SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Hweld*, 2018 NSSC 288

Date: 2018-11-16
Docket: Hfx. No. 477289
Registry: Halifax

Between:

Her Majesty the Queen
Appellant

v.

Lesianu Zewdie Hweld

Respondent

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	November 13, 2018, in Halifax, Nova Scotia
Counsel:	Jim Janson, for the Municipal Crown Lesianu Zewdie Hweld, Self-Represented

By the Court:

Introduction

[1] This is a Summary Conviction Appeal Court (SCAC) decision in response to an appeal by Mr. Hweld. He was charged that he did on July 6, 2017, at 7:14 p.m.:

> At or near Highway 102/Highway 102 NB EXI in the County of Halifax, Nova Scotia, did unlawfully commit the offence of driving in lane occupied by emergency vehicle that is stopped and exhibiting flashing light when other lane available contrary to Section 106F (1)(a) of the *Motor Vehicle Act*.

[2] The adjudicator acquitted Mr. Hweld. The Crown appeals, and seeks a retrial, alleging that the adjudicator erred because:

1. The verdict was a factually unreasonable conclusion;

2. He mis-applied the applicable burdens of proof, and specifically by requiring the Crown to prove beyond a reasonable doubt as an essential element of the offence, that there was, as stated in s. 106F of the *Motor Vehicle Act*, "another traffic lane, for traffic moving in the same direction as the vehicle and further from the emergency vehicle, into which the vehicle can move safely".

[3] I conclude that a retrial is appropriate.

Background

[4] At trial, Constable Geoffrey Sykes (of the Halifax Regional Police service) testified, as did Mr. Hweld.

[5] In his decision, the Adjudicator acquitted Mr. Hweld. As part of his reasoning he stated:

> *I am satisfied that the Crown has demonstrated that* this vehicle was clearly an emergency vehicle, stopped and exhibiting flashing lights,… The roadway as being two lanes, proceeding in that same direction and that *as [Constable Sykes] returned back to his vehicle he was able to observe a motor vehicle pass in the inside lane, where the lane closest to him and the officer also observed the passing lane was available… approximately 100 to 105 km/h.*
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> …
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> The defendant testified… the lane itself was vacant or that the lane he was travelling in it was approximately 250 metres when he first noticed the officer and the exhibiting flashing lights and that he looked in the lane next to him and found that there were other vehicles in the lane and did not feel that he had the ability to cross into the lane. There was a marked difference in the evidence given by the defendant and as well is the [officer]…
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> …
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> *The real question I think to be addressed in terms of the evidence in relation to this case is whether or not the defendant, in fact, had the other lane available… I have a difference of fact on those issues. And on that particular essential issue…. If I'm able to conclude… that the lane was available to the defendant in a safe manner to be able to reduce the speed of his motor vehicle and move into the passing lane, then I can find on behalf of the Crown that they've proven their case beyond a reasonable doubt.*
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> If I conclude on the facts of the matter that the defendant was not able to go into the other lane due to the presence of other vehicles, he could not change lanes safely, then he is to reduce his speed in the circumstances and the offence and the circumstances would not have been made out… If I accept Mr. Hweld's

> testimony on that point and I reject the evidence of the officer in the circumstances, I can find in favour of the defendant that the other lane was, in fact, available.
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> …
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> As I consider the evidence and had an opportunity in this case to review the record one more time… It's not clear to me as to how the officer was able to have observed that the lane was clear or whether the presence of vehicles [seemed the] Officer had indicated that [when] he was [in the process of]… getting on the highway, that he observed the lane was clear, at that [time]. Of course, that's not the operative time that the lane would have been clear. The officer would've made the observation at the time the vehicle was passing by him… The officer in the circumstances was obviously attending to other issues on the roadside with another driver at the time.
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> Looking at the evidence as a whole, *if I conclude that there is at least a reasonable doubt as to whether or not the defendant, Mr. Hweld , had the other lane available to him, I am to resolve that reasonable doubt in favour of the defendant… I am left… With some reasonable doubt as to whether or not the other lane was, in fact, available on the date and time in question and I find the defendant not guilty.*
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> [My italicization]

The statutory basis for the appeal herein

[6] Appeals are creatures of legislation. They all must find their roots in soil deliberately deposited by legislators. Rule 63.02 of Nova Scotia Civil Procedure Rules (Summary Conviction Appeal), reads:

> This Rule applies to a summary conviction appeal under part 27 of the *Criminal Code*, which includes an appeal of a decision in both federal summary conviction proceedings and, by operation of the *Summary Proceedings Act* (Nova Scotia) a provincial summary conviction proceeding.

[7] This appeal arises from a provincial offence summary conviction proceeding. Through the operation of s. 7 of the *Summary Proceedings Act*, R.S.N.S. 1989, c. 450, Rule 63, and ss. 813 and 822 of the *Criminal Code* the appeal is to this court sitting as a Summary Conviction Appeal Court (SCAC).

[8] Sections 813 and 822 of the *Criminal Code* read:

> 813(1) Except where otherwise provided by law,
>
> (b) the informant, the Attorney General or his agent in proceedings under this Part may appeal to the appeal court

> from an order that stays proceedings on an information or dismisses an information,…

[9] The "appeal court" is defined in Section 812, in the case of Nova Scotia, as "the Supreme Court".

[10] Section 822 reads:

> 822(1) Where an appeal is taken under section 813 in respect of any conviction, acquittal, sentence, verdict or order, sections 683 to 689, with the exception of subsections 683(3) and 686(5) apply, with such modifications as the circumstances require.

[11] Part 21 of the *Criminal Code* (Appeals - Indictable Offences) includes ss. 673 - 696.

[12] Section 683 contains a list of general procedural powers available to courts of appeal.

[13] Section 686 (4) reads:

> If an appeal is from an acquittal or verdict that the appellant or respondent was unfit to stand trial or not criminally responsible on account of mental disorder, the Court of Appeal may
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> (a) dismiss the appeal; or
>
> (b) allow the appeal, set aside the verdict and
>
> i) Order a new trial, or
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> ii) Except where the verdict is that of a court composed of a judge and jury, enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law, and pass a sentence that is warranted in law, or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.

The standard of review

[14] I will repeat what I said in *R. v. Garland* 2014 NSSC 445:

> 32 The appropriate standards of review were referred to by Justice Cromwell (as he then was) in *R. v. Nickerson*, 1999 NSCA 168:
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> > 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* (1999), 173 N.S.R. (2d) 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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> ...
>
> 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), 60 C.C.C. (2d) 169 (N.S.S.C.A.D.) 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, [1994] 1 S.C.R. 656 at 657, 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.**
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> [my emphasis added]

33 More recently, Justice Bryson, sitting as a chambers judge in *R. v. Alkhatib* 2013 NSCA 91, reiterated the differences in the approach taken by the Court of Appeal when reviewing an appeal heard by a summary conviction appeal court (a superior court justice), in contrast to that of a superior court justice acting as a summary conviction appeal court:

> 13 Justice Farrar in *R. v. Pottie*, 2013 NSCA 68 explained the standard of review for summary conviction appeals:
>
> [15] In the recent decision of *R. v. Francis*, 2011 NSCA 113, Fichaud, J.A. considered the standard of review to be applied in an appeal pursuant to s. 839(1)(a) of the Crimina**l** Code. In summary, there are two standards of review at play in summary conviction matters; the first is the standard of review to be applied by the SCAC judge when reviewing the trial decision; and the second being the standard we apply to the decision of the SCAC judge.
>
> [16] The standard of review for the SCAC judge when reviewing the trial judge's decision, absent an error of law or miscarriage of justice, is whether the trial judge's findings are reasonable or cannot be supported by the evidence. In undertaking this analysis the SCAC court is entitled to review the evidence at trial, re-examine it and re-weigh it, but only for the purposes of determining whether it is reasonably capable of supporting the trial judge's conclusions. The SCAC is not entitled to substitute its view of the evidence for that of the trial judge.
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> [17] Our jurisdiction is grounded in the error alleged to have been committed by the SCAC judge. It is not a *de novo* appeal from the trial judge. This Court must determine whether the SCAC judge erred in law in the statement or application of the principles governing its review (see Francis, para. 7; see also R. v. R.H.L**.**, 2008 NSCA 100; R. v. Travers, 2001 NSCA 71; R. v. Nickerson, 1999 NSCA 168, para. 6). This distinction is important when considering whether to grant leave; the error we must identify is in the SCAC judge's decision.

Why I conclude the adjudicator erred in a manner that requires a retrial

[15] Section 106E and 106F of the *Motor Vehicle Act*, c. 293, RSNS 1989, as amended, read:

1) No person shall drive a vehicle on a highway past an emergency vehicle, that is stopped on the roadway or a shoulder adjacent to it and exhibiting a flashing light, at a speed in excess of

    a) the speed limit but for this section; or

    b) sixty kilometres per hour,

    whichever is less.

2) A person commits an offence who contrary to subsection (1) exceeds the speed limit referred to in clause (1)(a) or (b) by

    a) between one and fifteen kilometres per hour, inclusive;

    b) between sixteen and thirty kilometres per hour inclusive; or

    c) thirty-one kilometres per hour or more.

(3) Where a highway is divided into separate roadways by a median, this Section only applies to a vehicle being driven on the same roadway as the emergency vehicle is stopped on or beside.

AND

1) The driver of the vehicle that is approaching an emergency vehicle, that is stopped and exhibiting a flashing light, shall not

    a) drive in a traffic lane occupied, or partly occupied, by the emergency vehicle; or

    b) drive in the traffic lane closest to the emergency vehicle and not occupied, or partially occupied by the emergency vehicle,

    if there is another traffic lane, for traffic moving in the same direction as the vehicle and further from the emergency vehicle, into which the vehicle can move safely.

2) Where the traffic on a highway is divided into separate roadways by a median, this Section only applies to a vehicle being driven on the same roadway as the emergency vehicle is stopped on or beside.

[16] My review of the transcript and the adjudicator's decision satisfy me that the adjudicator committed an overriding error of law when he determined that it was an essential element of the offence, which had to be proved beyond a reasonable doubt by the Crown, that there was (as stated in s. 106F of the *Motor Vehicle Act*) "another traffic lane, for traffic moving in the same direction as the vehicle and further from the emergency vehicle, into which the vehicle can move safely".

[17] I find as applicable, and adopt Justice Duncan's comments in *R. v. Davidson*, 2011 NSSC 55:[1]

> 16 I agree with the appellant that the adjudicator placed a burden on the Crown to prove beyond a reasonable doubt that the exception did not apply.
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> 17 Section 794(2) of the *Criminal Code of Canada***,** R.S.C. 1985, c. C-46 provides that the burden of proving an "exception, exemption, proviso, excuse or qualification prescribed by law [that] operates in favour of the defendant is on the defendant."
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> 18 Section 7(1) of the *Nova Scotia Summary Proceedings Act*, R.S.N.S. 1989, c. 450, incorporates s. 794(2) of the *Criminal Code* into all provincial summary conviction offences in Nova Scotia. Section 7(1) of the Summary Proceedings Act reads:
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> > Except where and to the extent that it is otherwise specially enacted, the provisions of the *Criminal Code* (Canada), except section 734.2, as amended or re-enacted from time to time, applicable to offences punishable on summary conviction, whether those provisions are procedural or substantive and including provisions which impose additional penalties and liabilities, apply, *mutatis mutandis*, to every proceeding under this Act.
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> 19 It is well-settled law that in Nova Scotia, s. 794(2) of the *Criminal Code* places the onus of proving an exception to a provincial offence on the accused.
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> 20 In *R. v. D.M.H.* (1991), 109 N.S.R. (2d) 322 (N.S.C.A.), a youth was charged with igniting a fire within 1000 feet of a forest without a burning permit, contrary to s. 23(3) of the Forests Act**,** R.S.N.S. 1989, c. 179. The trial judge acquitted on the basis that the Crown had failed to prove the youth did not have a permit. The Crown appealed. The Court of Appeal held that holding a permit was a statutory exception to the offence, and that s. 794(2) of the Criminal Code relieved the Crown of the onus of proving that an exception did not exist. The Court held, at paras. 6-8:
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> > In our opinion, s. 794(2) clearly relieves the Crown of the burden of negativing the exception herein and is merely an extension of the common law principle developed over the years in relation to regulatory offences prohibiting acts by persons other than those authorized by law. See the cases of *R. v. Soderberg* (1965), 45 C.R. 309, 51 W.W.R. 233, 49 D.L.R. (2d) 665 (B.C.S.C.); *R. v. Lee's Poultry Ltd.* (1985), 43 C.R. (3d) 2889, 7 O.A.C. 100, 12 C.R.R. 125, 17 C.C.C. (3d) 539; *R. v. Edwards*, [1975] 1 Q.B. 27.

[1] E.g, See also *R. v. Humber*, [2016] NJ No. 109 (PC).

> Furthermore, this rule applies to a prosecution under s. 23 of the *Forests Act*. Section 6(1) of the *Young Persons Summary Proceedings Act*, R.S.N.S. 1989, c. 509, adopts the Summary Proceedings Act, R.S.N.S. 1989, c. 450, which incorporates by reference all the provisions of the Criminal Code of Canada in prosecutions against young persons relating to provincial statutes. Thus s. 794 of the *Criminal Code* applies.
>
> The failure to have a burning permit is not an element of the offence charged against the respondent but an exception or exemption which, if proven by the respondent, could justify his acquittal. *See R. v. Staviss* (1943), 16 M.P.R. 508, 79 C.C.C. 105, [1943] 1 D.L.R. 707 (N.S.C.A.), and *R. v. MacInnis* (1982), 54 N.S.R. (2d) 62, 112 A.P.R. 62 (C.A.).
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> 21 In my view, the words "unless the stop cannot be made in safety", contained in section 93(2) of the *Motor Vehicle Act*, function as an exception or defence to the offence of failing to stop at an amber light, and not as an element of the offence. The burden then is on the accused to prove that the exception should justify an acquittal. In concluding otherwise the adjudicator erred in law.

[18] In similar fashion, I conclude that the essential elements of the offence in Section 106F that must be proven by the Crown beyond a reasonable doubt are:[2]

1. Driver of a "vehicle"[3];
2. Approaching an "emergency vehicle"[4] that is stopped and exhibiting a flashing light;
3. Drive [past the emergency vehicle] in a traffic lane occupied, or partly occupied, by the emergency vehicle; *or* drive in the traffic lane closest to the emergency vehicle and not occupied, or partly occupied by the emergency vehicle.[5]

[19] I conclude that Section 106F is a strict liability offence. The words "if there is another traffic lane, for traffic moving in the same direction as the vehicle and further from the emergency vehicle, into which the vehicle can move safely" contained in s. 106F (1) of the *Motor Vehicle Act*, function as an exception or defence to the offence of driving in a traffic lane occupied, or partly occupied by an emergency vehicle, or driving in a traffic lane closest to an emergency vehicle and not occupied, or partly occupied by the emergency vehicle.

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[2] In addition to the jurisdiction of the court, the date and place of the occurrence, and identity of the accused.
[3] Defined in s. 2(ac) of the *Act*.
[4] As defined in s. 106D of the *Act*.
[5] I note that section106F(2) states that "Where the traffic on a highway is divided into separate roadways by a median, this Section only applies to a vehicle being driven on the same roadway as the emergency vehicle is stopped on or beside."

[20] Once the Crown has proved the essential elements of the offence, it is open to a defendant to prove on a balance of probabilities, that it is more likely than not that, although there was another traffic lane, for traffic moving in the same direction as the vehicle and further from the emergency vehicle available, the circumstances were not such that the defendant's vehicle could have moved safely into that lane.

Conclusion

[21] The adjudicator made an error in law, which materially affected the outcome, therefore I must order a retrial to allow another adjudicator to assess whether the Crown has proved beyond a reasonable doubt the essential elements of this offence; and possibly whether the defendant has proved on a balance of probabilities that it was not safe to move into the lane even further away from the emergency vehicle.

Order

[22] I allow the appeal, set aside the verdict, and remit the matter for retrial.

[23] I request that Crown counsel draft an order to reflect the decision, and note since no costs were requested, none will be ordered.

Rosinski, J.