SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Basha, 2009 NSSC 345

Date: 20091118
Docket: Ken No. 308407
Registry: Kentville

Between:

Her Majesty the Queen

Respondent

v.

Mohammed Abou Basha

Appellant

Judge: The Honourable Justice Glen G. McDougall

Heard: July 14, 2009, in Kentville, Nova Scotia

Counsel: Chris Manning, Ll.B., for the appellant
Darrell I. Carmichael, Ll.B., for the respondent

By the Court:

THE APPEAL:

[1] This is an appeal from a decision of C. MacDonald, J.P.C.. The appellant was convicted under ss. 254(5) of the **Criminal Code**, which provides that "[e]veryone commits an offence who, without reasonable excuse, fails or refuses to comply with a demand made under this section." The appellant asks this Court to allow the appeal, set aside his conviction and sentence and enter an acquittal; or, in the alternative, to order a new trial.

SUMMARY CONVICTION APPEAL:

[2] The standard to be applied by a Summary Conviction Appeal Court is set out in **R.** v. **Nickerson** (1999), 178 N.S.R. (2d) 189, 1999 CarswellNS 203, where Cromwell, J.A. (as he then was) said, at paras. 5-6:

¶5 Unlike appeals to this Court in summary conviction matters, appeals to the Summary Conviction Appeal Court on the record may address questions of both fact and law. Hallett, J.A., for the Court, recently described the role of the Summary Conviction Appeal Court judge in **R. v. Miller (G.C.)** (1999), 173 N.S.R. (2d) 26; 527 A.P.R. 26(C.A.), at pp. 27-29:

> "On an appeal to a summary conviction appeal court (in this Province, the Supreme Court of Nova Scotia), from a summary conviction, on the ground that the verdict is unreasonable or unsupported by the evidence, the duty of the Supreme Court judge as an appellate court is explained in **Yebes v. The Queen** (1988), 36 C.C.C. (3d) 417. McIntyre, J., for the Court, stated at p. 430:
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> > '...The function of the Court of Appeal, under s. 613(1)(a)(i) of the **Criminal Code**, goes beyond merely finding that there is evidence to support a conviction. The court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the court must re-examine and to some extent reweigh and consider the effect of the evidence. The process will be the same whether the case is based on circumstantial or direct evidence.' (emphasis added)
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> . . . . .
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> "On an appeal from a conviction for a criminal offence on the ground that the guilty verdict is unreasonable, the appellate court judge is required to review, and to some extent, reweigh the evidence to determine if the verdict is unreasonable. Assessing whether a guilty verdict is unreasonable engages the legal concept of reasonableness (**Yebes**, *supra* at p. 427). Thus, the appellate review, on the grounds set out in s. 686(1)(a)(i) of the **Code** entails more than a mere review of the facts. The appellate court has a responsibility, to some extent, to do its own assessment of the evidence and not to automatically defer to the conclusions of the trial judge which is what the appellate court judge seems to have done in this appeal."

> ¶6 The scope of review of the trial court's findings of fact by the Summary Conviction Appeal Court is the same as on appeal against conviction to the Court of Appeal in indictable offences: see sections 822(1) and 686(1)(a)(i) and **R. v. Gillis** (1981), 45 N.S.R. (2d) 137; 86 A.P.R. 137; 60 C.C.C. (2d) 169 (C.A.), per Jones, J.A., at p. 176. Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in **R. v. Burns (R.H.)**, [1994] 1 S.C.R. 656; 165 N.R. 374; 42 B.C.A.C. 161; 67 W.A.C. 161; 89 C.C.C. (3d) 193, at p. 657 [S.C.R.], the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was some evidence to support the trial judge's conclusions nor a new trial on the transcript.

BACKGROUND:

[3] The trial judge heard evidence from RCMP Cst. Jason Daniel Sehl, the appellant, and the appellant's physician, Dr. Rehana Begum.

[4] The appellant was stopped at a road checkpoint on Highway No. 1, in Greenwich, Nova Scotia, at around 2:20 a.m. on May 31, 2008. Cst. Sehl's evidence was that he detected the smell of alcohol coming from the vehicle which he subsequently determined to be coming from the appellant's breath. Cst. Sehl demanded a breath sample. The appellant indicated his intention to comply with the demand and (according to Cst. Sehl) made four or five attempts to blow into the approved screening device at the roadside. Cst. Sehl then invited the appellant to sit in the back of the police car where his attempts to blow into the device would be recorded on the Eyewitness Digital Recording System. Cst. Sehl was not satisfied with the efforts made by the appellant to provide a breath sample and so charged him with failing "to comply with the demand made to him by a Peace Officer under section 254(2) of the **Criminal Code** to provide forthwith a sample of his breath necessary to enable a proper analysis of his breath to be made by the means of an approved screening device contrary to section 254(5) of the **Criminal Code**."

[5] The appellant's evidence at trial was that he only blew one or two times at the roadside; that he told the officer that he had weak lungs; and, that he offered to see a doctor or go to a hospital to give a blood sample. He testified that he blew as hard as

he could on each attempt but that his breathing problem prevented him from providing an adequate sample. It does not appear to have been disputed that the appellant was given multiple opportunities to provide a breath sample and did not do so because none of the attempts were long enough to provide an adequate breath sample. Cst. Sehl's evidence was that it was necessary to blow between six and ten seconds in order to provide an adequate sample.

THE TRIAL JUDGE'S DECISION:

[6] The trial judge stated correctly that the Crown had the burden of proving the essential elements of the offence beyond a reasonable doubt. She concluded that the Crown had done so:

> ...It is clear from the evidence that it is a situation that the officer had the grounds to make the demand,... That demand was made, that the device was presented to Mr. Abou-Basha and I am satisfied that it was indeed an approved screening device. [Transcript, p. 101]

[7] The trial judge was satisfied that the officer was using an approved screening device. Being satisfied that the essential elements of the offence were proven by the Crown, she continued:

> That being so – that is, being satisfied that the essential elements of the offence have been proven beyond a reasonable doubt by the Crown the issue then becomes the phrase "without reasonable excuse." And the law insofar as that goes is set out in the **Peck** case...

[8] The trial judge referred to **R.** v. **Peck** (1994), 128 N.S.R. (2d) 206, 1994 CarswellNS 1, where Chipman J.A. said, at para. 18, "[c]ase authority has established that the burden of proving that there is a reasonable excuse for failure to provide a breath sample in response to a demand rests with the accused on a balance of probabilities." She went on to remark on the evidence concerning the appellant's medical condition:

> So being mindful of that, having considered all of the evidence and also being very mindful of what the Court has said with respect to credibility of witnesses and what have you, in this particular case I find that Mr. Abou-Basha has not ... shown on the balance of probabilities that there was a reasonable excuse for his failure to comply.

> The evidence was to the effect that the accused has in the past suffered from coughing and, in fact, had seen a doctor for this back in January, and several months before this matter happened and had seen a doctor in early June, a few days after this matter arose.
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> Mr. Abou-Basha gave evidence himself in terms of coughing. Indeed, he testified that he basically was coughing for three months, did not take prescribed medicine although he had that prescription filled and that he mentioned about his involvement in sports and what have you. I am not saying that I do not believe that he occasionally had a cough.
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> I am not saying that at all. But what I am saying is that I am not satisfied that this cough connected or had any sort of a causal connection, put it that way, to his failure to provide the sample. [Transcript, pp. 102-103.]

[9] The trial judge went on to address the video evidence:

> I watched the tape or the disk showing the officer making or explaining to Mr. Abou-Basha what was expected of him. I watched Mr. Abou-Basha as he would appear to be providing a sample and it was clear from the disk that what would happen is that he would provide, there would be a very, very short period of time when he would not and then he would blow for a period of time after that.
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> And watching that, it was interesting because one could not help but note that that short period of time was enough basically to stop the instrument from being able to register the sample. But it was not a situation, for example, of Mr. Abou-Basha stopping and then inhaling or taking a breath and attempting to complete the sample. That is not what the tape or that disk showed. [Transcript, p. 103.]

[10] The trial judge concluded:

> As I said, I am satisfied that Mr. Abou-Basha has in the past seen doctors. He has seen them for a cough but he has not established on the balance of probabilities of reasonableness for his excuse to fail to comply with the demand and that being so, I find him guilty of this offence. [Transcript, pp. 103-104.]

GROUNDS OF APPEAL:

[11] The Grounds of Appeal are as follows:

1. The Learned Trial Judge failed to properly consider the issue of credibility of witnesses and in particular, the credibility of the Appellant.

2. The Learned Trial Judge failed to consider the issue of the requirement for mens rea under section 254(5) of the **Criminal Code**.

3. The Learned Trial Judge failed to properly consider the evidence of the in-car video camera and what it demonstrated.

4. The Learned Trial Judge failed to consider the medical evidence introduced by the defence.

5. Such other grounds of appeal as may appear from the full reading of the transcript.

Ground 1: Credibility

[12] The appellant maintains that the trial judge failed to properly consider the issue of credibility. The basic analysis of credibility where the accused gives evidence was set out in **R.** v. **W.(D.)**, [1991] 1 S.C.R. 742, [1991] S.C.J. No. 26, where Cory J. said, at para. 28:

> ... A trial judge might well instruct the jury on the question of credibility along these lines:
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> > First, if you believe the evidence of the accused, obviously you must acquit.
> >
> > Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
> >
> > Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[13] This analysis is equally applicable to the weighing of credibility by a trial judge without a jury. It is not necessary to repeat the exact words of Justice Cory's formulation. In **R.** v. **Saulnier**, 2005 NSCA 54, 2005 CarswellNS 130, Chipman J.A. said, for the court, at para. 17:

> The [*W.(D.)*] principle is, of course, equally applicable to a trial by a judge without a jury. The judge in the reasons for judgment is not required to spell it out as carefully as must be done in a jury charge, but it must appear clear from the judge's reasons as a whole that the judge applied the proper test. That is, the judge must not only make the necessary credibility findings to underlie a conclusion of guilt, but must also apply the principle of reasonable doubt.

[14] In **R.** v. **Kagan**, 2009 NSCA 43, Bateman J.A. said, for the court, at paras. 13 and 15:

> The alleged misapprehension of the evidence and the challenge to the credibility findings attack the reasonableness of the verdict. A verdict is unreasonable if the essential findings leading to it are demonstrably incompatible with evidence that is neither contradicted by other evidence or rejected by the trial judge. The verdict must be one that a properly instructed jury, acting judicially, could reasonably have rendered....
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> ....
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> A judge's credibility findings are entitled to deference. In reviewing such findings for error an appellate court must give due regard to the trial judge's advantage in seeing and hearing the witness and consider all of the evidence relevant to credibility.... An appellate court may intervene when the assessments of credibility made at trial cannot be supported by any reasonable view of the evidence....

[15] According to the appellant, the trial judge did not address the **W.(D.)** analysis. He submits that she only addressed the question of whether his coughing was a reasonable excuse for failing to provide a breath sample. He says she did not address his evidence that he gave his best effort to blow into the device; specifically, he says she did not address the question of whether his evidence was capable of raising a reasonable doubt, and, he says, she did not consider his evidence in conjunction with that of the other witnesses. The Crown's position is that there is no basis upon which to impugn the trial judge's findings of credibility, and, in particular, her rejection of the appellant's claim that his cough had a causal connection to his failure to supply a sample.

[16] I do not believe that the trial judge's failure to specifically refer to **W.(D.)** is a valid reason to overturn the conviction where the record shows that she considered credibility. In her oral decision the trial judge referred to the evidence offered by the

appellant in his defence, as well as the medical evidence. Issues of credibility were considered. I note, for instance, the trial judge's comments respecting the appellant's cough:

> ... I am not saying that I do not believe that he occasionally had a cough.... But what I am saying is that I am not satisfied that this cough ... had any sort of a causal connection ... to his failure to provide the sample.

[17] There is no requirement to refer specifically to **W.(D.)**, as long as it is apparent from the decision that the appropriate reasoning was applied in the weighing of the evidence. I am satisfied that the trial judge applied the proper considerations and that there is no basis upon which to disturb her findings of credibility.

Ground 2: *Mens Rea* as an Element of the Offence

[18] The appellant says the trial judge failed to consider the requirement of the *mens rea* necessary to make out an offence under s. 254(5). In **R.** v. **Peck** (1994), 128 N.S.R. (2d) 206, 1994 CarswellNS 1 (C.A.), Chipman J.A., for the majority, said, at para. 33:

> Care must be taken not to confuse the proof of the excuse by the accused with the opportunity always open to an accused to rely on reasonable doubt as to intention to commit the offence. If the trial judge in this case had a reasonable doubt that the appellant had intended to commit the offence, he was obliged to acquit.... [Emphasis in original.]

[19] In **Peck**, the appellant had blown several times without providing an adequate sample. The majority, per Chipman J.A., held that the test created a reverse onus, infringing s. 11(d), but was justified under s. 1. The Crown says that while para. 33 of **Peck** appears to support the "reasonable doubt" test, considering the decision in its entirety "that cannot be the meaning. The decision was about the constitutionality of the reverse onus test," which "is not the reasonable doubt test." Chipman J.A. said, at para. 18:

> Case authority has established that the burden of proving that there is a reasonable excuse for failure to provide a breath sample in response to a demand rests with the accused on a balance of probabilities....

[20] The Crown further points to the following comments at paras. 34-35:

> The trial judge took care to first make a finding that there was a failure or refusal to comply with the demand, which was a lawful demand. He found that the response of the appellant did not demonstrate any lack of understanding of the demand. There was, he said:
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> > Nothing apparent that he didn't understand the demand.
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> The trial judge then addressed the issue of reasonable excuse dealing with it as one which required proof by the appellant upon a balance of probabilities. He found such proof not forthcoming.

[21] The majority went on to say, at paras. 39 and 42:

> Placing upon the accused the burden to establish on a balance of probabilities the excuse Parliament provided for what would otherwise be an offence, is as minimal as possible an impairment of a constitutional right, having in mind the important objective. It is fair and reasonable.
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> ....
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> Reference to the facts of this case show how ineffective a legislative scheme such as suggested by the appellant would be. It would simply be too easy for persons to circumvent the legislation if they were only required to raise a reasonable doubt as to the reasonableness of their excuse for not providing the sample. Escape would be available on just such weak evidence as was offered here. Surely if there are such possible excuses as were enumerated by this court in [**R. v. Phinney** (1979), 49 C.C.C. (2d) 81], the accused who has exclusive knowledge of the circumstances should be required to establish the excuse on a balance of probabilities. Otherwise the Crown would be obliged to prove beyond a reasonable doubt the absence of such things as medical conditions, denial of right to counsel, unreasonable inconvenience, absence of reasonable and probable grounds or breakdown of breath detection equipment.... It would be impracticable to require the Crown to go so far. [Emphasis added.]

[22] I note also the following comments from Justice Kenkel's text Impaired Driving in Canada, at p. 18:

> Where there is an outright refusal, then the intent of the accused is plain. Most cases of refusal/failure though involve some attempts by the accused which do not result in an adequate sample. In those cases the Crown must show that the accused was given plain instructions and an adequate opportunity to provide a sample, and that

> circumstances prove the only reasonable inference is that the subsequent failure to provide a sample was intentional. The defence of "reasonable excuse" is engaged only after the Crown has proved a proper demand and a failure or refusal to comply.

[23] The appellant points to his evidence that he gave his best effort to blow into the device. He says the trial judge only considered whether he had a reasonable excuse for failing to provide a sample, and suggests that she found that the elements were made out on the basis of a lack of a reading on the screening device. He takes the position that "[t]he defence was not that the appellant had a reasonable excuse, but rather that the appellant did not have the *mens rea* to commit the offence. For the former, it would be necessary for the appellant to raise on a balance of probability a valid defence. For the latter, it is enough for the appellant to raise a reasonable doubt."

[24] The Crown submits that it is required to prove (1) that a peace officer with lawful grounds made a proper demand of the accused, (2) that the accused understood what was required of him and (3) that the accused was given a reasonable opportunity to comply with the demand and failed to do so. By this reasoning, the mental element is the understanding described at step (2), i.e. that the accused "understood what was required of him." This, the Crown submits, is established by proving beyond a reasonable doubt that the accused appeared to understand what he was required to do. It is open to the accused to claim that he did not understand what was required and to thereby raise a reasonable doubt. I am satisfied that the test from **Peck** is as described by the Crown and that the trial judge appropriately applied it in concluding that the Crown had proved beyond a reasonable doubt each and every element of the offence including the *mens rea* requirement. Only then did she go on to consider whether the appellant had established, on a balance of probabilities, that his medical condition prevented him from providing a proper sample.

Ground 3: The Video

[25] The appellant says the trial judge failed to consider the evidence of the video-camera in the police car. In fact, in her decision the trial judge provided a description of her observations from the video. As the Crown puts it, "[o]n the video the appellant can be seen and heard talking at length and at considerable volume. At times he and Cst. Sehl are almost shouting at the same time, each one trying to be heard over the other. It is hard to accept that he could not have blown for 6 to 10 seconds." The trial judge said:

> I watched the tape or the disk showing the officer making or explaining to Mr. Abou-Basha what was expected of him. I watched Mr. Abou-Basha as he would appear to be providing a sample and it was clear from the disk that what would happen is that he would provide, there would be a very, very short period of time when he would not and then he would blow for a period of time after that.
>
> And watching that, it was interesting because one could not help but note that that short period of time was enough basically to stop the instrument from being able to register the sample. But it was not a situation, for example, of Mr. Abou-Basha stopping and then inhaling or taking a breath and attempting to complete the sample. That is not what the tape or that disk showed. [Transcript, p. 103.]

[26] I am satisfied that the trial judge viewed and considered the video in her weighing of the evidence. No error is apparent on this ground.

Ground 4: Dr. Begum's Evidence

[27] The appellant says the trial judge did not consider the evidence of his physician, Dr. Rehana Begum, who, he says, "testified that she made a differential diagnosis and determined he could be suffering from asthma or from reflux." She stated on cross-examination that when she examined the appellant on June 5, 2008, some five days after he was stopped at the checkpoint, he was coughing continuously and would cough when he tried to take a deep breath. She recommended a pulmonary function test at that time. The appellant says the evidence of Dr. Begum went directly to the intention of the appellant to comply with the Breathalyzer request, but the trial judge did not comment on it. In fact, the trial judge did refer in her decision to the appellant's medical condition, to his having seen a doctor and having been prescribed medication, which he did not take. Among other points, the trial judge had before her the appellant's evidence that he had played soccer almost every day during the months

prior to being stopped at the checkpoint, even while suffering from the coughing of which he complained at trial. It is difficult to see how the trial judge's treatment of the medical evidence, and her findings therefrom, can be considered unreasonable or unsupportable. I can see no error on this ground of appeal.

SUFFICIENCY OF REASONS:

[28] Although the sufficiency of the trial judge's reasons was not stated as a ground of appeal, the Crown submits that the reasoning is clear and that the decision complies with the requirements of **R.** v. **R.E.M.**, [2008] SCC 51. One must bear in mind that the learned trial judge gave an oral decision immediately following the final submissions of counsel.

[29] I am satisfied that the trial judge's decision is supported by the evidence. Although her reasons were succinct, it is clear that she was satisfied that the prosecution had proven the essential elements of the offence beyond a reasonable doubt. She said this twice in her decision. She did not specifically refer to the requirement for the Crown to prove beyond a reasonable doubt that the accused's failure or refusal was wilful – i.e. the *mens rea* component – but the evidence does support this conclusion.

[30] Despite the brief reasons, the verdict is supported by the evidence. The trial judge was satisfied that the Crown succeeded in proving the elements of the offence beyond a reasonable doubt, including mens rea. She went on to consider the evidence of reasonable excuse, on which the burden rested on the appellant on a balance of probabilities. The trial judge concluded that the appellant was unable to meet this onus. Her interpretation of the evidence on this issue does not constitute a palpable and overriding error in her findings of fact, nor does her interpretation and application of the law result in any error.

CONCLUSION:

[31] For these reasons, the appeal is dismissed. The conviction and sentence will stand.

Justice Glen G. McDougall