R. v. *Supreme Steel Ltd.*, 2006 NWTSC 27

Date: 2006 05 23
Docket: S-1-CR-2004000024

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN, on the
information and complaint of Sylvester Wong,
Chief Inspector of Mines, Workers' Compensation
Board of the Northwest Territories

- and -

SUPREME STEEL LTD.

Crown summary conviction appeal from acquittal on a charge under the *Mine Health and Safety Act*, S.N.W.T. 1995, c. 25.

Heard at Yellowknife, NT on February 27, 2006.

Reasons filed: May 23, 2006

REASONS FOR JUDGMENT OF THE HONOURABLEJUSTICE V.A. SCHULER

Counsel for the Appellant: Noel Sinclair
Counsel for the Respondent: James W. Joosse

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REASONS FOR JUDGMENT

[1] On July 17, 2001, at a minesite in the Northwest Territories, two employees of the Respondent company died tragically when their work platform or "manbasket" at the raised end of a manlift's boom came crashing down onto rocks after the manlift turned or tipped over onto one side. As a result, the Respondent, who leased and operated the manlift, was charged under s. 15 of the *Mine Health and Safety Act,* S.N.W.T. 1995, c. 25, with failing to take every reasonable measure and precaution to protect the health and safety of its employees.

[2] After a four week trial held over approximately one year involving numerous witnesses and exhibits, the trial judge acquitted the Respondent. The Crown appeals that acquittal. For the reasons that follow, I have concluded that the appeal must be dismissed.

[3] Although the notice of appeal sets out several grounds, only the following were argued before me:

1. That the learned trial judge erred in law in acquitting the Respondent notwithstanding proof of "the statutory offence simpliciter";

2. That the acquittal was unreasonable for want of analysis by the trial judge of key issues in the trial;

3. That the trial judge's finding about causation of death was unreasonable because it is not supported by the evidence;

4. That the trial judge erred in admitting certainrecords into evidence as business records.

[4] The Appellant ("the Crown") seeks to have the acquittal overturned and a conviction entered or, alternatively, a new trial.

Background

[5] The evidence before the trial judge was extensive, often very technical and sometimes complicated. I will summarize it only to the extent necessary to provide context to these reasons. I will refer to the incident in which the manlift turned or tipped over as "the incident".

[6] The manlift on which the deceased were working at the time of their death is described as a self-propelled aerial work platform with an articulating boom capableof a working height of 131 feet or 39.9 metres. The deceased had driven the manlift to a spot outside the minesite's process plant building. The deceased, who were located in the manbasket, caused the manlift's components to be extended. One of the eyewitnesses, Mr. Gowanlock, testified that he observed the base of the manlift "rocking and dancing" and then it fell over.

[7] At trial, witnesses sometimes used different words to describe the various moveable components of the manlift. The terms that counsel and the trial judge most often used are what I will use in this judgment. The manlift has a riser section extending from its ground-level base. The riser is connected through the mast to the boom section, which is in turn connected through a jib to the manbasket. Both the riser and the boom have telescoping parts which permit them to extend and retract.

[8] The movement of the lifting components is controlled by safety limit switches. These switches are meant to ensure that the movement of those components is limited so as not to place the manlift in an unstable or unsafe configuration.

[9] A pair of "riser angle limit switches" are designed such that the riser must be raised to an angle of 70 degrees from the ground before its telescoping section can be extended. These switches are designed to be redundant, in other words both must permit the 70 degree angle to open before the extension can occur.

[10] Similarly, a pair of "riser telescoping limit switches" are designedto prevent the lowering of the riser until its telescoping sections are fully retracted. These switches are also designed to be redundant, that is, both must permit the riser telescoping sections to fully retract before the riser angle can be lowered from its fully elevated position.

[11] The day after the incident, while the manlift still lay where it had fallen, measurements were taken of the position of the riser and the boom. The riser angle was determined to be 52 degrees. The telescoping part of the riser and the boom were extended. It was observed that one of the riser angle limit switches permitted extension when the riser was raised to an angle of only 52 degrees, while the other permitted extension only when the riser was raised to an angle of 70 degrees.

[12] The Crown's theory was that the riser angle was 52 degrees with the riser extended prior to the manlift falling over, thus placing the manlift in an unstable configuration. Expert evidence called by the Crown was to the effect that during the incident, the riser hydraulic cylinder holding valve was damaged and this locked the riser in its then position, i.e. a 52 degree angle. Although the redundant character of the riser angle limit switches should have prevented the telescoping parts from extending with the riser angle at only 52 degrees, the Crown's theory relied on the deduction that the switch that permitted extension only when the riser angle was at 70 degrees must have become stuck before the incident, thus leaving the other switch to allow extension at 52 degrees. The Crown theory was that the stuck switch must then have come unstuck during the incident itself, which would accountfor its post-incident condition of not permitting extension until 70 degrees.

[13] The defence theory was that the deceased were working near the top of the process plant building, in the course of which they caused the manbasket to come into contact with the building. The defence theory was that this contact resulted in a recoil or reactive force against the manlift, causing it to fall or tip over. There was some eyewitness evidence placing the deceased in their manbasket close to the top of the

building and there was paint and other material on the manlift that suggested that at some time it might have come into contact with the building.

[14] The trial judge found that the Crown's theory of how and why the manlift came to turn over was probably correct; he was not satisfied, however, beyond a reasonable doubt that the manlift was unsafe. Although he found other failings on the part of the Respondent in connection with the training of its employees and its care of the manlift, he was unable to find a causal connection between those failings and the incident. In the result, he acquitted the Respondent.

> 1. Did the trial judge err in acquitting the Respondent notwithstanding proof of "the statutory offence simpliciter"?

[15] The Respondent was tried on the charge that it:

> on or about the 17th day of July 2001, at or near the Diavik Diamond Mine Site, located at or near 64 degrees 31' N, 110 degrees 20' W, near the City of Yellowknife, in the Northwest Territories, did fail to take every reasonable measure and precaution to protect the health and safety of its employees, to wit: Gregory Wheeler and Gerhard Bender, by having Gregory Wheeler and Gerhard Bender work on unsafe equipment which resulted in the death of Gregory Wheeler and Gerhard Bender, contrary to Section 15 of the *Mine Health and Safety Act*, and did thereby commit an offence under Section 39 of the *Mine Health and Safety Act*.

[16] Section 15 of the *Mine Health and Safety Act* provides:

> Where a contractor performs work at a mine, the contractor, the employee or officer of the contractor in charge of the work of the contractor at the mine and the owner and manager of the mine shall, in respect of the work of the contractor at the mine,
>
> > (a) take every reasonable measure and precaution to protect the health and safety of employees of the contractor, employees of the mine and other persons at the mine; and
> >
> > (b) comply with, and ensure that other persons comply with, this Act and the regulations and any applicable orders or directives issued under this Act or the regulations.

[17] Section 39 makes it a summary conviction offence for any person to contravene a provision of the *Act*.

[18] The Crown took the position at trial, as it did on this appeal, that the essential elements of the offence are a failure by the Respondent, on or about the date specified and in the place specified, to take every reasonable measure and precaution to protect the health and safety of the named employees. This is what Crown counsel referred to as the "statutory offence simpliciter". The Crown takes the position that the other details referred to in the charge as laid, that is, having the two named employees work on unsafe equipment which resulted in their death, are mere surplusage. The trial judge disagreed and held that those details are particulars that the Crown must prove.

[19] The Crown argued that the trial judge's ruling in this regard is wrong. If that is the case, it is the Crown's argument that the failings the trial judge found on the part of the Respondent are evidence of a failure to take every reasonable measure and precaution to protect the health and safety of its employees and the acquittal should be set aside and a conviction substituted on that basis.

[20] The Respondent argued that the trial judge's ruling is correct and that all along, the Respondent understood that the prohibited act alleged against it was having the employees work on unsafe equipment at the time of the incident in which they perished. The evidence upon which the trial judge found that there were certain failings on the part of the Respondent was evidence that went to the defence of due diligence.

[21] It is established law that fairness to an accused requires that there be some specification of the offence the accused is alleged to have committed. Thus in *Brodie v. The King* (1936), 65 C.C.C. 289 (S.C.C.), it was said that an accusedperson may not be charged merely with having committed murder; the indictment must identify with reasonable precision the act or acts with which he is charged. The offence should be described in such a way as to specify, in substance, the specific transaction intended to be brought against the accused.

[22] In *R. v. WIS Developments Corporation Ltd. et al* (1984), 12 C.C.C. (3d) 129, the Supreme Court of Canada said that an accused citizen must be treated fairly and that requires that he must be able clearly to identify what he is alleged to have done wrong so that he may prepare his case adequately.

[23] It is also settled law that the offence, as particularized in the charge, must be proved: *R. v. Saunders* (1990), 56 C.C.C. (3d) 220 (S.C.C.).

[24] Crown counsel argued that despite the detail contained in the charge, the Respondent was aware that the Crown would be alleging other failures on its part. In his opening statement at trial, Crown counsel did refer to certainalleged failureson the part of the Respondent, such as not having properly inspected or serviced the manlift. He also referred to problems with the switches. He said that based on that evidence he would be asking the Court to convict the Respondent of failing to take every reasonable measure and precaution to protectthe health and safetyof its employees"by permitting those two employees to operate this unsafe piece of equipment".

[25] On the Respondent's ultimately unsuccessful motion for a directed verdict of acquittal, the Crown reiterated that the prohibitedact allegedby the Crown was that the Respondent failed to take every reasonable measure and precaution to protect the health and safety of its employees by having those employees work on unsafe equipment, which resulted in the death of those employees. He said at one point that "... what we come down to is looking at whether or not there is some evidence that these workers were permitted to work on unsafe equipment, resulting in their death."

[26] In his final submissions at trial, Crown counsel took the position that so long as the Crown proved either that reasonable care was not taken by the Respondent to train its employees or that the manlift was not properly certified, inspected or serviced, it had proven the prohibited act. The Respondent, on the other hand, maintained that the prohibited act was causing the employees to operate an unsafe machine and submitted that it would be unfair, at the conclusion of a long trial, to require the Respondent to answer a charge that is not the particularized charge.

[27] In my view, the specifics set out in the charge cannot be viewed as mere surplusage. If the charge were to be framed in the words of s. 15 alone, without more, it would give the accused very little idea of what exactly it was alleged to have done or not done that amounted to failing to take every reasonable measure and precaution to protect the health and safety of its employees. As particularized, however, it tells the Respondent that the failure alleged against it relates specifically to the deceased and arises out of having them work on unsafe equipment which resulted in their death. It thus ties the charge to the incident that occurred on July 17, 2001. The charge the

Respondent had to answer is that it made the men work on unsafe equipment, not that it failed to train them properly. The evidence at trial focused mainly on how the manlift came to turn over and the connection between the incident, the riser angle, the switches and the hydraulic valve, all with a view to proving that the switches were not working properly and thus allowed the manlift to be placed in an unstable configuration, rendering it unsafe.

[28] The Crown also argued that the findings that were made by the trial judge about failings on the part of the Respondent amount to findings that the manlift was unsafe. The trial judge found that the Respondent did not adequately train the operators in the safe operation of the manlift, did not obtain the appropriate safety documentation for the manlift, and did not have the manlift adequately inspected or serviced. He found that these failings all amounted to having the deceased work under unsafe conditions, but were not proof that the equipment itself was unsafe. The trial judge also said he was unable to conclude that any of these failings were connected to the incident particularized in the charge.

[29] In my opinion, the Crown was required to prove the charge as particularized, which meant proving that the manlift was unsafe in a way that led to the incident that resulted in the employees' death. Put another way, the unsafe aspect alleged was whatever had caused the incident, which on the Crown's theory was a failure of the riser angle limit switches . This was precisely the issue that occupied most of the time at trial. It would not have been open to the Crown to seek a conviction on the charge before the court on the basis, for example, that there was a proven safety defect somewhere on the manlift, if that defect played no part in the incident particularizedin the charge. The trial judge was not satisfied that the failings that were established had any causal connection to the incident; indeed he ultimately decided that he could not say what had caused the incident. In my view, therefore, the findings he did make do not assist the Crown.

[30] Finally, the Crown argued that prior events can be relevantto prove a charge and cited *R. v. Ryback* (1996), 105 C.C.C. (3d) 240 (B.C.C.A.) [leave to appeal refused, [1996] S.C.C.A. No. 135]. *Ryback*, however, dealt with pre-charge conduct held to be relevant to the reasonableness of a complainant's fear of the accused charged with criminal harassment of her. What the Crown is really seeking in this case is not to use prior events as evidence relevant to the offence charged, but to substituteallegations of

other wrong-doing for the wrong-doing particularized in the charge. This, in my view, it cannot do.

[31] For the foregoing reasons, I find no merit in the first ground of appeal.

2. Is the acquittal unreasonable for want of analysis by the trial judge of key issues in the trial?

[32] The Crown submitted that the reasons given by the trial judge for acquitting the Respondent do not deal with key issues in the trial and are therefore inadequate.

[33] In *R. v. Sheppard*, [2002] 1 S.C.R. 869, 162 C.C.C. (3d) 298, the SupremeCourt said that inadequate reasons do not confer a free-standingright of appeal. An appellate court must take a functional approach to reasons and as long as they are reasonably intelligible and are sufficient to allow for meaningful appellate review for correctness, intervention is not warranted. The assessment of the adequacy of reasons is a highly contextual and case-specific exercise. The questionis not whether the trial judge failed to abide by "abstract notions of judicial accountability" but whether in the circumstances of the particular case, any deficiency in the reasons is prejudicial to the exercise of the appellant's right to an appeal. Where the record as a whole, including the reasons, plainly indicates the basis for the trial judge's decision, deficiencies in the reasons will not justify appellate intervention.

[34] Where the verdict challenged on appeal is an acquittal, particular legal considerations inform the assessment of the sufficiency of reasons for the acquittal: *R. v. Kendall* (2005), 75 O.R. (3d) 565; [2005] O.J. No. 2457 (C.A.). In *Kendall,* Cronk J.A. in giving the majority decision noted that cardinalprinciples of the presumptionof innocence and the Crown burden of proof of the accused's guilt beyond a reasonable doubt must inform any analysis of the sufficiency of reasons for acquittal in a criminal case. She went on to say that even so, in all criminal cases, the trial judge's reasons, or the record as a whole (including the reasons) must satisfy the purpose for which the requirement of reasons is imposed. The basis for the trial judge's decision must be plainly apparent.

[35] In his reasons for acquitting the Respondent, which occupy some 26 pages of transcript, the trial judge reviewedthe Crown and defencepositions on what the Crown had to prove and held that the Crown had to prove that the accused did a prohibited act

which caused the manlift to overturn and that the particularized prohibited act was having the deceased work on unsafe equipment. He set out the evidenceand argument presented by the Crown in support of the position that it had fulfilled that burden. Clearly he was somewhat impressed with the Crown evidence, particularly that of its expert witness, Mr. Thicke, because he found that Thicke's opinion was likely accurate: "I accept as a probability that [his] carefully considered and persuasive opinion is likely accurate". That opinion, and the Crown theory, was that the manlift was inadvertently placed in a potentially unstable configuration (extension at a riser angle of 52 degrees) by the operator and fell over as a result of the failure of the riser angle limit switches.

[36] The trial judge also referred to the Respondent's criticism that Mr. Thicke's reasoning was circular because the redundant character of the limit switches as they were found after the accident would have prevented the unsafe configuration; he noted the Respondent's argument that Thicke simply eliminated this circumstance by saying that the second riser full up limit switch must have been stuck at the time of the incident and then became unstuck. He noted that there was no evidence that it had been stuck either before or after the incident.

[37] The trial judge also found that the opinions of the defence expert Dr. Ball had sufficient merit to raise a reasonable doubt unless those opinions were rejected. The main aspect of Dr. Ball's opinion referred to by the trial judge was Ball's view that it was difficult to establish the causation of the accident because a proper accident reconstruction was never completed.

[38] The trial judge said further:

> I do not reject Dr. Ball's opinion that this case is missing a convincing accident reconstruction. In the place of convincing evidence, I am offered theories that I find to be probabilities.
>
> As attractive as the Crown's theory regarding the limit switches may be, I am unable to conclude beyond a balance of probabilities that this caused the manlift to topple over. This becomes a fatal flaw for the Crown on this argument. The theory may meet the civil standard, but not the standard that I am called upon to apply. To accept this theory as proof beyond a reasonable doubt would be an unsafe stretch given the compelling and persuasive evidence to the contrary, which I find to be reliable.

> The Crown is not allowed to stack probability upon probability as a substitute for proof beyond a reasonable doubt. The problem as I see it is that it is not possible to conclude what went wrong beyond a reasonable doubt, and I am not permitted to engage in speculation or other forms of guesswork to fill the void. The Crown's theory is highly persuasive and extremely tempting, but in the context of a different standard of proof.
>
> Based upon my assessment and weighing of the totality of the admissible evidence, I reject the Crown's theory that the Defendant required [the deceased] to operate unsafe equipment in which there was a critical safety system defect involving the safety limit switches. I am unable to conclude beyond a reasonable doubt what the status of the key limit switches was at the time the operators worked their fatal shift and the shifts leading up to it. In arriving at these conclusions, I have not overlooked that it is not incumbent upon the prosecution to prove its case to an absolute certainty regarding the actus reus.

[39] The trial judge then went on to make findings about inadequacies in training and other matters that I have referred to in my reasons for dismissing the first ground of appeal.

[40] In argument on this ground of appeal, counsel for the Crown relied mainly on the absence in the trial judge's reasons of any analysis of the evidence about the riser's hydraulic valve. That evidence, simply put, was that damage to the hydraulic valve during the incident would have restricted the flow of hydraulic fluid and locked the riser angle in the position it was in at the time the incident occurred. The inference the Crown asked the trial judge to draw from this was that the angle must have been at 52 degrees at the time the manlift fell over, rather than being at 70 degrees at the time it fell over and then decreasing to 52 degrees as found shortly afterward.

[41] While the trial judge does not analyse the evidence concerning the hydraulic valve, he does acknowledge the Crown's position by appending to his reasons paragraphs from the Crown's brief of argument. Among the paragraphs appended are 376 and 377, which clearly set out the significance of the hydraulic valve to the Crown's theory. The evidence about the workings of the hydraulic valve occupied a substantial amount of time at the trial and it cannot be that the experienced trial judge simply overlooked or failed to have any regard to that evidence.

[42] The trial judge in fact accepted that Mr. Thicke's opinion as to how the incident occurred was probably correct, from which it must follow that he acceptedas probably correct the Crown evidence as to the significance of the hydraulic valve.

[43] In my view, the trial judge's reasons are not deficient. It is clear from them that he accepted Mr. Thicke's opinion as to the cause of the incident as a probability but found that the Crown's case fell short of proof beyond a reasonable doubt. That was the basis for his decision. It does not preclude a meaningful review as to whether he was correct as to what the Crown had to prove or whetherthe acquittalis unreasonable. Accordingly, I find no merit in this ground of appeal.

[44] The question whether the acquittal is unreasonable will be examined under ground number 3.

3. Was the trial judge'sfinding about causationof death unreasonable because it is not supported by the evidence?

[45] In my view, the question posed by this ground of appeal is simply whether the acquittal is unreasonable. Generally, the standard of review for an appeal court is to ask whether a jury acting judicially could reasonablyhave reachedthe verdictrendered at trial. It is not whether this Court would have reached the same verdict that the trial judge did. Nor is it the task of this Court to re-try the case. An appeal court must also bear in mind the advantageous position of the trial judge in hearing and observing the witnesses, particularly where credibility is an important issue.

[46] In determining whether the acquittal was unreasonable, I start with the basics. The Respondent was to be presumed innocent and the Crown had the burden of proving otherwise. The Crown, having charged the Respondent as it did, had the burden of proving that the Respondent required the deceased to work on unsafe equipment which resulted in their death. There was no burden on the Respondent to prove what caused the incident: *R. v. Petro-Canada*, [2003] O.J. No. 216 (C.A.). If the trial judge had a reasonable doubt, he had to give the benefit of it to the accused. As juries are instructed every day, the standard of proof beyond a reasonable doubt is more than a probability, but less than absolute certainty.

[47] As I have indicated above, it is obvious from the trial judge's reasons that he was impressed with the Crown's evidence and in particular the theory of Mr. Thicke, but he found that it did not satisfy him beyond a probability as to what had caused the incident. There was some evidence from which a doubt could arise as to whether contact with the process plant building played a part in the incident, as was the opinion of Dr. Ball. Although the Crown position was that the eyewitness evidence rules out any contact between the building and the manbasket, I do not read the evidence that way at all. What the eyewitnesses were able to see and hear varied according to the vantage point they had and the circumstances they were in when the incidenthappened. More than one witness saw the operators positioning the manbasketnear the top of the process plant building(witnesses Luff, McInnes,Sanderson and Gowanlock),although none could say exactly how far the basket was from the building. There was also evidence that the task the men had been assigned was to replace girts on the upper part of the building.

[48] There was other evidence from which it could be inferred that the manbasket had come into contact with the building. The witness Magee voiced the opinion based on relatively fresh damage he observed on the manbasket that there had been significant contact between the manbasket and the building, although he allowed for the possibility that the damage was from a steel beam the riser hit on its way down to the ground.

[49] Even if the evidence about possible contact with the building and the expert opinion of Dr. Ball are discounted or found to be weak, that does not end the matter. The problem with the Crown's argument is that it is based on the propositionthat if the trial judge rejected the defence theory that the manlift fell over because of force exerted when it came into contact with the building,he had to acceptthe Crown theory. But that is not the law. Expert evidence is like any other evidence in that the trier of fact may accept some, all or none of the witness' testimony. In *Towne Cinema Theatres Ltd. v. The Queen* (1985), 18 C.C.C. (3d) 193 (S.C.C.) then Chief Justice Dickson said: "The law is clear that a trier of fact does not have to accept testimony, whether expert or otherwise. He can reject it, in whole or in part. He cannot,however, reject it without good reason. In this case, it was incumbent on the trial judge to consider and assess the weight, if any, to be given to the evidence ... ."

[50] The purpose of expert evidence is to assist the trier of fact through knowledge that the ordinary person would not have. The trier of fact is not obliged to accept an opinion as dispositive of the ultimate issue in the trial.

[51] The trial judge did not reject the evidence of Mr. Thicke. He found, however, that at the end of the day that evidence was a theory that did not provide more than a probable explanation for how and why the manlift fell over.

[52] I do not see how the trial judge's analysis can be criticized. A review of the evidence reveals that Mr. Thicke, who examined the manlift more than a year after the accident, at times explained his opinion in terms of possibilities or probabilities. The following examples will serve to illustrate.

[53] When asked a hypothetical question involving a limit switch that closes at 47 degrees and a second redundant limit switch that closes at 70 degrees, and how the second one could have closed before the riser angle reached 70 degrees, Mr. Thicke's answer was (at page 1295 of the transcript): "Well it must have been stuck in the closed position. And the reason I say that that is even a possibility, which I normally wouldn't think of as a possibility, is that there are other limit switches that were stuck or seized in the unit, and it occurs to me that that one also might have been stuck at the time of the tip-over, but through the jostling of the unit landing on the ground and then the righting of it, that freed the switch."

[54] Also at page 1295, in speaking of there being some paint overspray on the limit switches, Mr. Thicke said: "And it occurs to me that that might have contributed to the sticking of the limit switch."

[55] At page 1344, Mr. Thicke explained that "the most probable thing is that it [the limit switch] was stuck, and that happens to coincide with the hydraulic systemhaving to be at 52 degrees. There's a lot of evidence that suggests that it was stuck".

[56] In the written report containing his opinion, which was an exhibit at trial, Mr. Thicke describes the scenario that he posits as resulting in the incident as "the most probable sequence of events leading up to the tip-over ...". At page 35 of that report, Mr. Thicke says, "it seems probable that the other riser full up limit switch that appeared to be working after the incident may have been stuck in the closed position prior to the tip-over".

[57] At page 1250 of his testimony, Mr. Thicke said, “I suppose there’s some possibility of hooking and springing away from the building but I believe that’s inconsistent with other witness evidence ...”.

[58] When an expert gives an opinion, his or her degree of certaintyas to that opinion is a matter going to its weight. Although the trial judge did not make any negative findings about Mr. Thicke’s credibility, it is important that he heard and saw him testify. The trial judge was in a much better position than I am now to make the assessment of the expert opinion. Since there is a basis in the record for the trial judge’s conclusion that the evidence amounted to theories and probabilities, I do not see any basis for intervening and making my own assessment of the expert or the other evidence. I concede that I have jurisdiction to do that in some circumstances, as described in the following excerpt from *R. v. Multitech Warehouse (Manitoba) Direct Inc.*, [1995] M.J. No. 285 (C.A.) (at paragraph 42):

> In my opinion it can safely be said that on a Crown appeal from an acquittal in a summary conviction matter the appeal court has the jurisdiction to reverse a finding of fact. But in doing so, it must pay heed to the indisputable advantage given to the trial judge who saw and heard the witnesses, and the attendant “elbow room” that follows from this principle. Once this is understood, it seems to me to follow that on a Crown summary conviction appeal the appeal court must be free to reverse an acquittal on findings of fact when examination of all of the evidence discloses that the verdict is unreasonable. To hold otherwise would emasculate the undoubted authority that the appeal court judge has, within the guidelines just referred to, to reverse findings of facts.

[59] The trial judge stated in his reasons that the facts upon which Mr. Thicke arrives at his opinion are present in the evidence. That being so, he did not fail to take into account the evidence upon which the Crown relied or misapprehend that evidence.

[60] Ultimately, the trial judge said that he was not able to conclude beyond a reasonable doubt what the status of the key limit switches was at the time of the incident. There was no evidence that the redundant nature of the riser angle limit switches had failed either before or after the incident. The trial judge accepted Dr. Ball’s opinion that no proper analysis of the function and operation of the limit switches had been undertaken as should be done in a proper accident reconstruction. Ultimately, the trial judge found that it was not possible to conclude what went wrong, that there was “an unsolvable mystery”.

[61] Crown counsel did not point to any part of the trial judge's reasons where he applied a wrong principle or misapplied the burden of proof. In the absence of anything appearing on the record to indicate otherwise, it should be presumed that the trial judge applied the proper principles and directed himself properly: *R. v. Twist* (1980), 16 C.R. (3d) 94 (B.C.C.A.).

[62] In all the circumstances, I am unable to say that the trial judge's decision to acquit was unreasonable. Even if Dr. Ball's opinion that the accident was caused by the manlift coming into contact with the building is completely rejected, that still leaves open for consideration the weight of the expert opinion offered by the Crown. It was open to the trial judge to find that it offered no more than a probable explanation for the accident and that accordingly the charge as particularized was not proven beyond a reasonable doubt. Therefore, the acquittal is not unreasonableand there is no merit in this ground of appeal.

4. Did the trial judge err in admitting certain records into evidence as business records?

[63] At trial, the Respondent tendered through its president and chief executive officer several garage repair order invoices and asked that they be admittedas business records. The Respondent had received the invoices from another company ("Mech-Weld") for payment for parts and labour supplied by a mechanic who had done an inspection of the manlift prior to the incident. Crown counsel objected to the invoices being admitted into evidence for the truth of their content except as to the amount billed and when it was billed. The Respondent wanted the invoices accepted as evidence of the truth of their content going to what the mechanic did, relevant on the issue of due diligence. No witness from Mech-Weld testifiedand althoughthe witness who testified for the Respondent had some knowledge of the invoices in that the Respondent had received them, he had no knowledge of the preparation of the invoices.

[64] The trial judge held that the invoices were admissible under the common law as set out in *R. v. Monkhouse* (1987), 61 C.R. (3d) 343 (Alta. C.A.).

[65] In *Monkhouse*, Chief Justice Laycraft, as he then was, set out the common law rule as follows:

> In his useful book, Documentary Evidence in Canada (1984), Carswell Co., Mr. J.D. Ewart summarizes the common law rule after the decision in *Ares v. Venner* as follows at p. 54:
>
> > ... the modern rule can be said to make admissible a record containing (i) an original entry (ii) made contemporaneously (iii) in the routine (iv) of business (v) by a recorder with personal knowledge of the thing recorded as a result of having done or observed or formulated it (vi) who had a duty to make the record and (vii) who had no motive to misrepresent. ...

[66] To this summary, Laycraft C.J.A. added the modification that the original entry need not have been made personally by a recorder with knowledge of the thing recorded.

[67] Crown counsel pointedout that no witness from Mech-Wald testifiedto describe the records and provide an appropriate evidentiary foundation for their admissibility. Thus, there was no witness with a substantial knowledge of the records who could demonstrate that they were made contemporaneously by someone having personal knowledge of the matters being recorded who is under a duty to make the record or entry. The Crown conceded that the records were relevant mainly to the due diligence argument advanced by the Respondent. The trial judge appears to have rejected the suggestion that the manlift was adequately inspected, although without making a finding on the issue of due diligence. However, counsel for the Crown argued that the information in the records may have contributed to the reasonabledoubt entertainedby the trial judge about the Crown's proof of the offence.

[68] The trial judge found that all of the *Monkhouse* criteria were met save that in the case of an invoice prepared after the incident, there could be a motive to misrepresent. That invoice was not admitted into evidence.

[69] There was evidence before the trial judge that the Respondent had arranged for an inspection of all of its equipment that would be used at the minesiteand the invoices were received by the Respondent as a result of that arrangement. There was evidence that an individual named "Ron" had done the work and it appeared from the invoices themselves that "Ron" had written up the invoices. In my view, it was open to the trial judge to infer from all the circumstances that Ron was under a duty to record what he set out in the invoices in light of the arrangement that had been made with the

Respondent. Finally, there was evidence that each invoice had been initialled by a representative of the Respondent, signifying approval of the invoice. In my view, this latter circumstance in a sense made the invoices business records of the Respondent, recording its approval of what each invoice purported to represent.

[70] The trial judge also raised the possibility that the Crown might apply to call rebuttal evidence by way of calling "Ron" as a witness. The Crown did not apply to call that evidence.

[71] In my view the trial judge did not err in admitting the invoices as business records even though no witness was called to establish how they were generatedby the company that had compiled the invoices. There was sufficient evidence before the Court from which the trial judge could make the necessary inferences to satisfy the requirements of *Monkman*. Even if I am wrong on this point, the invoices were not relevant to proof of the charge before the court but only the defence of due diligence. There is no indication from his reasons that the trial judge consideredthe contentof the invoices as evidence on the issue of what caused the incident. I would not give effect to this ground of appeal.

[72] For the foregoing reasons the appeal from acquittal is dismissed.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
23rd day of May 2006

Counsel for the Appellant: Noel Sinclair
Counsel for the Respondent: James W. Joosse

S-1-CR-2004000024

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN, on the
information and complaint of Sylvester Wong,
Chief Inspector of Mines, Workers' Compensation
Board of the Northwest Territories

\- and -

SUPREME STEEL LTD.

REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE V.A. SCHULER