Date: 19980203 Docket: CAC 142921

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Lowe, 1998 NSCA 67

Chipman, Pugsley and Cromwell, JJ.A.

BETWEEN:	)	
	)	
LEROY JAMES LOWE	)	Appellant appeared
	)	in person
Appellant	)	
	)	
- and -	)	
	)	
HER MAJESTY THE QUEEN	)	William D. Delaney
	)	for the Respondent
Respondent	)	
	)	
	)	
	)	
	)	Appeal Heard:
	)	February 3, 1998
	)	
	)	
	)	Judgment Delivered:
	)	February 3, 1998

Revised Decision: The text of the decision has been revised to correct the docket number. This revised version was issued on November 8, 2007.

The reasons for judgment of the Court were delivered orally by:

CHIPMAN, J.A.:

The appellant was convicted by Judge Ross E. Archibald in Provincial Court on a charge of speeding contrary to s. 104(1) of the **Motor Vehicle Act**. His appeal to the Supreme Court was dismissed by Justice J. Edward Scanlan. His appeal to this Court is governed by s. 7 of the **Summary Proceedings Act** which incorporates by reference relevant sections of the **Criminal Code**. This appeal is by s. 839 of the **Code** limited to grounds involving a question of law alone in respect to which leave is granted. The appellant advances two grounds:

(I) The Crown failed to prove his identity beyond a reasonable doubt at the trial before Judge Archibald; and

(ii) Justice Scanlan erred in rendering judgment prior to receipt of the appellant's rebuttal factum.

Ground 1

The material evidence in support of the Crown's case at trial is contained in the following extract from the testimony of Constable George Yorston, RCMP:

> Q. Okay. And on February 11th of 1997, did you come in contact with an individual by the name of Leroy James Lowe?

> A. Yes, I did.
>
> Q. And could you just briefly for the Court indicate how you came into contact with Mr. Lowe?
>
> A. Yes. I was travelling east on East Queen Street in Salmon River, Colchester County, Nova Scotia. I observed a red Volvo coming towards me and it appeared to be travelling quite a bit faster than the posted 60 kilometre limit in that area. I activated the radar and I received two readings. The first reading was 93 kilometres per hour, the second reading was 91 kilometres per hour. This is the speed I believe I locked into my radar unit. I turned and stopped Mr. Lowe without losing sight of him and I approached him and he identified himself to me with a picture Nova Scotia driver's licence and I explained to him why he had been stopped and subsequently issued him with a Summary Offence Ticket.
>
> Q. Now you indicated that the speed in that area is 60 kilometres an hour. How is that made known to motorists?
>
> A. Approximately two kilometres before where I stopped Mr. Lowe, there's a sign posted by the Department of Transportation with the word "maximum" and the number "60" below it advising traffic travelling west, in which direction Mr. Lowe was travelling that that is a posted 60 ... maximum 60 kilometre per hour limit.

The appellant did not cross-examine Constable Yorston, nor did he call evidence on his own behalf. Judge Archibald found that the Crown's case had been made out. In dismissing the appellant's appeal Justice Scanlan said:

> . . . The Trial Judge accepted the evidence of the Officer on the issue of identity as a determative of fact. It is not for this Court to substitute its opinion as regards findings of fact.

> The driver clearly identified himself to the Officer in question by providing a photo driver's license, that evidence is uncontradicted. There is evidence before the Court on the issue of identity and it is up to the trier of the fact to determine whether the Crown has proven identity beyond a reasonable doubt. Having reviewed the trial transcript I am satisfied there is a reasonable basis for the conclusions of the Trial Judge and this court will therefore not interfere with that decision.

In our opinion the appellant's first ground of appeal does not raise a question of law because the question raised is of the sufficiency or weight of the evidence as distinct from a question of a complete absence of evidence. In **R. v. Deamond** (1976), 17 N.S.R. (2d) 242 MacKeigan, C.J.N.S., for this Court, drew this distinction in a somewhat similar case and at p. 243 continued:

> We unanimously agree that identity of name, especially when coupled with evidence of address and identifying papers, constitutes some evidence of identity, the weight of which depends on the circumstances and is for the trier of fact to determine.

Here there was evidence of the appellant's identity upon which the trial judge could be satisfied of guilt beyond a reasonable doubt. We have no power to entertain the first ground of appeal. Leave to appeal on this ground is denied.

Second Ground of Appeal

Another judge of the Supreme Court had given directions for the filing of written submissions on the appellant's appeal to that Court which was by way of

written briefs. These directions provided for a factum by the appellant, a response by the Crown and a rebuttal submission from the appellant. Following receipt of the Crown's submission, Justice Scanlan, apparently not aware of the appellant's right to file a further submission in reply, filed his written decision. This appears to have been the result of an administrative oversight. We have been provided with, and have reviewed, a copy of the rebuttal factum filed by the appellant. Section 839(2) of the **Criminal Code** provides:

> 839 (2) Sections 673 to 689 apply with such modifications as the circumstances require to an appeal under this section.
>
> Section 686(1)(b)(iii) provides:
>
> 686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> . . .
>
> (b) may dismiss the appeal where
>
> . . .
>
> (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, or

We are satisfied that had the appellant's written submission been drawn to Justice Scanlan's attention prior to his rendering the decision, the result would necessarily have been the same. Hence, no substantial wrong or miscarriage of justice has been occasioned.

Leave to appeal on the second ground is granted but the appeal is dismissed.

Chipman, J.A.

Concurred in:

Pugsley, J.A.

Cromwell, J.A.