NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Prest***, 2012 NSCA 45

Date: 20120503
Docket: CAC 352263
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Todd Earle Prest

Respondent

Judges:	Hamilton, Beveridge and Farrar, JJ.A.
Appeal Heard:	March 26, 2012, in Halifax, Nova Scotia
Held:	Leave to appeal is granted and the appeal is allowed per reasons for judgment of Farrar, J.A.; Hamilton and Beveridge, JJ.A. concurring.
Counsel:	Mark Scott, for the appellant David Daniels, for the respondent

Reasons for judgment:

[1] On March 9, 2011, Provincial Court Judge Claudine MacDonald found the respondent Todd Earle Prest guilty of operating a motor vehicle while his licence was suspended contrary to s. 287(2) of the **Motor Vehicle Act**, R.S.N.S. 1989, c. 293 (**MVA**). Mr. Prest did not dispute that he operated his motor vehicle on December 1st, 2010. Nor was it disputed that he was disqualified from driving pursuant to s. 205 of the **MVA**. The disqualification was mandatory following his guilty plea to driving without insurance, contrary to s. 230 of the **MVA**.

[2] At trial Mr. Prest was self-represented and argued he was not guilty of the offence because:

1. he had been informed by the Crown prosecutor at the time he pled guilty to driving without insurance that he would not lose his licence; and

2. he did not receive any notice from the Registrar of Motor Vehicles that his licence had been suspended.

Therefore, he had no reason to believe his license had been suspended.

[3] The trial judge accepted Mr. Prest's evidence on these two issues but found they were not a defence to the charge. He was fined $500 plus a $75 victim surcharge. As a result of the conviction, his licence was suspended for one year.

[4] By Notice of Appeal dated March 17, 2011, Mr. Prest appealed his conviction to the Summary Conviction Appeal Court (SCAC). He also sought to introduce fresh evidence on his appeal consisting of two affidavits, one from Mr. Prest and the other from his estranged wife seeking to introduce the Letter of Suspension from the Registrar and explain why the letter never reached Mr. Prest. The Crown objected to the introduction of the fresh evidence.

[5] Mr. Prest was still self-represented at the time of filing his Notice of Appeal. However, when the appeal was heard he was represented by counsel. The issues before the SCAC were whether:

1. the fresh evidence would be admitted;

2. the defence of due diligence had been made out;

3. the defence of officially induced error applied.

[6] By decision dated May 10, 2011, Supreme Court Justice Gerald R. P. Moir allowed the Registrar's Letter of Suspension to Mr. Prest dated September 16, 2010, to be admitted for the very limited purpose of showing what information the Registrar provides to individuals whose licences have been suspended pursuant to s. 205 of the **MVA** but for no other purpose (the Crown agreed to the admission of the letter for this limited purpose).

[7] The SCAC judge found that the defences of due diligence and officially induced error were available to Mr. Prest. He then reviewed the evidence and concluded that Mr. Prest had established, on the balance of probabilities, both of the defences.

[8] He acquitted Mr. Prest of the charge based on the due diligence defence and, alternatively, had the due diligence defence not been made out, would have stayed the charge based on the officially induced error defence.

[9] The Crown seeks leave to appeal and, if granted, appeals from the decision of the SCAC alleging that the SCAC judge erred in ruling that the defence of due diligence and the defence of officially induced error were available to the respondent.

Issues

[10] The Crown argues:

1. The SCAC Judge erred in law in ruling the defence of due diligence was available to the respondent;

2. The SCAC Judge erred in law in ruling the defence of officially induced error of law was available to the respondent;

3. Alternatively, if the defences were available, the SCAC erred in law in failing to order a new trial.

Standard of Review

[11] The standard of review under s. 839 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46 was recently restated by this Court in **R. v. Francis**, 2011 NSCA 113:

> [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:
> >
> > > [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.
> > >
> > > [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:
> > >
> > > > ... 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 <u>some</u> evidence to support the trial judge's conclusions nor a new trial on the transcript. (Underlining in original)

[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.):

> [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. **...**

[12] Therefore, for the Crown to be successful I must be satisfied Justice Moir erred in law.

Analysis

[13] The Crown's argument focuses on the defences not being available "on the facts" of this case. In its factum it acknowledges that due diligence can be a defence to driving while suspended when it states:

> 38. ... [It is without question that the offence prosecuted was one of strict liability to which diligence would be available. Of course, the fact that due

> diligence is generally available as a defence to strict liability infractions does nothing to characterize the nature of the mistake in question] ....

[14] The Crown goes on to argue that the defence does not apply on the facts as found by the trial judge. Similarly, in addressing the defence of officially induced error, the Crown in its factum states:

> 53. The SCAC Justice was correct to conclude that the defence of officially induced error is a rare exception to the principle that ignorance of the law does not excuse criminal behaviour. He was, moreover, correct to note that its basis is akin to entrapment. Therefore, a stay of proceedings would be the appropriate remedy. The SCAC's treatment of the facts to the law, however, reflects numerous legal errors.

[15] Again the Crown is arguing that the defence of officially induced error is not available to Mr. Prest on the facts as found by the trial judge.

[16] With that backdrop, the issue on this appeal, succinctly stated, is whether the SCAC judge committed reviewable error in overturning the conviction and entering an acquittal. I had earlier set out the standard of review which would require the SCAC judge to identify an error of law, a miscarriage of justice or whether the findings of the trial judge are unreasonable or cannot be supported by the evidence.

[17] In my view, although the SCAC judge does not explicitly state it, it is implicit in his reasons that he found that the findings of the trial judge were unreasonable and could not be supported by the evidence. The result of this error was a failure to properly consider the two defences raised by Mr. Prest.

[18] To explain in more detail it is necessary to review the evidence before the trial judge and how that evidence was addressed by the SCAC judge in his reasons. I would also add, for reasons that will become apparent, that it is only necessary to address that portion of the SCAC judge's reasons relating to officially induced error.

[19] As noted earlier, Mr. Prest was self-represented at trial. Prior to being sworn Mr. Prest said this to the court:

> **MR. PREST:** Actually when I was in Court to plead guilty to no insurance, I had talked to Mrs. Brodie. When I changed my plea to guilty, I asked her if I would lose my license. She assured me I would not lose my license.

[20] The trial judge, correctly, interrupted Mr. Prest and told him he would have to be under oath before she could consider that evidence.

[21] After being sworn he said the following:

> **THE COURT:** So, Mr. Prest, what did you want to say about this matter?
>
> **A.** Um, while I had attended Court for a no insurance fine ...
>
> **THE COURT:** Right.
>
> **A.** ... which I had plead not guilty to. When I got here I had talked to Mrs. Brodie ...
>
> **THE COURT:** Mmm
>
> **A.** ...um, told her I'd change plea, I was wondering if I would lose my license because of my job. She assured me no that they would not be seeking for me to lose my license which was fine. I plead guilty and I had a year to pay the fine. And, so that was it and then Mr. Peters pulls me over and tells me I have no, I had my license suspended and that I should have received a letter. ...
> (My emphasis)

[22] In cross-examination the following exchange took place:

> **Q.** And you indicated that you had a conversation with somebody named Ms. Brodie.
>
> **A.** Right.
>
> **Q.** She was the Crown Attorney at the time, was she?
>
> **A.** Yes.

Q. Would it be fair to say, Mr. Prest, that you asked her about what the Court would do with respect to the no insurance ticket, and would the Crown be seeking the suspension of your license?

A. I just asked her, would I lose my license, right, I need them for my job ...

Q. Would you lose your license?

A. Rrr, right.

Q. And isn't it fair to say that she would have responded, "Crown is not seeking to have you suspended".

A. I can't really recall. I remember her just saying no, right, that I wouldn't lose my license.

Q. So, you don't recall her saying "the Crown is not seeking but I'm not sure what Motor Vehicle Registry would do"?

A. No, but I can't say for sure.

Q. You can't say for sure that she didn't say that.

A. There was an officer there too. The officer that pulled me over for that and I ask him as well. We .., three of us were standing there.

Q. Okay, so it may be that she said that to you, it may be that she said "look, I'm not going to be seeking as the Crown Attorney in Court today but Motor Vehicle Registry, they may.

A. She could have, yes.
(My Emphasis)

[23] Mr. Prest was, originally, unequivocal that Ms. Brodie told him that he would not lose his license. When it was put to him in cross-examination if she could have expanded on that comment, Mr. Prest did not recall her saying anything to that effect but he could not be sure.

[24] The trial judge had this to say when addressing his evidence:

> **THE COURT:** ... Ignorance of the law is no excuse, that saying, well legally that happens to be the way things are. And so, although Ms. Brodie, for example, would have told you, look the Crown isn't seeking anything with respect to your license but that doesn't mean that the Province doesn't do something with the license, separate and apart from what would happen in the Courtroom, you see. So it happens by operation of law that you lost your licence and that being so I am satisfied the Crown has proven the charge. ...
> (My emphasis)

[25] The SCAC judge, after setting forth the elements of the defence of officially induced error (para. 81), says this:

> 82 (1) An error of law, or of mixed law and fact, was made. Mr. Prest asked the prosecutor, and the police officer who had charged him, whether he would lose his driver's licence. It was important to his job.
>
> 83 The reply to this question was that the Crown would not seek a suspension or a revocation. The judge found that the prosecutor said this. There was no evidence upon which she could have taken her findings any further. Mr. Prest's evidence that the prosecutor "could have" said something about the Registrar is, in the absence of evidence from the prosecutor or the police officer, no evidence that she actually said it. Certainly, no finding could be made, and no finding was made, that the possibility of a suspension by the Registrar, rather than the judge, was communicated to Mr. Prest.
>
> 84 Mr. Prest's concern was not with the mechanics of licence suspension. The prosecutor and the police officer were being asked about the effect of conviction on the licence. The prosecutor's response would lead a reasonable person to conclude that the power to suspend was with the judge, and the Crown was not going to ask the judge to do so.
> (My emphasis)

[26] I take from this portion of the SCAC judge's reasons that, in keeping with his standard of review, he had determined that the trial judge misapprehended the evidence by finding as a fact that Ms. Brodie "would" have told him that the province may do something with his license even though the Crown was not seeking its suspension.

[27] The SCAC judge determined that there was no evidence upon which the trial judge could have taken her findings that far. I agree.

[28] It is also implicit in the SCAC judge's decision that the misapprehension was material in that it impacted the trial judge's proper consideration of the defence of officially induced error, and was essential to the decision to convict (see **R. v. S.D.D.** 2005 NSCA 71, para. 12). Having found the trial judge erred, the SCAC judge conducted his own assessment of the evidence, made findings of fact based on his review of the evidence and entered an acquittal.

[29] With respect, once the SCAC judge found there has been a misapprehension of the evidence and that misapprehension was material and essential to the decision to convict, he should have ordered a new trial.

[30] Section 686(2) applies to summary conviction appeals. It provides:

> **686(2)** Where a court of appeal allows an appeal under paragraph (1)(a), it shall quash the conviction and
>
> (a) direct a judgment or verdict of acquittal to be entered; or
>
> (b) order a new trial.

[31] The proper exercise of the SCAC's discretion under ss. 686(2) of the **Criminal Code** was considered by Hamilton, J.A. of this Court in **R. v. MacNeil**, 2009 NSCA 46. In that case the test was formulated as follows:

> [10] ... where a conviction is quashed because of some mistake in the conduct of the trial, the SCAC judge should generally direct a new trial where there is admissible evidence upon which a properly instructed trier of fact could convict on a proper trial. Where there is no evidence on which a properly instructed trier of fact could convict, there should be an acquittal.

[32] The SCAC is not entitled to substitute its view of the evidence for that of the trial judge. A summary conviction appeal on the record is just that, an appeal. It is not a new trial on the transcript (see **R. v. Nickerson**, 1999 NSCA 168, para. 6). An example of where the SCAC judge strays into the purview of the trial judge is in discussion of the elements of the defence of officially induced error. At para. 85 the SCAC judge says:

> [85] Mr. Prest considered the legal consequences of his actions. Mr. Morrison makes the point that Mr. Prest was determined to plead guilty regardless of the

> advice he received about suspension. This subject was not delved into during testimony, but the way Mr. Prest put it makes it appear that he had determined to plead guilty and only wanted to know what the consequence was for his license. (My emphasis)

[33] It is not for the SCAC judge to review the record and come to a conclusion on the record about what it appears Mr. Prest may have intended by his actions, especially when the SCAC judge acknowledges the subject was "not delved into during testimony".

[34] The SCAC judge goes further and finds that the advice received from the Crown prosecutor was reasonable, that it was erroneous and that Mr. Prest relied on the advice, going so far as to conclude that had Mr. Prest been given the correct advice, he would have learned not only about the automatic suspension of his license but also how easily it could have been reinstated.

[35] These are all findings of fact coming from the SCAC judge's review of the evidence and substituting his view of the evidence for that of the trial judge which, with respect, is not the role of a SCAC judge.

[36] In these circumstances, there was evidence upon which a properly instructed jury could convict and the proper remedy for the SCAC judge was to order a new trial. It was not to substitute his view of how the trial evidence should be weighed. In doing so he erred.

[37] As I am of the view that a new trial ought to be ordered based on the SCAC judge's error in doing his own assessment of the evidence on the officially induced error defence, it is not necessary for me to go through his analysis on the due diligence defence. However, it is instructive to note that the Crown, in making its submissions on the due diligence defence, suggested it would have been incumbent upon the SCAC to consider the fresh evidence sought to have been introduced by Mr. Prest. (This is somewhat ironic given its position on the admissibility of the fresh evidence before the SCAC.) It says the fresh evidence clearly shows that the due diligence defence does not apply to the facts of this case. This invites the SCAC judge to embark on a review of the evidence and substitute his view for that of the trial judge. As noted above, that is not the role of a SCAC judge.

[38] In conclusion, I would grant leave to appeal, allow the appeal and order a new trial before the Provincial Court should the Crown wish to proceed further.

Farrar, J.A.

Concurred in:

Hamilton, J.A.

Beveridge, J.A.