File No.: 016444

ONTARIO COURT OF JUSTICE
(Northern Region)

B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

-and-

GULED YUSUF

Appellant

APPELLANT'S FACTUM

PART I – STATEMENT OF THE CASE

¶ 1 Guled Yusuf was charged on the 7th day of November, 2001, that he did commit the offence of *Careless Driving* contrary to the *Ontario Highway Traffic Act*, s. 130.

¶ 2 The matter was heard and determined in the Ontario Court of Justice at 155 Elm Street, Sudbury, before His Worship C. Sanders on the 21st day of February, 2002.

¶ 3 The appellant entered a plea of not guilty, a conviction was registered after trial and the appellant was sentenced to pay a fine of $400.00.

¶ 4 The appellant moves against the conviction by way of appeal to the Ontario Court of Justice, Provincial Offences Appeal Court at Sudbury, Ontario.

PART II – STATEMENT OF THE FACTS

¶5 On the 7th day of November 2001, the appellant was operating a tractor-trailer northbound on Hwy 69, in the Northern Region. The appellant's motor vehicle left the northbound lanes, crossed the centre line of the highway, proceeded across the southbound lane and struck the guardrail.

¶6 After striking the guardrail, the motor vehicle swerved back on to the roadway, once again crossing the centre line. The vehicle then swerved toward the guardrail again, proceeded through the guardrail and traveled down a 60 foot embankment where it came to rest in the lake below.

¶7 The appellant was able to get out of the vehicle and climb up the embankment. He was cold and wet but he did not sustain serious injuries.

¶8 The appellant was met by a man who appeared to be a city or highway worker. They had a brief conversation just prior to the police arriving at the scene. This person was not called as a witness at trial.

¶9 Officer Hunt was called by the Crown as an expert witness in the field of accident reconstruction as he is a technical accident investigator. Officer Hunt's evidence was to the effect that he did not find evidence that the appellant had swerved prior to the accident occurring and further that the physical evidence revealed that the appellant's tractor-trailer had left the northbound lanes on a tangent to the curve in the roadway.

¶10 Officer Hunt's opinion was that the manner in which the tractor-trailer left the roadway was inconsistent with the appellant's explanation that he had swerved to avoid an animal and further that the evidence was more consistent with the Crown's theory that the appellant had fallen asleep while driving.

¶11 Although Officer Hunt was held out to be an expert in the field of technical accident investigation, he offered as fact in his evidence a detailed account of the driver's level of awareness and stages of sleep that he believes the driver to have been in as the events unfolded. These opinions were based primarily on an absence of markings on the roadway.

¶12 Officer Coulombe testified that a statement was taken from the Appellant at the scene of the accident and a subsequent statement to the same officer later at the hospital.

¶13 In both statements the appellant was alleged to have asserted that there had been an animal on the roadway and his efforts to avoid hitting the animal had caused the accident.

¶14 The Appellant was alleged to have provided a statement to Officer Drake at the roadside that was inconsistent with his statements to Officer Coulombe to the effect that he did not know why he hit the guardrail.

¶15 The Appellant gave evidence at trial. He indicated that he had not fallen asleep, that he was not tired and that the accident happened as a result of his swerving to avoid a large animal.

PART III – ISSUES AND THE LAW

THE JUDGEMENT AT TRIAL

¶16 The learned Justice of the Peace made an adverse finding of credibility against the appellant, the foundation for which is found in the *Reasons for Judgement* at page 86, line 22:

> "The driver said that when he climbed up the side of the embankment after getting out of the tractor there was a person there who he says looked like somebody that worked for the City, and this not being a city would maybe be somebody who worked for the road or somebody who maybe was working for the City and was out in that area. At this point, which must have taken a few minutes, the driver says he told this person that he had gone down the embankment. Now, in his own

> evidence he did not give any evidence that at this point he told this person that he tried to miss an animal and that as a result of him trying to miss the animal he went into the ditch which clearly if he had of tried to miss a large animal that would be the first thing he'd say, I tried to miss the animal, and in his own evidence he did not say that he told this person that he tried to miss the animal. Now, this person was not called as a witness, was not identified and went on his way."

¶17 The City worker was not called as a witness at trial and the details of the appellant's conversation with him were related to the Court by the appellant in his evidence in chief. The appellant was not cross-examined on this evidence nor did the Court make any inquiries of the appellant in this regard. The appellant's evidence is found at page 74, line 6:

> "When I went back on the highway at that time there was nobody yet on the highway, only me and myself. I realized—I saw a man coming—running by toward me. He was—he looked like a man who works for the City, but he fixes like—He looked a highway-repair man or something like that, and then he asked me you okay? And then I said, yes, I'm fine. He asked me if I needed help. I said, yeah, my tractor. He goes what happened? I said my tractor went down the ditch, and shortly later the Officers arrived, Officer Drake and then Officer Coulombe."

¶18 It is respectfully submitted that the learned Justice of the Peace erred in using this evidence, which simply formed part of the appellant's narrative, as the foundation for an adverse credibility finding.

¶19 Had the appellant attempted to lead evidence to the effect that he had mentioned the animal on the roadway to the City worker, the Court would have been obliged to rule the evidence inadmissible as it would have clearly been an affront to the rules of evidence as they relate to self-serving evidence and prior consistent statements.

¶20 David Paciocco and Lee Stuesser in *The Law of Evidence* (Irwin Law - 1996) at page 255, describe the rule against self-serving evidence in the following terms:

> "It is generally impermissible to prove that at some time prior to testifying, a witness made statements consistent with her testimony. Where that statement is

> being proved to show consistency, it violates the rule against self-serving evidence, or the rule against narrative, as it is some-times called. The reference to "self-serving" evidence comes from the fact that efforts are being made to bolster the credibility of a witness based on what that witness herself said."

¶21 The result is that the appellant was placed in an exceedingly untenable position. Simply put, the appellant was found not to be credible as a result of his not offering evidence that would have served only to bolster his own credibility. Such evidence is inadmissible.

¶22 Notwithstanding that it may have been open to the Court to reject the appellant's evidence for other reasons, it is clear that the error outlined above played a significant role in the credibility assessment of the appellant. Accordingly, the error cannot be said to have occasioned no substantial wrong or miscarriage of justice. Had the appellant been believed, he would have been acquitted.

¶23 In Colpitts v. The Queen, [1965] S.C.R. 739, Cartwright J. (as he then was) stated, at p. 744:

> "... once error in law has been found to have occurred at the trial, the onus resting upon the Crown is to satisfy the Court that the verdict would necessarily have been the same if such error had not occurred."

¶24 It is respectfully submitted that where the error in law may have affected the verdict, appellate intervention is warranted.

THE FIRST STATEMENT TO OFFICER COULOMBE

¶25 The Appellant was alleged to have made three statements to the authorities. It is respectfully submitted that the manner in which all of these statements were entered was improper.

¶26 The first statement was said to have been taken at the roadside by Officer Coulombe shortly after the accident occurred. The *voir dire* concerning the admissibility of this statement begins on page 4, line 25 of the trial transcript.

¶27 It became clear by the comments made by the Appellant immediately prior to the commencement of the *voir dire* that the sequence of events was disputed. At page 4, line 14 the appellant indicates the following:

MR. YUSUF: I don't recall making any statements.

THE COURT: Well the Officer is about to give information on a statement that you made and, therefore, we're going to have a *voir dire* to determine whether the statement was made under duress. Do you understand that?

MR. YUSUF: Yes, but I only spoke to this Officer on ...

THE COURT: We're not deciding anything about the statement at this point. All we're deciding is whether you made it of your own—

MR. YUSUF: But if I didn't make the statements?

THE COURT: Well, sir, you'll be able to ask the Officer questions. At this point you have to be re-sworn for the *voir dire*.

¶28 The Crown was permitted to put leading questions to her own witness during her examination of the Officer on the crucial subject as to when the statement was made, and who was present during its taking. The learned trial Justice failed to intervene to assist the unrepresented Appellant in this regard. At page 5, line 17:

Q. And no other Officers had appeared at the scene at this time?

A. No, Constable Drake was not too far behind, but I don't know if he was there at the time. Like, if he had arrived on the scene yet or not.

Q. But he hadn't spoken ...

A. No, I was the first one there and I was just in the process of figuring out what had happened.

¶29 The Officer was challenged by the Appellant during cross-examination as to whether Officer Drake was present when the statement was taken at page 6, line 22:

Q. Were you the first Officer on site?

A. Yes, I was.

Q. And when the prosecutor asked you how come and you didn't—she asked you that where was Officer Drake at the time that you said you didn't know exactly where he was at that time?

A. He was behind me.

Q. How much behind you? Like seconds, ten minutes, five seconds?

A. He must have been three to five minutes behind me, if that.

Q. So how did I end up in his cruiser before I ended up into—before I spoke to you?

A. Because I was assessing the scene and I spoke to you, and then I went to check on the tractor-trailer to see what I had—what was involved, what I need to do next, and then he arrived and took care of you.

¶30 Further in the cross-examination at page 7, line14:

Q. Where was I?

A. Well, I'm telling you I tried to spoke to you. I went to look for what else I needed to do and then when I was walking back he arrived on scene, so he was just a matter of minutes behind me.

¶31 The evidence of Officer Drake's presence at the scene and his involvement in the statement was clearly contested by the Appellant and was very much a live issue and accordingly the Crown was obliged to call Officer Drake on the *voir dire*. The Crown's obligation to call all persons in authority on a *voir dire* of this nature has been set out with clarity by the Supreme Court of Canada in R v. Thiffault, [1933] S.C.R. 509, per Duff C.J.:

> "Where such a statement is elicited in the presence of several officers, the statement ought, as a rule, not to be admitted unless (in the absence of some adequate explanation of their absence) those who were present are produced by the Crown as witnesses..."

¶32 It is respectfully submitted that Crown's failure to call Officer Drake as a witness on the *voir dire* was sufficient alone to raise a reasonable doubt as to the voluntary character of the Appellant's statement to the authorities. The Supreme Court in Sankey v. The King, [1927] S.C.R. 436, at 440-1, considered the issue:

> "...and, if another policeman was present, as the defendant swore at the trial, his evidence should have been adduced before the statement was received in evidence. With all the facts before him, the learned judge should form his own opinion that the tendered statement was indeed free and voluntary as the basis for

> its admission, rather than accept the mere opinion of the police officer, who had obtained it, that it was made "voluntarily and freely"."

¶33 Unfortunately, the difficulties with the admission of the statement and the unsatisfactory procedure followed do not end here. The principles of natural justice require that all parties be given the right to be heard in a fair trial. The trial Justice's obligation to ensure a fair trial is heightened when the accused is not represented by counsel. In R v. McGibbon, [1988] O.J. No.: 1936, the Ontario Court of Appeal stated the following:

> "Consistent with the duty to ensure that the accused has a fair trial, the trial judge is required within reason to provide assistance to the unrepresented accused, to aid him in the proper conduct of his defence, and to guide him throughout the trial in such a way that his defence is brought out with its full force and effect."

¶34 It is respectfully submitted that the learned Justice of the Peace failed in this regard. Not only did the trial Justice not inform the Appellant of his right to give evidence on the *voir dire*, he outlined the procedure to be followed on a *voir dire* improperly. At page 6, line 15:

> THE COURT: At this time you may ask the Officer questions concerning whether the statement was taken voluntarily or not. We will not talk about the statement at all. Do you understand? The statement will be either introduced or not introduced and at that time you will have your opportunity to talk about the statement.
>
> MR. YUSUF: Okay, I'd like to ask her a question.

¶35 At the conclusion of the Appellant's cross-examination of Officer Coulombe, the trial Justice again misdirected the Appellant as to his right to give evidence and the procedure to be followed on the *voir dire*. At page 8, line 11:

> THE COURT: Well that's different than this. If you have any questions to do with the *voir dire* whether it was taken with pressure then this is the time to ask the questions, if not I'll make a ruling on the *voir dire* and then we'll go into the statement or not go into the statement.

MR. YUSUF: You can go ahead with the statement, but I'm saying that I didn't speak to her at that time.

THE COURT: Therefore, at this point I will rule that the statement was taken without duress and you may give the statement. We will return to the trial proper.

¶36 It is respectfully submitted that the procedure followed on the *voir dire* was manifestly improper and the results obtained wholly unacceptable.

¶37 Where an accused person denies making a statement, the trial Justice should make a determination on the issue at the end of the trial based on all of the evidence it has before it. See R v. Park, [1981] 2 S.C.R. 64. The Appellant's denial that he had spoken to Officer Coulombe on the side of the roadway was left unaddressed at the conclusion of the trial. Had the trial Justice turned his mind to the issue, he no doubt would have noticed the inconsistencies in Officer Coulombe's evidence.

¶38 Composite exhibit 3-B entered at trial is a synopsis of the events prepared by Officer Coulombe. It is reproduced in part:

> "As [Officer Coulombe] pulled over, she was met by a male who advised he did not witness the accident but was the first one on scene and stated the tractor trailer involved is down the embankment into Rock Lake and the driver is out of the vehicle but requires medical attention.
> Cst. Coulombe dispatched an Ambulance while Cst. Drake took the driver into his cruiser to wait for the Ambulance.
> The driver verbally identified himself to Cst. Drake as: Guled Yusuf .....He stated to the officers that he was northbound on Hwy. 69 when he swerved to miss an animal and then lost control of the vehicle."

¶39 The synopsis clearly put the Appellant in Officer Drake's vehicle before speaking to Officer Coulombe. This prior statement by Officer Coulombe was inconsistent with her evidence taken on the *voir dire* and consistent with the Appellant's assertions during the cross-examination. Officer Coulombe's credibility was left unaddressed by the learned Justice of the Peace.

THE SECOND STATEMENT TO OFFICER COULOMBE

¶40 Officer Coulombe obtained a second statement from the Appellant at the hospital. It is respectfully submitted that the procedure followed on the *voir dire* concerning the admissibility of this statement was unacceptable. At the commencement of the *voir dire* the Appellant made the following comments at page 16, line 15:

> MR. YUSUF: Objection, Your Honour. The statement was taken at the hospital. I was on a nerve—nervous, very wreck at that time. I wasn't on my state of mind and I didn't have any lawyer present at that time, and I didn't have anybody to even consult. So I would advise the Judge that this statement would be thrown out because I was—I just jumped off an 80-foot cliff, Your Honour, and I'm nervous and I'm wrecked, and I just—I had back pains, so her testifying against me speaking that day is irrelevant because I wasn't even on a state of mind.

¶41 The Appellant made it clear that he was opposed to the statement being entered for various reasons including that he did not posses an operating mind at the relevant time. The difficulty arises at the conclusion of the Crown's case in chief on the *voir dire*.

¶42 The learned Justice of the Peace properly inquired of the Appellant as to whether or not he would like to give evidence on the *voir dire*. The Appellant answered in the affirmative. At page 21, line 21:

> THE COURT: Very well. Would you like to give evidence as to your state of mind that would show that you gave this statement under duress or medical condition that you would have not known what you were giving and that this Officer would have taken advantage of you?
>
> MR. YUSUF: Yeah, because she thought anybody that seen what happened in ...

¶43 After a brief exchange, the learned Justice of the Peace ruled the statement admissible and returned to the trial proper having denied the Appellant his right to give evidence.

¶44 Hill J., of the Superior Court of Justice commented on the right of the parties to be heard in R v. J.V., [2002] O.J. No.: 1027, at paragraph 97:

> "The bedrock of our jurisprudence is the adversary system: S.(R.D.) v. The Queen, supra at 364 per Major J. Within the rules of natural justice is the duty to act fairly including the need to afford to the parties a right to be heard, also known as the audi alteram partem rule"

¶45 And at paragraph 102:

> "A departure from this rule of natural justice constitutes an excess of jurisdiction: Supermarchés Jean Labrecque Inc. v. Flamand, supra at 236; L'Alliance des Professeurs Catholiques de Montreal v. La Commission des Relations Ouvrieres de la Province de Quebec et la Commission des Ecoles Catholiques de Montreal, supra at 199. In effect, the court acts unfairly and arbitrarily in breaching the rule and it should go without saying there is no jurisdiction to act arbitrarily: Dubois v. The Queen, supra at 230."

¶46 And at paragraph 105, citing Langdon J.:

> "The conduct of the justice of the peace in refusing to hear argument from a party against whom he intended to rule was a FLAGRANT violation of the most fundamental rule of any court - audi alteram partem. If such conduct were persisted in, it could give cause for removal from office of a judicial officer. It is not possible to be critical enough of this conduct. It was a clear and serious legal error and entitles the prisoner to review."

¶47 It is respectfully submitted that the trial Justice's refusal to hear from the Appellant on the *voir dire* constitutes a serious and overriding error that amounts to an excess of jurisdiction.

THE STATEMENT TO OFFICER DRAKE

¶48 The statement obtained by Officer Drake, which was alleged to have been made after the road side statement mentioned above, but prior to the statement taken at the hospital, was entered and its contents were inconsistent with the other two statements given by the appellant to Officer Coloumbe. Specifically, when asked what happened by Officer Drake, the appellant allegedly said "I don't know ....." See page 32, line 27.

¶49 The Crown requested of the Court that a third *voir dire* ensue to determine the admissibility of the statement. It became clear that the officer had not recorded any details of this statement in his notebook or accident report, and that there was no record that the appellant had ever been cautioned prior to giving the statement, and that there was no verbatim account of the conversation. It was also evident that the appellant had been in the company of other persons in authority prior to giving the statement, and that no disclosure of this statement had been made to the accused until after a mistrial had been declared as a result of the non-disclosure.

¶50 The statement that was eventually disclosed to the appellant prior to the second trial had not been reduced to writing until several months after it was allegedly made. Notwithstanding all of the above, the unrepresented appellant, who denied the contents of the statement, was permitted to waive his right to a *voir dire*.

¶51 In R v. Delmorone, [2002] O.J. No.: 3988, Libman J. of the Ontario Court of Justice conducted a thorough review of the authorities dealing with police investigatory techniques as they relate to statements taken from accused persons. He noted the following at paragraph 14:

> "While there is no absolute rule requiring the recording of statements, the concept of voluntariness is broadly defined to address both reliability and fairness concerns. The latter extends not only to the potential unfairness caused by the admission of the evidence at the trial itself, but also to the protection of the accused's rights during the investigative process: R. v. Moore-McFarlane (2001), 56 O.R. (3d) 737, 47 C.R. (5th) 203, 160 C.C.C. (3d) 493 at [C.C.C.] p. 514; Paul Calarco, "What Happens When Evidence Has Not Been Recorded? Staying Charges to Ensure a Fair Trial" (2001), 44 C.L.Q. 514."

¶52 And further at paragraph 15:

> "Where the authorities can easily obtain a reliable and permanent recording of an interview with an accused person who agrees to speak to them, and they elect not to do so, it must be emphasized that they run a very real risk of a finding by the court that the reason they did not do so is that they did not wish such a reliable and independent account to be made available for subsequent scrutiny. Indeed, such a

> context serves to make "the resulting non-recorded interrogation suspect": R. v. Moore-McFarlane, supra, [C.C.C.] p. 517"

¶53 Justice Libman's observations at paragraph 81 are particularly applicable to the case at bar:

> "A police officer who questions an accused without keeping a contemporaneous record of the interrogation risks an adverse finding on the accuracy of what the witness recalls. This applies not only in respect of the content of the accused's statement, but also on the question of the sequence in which matters were discussed: R. v. Bunn (2001), 153 Man. R. (2d) 264, [2001] 7 W.W.R. 32 (C.A.) at [Man. R.] p. 268; R. v. Barrett (1993), 13 O.R. (3d) 587, 23 C.R. (4th) 49, 82 C.C.C. (3d) 266 (C.A.) at [C.C.C.] p. 275, per Arbour J.A., rev'd on other grounds, [1995] 1 S.C.R. 752, 38 C.R. (4th) 1, 96 C.C.C. (3d) 319.
>
> To put it another way, the presence of such a contemporaneous record assists the prosecution to prove affirmatively all the surrounding circumstances leading up to the making of the confession: R. v. Koszulap (1974), 27 C.R.N.S. 226, 20 C.C.C. (2d) 193 (Ont. C.A.) at [C.C.C.] p. 197, per Martin J.A. A statement of a police officer's "interpretation of the substance of the answers to the interrogatories administered" will not suffice: R. v. Thiffault, [1933] S.C.R. 509, [1933] 3 D.L.R. 591, 60 C.C.C. 97 at [C.C.C.] p. 100."

¶54 It is respectfully submitted that the learned Justice of the Peace erred in permitting the unrepresented Appellant to waive his right to a *voir dire*. This is particularly so given that there was no contemporaneous record of the statement made and that the Appellant had denied the contents of the statement all together.

¶55 It is respectfully submitted that the errors outlined above are of such a nature that the conviction must be set aside.

PART IV – ORDER REQUESTED

¶56 It is respectfully requested that this Honourable Court set aside the conviction and direct that an acquittal be entered or in the alternative that a new trial be ordered.