissions and/or submissions on sentence, the matter should be tried by another judge to avoid an apprehension of bias: *R. v. da Silva (1985), 18 C.C.C. (3d) 102 (Ont. C.A.); R. v. Mitrevski, [2001] O.J. No. 2202 (S.C.J.).*

Problems may also arise from judicial comment in the course of the proceeding. As Martin J.A. indicated *in R. v Valley (1986), 26 C.C.C. (3d) 207 (Ont. C.A.)*, the judge

> *"may question witnesses to clear up ambiguities, explore some matter which the answers of a witness have left vague or, indeed, may pt questions which should have been put to bring out some relevant matter, but which have been omitted. ....The judge has the duty to intervene to clear the innocent....(and) to ensure that the accused is afforded the right to make full answer and defence....*

In his review of the jurisprudence at p. 231-232, Martin J.A. identified the types of judicial interventions which have resulted in the quashing of convictions. These include: 1) questioning of an accused or his witnesses to an extent or in a matter which conveys the impression that the judge is placing his authority on the side of the prosecution or that he disbelieves the accused or his witnesses; 2) judicial interventions making it impossible for the defence to present its case properly; 3) judicial interventions preventing the accused from doing himself justice or telling his story in his own way; 4) comments suggesting that counsel is acting in a professionally unethical manner, or denigrating the integrity or good faith of the defence. The very recent decision of the Ontario Court of Appeal in *Brown, supra.* is an illustration of how a reasonable apprehension of bias can be found if the presiding judge openly indicates a distaste or aversion to a particular type of defence such that the defendant could have reasonably perceived that the judge was denigrating his defence or that the judge was placing his authority on the side of the prosecution.

The ultimate question to be answered is not whether the accused was in fact prejudiced by the interventions. The issue is whether he might reasonably consider that he had not had a fair trial or whether a reasonably minded person who had been present throughout the trial would consider that the accused had not had a fair trial: *Brouillard v. The Queen (1985), 17 C.C.C. (3d) 193.*

At the outset it is important to note that provincial offences courts are intended to provide a speedy, efficient and convenient method of dealing with offences under provincial legislation. The underlying philosophy of the Provincial Offences Act is to encourage persons to represent themselves personally at trial. The courts that hear these

matters are given a wide discretion as to how they proceed. Justices presiding in these courts are encouraged to give unrepresented defendants some latitude in matters of procedure and evidence, provided there is no offence done to basic principles of law and evidence. *R. v. Hill [1987] O.J. No. 1935 (Ont. Ct. Prov. Div.).* Dealing with long lists, many defendants representing themselves, others represented by paid agents who may, or may not, have any legal training--are significant challenges for any jurist. Notwithstanding the informality that may be necessary in these courts, it is equally true that the basic principles of the common law and the Charter also apply. This extends to a hearing before an impartial tribunal without any reasonable apprehension of bias.

The record of the exchange between the presiding jurist and Mr. Wells raises several concerns. Apart from the problems already discussed with respect to the taking of the plea and the substance of the sentencing hearing, it is apparent that the presiding jurist became increasingly aggravated with the defendant as the exchange between them continued. His own assertions of fact which were denied by the defendant, his tendency to interrupt the defendant, the sarcasm he directed to him, and his failure to look at the documentation which the defendant sought to tender, all indicated that he had developed an animus to the defendant. Jurists are entitled to make findings of credibility against an accused person, but not as a result of a judicial inquisition, and not without giving the defendant a full opportunity to present his case. At the conclusion of this matter, the defendant could well have concluded that he had not been given a fair hearing. A reasonable observer of the entire proceeding could also conclude that the jurist had put the authority of his office on the side of the prosecution, and that the defendant was precluded from presenting his case properly or from telling his story as he may have wanted.

Applying the tests indicated above, I find that there was a reasonable apprehension of bias in the circumstances of this case. This finding, based on the common law principles previously discussed, would also give rise to a breach of s. 7 and s. 11(d) of the Charter: *R. v. Stark [1994] O.J. No. 406 (Ont. Ct. of Justice. Gen. Div.*

Ferguson J.) paras 46-62. For that reason as well, the appeal of the conviction and the sentence ought to be granted.

4) Remedy?

The appellant seeks a stay of proceedings in this matter, and an order for costs against the crown. Under s. 138 of the Provincial Offences Act, the court may affirm, reverse, or vary the decision appealed from, or direct a new trial, and may make an order for costs incurred on the appeal.

In general, a new trial should be ordered unless there is no evidence to support a conviction or there are other reasons for not directing a retrial having regard to all the circumstances. In this case, Mr. Wells was sentenced to imprisonment for fifteen days, and, because of the O.P.S.E.U. strike which began shortly after his incarceration, served his full sentence. In the circumstances, an order for a new trial would be oppressive and would not serve the interests of justice. There are Charter implications to my findings in this matter, and a remedy under s. 24(1) of the Charter is available. In my view, this is one of those rare situations where a stay of proceedings seems appropriate and just in the circumstances.

Mr. Brown submitted that the defendant stood to gain nothing from this application, as he is not a driver, and he cannot be put back into the position he was before he served his sentence. He indicated that Mr. Wells' only motive for bringing the appeal was to serve the public interest and to ensure trial fairness for other litigants in the future. On this basis, he submitted that costs should be awarded on a solicitor-and-client basis.

I find, however, that there is no basis for an order of costs. Apart from the fact that the crown made no submissions as to sentence, the deficiencies apparent in the process before this court cannot be attributed in any way to the crown. On my reading of the jurisprudence, there is no basis in law for an order of costs against the crown in the

absence of misconduct by the crown: *R. v. Jedynack (1994) 20 C.R. (2d) 335 (Ont. C. Gen. Div.) at p. 343.* Mr. Brown relied on R. v. Pawlowski (1993) 12 O.R. (3d) 709 (Ont. C.A.) to support his submission that costs can be ordered against the crown for an anticipated Charter breach, even in the absence of crown misconduct. I agree with Mr. Sweeney, however, that decision in Pawlowski supra. reflects the fact that the crown had made two unsuccessful applications to the court, and the defendant was only awarded the costs of defending those applications. Clearly, that is a different situation from the matter before this court.

Decision

For the reasons set out above, the appeal of conviction and sentence is granted. There will be a stay of proceedings in this matter, and no order for costs.

Justice Marion E. Lane

May 23, 2003