S.C.C. No. 02791

NOVA SCOTIA COURT OF APPEAL

Chipman, Freeman and Roscoe, JJ.A.

Cite as: R. v. Kennie, 1993 NSCA 106

BETWEEN:

GERALD DALTON KENNIE Appellant - and - HER MAJESTY THE QUEEN Respondent	)	Christopher Manning for the Appellant Robert C. Hagell for the Respondent Appeal Heard: April 7, 1993 Judgment Delivered: April 7, 1993

THE COURT: Appeal allowed and new trial ordered, per oral reasons for judgment of Roscoe, J.A.; Chipman and Freeman, JJ.A. concurring.

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

ROSCOE, J.A.:

The appellant was convicted of dangerous driving after a trial by judge and jury. The appellant was unrepresented by counsel at the trial. The sole ground of appeal is that the learned trial judge erred in law in not allowing the appellant sufficient opportunity to make a full answer and defence in accordance with s. 650(3) of the ***Criminal Code***.

The facts giving rise to the charge of dangerous driving, as told by the Crown witnesses, are as follows. Three men, operating two skidoos, crossed over farm lands owned by the appellant. After they left the farm lands and were travelling on a public road a car approached the skidoos, hit one of them, and, in the process, hit one of the men in the leg. The Crown witnesses identified the appellant as the driver of the car. The Crown witnesses testified that after a heated discussion, the appellant put his car into reverse and ran into another of the skidooers, knocking him to the ground.

During the trial, the appellant experienced difficulties in his cross-examination of witnesses and was, on several occasions, prevented by the trial judge from attempting to give evidence himself while questioning the Crown witnesses. For example, the following excerpts from pp. 39-41 of the transcript point out the difficulties experienced by the appellant:

> "MR. KENNIE, cross continued:
>
> Q. Your Honour, before I begin the cross examination of this witness I would like to say this will be the only time that I will ever be able to say that this is my first charge, I went for legal advise --
>
> MR. BUNTAIN: Objection --
>
> THE COURT: First what, this is your first what?
>
> MR. BUNTAIN: Charge --
>
> MR. KENNIE: Charge.

THE COURT: **You can't give evidence sir**, there's a witness on the stand and you are entitled to cross examine the witness, so you must cross examine the witness.

MR. KENNIE: Okay.

MR.KENNIE, cross continued:

Q. Mr. Rafuse on January 15th what route did you take on your way to Centerville?

A. The tracks.

Q. You went the tracks?

A. Yes I did.

Q. Can you ah show the jury just the route you ah took, or show me.

A. No, it don't show the tracks on there --

Q. No, but ah, where'd you come, you live right up here --

A. . . . (inaudible) . . . where's Emery's Irving --

Q. You went by the tracks?

A. Yes I have to go down by, I got to go down behind Emery's Irving but it's not on there.

Q. Okay, so you're going out this way then?

A. Yes, yes.

Q. Okay, so --

A. Down by Aldershot School way --

THE COURT: Well that was all very nice, but it was just between the two of you and the jury doesn't know ah and **you can't tell them**, you've got to ask the witness to describe where he lives, if that's what you want to find out --

MR. KENNIE: I can't tell the jury that?

THE COURT: **You can't tell them anything**, you're the examiner and this is what I'm trying to tell you, you ask the questions, you're better off to stand back --

MR. KENNIE, cross continued:

Q. Will you show the jury then just how you got to Centerville that night?

THE COURT: And you're looking at exhibit 2.

A. I don't see the route on here I got here cause I don't see the gas station on here, if the gas station ain't on here I can't show it.

Q. Okay, I'll go on to my next question, you went by the tracks then?

A. Yes.

Q. Did you go down past Stevenson's house on your way to Centerville that night?

A. No I didn't.

Q. Ah, but ah Mr. Stevenson said that ah --

THE COURT: No, you've got to --

Q. He saw you --

THE COURT: No, you can't --

Q. There's, there's --

THE COURT: Just a minute now, just a minute, this is one of the problems, I have to control the Court and I realize that you are defending yourself and you don't have the experience or training of a trained and experienced counsel, **but I can't permit you to put in evidence yourself at this stage**. All you can get from this witness is his statement, whatever it may be. If somebody else has said something different and that person is on the stand, just a minute now, don't jump to conclusions, I'm trying to help you. If somebody else has said something different then you bring it out with that other person, but you can't argue with the witness on the stand.

MR. KENNIE, cross continued:

Q. So you're saying that you didn't go down past Stevenson's house?"

[emphasis added]

And further at pp. 44-45:

"[MR. KENNIE]: That was the reason you came back that way because you were having trouble with your skidoo --

A. That's right, but I'm just saying you said that, can't you say we could have been going at the same speed, if you were you wouldn't have caught up to me, would have just stayed the same distance.

Q. Well I'm making the point that --

A. Okay, I'm just trying to tell you.

Q. I'm making the point that I had 600 feet and I measured it --

A. Okay --

MR. BUNTAIN: He's giving evidence.

THE COURT: **You can't give evidence sir**, ah, you've established what you're saying, --

MR. KENNIE: Okay, so you still don't, you still can't consider that we were travelling down that road about the same speed?"

[emphasis added]

And again at p. 52 when the appellant was asking the whereabouts of one of the other skidoo drivers:

"[MR. KENNIE]: Doesn't he work at the Irving, at the Aldershot Irving.

A. Emery's, Emery Irving.

Q. He works there?

A. No, his father did, Percy, Percy don't know where he's living, either did I . . . (inaudible) . . . get ahold of him.

Q. I think you'll find that he's working at Aldershot Irving --

THE COURT: **Well, you can't give evidence** ah I have to instruct the jury that when I tell **Mr. Kennie that he can't give evidence it is not evidence and you mustn't pay attention to it,** ah, I've got to give him lots of leeway because he's not experienced, **but I can't allow, allow evidence in that's not evidence**.

MR. KENNIE, cross continued:

Q. Why didn't Trevor make a statement?"

[emphasis added]

And at p. 56:

> "[MR. KENNIE]: Do you have a license to drive your snowmobile on my field?
>
> A. I might not have a license to drive them on your field but you don't need a license to drive a skidoo, you didn't have, you didn't have any sings [sic] that said no trespassing, no nothing and everybody else skidoos through there. Doesn't take very much to go out and nail up a couple signs to say no, no skidooing, no trespassing.
>
> Q. What if I told you on Sunday night I nailed up a sign and at 4 o'clock and at 5 o'clock it was torn down, what would be the sense of putting up signs?
>
> THE COURT: Just a minute, just a minute, **you can't, you're giving evidence**.
>
> MR. KENNIE, cross continued:
>
> Q. Have you been on my fields before?"
>
> [emphasis added]

At pp. 117 to 120 the following exchange is recorded:

> "[MR. KENNIE]: When I went down to the next driveway, could I have been going down there to get the number plate off the skidoo that was parked along that trail, the skidoo of Trevor's?
>
> THE COURT: How would the witness know that, what you had in mind?
>
> MR. KENNIE: Well I just asked a question, could --
>
> THE COURT: Well, I know you've asked the question, but what I'm asking you was, you're asking a question that the witness doesn't know, you're asking him what you thought, what was in your mind at the time, he doesn't know what was in your mind.
>
> MR, KENNIE: Well that's, oh, I guess he can't answer my question, I don't know how to re-phrase it.
>
> MR. STEVENSON: Well if you want to know why, it looked like to me that you were still in pursuit of the boys, is what it looked like to me, like you, you were at top anger to me, it looked like, like when you backed up out of there and you went down the road there you

looked like you weren't finished what you were doing or whatever, that's what it looked like to me.

MR. KENNIE, cross continued:

Q. But now they were, but now they were in the field.

A. Pardon?

Q. They were in the field, I was going down the road. Couldn't I have been going down the road to get the number off that skidoo along the trail? Isn't that possible?

A. Well, how, how could that be possible --

THE COURT: I'm sorry witness, just stop for a minute, just stop for a minute, just stop for a minute. The witness doesn't know what you were going down the road for because what you're going down the road for has to be in your mind --

MR. KENNIE: But --

THE COURT: Now you're digging a hole that's all, ah --

MR. KENNIE: But, but Your Honour, he's making --

THE COURT: Just a minute now --

MR. KENNIE: He's making accusations --

THE COURT: Fine, no he's not making accusations, he's giving the evidence as he saw it, now, you're getting him in deeper all the time as why you were going down the road, **that's a matter that only you can tell why you were going down the road**, not this witness.

MR. KENNIE: Could I have a converse with you for a second ah Your Honour?

THE COURT: Can you just give me an idea of what ah --?

MR. KENNIE: **Well, I have something to say here**, but I don't know how to get it across and ah, like there's four different versions of me going down the road.

THE COURT: There, there could be as many versions as there are witness ah --

MR. KENNIE: **Can I give all those versions** and point out the differences?

THE COURT: **That's a matter for argument**, that's what you do at the end.

MR. KENNIE: Um hum, okay.

MR. KENNIE, cross continued:

Q. Mr. Stevenson, oh, I don't know if I can ask that question either. Before the preliminary inquiry in the courthouse, did Constable tell you fellows to get your stories all together before the preliminary inquiry?"

. . .

"Q. Did anybody overhear that?

THE COURT: He doesn't know that either.

MR. KENNIE, cross continued:

Q. Mr. Stevenson, have you ever worked for me?

A. No.

Q. How come you're on, on our payroll?

THE COURT: Now that's another matter, you can't --

MR. KENNIE: Are you, are you --

THE COURT: Just a minute now Mr. Kennie, you asked him a question --

MR. KENNIE: Um hum, he said no.

THE COURT: And he said no. **You started then to give evidence and you can't do that** and I'm trying to give you every bit of leeway that I possibly can, but I have to control the trial to keep the matter fair and **I can't allow you to put in evidence**. It gets into the minds of the jury without it being sworn testimony.

MR. KENNIE: I'm sorry Your Honour.

MR. KENNIE, cross continued:

Q. Did you pick tobacco for me?

A. No."

[emphasis added]

At the end of the first day of the trial, after receiving information from the Crown prosecutor that he would decide through the evening whether or not the Crown's case was complete, the trial judge said (at p. 131):

> "THE COURT: Well, you'll have all evening to to decide that. Mr. Kennie you will, you know that we're reaching the end or near the end of the Crown's case so I will expect you to decide whether or not you **wish to call evidence** ah tomorrow morning and we'll proceed ah, because we only have two days scheduled for this trial." [emphasis added]

At the beginning of the next day, the following exchange took place:

> THE COURT: Morning Mr. Foreman and Members of the Jury. We're ready to start day two Mr. Buntain.
>
> MR. BUNTAIN: Yes My Lord the Crown will now tender exhibits 1 and 2 and rest its case.
>
> THE COURT: Alright, so the Crown's evidence is concluded and ah Mr. Kennie you have the option **to call or not call evidence ah whatever you wish**.
>
> MR. KENNIE: Ah, Your Honour **I have no witnesses** to call for the defense. These witnesses have contradicted themselves enough in their statements.
>
> THE COURT: Well, you don't have to argue now, you're not going to call any evidence at all?
>
> MR. KENNIE: No sir.
>
> THE COURT: Alright, and then ah the evidence on this matter is closed and that's the ah evidence that you have to deal with. Are you ready to move into your address to the jury?
>
> MR. BUNTAIN: Yes My Lord, I'm prepared to start now.
>
> THE COURT: Alright, then ah Mr. Buntain will give his address ah, the rule is that he goes first where no evidence was called by the defense and if evidence had been called by the defense, the defense would go first."
>
> [emphais added]

Prior to presenting his closing address, the appellant was cautioned by the trial judge as follows (p. 145):

". . . The only thing I'm going to have to caution you Mr. Kennie, which, which I, is something I don't usually do because ah, usually I'm talking to counsel and you're not trained or experienced ah, but just ah in view of some of the things that occurred in the cross examination I have to tell you that you're not ah in your address, **you are not to introduce what would be evidence to the jury**, you have to give your address based on the evidence of the witnesses and you can't indicate evidence on your own behalf ah during their address, so think about that ah, we'll recess ten minutes and then we'll hear from Mr. Kennie." [emphasis added]

The appellant's address to the jury began as follows (p. 147):

"MR. KENNIE: This is not the case of a rich farmer and some poor boys, times are tougher than that. These are men, I'm the victim. They trespassed, they broke the law, they damaged crops. They were driving an unauthorized machine on a public highway in manner that was dangerous. People's rights are supposed to be sacred under the so-called ***Charter***. When is the system going to stop protecting the criminals and start protecting the people whose rights are being violated? In my case, the right to the enjoyment and protection of my property was disregarded. In the past ten years my farm has been used as a recreational area for the north end of Kentville. Just a few days before harvest a portion of my crop was damaged by local kids. They didn't mean to be destructive, it was just fun to them. Marijuana has been grown on the back of my farm, right in back of Stevensons' place. My fences have been dismantled, irrogation [sic] pump ruined, sprinklers thrown in pond, tractor radio stripped, cattle shot and the list goes on --

THE COURT: Mr., Mr. Kennie, that is what I've kind of suggested to you that **you can't do, you can't give evidence, that's evidence**, now I don't like to interrupt you in your, but it's not fair, it's not, I'm, it's not proper, I wouldn't allow counsel to do it and I can't allow you. **You can't given evidence and the jury can disregard all of those** things that you're saying --

MR. KENNIE: I'm, **I'm just stating a fact** --

THE COURT: No, the facts that you're stating are evidence, that's what I'm trying to tell you **you can't do**. You can comment on the evidence, you're supposed to address the jury on the evidence that was given by the witnesses, but you can't give your own history of ah, of what happened unless you went on the stand, and you chose not to do that.

MR. KENNIE: Let's consider what was said, Webster said I hit his leg, but, no marks, no blood, no call to a doctor, no official report. . . ."

[emphasis added]

And at p. 150:

". . . I am alone. I have only my story and that I never hit them. I never intended to hit them. My only intentions were, was to get a license plate number --

THE COURT: This, this is what you can't do Mr. Kennie, **you can't you can't give evidence** --

MR. KENNIE: So I could report them to the R.C.M.P. . . ."

[emphasis added]

In ***R. v. McGibbon*** (1988), 45 C.C.C. (3d) 334 (Ont. C.A.), Griffiths J.A. said at p. 347:

" Consistent with the duty to ensure that the accused has a fair trial, the trial judge is required within reason to provide assistance to the unrepresented accused, to aid him in the proper conduct of his defence, and to guide him throughout the trial in such a way that his defence is brought out with its full force and effect. How far the trial judge should go in assisting the accused in such matters as the examination and cross-examination of witnesses must of necessity be a matter of discretion."

In the **Criminal Trial Handbook**, The Honourable Roger E. Salhany, Carswell, 1992, states at p. 3-4:

"An accused who insists on appearing without counsel should be advised by the trial judge of the following:

(a) of the right to cross-examine the witnesses for the prosecution;

(b) of the right, at the close of the prosecution, to remain silent or to give evidence on their own behalf and that the accused is liable to be cross-examined if he or she does;

(c) of the right to call witnesses in the accused's own defence and of the right to make submissions on any issue raised in the course of the trial: ***Aucoin***, [1979] 1 S.C.R. 554;

> (d) of the right at the end of the trial to make submission to the jury, or in the case of trial by judge alone, to the presiding judge. "

In this case, although the trial judge advised the appellant that he had "the option to call or not to call evidence", he was not told of his option to personally testify. In fact, he was told on nine occasions "you can't give evidence" and only one of those reprimands was followed by "at this stage". The exchange quoted above from p. 118 ***et seq.*** where the appellant said "I have something to say here but I don't know how to get it across . . ." and the trial judge explained "that's a matter for argument, you do it at the end" certainly is not helpful to an accused who does not understand that he has the right to testify. A lay person,
not experienced in criminal procedure, could easily have misunderstood the trial judge and thought that the time for him to give his side of the story was during his argument. It is clear from the transcript that the appellant did have evidence he wanted put before the jury, but also clear that he did not know when to do that.

In ***R. v. Campbell*** (1981), 64 C.C.C. (2d) 54 (N.S.C.A.), Jones J.A. said at p. 59:

> " While a trial judge has a wide discretion in the conduct of a trial, he has an overall responsibility to conduct the proceedings in a fair and impartial manner giving the defence every opportunity 'to make full answer and defence personally or by counsel': see s. 577(3) of the ***Criminal Code***."

Justice Jones referred to ***R. v. Clewer*** (1953), 37 Cr. App. R. 37, where Goddard L.C.J. stated:

> ". . . the first and most important thing for the administration of the criminal law is that it should appear that the prisoner is having a fair trial, and that he should not be left with any sense of injustice on the ground that his case has not been fairly put before the jury."

In this case, it is clear that the appellant was not given every opportunity to fairly put his case before the jury. The appeal is allowed and a new trial is ordered.

J.A.

Concurred in:

Chipman, J.A.

Freeman, J.A.