SUPREME COURT OF YUKON

Citation: *R v Stephens*, 2016 YKSC 62

Date: 20161124
S.C. No. 16-AP002
Registry: Whitehorse

BETWEEN:

REGINA

RESPONDENT

AND

JAMES CARL ROGER STEPHENS

APPELLANT

Before Mr. Justice L.F. Gower

Appearances:

Vincent Larochelle — Counsel for the Appellant
Leo Lane — Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a summary conviction appeal from an *ex parte* conviction on a charge of driving over .08, contrary to s 253(1)(b) of the *Criminal Code*, RSC, 1986, c C-46, (the "*Code*"). The appellant was sentenced to four months in jail, less credit for remand time, as well as a three-year driving prohibition. There are two issues: (1) was the decision of the trial judge to proceed *ex parte* arbitrary or unreasonable, and did it give rise to a miscarriage of justice? and (2) were the reasons for judgment on the conviction insufficient to permit appellate review?

ANALYSIS

1. Was the decision of the trial judge to proceed ex parte arbitrary or unreasonable, and did it give rise to a miscarriage of justice?

[2] The appellant was charged with impaired driving and driving over .08 for an incident on April 11, 2015. The information was sworn on May 11, 2015.

[3] On May 13, 2015, the appellant failed to appear pursuant to a promise to appear and an endorsed bench warrant[1] was issued for his arrest. On May 15, 2015, the appellant appeared, the bench warrant was vacated and he was released on an undertaking. He was unrepresented at that time.

[4] On July 22, 2015, the appellant had counsel, but failed to appear and a further endorsed bench warrant was issued. He appeared in court the next day, on July 23, 2015, with his counsel. The bench warrant was vacated and he was released on a new undertaking.

[5] On August 12, 2015, the appellant discharged his counsel on the basis of a breakdown in the solicitor-client relationship.

[6] On August 26, 2015, the appellant entered not guilty pleas, and two days later the trial was set for December 11, 2015. At that time he was unrepresented.

[7] On December 11, 2015, the appellant attended for his trial before a deputy judge of the Territorial Court. Mr. Nils Clarke appeared on behalf of the Yukon Legal Services Society ("Legal Aid") indicating that the appellant had attended at the Legal Aid offices the day before wanting a new lawyer. Mr. Clarke suggested that the appellant was entitled to have a second counsel appointed to represent him, but the problem was that the Crown was prepared to proceed to trial that day. Mr. Clarke also indicated that the

[1] If arrested on such a warrant, the appellant could be released by a police officer in charge, as opposed to having to come to court.

appellant had some medical issues and was taking “a fair amount of medication” at that time. In particular, Mr. Clarke stated as follows before the Court:

> MR. CLARKE: ...there are some medical issues that Mr. Stephens has. But, in my respectful submission, he would certainly benefit from - from having counsel ... he’s not bad about staying in contact with Legal Aid… The down side is that Crown, I gather, is prepared to proceed to trial today…
> THE COURT: Did you get any sense that there was a stalling effort here on the part of Mr. Stephens or that he is attempting to gain the system?
> MR. CLARKE: My sense, Your Honour, is that Mr. Stephens is facing a number of challenges. I believe he faces some physical challenges, he has some - he - he’s taking a fair amount of medication right now. I believe he’s going the best - the best he can… he should have a lawyer…

[8] Crown counsel then confirmed that she was ready to proceed and that three Crown witnesses were present: a civilian witness who had been flown in from Old Crow, as well as two RCMP officers. The Crown also indicated that upon a conviction, the appellant would be facing “a significant jail term”. Finally, she indicated that the civilian witness’ testimony would probably only take five minutes, if that.

[9] The trial judge then stood down the matter for a few minutes while Mr. Clarke attempted to review the Crown’s evidence from the civilian witness with the appellant. When he returned, Mr. Clarke indicated that the evidence was not “critical to this prosecution… but I’m having difficulty getting through to Mr. Stephens right now”.

[10] The appellant then asked to be sworn in and answered questions from the trial judge, including the following exchanges:

> Q … What I really want to find out from you is why did you leave this until yesterday when you knew your trial was going ahead today?

> A I did not realize - like I - I asked for help. I've been all over town asking for help. I went to FASSY [the Fetal Alcohol Syndrome Society of Yukon], I went to Human Rights, and, you know, they're like, well, you know, we feel bad for you, but nobody will help me. And I - you know, I - I don't know what I'm doing. I was trying to go to school to be a lawyer. Like some - some of my people were my teachers and - you know, and then I got asked to leave court because they said I brought a weapon, a 17th century trade act to the Russian proof mark (phonetic) to school. They said I brought a weapon to school? I mean you know, that's absurd… I even have "*amicus curiae*" as my second tattoo…
> Q Are you - are you feeling fairly well today, Mr. Stephens in terms of your health?
> A Yeah. I've never been - my back's really sore, but I've never been unlawfully at large and now I have a document saying that I'm unlawfully at large. I got a warrant vacated and the police officer outside, I'm at the fair working because I have an impaired, the first day the judge picked me up.
> Q Okay, just a second. When was the fair?
> A In the summertime.

It is worth remembering that this exchange occurred on December 11, 2015.

[11] In the result, the trial judge decided to proceed to hear the evidence of the civilian witness from Old Crow. The witness stated that she was a support worker at the Options for Independence building in Whitehorse in April 2015. On Saturday, April 15th, while working in the building, she noticed an individual named Jimmy trying to get into the building. She observed that his voice was slurred and she concluded that he had been drinking. The witness then observed this individual getting into his vehicle and driving towards the downtown area. She believed the individual was intoxicated and noted his licence plate number. The witness then called the RCMP to report the incident.

[12] When the trial judge asked the appellant if he had any questions for the witness, he replied:

> I - I agree with what she said, yeah…. Well, that's pretty much what happened, yeah.

[13] The trial judge then adjourned the matter over to December 18, 2015, for the purpose of fixing a date for the continuation of the trial. In the meantime he told the appellant to get over to Legal Aid.

[14] On December 18, 2015, the appellant appeared in fix-date court. He was still unrepresented. When the Crown reminded the court that the appellant was supposed to get a lawyer, the appellant made the following statement:

> I've been injured. I'll get one, it's just going to take a bit more time. I've got like a pregnant dog in the car right now ready to give birth any minute now that I got sort given to me last week and, I don't know, it's getting really big, but no puppies yet. Well at least maybe -- now, if I go outside, there might be…

The justice of the peace then proceeded to schedule the continuation of the trial for March 18, 2016. She also scheduled an appearance on February 19, 2016, when there was to be a "check-in" with the Territorial Court, presumably to see if the appellant was prepared to proceed to trial.

[15] On February 19, 2016, the appellant failed to appear and an endorsed the bench warrant was issued for his arrest. The trial date of March 18, 2016, was confirmed.

[16] On March 18, 2016, the appellant failed to appear. At that time, the Crown only had one remaining RCMP witness to call, and his evidence was not expected to be lengthy. Both the trial judge and the Crown were initially under the mistaken impression that the trial had already commenced on an *ex parte* basis on December 11, 2015.

However, this mistake was quickly recognized by the Crown and she confirmed that the appellant had in fact appeared on December 11, 2015, when the civilian witness from Old Crow testified. The Crown further informed the trial judge that the appellant had failed to appear on February 19, 2016. Then, the following exchange took place between the Crown and the trial judge:

> MS. LAVIDAS: So I understand that the RCMP have seen him around town, but we have not seen him here, and so there's a warrant - endorsed warrant for him now [from February 19th].
> THE COURT: So what is your preference?
> MS. LAVIDAS: We can proceed today if –
> THE COURT: Sure. And it's just the one RCMP witness?
> MS. LAVIDAS: It's just one RCMP witness.
> THE COURT: Okay.

[17] The power of a summary conviction court to grant an adjournment or to direct that a matter proceed to trial *ex parte* is found in s 803 of the *Code*. The relevant subsections are as follows:

> (1) The summary conviction court may, in its discretion, before or during the trial, adjourn the trial to a time and place to be appointed and stated in the presence of the parties or their counsel or agents.
>
> (2) If a defendant who is tried alone or together with others does not appear at the time and place appointed for the trial after having been notified of that time and place, or does not appear for the resumption of a trial that has been adjourned in accordance with subsection (1), the summary conviction court
>
> > (a) may proceed ex parte to hear and determine the proceedings in the absence of that defendant as if they had appeared; or
> >
> > (b) may, if it thinks fit, issue a warrant in Form 7 for the arrest of that defendant and adjourn the trial to await their appearance under the warrant…

[18] The standard of review of the exercise of judicial discretion in granting an adjournment was addressed in *R v Toor*, 2001 ABCA 88, a decision of Paperny JA, sitting alone as a chambers judge on the Alberta Court of Appeal. There, the accused was charged with spousal assault. The trial judge refused a request for an adjournment by defence counsel based on the accused's ill health. The Crown had objected to the adjournment because it was the second date scheduled for trial, and two Crown witnesses as well as an interpreter were in attendance. The charge was also somewhat dated. The trial proceeded in the absence of the accused, but defence counsel cross-examined both Crown witnesses. Therefore, Paperny JA held that the trial did not proceed *ex parte*. Rather, the issue was whether the trial judge properly exercised his or her discretion in refusing the adjournment. Interestingly, Paperny JA determined this to be a question of mixed fact and law, but the Supreme Court authority she relied upon seems to say that if the discretion was not exercised judicially, then the reviewing court would deal with the issue as a question of law. The following passages from the reasons are relevant:

> 12 I am not satisfied that the issue raised is a question of pure law. The issue, at its highest, is whether an adjournment ought to have been granted. Whether the learned trial judge erred in refusing to grant an adjournment in these circumstances is a question of mixed fact and law. While there may be cases where an exercise of discretion is a pure question of law, this is not.
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> …
>
> 15 … The granting of adjournments and the exercise of judicial discretion are generally afforded a considerable degree of deference, and the law is well established in the area.

> 16 Section 803(1) provides that the summary conviction court may adjourn a trial "in its discretion". The proper exercise of that discretion must not be arbitrary or unreasonable: R. v. Barrette, [1977] 2 S.C.R. 121. This court, in following Barrette, has also adopted the test that error will be overlooked if there has been no miscarriage of justice: R. v. Harrison and Alonso (1982), 38 A.R. 304 and also, R. v. Underwood (1995), 174 A.R. 234.
>
> 17 Moreover, the principles governing appellate review of the granting of adjournments leave this court without jurisdiction where the discretion to adjourn was properly exercised. The rule was set out in the Supreme Court of Canada decision in Darville v. The Queen (1956), 116 C.C.C. 113, where Taschereau J. stated at p. 115:
>
> > I do not feel that it is essential in the present case to determine if the trial judge exercised his discretion in refusing the postponement of the trial in order to allow the appellant to subpoena his witnesses. If it were a proper exercise of discretion, I am satisfied that this exercise of discretion would not be reviewable by this Court (Mulvihill v. The King (1914), 49 S.C.R. 587, 23 C.C.C. 194, 18 D.L.R. 217), as it would be without jurisdiction, the question being a question of fact. If the discretion of the learned trial judge was not exercised in a judicial way, then this Court would have jurisdiction, as it would be dealing with a question of law . . . (my emphasis)

In the result in *Toor*, Paperny JA dismissed the application for leave to appeal on the basis of the refused adjournment.

[19] In the case at bar, I conclude that the trial judge was both arbitrary and unreasonable in directing that the matter proceed *ex parte* on March 18, 2016. I further conclude that there was a miscarriage of justice. I say this for the following reasons.

[20] First, it is clear from the outset with the exchanges between the trial judge, Mr. Clarke, and the appellant on December 11, 2015, that the appellant had not only some physical medical challenges, but that there should also have been concern about

potential cognitive or mental health issues. The appellant's explanation for why he waited until the day before to speak with Legal Aid is rambling, nonresponsive and virtually incomprehensible. Further, the appellant's explanation for why he did not have a lawyer on December 18, 2015, was similarly rambling and non-responsive. Thus, the extent to which the appellant appeared to be experiencing difficulty understanding the questions put to him and the seriousness of the proceedings at hand should have been a factor taken into consideration by the trial judge before deciding to proceed *ex parte*.

[21] Second, the appellant had a history (in May and July 2015) of failing to appear, but then reappearing in court within a day or two of the nonappearance. Further, Mr. Clarke said that the appellant was "not bad about staying in contact with Legal Aid". Finally, the Crown was aware that the RCMP had seen the appellant "around town". Despite all of this information, the trial judge gave no consideration to whether there might be some merit to adjourning the matter for a day or two to see if the appellant could be located.

[22] Third, this was not an overly dated matter (which was the case in *Toor*), as the offences arose on April 11, 2015, less than one year prior to the *ex parte* trial on March 18, 2016. This was not considered by the trial judge either.

[23] Fourth, only one Crown witness was expected to testify and his evidence was not expected to be overly long. In addition, because it was an RCMP officer, and therefore a professional witness, there would be less disruption to the witness' convenience than if it were a civilian witness.

[24] Lastly, the trial judge was aware that the appellant was facing "a significant jail term" if convicted.

[25] Not only did the trial judge fail to give any consideration to these or any other factors, with respect, his immediate agreement that the Crown could proceed *ex parte* without any rationale given at all is almost tantamount to a delegation of the Court's discretion to the Crown. It is in that sense that I find the discretion was exercised arbitrarily and unreasonably. In the result, the appellant was convicted *ex parte* without the benefit of counsel and without the opportunity to cross-examine the RCMP witness. As the appellant's counsel suggested, cross-examination might well have borne fruit, especially with respect to whether the RCMP officer had sufficient grounds to form a reasonable suspicion that the appellant had alcohol in his body before making the demand that he provide a sample of his breath into the approved screening device. Ultimately, the appellant was sentenced to four months in prison, less credit for time served, and received a three-year driving prohibition. Given all the circumstances outlined above, I find that to be a miscarriage of justice.

[26] To be clear, my concern here emanates from the total lack of any consideration of the fairness and propriety of proceeding *ex parte* by the trial judge. It may be that the trial judge did have in mind the three previous failures to appear (including February 19, 2016), however we do not know that for sure. Thus, we do not know what he based his discretion upon or why he decided to proceed *ex parte*, because he provided no reasons for the decision. Had the trial judge engaged in some attempt at discerning whether it was fair and appropriate to proceed in this fashion, this Court may well have been required to afford the decision a considerable degree of deference, as suggested in *Toor*. However, since I do not know why the trial judge made this decision, I am unable to say that he exercised his discretion judicially. In this regard, I refer to my

earlier comments in *R v Nuyaviak*, 2015 YKSC 51. That case involved the discretion of a sentencing judge (interestingly, the same deputy judge as in the case at bar) to depart from a joint sentencing submission from counsel. Nevertheless, I think the comments I made about exercising discretion judicially are still pertinent:

> 22 In the case at bar, we have the unusual circumstance of the sentencing judge imposing a result which departed from the joint submission without giving any reasons whatsoever for doing so. Both Crown and defence counsel referred to this as an error in principle, and I agree with that description. Further, it seems to me that the consequence of this error is that it is not possible for this appeal court to give any deference to the sentencing decision as a whole, since it is not possible to examine how or why the sentencing judge weighed or balanced the relevant factors leading him to impose a sentence arguably more severe than that jointly proposed by counsel. For the same reason, it cannot be said that the sentencing judge exercised his discretion reasonably, since it is axiomatic that such discretion must be exercised *judicially*, which by definition requires a weighing of the relevant factors and the provision of reasons. (emphasis already added)

[27] The pros and cons of proceedings *ex parte* were addressed by the Ontario Court of Appeal in *R v Jenkins*, 2010 ONCA 278. As the Court was sitting as a panel of five, the decision has enhanced persuasive value. There, the appellant was convicted of driving while his licence was under suspension. The trial proceeded *ex parte* and the appellant was sentenced to 10 days in jail and ordered to pay a fine of $7,500. About three years later, when the appellant realized that he could not have his driver's licence reinstated until his fines were paid, he decided to appeal this and other convictions. One of the central issues in that case was the constitutionality of s 54(1)(a) of the Ontario *Provincial Offences Act*, RSO 1990, c P 33, which is worded almost identically to s 803(2) of the *Code*. The section permits *ex parte* trials even in circumstances where

there is a possibility of incarceration, which the appellant argued was a violation of ss 7 or 11(d) of the *Charter*. The Court of Appeal upheld the constitutionality of the provision.

[28] To be clear, there is no such *Charter* challenge in the case at bar. Nevertheless, the Court in *Jenkins* made a number of advisory remarks regarding the wisdom of proceeding with *ex parte* trials, which I find are instructive in the case before me:

> 31 In upholding the constitutionality of *ex parte* trials under the Act, I do not suggest that they are or should become the norm. Clearly, there is a risk of a miscarriage of justice inherent in an *ex parte* proceeding that does not exist where the defendant is present. This risk exists despite the significant legislative and administrative safeguards in place to facilitate a defendant's appearance at trial personally, by counsel or through an agent. For example, a defendant can, with a simple phone call to the location identified in the summons, find out when his or her trial is scheduled even if the defendant has missed the return date on the summons. In addition, some, but not all, miscarriages occasioned by *ex parte* proceedings can be rectified on appeal. To acknowledge that an *ex parte* proceeding can result in a miscarriage of justice does not, however, advance the constitutional analysis. A procedure need not be foolproof to be constitutional.
>
> 32 Prosecutors and judges have a role to play in minimizing the risk of miscarriages of justice through *ex parte* proceedings. An *ex parte* trial is not automatic when a defendant fails to appear in answer to a charge under Part III of the Act. The prosecutor must request an *ex parte* trial and the trial judge has the discretion to proceed *ex parte* or to take other steps, usually the issuance of a warrant, to compel the attendance of the defendant.
>
> 33 The court was told in oral argument that there are no formal guidelines in place to assist prosecutors in deciding when to request an *ex parte* trial. In every case where the prosecutor will seek a custodial sentence upon conviction, the prosecutor would be well-advised to consider whether an *ex parte* proceeding is appropriate. The longer the period of imprisonment sought, the less inclined the prosecutor should be to request an *ex parte* trial. If the prosecutor ultimately decides that it would be proper to proceed *ex parte*, he or

> she should advise the trial judge, before the trial begins, of their intention to seek a custodial sentence and the range of sentence that they anticipate will be appropriate. The trial judge can use this information to decide whether to proceed with the trial or take other action, such as adjourn the hearing and issue a warrant for the defendant's arrest.
>
> 34 Finally, it is worth noting that, as observed by Simmons J.A. during the oral argument of this appeal, declining to proceed *ex parte* and issuing a warrant for the arrest of the defendant carries its own significant risk of an unnecessary deprivation of liberty. Issuing a warrant is often the only viable alternative to an *ex parte* proceeding where the defendant has not appeared in answer to a summons. A person arrested on a warrant issued when he or she did not attend their trial may well spend some time in custody before that trial is held or the person is released on bail. If the person is convicted and receives a non-custodial sentence, he or she will have spent more time in custody than would have been the case had the trial proceeded *ex parte*. This risk is significant given that the vast majority of *ex parte* trials do not result in sentences of imprisonment.
>
> 35 I would uphold the constitutionality of s. 54(1)(a) of the *Act*. The court has jurisdiction to proceed with an *ex parte* trial when the conditions precedent under the statute are met. Whether the court should do so, will depend on the circumstances. The exercise of that discretion in a specific case is reviewable on appeal. (my emphasis, footnotes omitted)

[29] *Jenkins* was referred to with approval by Paciocco J in *R v Yussuf*, 2014 ONCJ 143. That case involved an accused charged with obstruction of justice. On the day of his assigned trial, the accused refused to identify himself. As duty counsel was initially unavailable, the trial judge had to obtain evidence from an RCMP officer regarding the identity of the accused before the Court. The accused then claimed not to understand the charge. The trial judge directed that a plea of not guilty be entered on his behalf. The Court then recessed for lunch and the accused was ordered to re-attend. He did so, but then brought an application for an adjournment, which the trial judge denied. The

accused then asked to speak to a lawyer, and was given a brief opportunity to do so with duty counsel. The accused then failed to return to court at the assigned time and the Crown moved to have him tried *in absentia* (*ex parte*). The trial judge agreed to do so, but provided fairly lengthy reasons for making that decision. Again, I find these reasons instructive in the case at bar.

[30] I note that the trial judge refers below to s 803(2)(b) of the *Code*, but the fact that he decided to proceed *ex parte* with the trial suggests that he must have meant s 803(2)(a). In any event, I have regard to the following passages from the decision:

> 13 The tenor of the Ontario Court of Appeal decision in *R. v. Jenkins* [2010] O.J. No. 1517 is that trial courts should order trials *in absentia* reticently, even though, as the British Columbia Court of Appeal noted in *R. v. Tarrant* [1994] B.C.J. No. 1600 at paras, 16-18, an accused who absconds during trial cannot later be heard to complain that he has been deprived of his right to be heard. Bearing the caution expressed in *Tarrant* in mind I granted the order pursuant to section 803(2)(b) of the *Criminal Code of Canada*.
>
> 14 First, the necessary conditions imposed by section 803(2)(b) were met -- Mr. Yussuf was being tried summarily, and had failed to appear upon the resumption of his trial after the adjournment I had ordered.
>
> 15 Second, I concluded that it was in the interests of justice to proceed *in absentia* in spite of the strong preference for adjourning a matter and issuing a bench warrant in cases even of voluntary non-attendance. My decision to go ahead was based on a combination of the delay, the investment that had already been made in moving the matter along, the nature of the charge and potential consequences, and the need to maintain the integrity and repute of the administration of justice.
>
> 16 In terms of delay, the charge was becoming stale -- dating back to the 3rd of September 2012, some 19 months ago. It was also clear to me that Mr. Yussuf was trying to avoid having the matter heard. He had failed to appear on 27 September 2012 in answer to the charge, requiring a bench

> warrant to be issued. He had also been ordered on 4 October 2012 to appear before court with identification, and yet refused to identify himself before me, resulting in a significant loss of court time.
>
> 17 In terms of the cost of putting things over, three police officers were present and had waited all morning for the trial to begin, at significant public cost. And as indicated, considerable court time had already been expended trying to move the case forward in spite of Mr. Yussuf's lack of co-operation.
>
> 18 I considered that, while any criminal charge is serious and any deprivation of liberty is a manifest incursion into someone's liberty interest, the charge Mr. Yussuf was being tried on was, in terms of penalty and process, the least serious form of criminal offence in the *Criminal Code*, carrying a maximum sentence of 6 months incarceration, and typically involving no incarceration or a short period of custody. Had the offence been one of the more serious offences in the *Criminal Code* I would have been far less inclined to proceed as I did.
>
> 19 In terms of the repute of the administration of justice, it was apparent that Mr. Yussuf left because of my refusal to grant his adjournment request and in the face of my expressed direction that he re-attend for the trial that would be taking place in the afternoon. He demonstrated little respect for the court process, making it clear to me that if the matter was simply put over, the difficulties that were experienced on this trial date were apt to be repeated at a future trial date in front of another judge. Through his behaviour, I concluded that Mr. Yussuf's behaviour had to be dealt with decisively.
>
> 20 The option of a trial *in absentia* recognizes that where an accused effectively waives his right to make full answer and defence by absconding, a trial judge is able to ensure that the Crown case is presided over and adjudicated fairly. I therefore ordered that the trial proceed *in absentia*. (my emphasis)

[31] The Crown submitted that the three appellate decisions which were referred to with approval by the Ontario Court of Appeal in *Jenkins*, are still good law even if they

are all over 30 years old. Counsel submits that these cases all support the general proposition that where a litigant has notice of his trial date, and by his own conduct fails to attend either in person or by counsel, he cannot later be heard to complain that he has been deprived of his right to make full answer and defence.

[32] The first such decision is *R v Felipa* (1986) 55 OR (2d) 362(CA). There, the appellant was charged with driving while his licence was under suspension and using unauthorized licence plates. Both offences were under the Ontario *Highway Traffic Act*, RSO 1980, c 198. He was served with a summons to appear on September 9, 1985. He did not appear. The matter was adjourned to December 4, 1985, for trial. The appellant was not served with any notice of the adjourned date. On December 4th, the justice of the peace proceeded to hear the witnesses and convicted the appellant on both counts. The appellant had a long record for driving offences and received a sentence of six months imprisonment for driving while his licence was under suspension and a fine of $53 for the unauthorized licence plates.

[33] The issue before the Ontario Court of Appeal in *Felipa* was whether an *ex parte* summary conviction trial violated ss 7 and 11(d) of the *Charter*. Section 55(1) of the Ontario *Provincial Offences Act*, cited above, permitted the court to hold an *ex parte* trial, in much the same way as s 803(2) of the *Code*. While the Court recognized that the decision to proceed *ex parte* was discretionary, it made no further comment about how that discretion was to be exercised. Rather, the focus was on the defence argument that, where there was a possibility of imprisonment, ss 7 and 11(d) of the *Charter* required the court to adjourn the matter and issue process to bring the

defendant before the court so that he is able to face his accusers and make full answer and defence. To this, the Court of Appeal responded:

> 9 With respect we do not agree. Section 55(1)(a) does not deprive the defendant of his right to be present at his trial. To exercise the right the defendant need only appear at the time and place fixed for the trial. The section merely provides the machinery to be employed if the defendant does not avail himself of his right to appear at the trial: see R. v. Tarrant (1984), 13 C.C.C. (3d) 219, 10 D.L.R. (4th) 751 (B.C.C.A.), and R. v. Rogers, [1984] 6 W.W.R. 89, 34 Sask. R. 284, 13 C.R.R. 189 (Sask. C.A.).

The Court also appears to have been influenced by the fact that the *ex parte* trials allowed by the *Provincial Offences Act*, cited above, provided an efficient mechanism for dealing with the thousands of charges under the *Highway Traffic Act*, cited above, where about 25% of the time the accused did not appear:

> 11 The Provincial Offences Act is designed to provide a fair and efficient method for the trial of the large number of cases which are handled by the provincial offences court. Counsel for the respondent has placed before us the statistics for the period from April, 1985, to December, 1985. These indicate that during this period the provincial offences court handled some 57,000 charges under the Highway Traffic Act by summons or pursuant to Part III of the Provincial Offences Act. About 25% of those charged did not appear and were tried in absentia.

[34] I distinguish *Felipa* from the case at bar. First, the clear focus of the Court was on the *Charter* issue and not on how the discretion to order *ex parte* trials is to be exercised. Second, the court was obviously influenced by the significant number of traffic charges for which accused persons frequently do not appear and by the fact that *ex parte* trials provide an efficient means of disposing of such offences.

[35] *R v Tarrant* (1984), 10 DLR (4th) 751 (BCCA), was the second case referred to with approval by the Ontario Court of Appeal in *Jenkins*. There, the appellant was

charged with lending a firearm to a person impaired by alcohol. He appeared in Provincial Court on April 27, 1982, and entered a plea of not guilty. The trial date was set for July 13, 1982. The appellant failed to appear. The Crown noted that witnesses had come from a considerable distance at some expense to the taxpayers. Nevertheless, the Crown asked that the matter be put over to the afternoon docket, with a warrant to be issued in the meantime, so that the police could try and locate the appellant and bring him before the Court. The trial judge made such an order. However, the Crown asked the matter to be reconvened shortly afterwards, as the police had obtained some new information, after numerous inquiries, that the appellant was in the Whitehorse area of Yukon fighting forest fires. Accordingly, there was no immediate likelihood of bringing the appellant before the Court and, after "further discussion", the trial judge ordered that the matter go ahead *ex parte* that afternoon under s 738 of the *Code* (the predecessor to s 803). The appellant was found guilty, but his sentencing was adjourned pending his arrest.

[36] When the matter came before the British Columbia Court of Appeal, the principal issues were: (1) whether s 738(3)(a) of the *Code*, which permits *ex parte* trials, infringed or denied the appellant's right to be present at his summary conviction trial, as guaranteed by the *Charter?* and (2) whether the trial judge improperly exercised his discretion when he determined that the proceedings should go ahead *ex parte*? The Court agreed with the following comments of the County Court Judge in dismissing the *Charter* argument:

> 13 …It is implicit in the arguments advanced by the appellant under the Charter that he has been "deprived" of his right "to life, liberty and security" and of his right to a fair hearing by the provisions of s. 738(3) of the Criminal Code. It

> is my conclusion, however, that if any rights were lost by the appellant, this was not the result of the provisions of the Criminal Code but rather the result of his own conduct.

As for the second issue, the Court held that the trial judge did not err:

> 14 …I think that there is no issue of law raised here, but I do not by that suggest that I think that the trial judge acted improperly. I do not think that he did. This appellant was not denied his right to be present at his trial. The judge went to greater trouble than he was required to when he directed that enquiries be made. In this summary conviction case the appellant was present when his date was fixed. The Provincial Court Judge was told that he was no longer in the area, that there were witnesses from elsewhere in British Columbia to be heard. The judge knew the charge. It was, I note, a case that ultimately resulted in a fine. I think that the Provincial Court Judge properly exercised his discretion and that there was no error of law shown there. I would dismiss the appeal. (my emphasis)

[37] I would distinguish *Tarrant* on the following basis. Although the court did consider whether the trial judge properly exercised his discretion to hold the *ex parte* trial, the record on the appeal allowed the Court to discern the probable reasons for the trial judge proceeding as he or she did, much more clearly than in the case at bar:

1) there were two Crown witnesses waiting to testify, and both had apparently travelled from Kelowna to Houston, BC for the trial;
2) there was no prospect of locating the appellant in the community, as he was known to be in the Yukon fighting fires;
3) there was discussion between the Court and counsel before the decision to proceed *ex parte* was made; and
4) there was no suggestion that the Crown was seeking “a significant jail term”, as in the case at bar.

[38] *R v Rogers*, [1984] 6 WWR 89 (Sask CA), is the third case referred to with approval by the Ontario Court of Appeal in *Jenkins*. There, the appellant was charged with driving over .08. He appeared before the Provincial Court on November 15, 1983, and obtained an adjournment until November 29th for plea. On November 29, 1983, the appellant appeared with counsel and entered a plea of not guilty. The trial date was fixed for February 13, 1984. On that date, neither the appellant nor his counsel appeared in the trial proceeded *ex parte*. The appellant was found guilty and on February 17, 1984, the court imposed a fine of $500, with a term of 60 days in default of payment. A warrant for nonpayment was subsequently issued and on April 9, 1984, the appellant was arrested, and then released upon payment of the fine. When the matter came before the Saskatchewan Court of Appeal, the main issue was whether ss 7 and 11(d) of the *Charter* guaranteed the right of an accused to be present at a summary conviction trial and whether s 738(3)(a) (again, the predecessor to s 803) was constitutionally invalid to the extent that it infringed upon that right. The Court noted its agreement with *Tarrant* and rejected the *Charter* argument as follows:

> …[I]n our view, s.738 (3)(a) of the Code does not deprive an accused of his right to be present at his trial. To exercise this right, he must appear at the time and place fixed for his trial. If, by his own conduct, he fails to attend (either in person or by counsel) and avail himself of that right, he cannot later be heard to say that he has been deprived of his constitutional rights. In the circumstances of this case, his non-appearance at trial resulted from his own course of conduct. We hold, in the circumstances of this case, that there has been no violation of the appellant's constitutional rights. No one tried to obstruct or balance away his right to appear at trial or his right to counsel or his right of appeal. Accordingly ss. 7 and 11(d) of the Charter are of no application in this case. The appellant's principal ground of appeal fails. On this branch of the case, we are in respectful agreement with the reasons

> for judgment of the British Columbia Court of Appeal in *R v. Tarrant*…

[39] I would distinguish *Rogers* as well, because the primary issue there was the constitutionality of s 738(3)(a) of the *Code*. Although the Court touched on the lack of a clear explanation from the appellant for his failure to appear, this was not in the context of a discussion about how the discretion is to be exercised in deciding whether to proceed with an *ex parte* trial. Rather, it was in the context of the appellant having applied for an order in the nature of *certiorari* to quash the conviction, when the appellant had a right of appeal from that conviction.

2. Were the reasons for judgment on the conviction insufficient to permit appellate review?

[40] This is an alternative argument by the appellant, which would only apply if I found that the trial judge was justified in proceeding *ex parte*. Nevertheless, I will dispose of it briefly.

[41] The reasons for conviction given by the trial judge were extremely brief, and are encapsulated in the following exchange with Crown counsel:

> THE COURT: Based on the evidence of the constable today, and the evidence of Anne-Marie Miller [the Old Crow witness], Ms. Lavidas, do you feel that the Crown has proven the case beyond a reasonable doubt?
>
> MS. LAVIDAS: Yes, Your Honour. The Crown's submission is that the Crown has proven the case beyond a reasonable doubt with respect to Counts 1 and Counts 2 [as written]. We have a valid ASD [approved screening device] demand, he did have the grounds to do the ASD demand. There are a number of indicia, impairment, or a number of grounds that he observed for the ASD demand, the speeding, the driving, and pulling him over, and odour of liquor, that he did the ASD demand, his movements, his mannerisms. It's the Crown's submission that this

> particular evidence that you have before you meets the test in *Stellato*, where any degree of impairment, a slight impairment, would be enough to prove impairment in the driving of the vehicle.
>
> THE COURT: All right. I agree with you. The case is proven beyond a reasonable doubt.
>
> With regard to this Information, it has two counts. Are you seeking one or two convictions here?
>
> MS. LAVIDAS: Just one conviction, Your Honour.
>
> THE COURT: And that would be on the 253(1)(b) that is Count 2?
>
> MS. LAVIDAS: Yes.

[42] Here, I agree with the Crown that reasons are not always essential to meaningful appellate review. The Supreme Court stated in *R v Sheppard*, 2002 SCC 26, at para 46:

> … [T]he duty to give reasons, where it exists, arises out of the circumstances of a particular case. Where it is plain from the record why an accused has been convicted or acquitted, and the absence or inadequacy of reasons provides no significant impediment to the exercise of the right of appeal, the appeal court will not on that account intervene. …

[43] I further agree that it is evident from the record why the appellant was convicted. The RCMP officer testified that he stopped the appellant because he was driving "noticeably fast". He was entitled to do so. Further, the officer listed several grounds for making the ASD demand:

1) driving at a "considerable speed" and "accelerating very rapidly in Rabbit's Foot Canyon";

2) unusual speech;

3) slow and deliberate movements when looking for his driving documents;

4) a smell of liquor which the officer believed to be coming from the appellant's breath; and

5) a civilian witness's report of an intoxicated driver with a licence plate that matched the appellant's.

[44] The record further indicates that the appellant failed the ASD, which justified a further breath sample demand. The Crown filed a certificate to prove that the two breath samples provided by the appellant indicated blood alcohol concentrations of 140 and 130mgs, respectively.

[45] In short, I agree with the Crown that the path to the conviction is plain from the record. Accordingly, I would dismiss this ground of appeal.

CONCLUSION

[46] Having found that the appellant's first ground of appeal is successful, I quash the conviction and order that a new trial be held.

_____
GOWER J.