

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

v.

MICHAEL JACK

J U D G M E N T

BEFORE HIS WORSHIP JUSTICE OF THE PEACE C. YOUNG
On AUGUST 12, 2010
at PETERBOROUGH, Ontario.

CHARGE: s. 136(1)(a) HTA - Fail to Yield to Traffic

A P P E A R A N C E S:

N. HENRY, Ms.,
P. SUTTON

Prosecutor for the Crown
Agent for the accused

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August 12, 2010

MR. JARVIS: Good morning, Your Worship.

THE COURT: Good morning, Mr. Jarvis.

MR. JARVIS: Your Worship, Number 22 on the docket, Michael Jack, is a matter that you are seized with. I don't know if you're prepared to deal with that matter now or not.

THE COURT: Sure.

MR. JARVIS: All the parties are here.

COURTROOM CLERK: Could the parties identify themselves for the record?

MS. HENRY: Yes, good morning, Your Worship. For the record, last name Henry, first initial "N" appearing as the municipal prosecutor with respect to this matter.

MR. SUTTON: And for the record, Your Worship, surname Sutton, S-U-T-T-O-N, first initial "P" appearing on behalf of Mr. Jack.

THE COURT: Mr. Jack is here?

MR. SUTTON: He is not.

THE COURT: Just bear with me, everybody. I'll be right with you. A trial commenced here in the Provincial Offences Court in the County of Peterborough on the 1st day of April, 2010. That trial concerned the laying of a charge under s. 136(1)(a) of the *Highway Traffic Act* of the Province of Ontario of fail to yield to traffic. The charge was laid against a Constable Michael Jack, at that time an officer working out of the OPP, Peterborough detachment. Officer Jack was charged under s. 136(1)(a). That charge was failing to yield to traffic on a through highway to which, as I said, under s. 136(1)(b), I just want

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to make sure of our -- no (1)(a). Officer Jack was charged. He pled not guilty.

5 The first witness was Sergeant Robert Flindall, and Sergeant Flindall testified that he was the supervisor on the day shift. He testified that they all were attending -- an Officer Payne, Sergeant Flindall and Officer Jack were attending a domestic-type matter on the 14th Line, Smith Township.

10 After they had been there some time they had determined as officers that it was not an emergent call, and they left. Sergeant Flindall was leading followed by Officer Payne, who in turn was followed by Officer Jack.

15 They were westbound, as I understand it, on the 14th Line of Smith and Officer Jack, when he reached the Peterborough County 23 road stopped and looked both ways and then turned southbound or left and proceeded on County Road 23.

20 Sergeant Flindall indicated that he looked in his mirror and that he noticed Officer Payne had also turned southbound as well. He added that it was safe for her to do so. He looked in his mirror and Officer Jack started to enter the intersection and in his opinion it would have been unsafe for Constable Jack to pull out.

25 The sergeant looked in his mirror and saw that there were four southbound motor vehicles, Officer

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Payne's and there others. Officer Jack did turn out into the intersection, turned left and caused the lead civilian motor vehicle to brake hard and Jack had to turn hard back into the northbound lanes to avoid a collision as he continued travelling in the northbound lane.

Other motor vehicles did not have to take to the ditch, if you will, to avoid a collision. Did not have to. Officer Jack was in the northbound lane for two to three hundred metres according to Sergeant Flindall before he could get back into the southbound lane. Southbound traffic was about a half a kilometre north of the intersection when the sergeant was at the intersection himself. The sergeant returned to the police station, dealt with other matters, and at approximately 12:15 p.m. he gave Officer Jack a ticket for failing to yield to traffic under s. 136(1)(a). Officer Jack had been -- I believe there had been a relationship between the two officers. One had been a probationary officer under him.

Officer Payne was behind Sergeant Flindall and did not see Officer Jack pull up and stop at the stop sign at the 14th Line of Smith and Peterborough County Road 23. He believes he remembers that the individual stopped behind Officer Payne.

Under cross-examination Sergeant Flindall testified that the civilian motor vehicle that was in question at first that was northbound was four to five hundred metres north of the intersection when

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5 he was at the intersection himself getting ready to
turn. Under cross-examination he testified that
there's a cage in his motor vehicle, there are rear
deck lights mounted, but that he had a clear view
to the rear, and that he was able to see things
through, not only his own vehicle, but Officer
Payne's motor vehicle that was behind him as well.
He could see quite clearly through the two of them
10 to Officer Jack's motor vehicle. He testified that
there was a period of from ten to fifteen seconds
that Officer Payne's motor vehicle was behind his.
The relevance of that escapes me.

15 Officer Jack, he testifies, not Officer Jack, but
under cross-examination, Sergeant Flindall, that he
pulled out, in his opinion, in his conversation
with Officer Payne, she contacted him to see if
Sergeant Flindall had seen Officer Jack make his
alleged turn. Officer Payne called her sergeant.
She was right behind him. She called him on her
cell phone and the officer stated to her sergeant
20 that she was able to watch the merging traffic
behind her. While using his interior mirror he
could see both police motor vehicles behind him and
he could see that when Officer Payne pulled out
there was some 200 metres between the other
25 vehicles and the intersection, and those were
observations of that. He made observations through
his left mirror and his inside mirror.

30 He returned to the station. As he had earlier
testified Officer Payne was at the station as well.
He was asked why it had taken some seven hours to

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lay the charge against Officer Jack and there really was no direct answer, although there was some indication that Officer Jack was out performing other duties for the balance of that day. There was no re-direct examination by the prosecution.

The second witness was one Officer Jennifer Payne. Officer Payne made notes 20 minutes after the incident at the station. She referred again to the call that the three of them had made at the private dwelling on the 14th Line of Smith at about 10:54 that morning. She herself was westbound on the 14th Line approaching Peterborough County 23. She was following her sergeant, and in turn she was followed by Officer Jack. She approached the intersection and the sergeant made a left-hand turn. She made a safe left-hand turn as well. The southbound traffic was 200 to 210 metres west of the intersection before she made her left-hand turn, and she saw southbound three other motor vehicles coming. She made the left turn. She in her mind determined that there was no way Officer Jack could make it. She looked in the mirror and saw Officer Jack as there were northbound vehicles coming by.

There was one southbound motor vehicle, she testified, that was right at the intersection when Officer Jack turned left and had to turn into the northbound lane. Officer Jack eventually pulled in behind her. When Jack pulled out the southbound motor vehicle was almost right beside him. She saw

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all of these events in her rear view mirror. She didn't see Officer Jack leave the stop sign. In her opinion his manoeuvre caused a danger.

5 She testified that she called her sergeant on her cell phone because she was shocked and in disbelief. Under cross-examination she testified that the sergeant made his turn. She couldn't estimate how far he was from the other motor vehicles. The time between the sergeant's turn and hers would have been, she estimated, ten to fifteen seconds. She estimated the speed of the motor vehicles coming in that direction southbound as being 80 kilometres per hour. She estimated she had more than enough time to make the turn. She testified she'd been an officer for 11 years. She testified that her motor vehicle as well had a cage and lights, et cetera, on the rear and on the back.

10 She testified when she was asked that she had not stopped the other motor vehicles who were present at that time, the vehicles that were also southbound, so that she might be able to get the best evidence of the charge that was laid against Officer Jack because she testified that was the sergeant's job. Officer Payne stated that they were also getting best evidence as they were police officers. We were getting best evidence from them because they were police officers.

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5 that the motor vehicles had to slow down because of the alleged manoeuvres by Officer Jack" her answer to that was that she did not see Officer Jack make his turn. "Did you see him turn into the southbound lane?" she was asked, and she testified, "Yes." Officer Payne was asked, "Why did you not notify the police by use of the police radio as opposed to a cell phone?" Her answer was, "I don't know why."

10 The following question was put to Officer Payne, "Cell phones were being discontinued at that time, the use of cell phones was being discontinued at that time. It would have appeared to have been a policy of your police force. Why did you use it while driving?" The answer by Officer Payne was that, "It was before the law was in existence and police officers are exempt from the law." At that point the Crown chose to rest its case.

20 The court was then presented with a motion from the defence that the court should consider a motion of non-suit and a directed verdict of not guilty based on the fact that a prima facie case had not been established.

25 The motion indicated that the first witness, Sergeant Flindall, did not prove the identity of the charged person. Secondly, he indicated that there was no evidence that the defendant was operating a motor vehicle in the northbound lane. One could surmise, but there was no evidence presented to the court that this, in fact, was

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happening or had happened, et cetera.

In due course on the 27th day of May I ruled that the motion for non-suit had not been made out and that in my opinion there was sufficient evidence to continue Officer Jack, and so we continued on on the 27th day of May.

At that point the Crown had rested their case and defence opened their case by calling the defendant, Officer Michael Jack. Officer Jack indicated that he had started his career here on August the 25th, 2008 and he was sworn in on January the 29th. He worked with a probationary officer and a coach officer for a while. That it had not worked out well. He felt, and this was his evidence on the stand, that he had been discriminated against, left out of many things, and because he spoke in his opinion, a different voice, his English. I believe Officer Jack was South African or something of that nature, but he spoke, not different grammar, but in a different manner.

There was a statement made in the evidence that Officer Payne never became his coach officer, and I couldn't verify that from what I had heard, whether there was an indication that she was going to be his coach officer. Nothing hinges on it in any event.

He testified that on the 1st of July, 2009 Officer Payne reprimanded him in front of another office or officers. He testified that on the 18th day of July, 2009 Officer Payne accused him of winking at

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5 her and said it wasn't professional, and he testified that he had done nothing at that time. That he had an involuntary movement in his eye and that he was being harassed and he felt that he was being constantly scrutinized.

10 There was another incident where the sergeant reprimanded him for some item and the sergeant told him that he was considering charging him with neglect of duty and insubordination under the *Police Act*. The reality was, he was never so charged. He testified that there had been a complaint that he associated with undesirable people. The complaint was unsubstantiated and after it had been spoken to he never heard of it again.

15 And all of those things are interesting to hear and look at, but they have absolutely no bearing on what we're here to do.

20 On the date of the incident, and this is direct evidence of Officer Jack, he was called along with the other officers to the 14th Line of Smith on a 911 call. He testified that after 20 to 30 minutes it was determined to be a not serious call. There were five cruisers and they started to leave the scene. Sergeant Flindall, Officer Payne and himself headed westbound. He was the last one in that line. He went west on the 14th Line and, of course, he believes he stopped and there's incidentally no evidence to the contrary. He believes he came to a complete stop at the 14th

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Line and Peterborough County Road 23. He believes he came to a complete stop. In all the other evidence there is no evidence in any way, shape or form, relating to the stop sign at the 14th Line and County Road 23, other than an acknowledgement that no one saw it or was looking at it.

He turned left on County Road 23, as did the other two officers. He testified that he looked and there were at that time no northbound motor vehicles. There were two southbound vehicles, both cruisers, and a vehicle well north of the 14th Line, which was southbound.

He testified that the southbound motor vehicles were about 100 metres at his best guess. He turned onto Peterborough County Road 23 and merged into the southbound lane. He noticed no motor vehicle southbound take any evasive actions as a result of his turn. He could not estimate how far Sergeant Payne was ahead of him. Maybe 100 metres, but not closer. He continued to the detachment and the sergeant advised him that he was to be charged.

He was never told of his situation prior to his arriving at the detachment. Eventually he was dismissed. He didn't believe he failed to yield the right-of-way to oncoming traffic. After training for driving, and now it was not clear in the evidence to me, whether this was driver training at that time or prior to that time. Again, nothing really hinges on it, but he did testify that on that driver training sponsored by

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5 the OPP five was the average that most officers scored. He scored 5.6 and 6.0 is the OPP standard. He then went for additional training and testified that he did quite well. He testified that he felt he had been harassed, humiliated, and that his accent had been brought up many times.

10 In cross-examination he testified he was going to the detachment. He testified that there was no van southbound in that lane, that the motor vehicles were northbound. He testified that the sergeant had told him he was considering laying a charge against him, but that he didn't.

15 The defence then called an Officer Lloyd Tapp from the OPP in Lindsay, and Lloyd Tapp was in highway investigations, Safety Division working road safety, 24 years an officer. Investigates numerous events. Fifteen years with Metro Police. Probably investigated some 500 events over that period of time. He has been qualified as an expert witness many times, especially in dealing with the elements of the offence of 136(1)(a) and (b).

20 He felt that the disclosure, et cetera, had not been complete, and given the evidence that we have heard, he felt that the charge as laid was inappropriate.

25 In cross-examination the cross-examination essentially from the prosecutor said, you know, asked a simply question, "Were you present at the scene," et cetera, the scene of the alleged
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offence, and, of course, the answer was no.

So ended the trial. The prosecution made their submissions and essentially saying that the officer was guilty as charged, and the defence made their submissions. And now it's time for me to make my submissions.

Well, it's a very interesting thing. There are elements in the evidence that I have heard that cause me some concern. One of them is the, I guess for want of a better word, the lack of exactness in the evidence proffered, and it's taken us some time in this trial to get to this point, and I take my share of the responsibility, but the best evidence as to what took place at that intersection and on County Road 23 stayed on that road forever that day. No way could one say the best evidence had been captured. Maybe the only thing that failed to be carried out was the stopping and the interviewing of the people who, if the allegations are correct, had been placed in danger by the actions of the third car pulling out. But certainly the evidence as given by the two officers, requires a most precise skill and I certainly don't possess it, but it's important sometimes, and this is one of those times. The ability to view things in their proper context, in addition to when you're driving and looking through cages and lights and hopefully not right side mirrors as opposed to left side mirrors, all kinds of things like we all know about.

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5 All of the other behavioural items that are part of this trial are none of my business. It's something for other people to deal with, but what we're concerned with is whether or not Officer Jack broke the law by failing to yield to oncoming traffic and stopping. Stopping and then failing to yield to oncoming traffic at the 14th Line of Smith Township and Peterborough County Road 23.

10 I do not feel there is enough evidence to substantiate a conviction. I truly don't. Because of some of the ancillary things that became part of the evidence, I'm taken into the case of R. v. W.D., and there are two times when you must acquit. One is if you believe the evidence of the defence or the prosecution. The second time is, even if you may not believe all of that evidence as given by the defence, if at the end of the consideration of that evidence you still find, not only doubt but a reasonable doubt, as to whether or not you can come to a decision of guilt, obviously, you must acquit.

20 As well where credibility is an issue for whatever reason, in this instance, because of the peculiar nature of the evidence and its lack of precision then I must first resolve that issue of credibility beyond a reasonable doubt before I can turn my mind to a finding of guilt or not guilty.

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30 Based on all of the things I have just said I am in no position to resolve the issue of credibility. I found myself thinking, "I'm going to go find a road

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and measure two and three hundred metres," and I thought to myself, "Well, that's not my job." My job is to listen to the evidence as presented.

In any event, I am unable to find Officer Jack guilty beyond a reasonable doubt and the charge against him is dismissed. Thank you both very much.

MS. HENRY: Thank you.

MR. SUTTON: Thank you.

--- ADJOURNED.

FORM 2

Certificate of Transcript
Evidence Act, subsection 5(2)

I, Patricia Anne Elizabeth Pimblott, certify
that this document is a true and accurate
transcript of the record of R. v. Jack
in the Ontario Court of Justice held at 70 Simcoe
Street, Peterborough, Ontario taken from DRD recordings.

Oct 5/10

Date

P. Pimblott

Patricia Anne Elizabeth Pimblott, C.C.R.