C.A.C. No. 02980

NOVA SCOTIA COURT OF APPEAL

Hallett, Roscoe and Pugsley, JJ.A.
Cite as: R. v. Johnson, 1994 NSCA 150

BETWEEN:

KEVIN JAMES MACKAY JOHNSON Appellant - and - HER MAJESTY THE QUEEN Respondent	)	Malcolm S. Jeffcock for the appellant William Delaney for the respondent Appeal Heard: April 8, 1994 Judgment Delivered: April 8, 1994

THE COURT: Appeal dismissed, per oral reasons for judgment of Roscoe, J.A.; Hallett and Pugsley, JJ.A. concurring.

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

ROSCOE, J.A.:

The appellant pled guilty to impaired driving, contrary to s. 253(a) of the **Criminal Code**. He was sentenced to a period of incarceration of six months by a judge of the Provincial Court. On appeal to Justice Scanlan of the Supreme Court the sentence was reduced to three months on the basis that the accused only had two prior drinking and driving offences, not three as the trial judge had mistakenly believed. No notice was given to the accused that a greater punishment would be sought pursuant to s. 665 of the **Criminal Code**.

The appellant submits that the Summary Appeal judge erred by imposing a disposition other than a fine, thereby failing to properly apply s. 255(1) and s. 665 of the **Criminal Code**.

The relevant sections are as follows:

> 255 (1) Every one who commits an offence under section 253 or 254 is guilty of an indictable offence or an offence punishable on summary conviction and is liable,
>
> (a) whether the offence is prosecuted by indictment or punishable on summary conviction, to the following minimum punishment, namely,
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> (i) for a first offence, to a fine of not less than three hundred dollars,
>
> (ii) for a second offence, to imprisonment for not less than fourteen days, and
>
> (iii) for each subsequent offence, to imprisonment for not less than ninetydays;
>
> (b) where the offence is prosecuted by indictment, to imprisonment for a term not exceeding five years; and
>
> (c) where the offence is punishable on summary conviction, to imprisonment for a term not exceeding six months.
>
> 665 (1) Subject to subsections (3) and (4), where an accused or a defendant is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions, no greater punishment shall be imposed on him by reason thereof

> unless the prosecutor satisfies the court that the accused or defendant, before making his plea, was notified that a greater punishment would be sought by reason thereof.

The question to be answered on this appeal is, in the absence of notice pursuant to s. 665, what is the possible range of sentence? Justice Scanlan answered the question as follows:

> In any case dealing with sentencing the Crown is entitled to make submissions as to prior convictions. Every offence is likely to attract an increased penalty if the convict has an extensive previous record. I refer to **R. v. Norris** (1988) 41 C.C.C. (3d) 441 wherein the Northwest Territories Court of Appeal analyzed the history of section 665 (then section 592 of the Code). The court held that section 665 was not intended to apply to all offences. The court went on to hold that even in cases where section 665 does apply and more specifically as regards a prosecution for impaired driving,
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> > "...the trial judge may impose any fit sentence above the minimum fixed by s. 239(a)(i) for first offenders... In setting the sentence the judge may look at all relevant information about the convicted person's character including his or her previous convictions for this or any other offence. A previous conviction for impaired driving is relevant, in the same way that a previous conviction for public drunkenness...would be. Indeed, just as a previous unblemished record would be relevant."
>
> I adopt these comments of Côté, J. A. as set out in **Norris**. If the Crown proceeds to give notice of prior convictions pursuant to section 665 then it serves only to establish a minimum sentence which the court may impose. The sentencing judge retains the authority to impose a sentence between the minimum and maximum sentence. This is so whether it be for a first or subsequent offence. As noted above the trial judge is entitled to consider all relevant factors in determining a proper sentence, including prior convictions.

Côté, J. A. summarized his interpretation of s. 665 as follows:

> In summary, giving or not giving a notice under s. 592 [now 665] only selects the bottom limit to the judge's *power* to sentence. Between that and the statutory maximum, the judge still weighs all the relevant factors and judges where to place the sentence on the scale.

We agree with the conclusions reached in **R. v. Norris** and with its application by Justice Scanlan to the facts of this case. We reject the appellant's argument that pursuant to s. 255(1)(a) a trial judge is limited to imposing a fine for a first offence. The appeal is therefore dismissed.

Roscoe, J.A.

Concurred in:

Hallett, J.A.

Pugsley, J.A.