NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Francis***, 2011 NSCA 113

Date: 20111209
Docket: CAC 338339
Registry: Halifax

Between:

Tony Francis

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Hamilton, Fichaud and Farrar, JJ.A.
Appeal Heard:	November 29, 2011, in Halifax, Nova Scotia
Held:	Leave to appeal is granted but the appeal is dismissed per reasons for judgment of Fichaud, J.A.; Hamilton and Farrar, JJ.A. concurring
Counsel:	Luke A. Craggs, for the appellant William D. Delaney, for the respondent

Reasons for judgment:

[1] Mr. Francis appeals his impaired driving conviction.

Background

[2] On December 8, 2006 a witness saw Mr. Francis driving his truck across the centre line in the lane for oncoming traffic on the MacKay Bridge between Dartmouth and Halifax. The witness said the truck "swayed over into the other lane of traffic ... kind of driving back and forth ...". The witness' car followed Mr. Francis off the Bridge to the Bedford Highway, then on an exit ramp to Joseph Howe Drive. Another witness in that following car testified that, as Mr. Francis turned onto Joseph Howe Drive, Mr. Francis "almost lost control of the truck going around that turn". The witness called 911 to notify the police.

[3] Police Cst. MacDonald responded to the in progress call. He observed Mr. Francis fail to stop at a Stop sign, then followed behind Mr. Francis to initiate a traffic stop. Cst. MacDonald activated his police emergency lights, but Mr. Francis continued to drive. Cst. MacDonald then engaged the siren, in response to which Mr. Francis pulled to the shoulder of the road and slowed, but continued to drive. Cst. MacDonald then pulled alongside Mr. Francis and gave a hand signal to stop. Mr. Francis did so. The officer noticed a strong smell of alcohol, slurred speech, lethargy and confusion from Mr. Francis.

[4] On January 8, 2009, by an oral decision, Judge Sherar of the Provincial Court convicted Mr. Francis of impaired driving contrary to s. 253(a) of the *Criminal Code*.

[5] Mr. Francis appealed his conviction to the Supreme Court of Nova Scotia sitting as the Summary Conviction Appeal Court (SCAC). He submitted that the verdict should be set aside as unreasonable and could not be supported by the evidence. By a decision dated September 21, 2010, Justice Duncan dismissed his appeal (2010 NSSC 349).

Issue

[6] Mr. Francis applies for leave to appeal to the Court of Appeal. He submits that the SCAC erred in applying the test as to whether the trial judge's verdict was unreasonable.

Standard of Review

[7] The parties agree, as do I, that the standard of review is as stated in *R. v. Farrell,* [2009] N.S.J. No. 15, para 9:

> **9** Recently in **R. v. R.H.L.**, [2008] N.S.J. No. 468, 2008 NSCA 100, Justice Saunders described the two standards of review in summary conviction matters, the first being the standard to be applied by the SCAC judge and the second being the standard applied to that decision by this court:
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> > [20] Not only are appeals under s. 839 restricted to questions of law "but the error of law required to ground jurisdiction in this court is that of the summary conviction appeal judge" per Oland, J.A. in **R. v. Travers (R.H.)**, [2001] N.S. J. No. 154, 2001 NSCA 71 at para. 21, also making reference to **R. v. Shrubsall**, [2000] N.S.J. No. 26 (N.S.C.A.) at para. 7. Accordingly, for this appeal to succeed an error in law must be identified in the decision of Justice LeBlanc, sitting as the SCAC.
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> > [21] The standard of review that applied at the SCAC during its review of the trial judge's decision was explained by this court in **R. v. Nickerson**, [1999] N.S.J. No. 210 at para. 6:
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> > > ... 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. (Underlining in original)
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> [22] The standard of review we are to apply on an appeal from a SCAC was described in **R. v. C.S.M.**, [2004] N.S.J. No. 173 (C.A.):
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> [26] Under s. 839(1), the issue is whether the SCAC has erred in "law alone". The Court of Appeal is considering an appeal from the SCAC, not a de novo appeal from the trial court. This Court must determine whether the SCAC erred in law in the statement or application of the principles governing the review by the SCAC of the trial verdict. **R. v. Travers (R.H.)** (2001), 193 N.S.R. (2d) 263; 602 A.P.R. 263; 2001 NSCA 71, at para. 21; **R. v. Cunningham** (P.R.) (1995), 143 N.S.R. (2d) 149*;* 411 A.P.R. 149 (C.A.), at para.12, 21; **R. v. G.W.**, [1996] O.J. No. 3075, (C.A.) at para. 20; **R. v. Emery** (1981), 61 C.C.C. (2d) 84 (B.C.C.A.).
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> See as well **R. v. Hayes**, [2008] N.S.J. No. 100 (C.A.) per Hamilton, J.A. at para. 21-22.

Analysis

[8] Mr. Francis' factum says that the SCAC judge "erroneously deferred" and "automatically deferred to the conclusions of the trial judge", instead of reviewing the evidence independently to determine whether the verdict was unreasonable. After mentioning the evidence that Mr. Francis cited to indicate he was not impaired, the SCAC judge said:

> [54] It was certainly open to the trial judge to take the view that this evidence was inconsistent with impairment, but he did not accept that argument.

At the hearing in this Court, Mr. Francis' counsel submitted that this passage in particular exhibits undue deference by the SCAC judge to the trial judge.

[9] With respect, there is no merit to Mr. Francis' submission.

[10] In the quoted passage, the SCAC judge made no assessment of the trial judge's findings. He merely recounted that the trial judge failed to accept Mr. Francis' submission.

[11] The SCAC judge (paras 10-12) quoted passages from the authorities of this Court on the power of a Summary Conviction Appeal Court to assess a ground of appeal that the trial verdict was unreasonable under the test in *R. v. Biniaris*, [2000] 1 S.C.R. 381, paras 36, 38-40. The judge applied those principles.

[12] The SCAC judge reviewed the pertinent evidence. He cited adjectives used by the trial judge - "erratic" and "dangerous" - to characterize Mr. Francis' driving. The SCAC judge said there was insufficient evidence to support those adjectives.

[13] The SCAC judge also noted findings of the trial judge that were sufficiently supported by the evidence. The SCAC judge reviewed the evidence that supported those facts. Those facts are set out above (paras 2-3), and were well grounded in the testimony of the Crown's witnesses. Mr. Francis did not testify and offered no evidence.

[14] The crux of SCAC judge's reasoning was:

> [56] The appellant's crossing of the bridge in the wrong lane of travel, his failure to stop at the stop sign, and his failure to stop for the police after Cst. MacDonald initiated his pursuit, together with evidence of alcohol consumption and physical indicia of impairment may reasonably lead to an inference that the appellant was impaired at the time of the operation of the motor vehicle, when seen as part of all of the supportable facts found by the trial judge. Indeed this was the path of reasoning adopted by the trial judge, ...
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> [58] It is useful to state again that the role of the Summary Conviction Appeal Court is not to simply substitute its' view of the evidence for that of the trial judge. Rather, the question is whether, after reviewing the admissible evidence, it can be concluded that it is reasonably capable of supporting the conclusions of the trial judge, properly directed and acting judicially.
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> [59] I acknowledge the judge's misapprehension of some facts, and that certain of the evidence, if looked at in isolation, is not compelling evidence of impairment. However, I am satisfied that the remaining evidence of unsafe operation of the vehicle, failure to obey traffic laws, failure to respond in a timely manner to the attempts by Cst. MacDonald to stop the appellant, the smell of alcohol on the appellant's breath, and the officers' observations of physical indicia consistent with impairment leave a sufficient body of evidence that reasonably supports the learned trial judge's conclusion that the appellant was criminally impaired by alcohol at the time of operating his motor vehicle, and at the time and place alleged in the Information.

[15] The SCAC judge made no appealable error, under the principles set out in *Farrell*, in his application of the tests that govern whether the trial verdict was unreasonable further to *Biniaris* and the other governing authorities.

[16] I would grant leave but dismiss the appeal.

Fichaud, J.A.

Concurred: Hamilton, J.A.

Farrar, J.A.