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Cite as: R. v. Strang, 1992 NSCA 83

S.C.C. Nos. 02400 & 02408

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Jones, Hart and Hallett, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN Appellant - and - LELAND LLOYD STRANG Respondent - and - HER MAJESTY THE QUEEN Appellant - and - JOHN WAYNE LUNN Respondent	Kenneth W.F. Fiske for the Appellant Leland Lloyd Strang not represented Robert L. Barnes for the Respondent Lunn Appeals Heard: November 28, 1991 Judgment Delivered: January 10, 1992

THE COURT: Appeal against Strang allowed, verdict of acquittal set aside, matter referred to Provincial Court for a new trial; Appeal against Lunn dismissed, per reasons for judgment of Hart, J.A., Jones and Hallett, JJ.A. concurring.

HART, J.A.:

These two summary appeals involve the constitutionality of Section 193 of the **Motor Vehicle Act**, R.S.N.S. 1989, c. 293.

The important provisions of the **Motor Vehicle Act** controlling the weights of vehicles upon highways are as follows:

Officer may require vehicle to be weighed

192(1) Any peace officer having reason to believe that the weight of a vehicle and load is in excess of the maximum permitted by any regulations made under this Act, the **Public Highways Act** or any Act or regulation is authorized to weigh the vehicle either by means of portable or stationary scales, and may require that the vehicle be driven to the nearest scales, in the event such scales are within a distance of 8 kilometres.

Officer may require unloading

(2) The officer may then require the driver to unload immediately such portion of the load as may be necessary to decrease the gross or axle weight of the vehicle to the maximum therefor specified in the regulations.

Portable weighing device

(3) In lieu of proceeding to such scales, the weight of the load may be determined by a portable weighing device provided by the peace officer and it shall be the duty of the driver of the vehicle to facilitate the weighing of the vehicle and load by any such device.

Failure to comply

(4) Any driver who, when so required to proceed to such scales or to assist in the weighing of a vehicle in his charge, refuses or fails to do so shall be guilty of an offence. R.S., c. 191, s. 173; 1970, c. 53, s. 18; 1978-79, c. 29, s. 1.

Proof of scale reading is prima facie evidence

193 In a prosecution proof of the reading of any

> scale or weighing device is **prima facie** evidence of the accuracy of the scale or weighing device and of the reading. 1977, c. 35, s. 20.

The respondent Strang was operating his two-axle truck with a load of gravel near Clyde River on March 19, 1990. He was stopped by Inspector Bullerwell and with the assistance of Mr. Strang, his truck was weighed on portable scales and shown to be 6,900 kilograms overweight.

The respondent was charged as follows:

> At or near Clyde River, Shelburne County, Nova Scotia, on or about the 19th day of March, 1990, did unlawfully commit the offence of operating upon a public highway, a motor vehicle having a single axle weight of 134000 kilograms, being in excess by 6900 kilograms of the 6500 kilograms permitted by paragraph (a) of N.S. Reg. 94/90 made pursuant to Section 20(1) of the Public Highways Act.

The trial proceeded before Judge Woolaver of the Provincial Court. Inspector Bullerwell was the only witness and at the end of the case, counsel were given permission to submit briefs on behalf of their respective clients.

Before any decision was reached by the trial judge, he was advised that a decision had been handed down by the Honourable Judge Bateman of the County Court in **Boyd** v. **The Queen** declaring that section 193 of the **Motor Vehicle Act** was unconstitutional. Judge Woolaver considered himself bound by that decision and he found Mr. Strang not guilty of the offence with which he was charged.

On September 25, 1989, the respondent Lunn was observed by the Deputy Chief of Police of Bedford driving his truck

loaded with rock and directed Mr. Lunn to pull into a parking lot adjacent to the highway where two Motor Vehicle Inspectors weighed the suspected overweight vehicle.

Mr. Lunn was instructed to drive his vehicle onto a set of portable scales and the truck was found to be almost 6,000 kilograms overweight. Mr. Lunn was charged as follows:

> That he at or near Highway No. 2, Bedford, Halifax County, Nova Scotia, on or about the 25th day of September, 1989, did unlawfully commit the offence of operating an overweight vehicle contrary to Section 2(1)(d) of the N.S. Reg. 30/80, Schedule "A", Table 5, Column C and "B", Figure 7, Column 1, made pursuant to Section 172 of the Motor Vehicle Act.

The trial proceeded before His Honour Judge Robert A. Stroud of the Provincial Court. Evidence was led from Inspector Richard that he placed four scales under the tires on each side of the two rear axles of the truck. The weights recorded were 5,700 kilograms, 6,500 kilograms, 5,400 kilograms and 5,500 kilograms for a gross weight of 23,100 kilograms. The allowable weight at the time was 17,000 kilograms, plus 1,000 kilograms tolerance.

Mr. Richard testified that once each month he would pick up six scales and that the scales used in this case had been used for about two weeks at the time. He assumed they had been checked by the company that he obtained them from but had no personal knowledge of this. He was questioned about the difference in the readings of the four scales and he attempted to explain that there was a "walking beam on the truck which was supposed to equalize the weight between the

two rear axles". He stated, however, that he had never seen one that works. There was some further discussion about the fifth wheel and a pin and the fact that the weight on this pin is carried by the tractor of the unit.

The defence then called an engineer who was qualified as one who has experience in dealing with issues of loads placed on pressure points and the physical formulas that are needed to calculate the effects of the load placed in those different pressure points. The intent of this evidence was to undermine the accuracy of the scales. In his testimony, the expert stated:

> Q. ...So, if I might just summarize for the moment, if we have a rear equalizing system that's working, you're saying that the two wheels on one side when weighed by scales should give readings on each of the scales that are equal?
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> A. That's correct.
>
> Q. And, if the equalizing system is not working, then there could be a difference in the scale readings but the front wheel of the two rear wheels should weigh...should show a heavier reading?
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> A. That's correct.
>
> Q. Now, let me ask you this question. Assume that we have a configuration as shown in that diagram, a five axle tractor trailer, and assume that the rear axle assembly - the fourth and fifth axles - is on a equalizing system that's working correctly and assume that two scales under those wheels do not show the same weight, what does that say to you?
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> A. Given those assumptions, I would question the calibration of the scales.

At the conclusion of the trial, it was agreed that the trial judge would reserve his decision and await the judgment in the case of **Boyd** v. **The Queen** which was then being considered

by the County Court and had not yet been decided. When the Court reconvened on November 1, 1990, Judge Stroud rendered his decision as follows:

> ... I have read the decision of Judge Bateman but I don't have it with me this morning so I am going by memory. But, her finding was to the unconstitutionality of section 174 of the Motor Vehicle Act.
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> It is binding upon me, subject only to its application to the facts of this case and, of course, that section deals with a presumption as to the reliability or accuracy of the scales that were used in all of these cases.
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> The evidence in all three cases was identical. In fact the evidence from the first trial, was, as agreed by Counsel, put into the other two by agreement. The evidence as to accuracy of the scales simply indicated that the scales were returned periodically and left with the equipment company from which they were obtained for, presumably checking. However, as to what checking was done, and the accuracy of the scales based upon that, is primarily hearsay evidence in any event, since the witness giving that testimony had no knowledge of what was done. So, there is certainly insufficient evidence for me to determine beyond a reasonable doubt, that the scales that were used in these cases were accurate and as a result of the finding of unconstitutionality of the section of the Motor Vehicle Act containing that presumption, the Crown has failed to prove all the elements of the offence beyond a reasonable doubt.
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> So, I therefore find Mr. Boyd, Mr. Goodwin and Mr. Lunn not guilty of the offences under the overweight provisions of the Motor Vehicle Act and the appropriate Regulations as indicated in the Summary Offence Ticket.

The section of the **Act** with which Judge Stroud was dealing was Section 193 rather than 174, which was its previous number. Judge Stroud had also been dealing with the cases of James Boyd and James Goodwin by agreement of counsel and this was why he referred to the evidence in all three cases being

identical.

The Crown has appealed the acquittals of Mr. Strang and Mr. Lunn and the points in issue in each case are:

> 1. THAT the learned Provincial Court Judge erred in law in holding the provisions of s. 193 of the Motor Vehicle Act, R.S.N.S. 1989, c. 293 inconsistent with the right to be presumed innocent until proven guilty according to law under s. 11(d) of the Canadian Charter of Rights and Freedoms.
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> 2. THAT the learned Provincial Court Judge erred in law in holding the provisions of s. 193 of the Motor Vehicle Act, R.S.N.S. 1989, c. 293 are not a reasonable limit within the meaning of s. 1 of the Charter upon the exercise of the right to be presumed innocent until proven guilty according to law under s. 11(d) of the Charter and consequently holding that s. 193 of the Motor Vehicle Act is of no force or effect.

It would appear from Judge Stroud's decision that the **prima facie** presumption of accuracy of the scales under Section 193 had been rebutted by the evidence heard by the trial judge. Whether or not Section 193 is constitutionally valid would have no bearing therefore on the acquittal of the accused and I would therefore at this point dismiss the appeal in the case of Mr. Lunn.

No such finding was made in the Strang case and it is therefore necessary to consider whether the acquittal was properly based upon the unconstitutionality of Section 193. If not, a new trial should be ordered.

Judge Bateman in the **Boyd** case found that the prima facie proof of the validity of the weighing scale under section 193 of the **Motor Vehicle Act** offended the right to be presumed

innocent under section 11(d) of the **Charter** and that the provision could not be preserved by section 1. She based her conclusion principally upon the decision of Chief Justice Dickson in **R. v. Oakes**. In her decision reported in (1991), 99 N.S.R. (3d) 43 she stated:

> "**[13]** In **R. v. Oakes**, [1986] 1 S.C.R. 103; 65 N.R. 87; 14 O.A.C. 335; 26 D.L.R. (4th) 200; 50 C.R. (3d) 1; 24 C.C.C. (3d) 321; 19 C.R.R. 308, the Supreme Court of Canada analyzed at length the nature of the presumption of innocence. At page 222 D.L.R., p. 121 N.R., Dickson, C.J.C. (as he then was), writing for the majority states:
>
> > "In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in section 11(d). If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt." (emphasis added)
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> "**[14]** Dickson, C.J.C., concluded that the presumption of innocence has at least three components. Summarizing, he found them to be as follows:
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> 1. An individual must be proven guilty beyond a reasonable doubt;
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> 2. It is the state which must bear the burden of proof;
>
> 3. Criminal prosecutions must be carried out in accordance with lawful procedures and fairness.
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> **[15]** The appellant submits that insofar as s. 174 relieves the Crown of proving an element essential to the offence (the accuracy of the scales) it does offend s. 11(d). The respondent submits that s. 174 simply serves as an evidentiary aid to the Crown which might support a conviction. The requirement is only that the accused raise a reasonable doubt as to the accuracy of the scales as distinct from a requirement that the accused prove inaccuracy of the scales on the balance of probabilities. The respondent distinguishes this type of clause from the true "reverse onus" or "presumptive" clause and refers to many cases in support.

[16] Notwithstanding the very able argument of the respondent I am not satisfied that the determination as to whether or not the clause offends the presumption of innocence can be determined solely on the basis of categorizing such sections as "mandatory presumptions","permissive presumptions", or "reverse onus" clauses. There must be some consideration of the importance of the presumed element to the offence. With respect to the offence under consideration, overweight trucking, the only element which needs be proved by the Crown is the fact that the accused's vehicle was of a weight over the prescribed limit for that vehicle size. In other words proof of the weight is the very essence of the Crown's case. Clearly the accuracy of the scales is crucial to the court accepting that the vehicle was indeed overweight. Additionally, the portable scales used to determine that weight are solely within the control of the Crown. It is beyond the ability of the accused to call any independent direct evidence as to the accuracy of the scales. While the accused may be in a position to collaterally attack the accuracy by offering conflicting evidence as to weight he has no practical ability to directly attack the accuracy of the particular set of portable scales used. The question, then, is whether this provision (s. 174) which relieves the Crown of calling any evidence as to accuracy in order to establish a prima facie case, when the instrument (in this case the scales) used to calculate the offence, is solely within the control of the Crown offends any of the three elements of the presumption of innocence as enumerated by Dickson, C.J.C. (as he then was), in **Oakes.**

[17] Fundamental to the presumption of innocence are the principles that the Crown must bear the onus of proof and that criminal prosecutions must be carried out in accordance with lawful procedures and principles of fairness."

It must be remembered that the presumption in the **Oakes** case was fundamentally different from the "prima facie" direction in the case under appeal. It was a presumption under the **Narcotic Control Act** which shifted the burden to the accused to prove that he did not have the drug that was found to be in his possession for the purpose of trafficking.

In **R v. Pye**, (1984) 2 N.S.R. (2d) 10 our Appeal Division had previously reached the conclusion that a "prima facie" case created by legislation under the **Lands and Forests Act**

did not violate the **Charter of Rights**. Macdonald, J.A., speaking for the court, said at p. 17:

> "[30] In **Sumbeam Corp. (Canada) Ltd. v. R.**, [1969] S.C.R. 221; [1969] 2 C.C.C. 189, the majority judgment was delivered by Mr. Justice Ritchie who said (p. 194 C.C.C. report):
>
> I do not think that any authority is needed for the proposition that, when the Crown has proved a **prima facie** case and no evidence is given on behalf of the accused, the jury **may** convict, but I know of no authority to the effect that the trier of fact is **required** to convict under such circumstances.
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> [31] In **Boyle**, supra, Mr. Justice Martin said (p. 208):
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> Where **prima facie** is used in the sense in which it is used by Viscount Sankey in **Woolmington's** case, and by Mr. Justice Ritchie in the **Sunbeam** case, conviction will not necessarily ensue. Experience shows us that, in fact, acquittals are not uncommon even though there is a sufficient case to go to the jury, and in respect of which no countervailing evidence is introduced, simply because the jury is not convinced beyond a reasonable doubt of the accused's guilt. The reasonable doubt may exist as to whether the accused committed the prohibited act or whether some essential element of the offence has been proved.
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> [32] I have concluded that the term **prima facie** evidence is used in s. 202(5) of the **Lands and Forests Act** in the permissive sense illustrated in the **Woolmington, Sunbeam** and **Russell** cases rather than in the mandatory sense of being a rebuttable presumption of law as exemplified by **Re Boyle and The Queen**, supra. As such it does not, in my opinion, violate the right to be presumed innocent guaranteed by the **Charter of Rights and Freedoms**."

Judge Bateman argues that this case has been overruled by **Oakes** but I cannot agree. It is a permissive rule only and if a reasonable doubt exists no conviction could be entered.

I cannot agree with the conclusion reached by Judge Bateman in the "**Boyd**" appeal. In my opinion the legislative

provision is only unconstitutional as offending the presumption of innocence under **Oakes** reasoning if it makes it possible for a person to be convicted although a reasonable doubt still exists as to one of the elements of the offence charged. Under section 193 an accused person is free to raise such a reasonable doubt of the accuracy of the scales by whatever method he or she should choose and if that doubt should exist as it did in the Lunn case then the accused must receive the benefit of that doubt and be acquitted. It is unnecessary for the accused to affirmatively establish anything by way of a preponderance of evidence. If no such doubt is raised from the evidence as a whole then the trier of fact is entitled to rely upon the normal accuracy of such scales.

There is nothing unusual about weight restrictions which apply to highway use. They are part of a regulatory scheme well known to the trucking industry. Many heavy truckers have to weigh their own vehicles since the amount of remuneration per load often depends upon its weight. Truckers are always free to challenge the accuracy of the inspectors scales by whatever method they choose and if they should raise a reasonable doubt they must receive the benefit of it.

In my opinion the trial judge's reasoning was influenced too greatly by the presumed difficulty an accused trucker would have in undermining the Crown's evidence

as to the weight of the load. The real issue is whether or not section 193 is unconstitutional because it permits the conviction of an accused trucker even though the trier of fact may have reasonable doubt as to whether the weight of the load exceeded the permissible limit. If such a doubt exists the trial judge would, in my opinion, be bound to acquit the accused and section 193 does not therefore offend the provisions of the **Charter of Rights and Freedoms.**

Surely the burden cast upon the accused to raise a reasonable doubt is not as great as the burden of an accused in a strict liability offence to establish due diligence by a balance of probabilities as was held to be constitutionally valid by a majority recently by the Supreme Court of Canada in **The Wholesale Travel Group v. The Queen** (unreported). Judgment rendered October 24, 1991.

I would therefore allow the appeal in the case of Mr. Strang, set aside his acquittal and direct the matter be referred to the Provincial Court for a new trial.

J.A.

Concurred in:

Jones, J.A.

Hallett, J.A.