C.A.C. No. 111122

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Cunningham, 1995 NSCA 153
Roscoe, Pugsley and Bateman, JJ.A.

BETWEEN:

PAMELA ROSE CUNNINGHAM	)	
	)	
N. Blaise MacDonald		
	)	Lisa Fraser-Hill
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Robert C. Hagell
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
	)	
Respondent	)	Appeal Heard:
	)	May 24, 1995
	)	
	)	
	)	Judgment Delivered:
	)	July 10, 1995
	)	

THE COURT: Leave to appeal is granted but the appeal dismissed per reasons for judgment of Bateman, J.A.; Roscoe and Pugsley, JJ.A. concurring.

BATEMAN, J.A.:

The appellant was convicted by a Provincial Court judge of operating a motor

vehicle with a blood alcohol level in excess of eighty milligrams, contrary to s.253(b) of the **Criminal Code.** She appeals the dismissal by a summary conviction appeal judge of the appeal of her conviction.

Facts:

The appellant driver was stopped by a Constable Bouchard late one evening. He had observed her car speeding. Noting a strong smell of alcohol and that the appellant's face was flushed, he gave her the Alert demand. Despite several attempts, the appellant was unable to blow long enough nor hard enough to provide a proper breath sample. Upon being advised that she would be charged with refusal, the appellant asked to take a breathalyser test. She had been stopped by the Constable at 11:18 p.m. The breath samples were provided at 12:36 a.m. and 12:53 a.m.

At trial the appellant did not dispute the accuracy of the breathalyser reading, but submitted that it was not representative of her blood alcohol level at the time she was driving the vehicle.

The appellant had spent the evening with friends. She testified that she had hastily consumed a strong drink of alcohol just before leaving to go home. She was on her way home when stopped by the Constable. It was the theory of the defence that the appellant's blood alcohol level was rising due to that last drink, but
that she would not have been over the legal limit at the time stopped. Dr. Gerald MacKenzie testified to that effect.

The appellant's companions that evening testified as to the amount the appellant had had to drink and the size and timing of her drinks. Their evidence was not accepted by the trial judge. As a result, no foundation was established for the opinion of Dr. MacKenzie. There was thus no 'evidence to the contrary'. The appellant was convicted.

Issues:

The appellant says that the trial judge misapprehended the evidence of Constable Bouchard in two respects. Firstly, that the trial judge understood the Constable to have testified that he formed the opinion that the appellant was impaired, prior to administering the Alert demand. The appellant submits that the Constable's evidence was not to that effect. In this regard the trial judge said:

> ... I shall deal with the Crown evidence of Constable Bouchard and, in particular, the evidence and indices of impairment - the strong smell of alcohol, the flushed face, and the bloodshot eyes. The indices given by the Crown witness certainly indicated to him, without any question, that she was impaired.

At trial Constable Bouchard testified that when he approached the appellant, after stopping her car, "she showed signs of impairment", in particular, "a strong smell of liquor from her breath, her eyes were bloodshot and her face was flushed." He testified, as well, that in addition to her inability to provide a proper sample on the Alert device, her speech was slightly slurred.

Secondly, the appellant submits, that the trial judge inappropriately considered Cst. Bouchard's past veracity, in assessing his evidence. The trial judge said, in this regard:

> I have a Crown witness who has given evidence here today, Cst. Bouchard, who has, and who has always, in the past, given evidence and truthful evidence and sometimes to the point where it operates in opposition to the Crown.

These two factors, submits the appellant, caused the trial judge to place undue emphasis on the evidence of Constable Bouchard. The appellant submits, that, because the Judge formed the erroneous assumption that Constable Bouchard had testified that the appellant was impaired when stopped, the trial judge was improperly influenced to reject the evidence of the defence witnesses as to the amount and timing of the appellant's drinks that night.

The appellant says that the summary conviction appeal judge fell into error when he confirmed the trial judge's finding of credibility. The appellant submits, as well, that the reasons provided by the summary conviction appeal judge do not demonstrate a sufficient basis for rejecting the evidence of the defence witnesses.

Analysis:

An appeal of the decision of a summary conviction appeal judge, pursuant to s.839 of the **Criminal Code**, requires leave of the Court and is limited to questions of law.

Such an appeal is not a second appeal against the judgment at trial, but rather an appeal against the decision of the judge of the summary conviction appeal court. (**R. v. Emery** (1981), 61 C.C.C. (2d) 84 (B.C.C.A.)) The error of law required to ground jurisdiction in the Court of Appeal is that of the summary conviction appeal judge, not the trial judge.

On appeal to the summary conviction appeal judge the appellant alleged that the trial judge erred at law both in failing to give reasons when rejecting the evidence of certain defence witnesses and in misapprehending the evidence of Cst. Bouchard. The summary conviction appeal judge held that the trial judge, in not providing reasons for rejecting the evidence of the defence witnesses, erred. He, thus, reviewed the trial transcript and independently assessed the evidence of those witnesses.

The summary conviction appeal judge says, in this regard:

> That said, having read and re-read various parts of the transcript, I am unable to say that I find the evidence of the four to have any ring of truth. Ms. Cunningham is described by her friends as being a "heavy social drinker", yet the evidence is that she consumed less of the pint of rum in three drinks than Ms. Hogan had consumed in two. Evidence as to the quantity of liquor in her three drinks rests on the ex post facto reconstruction of her companion, Mr. Swinimer. The blood alcohol level calculations produced by Dr. MacKenzie rest ultimately on the proposition that the

> last drink consumed by Ms. Cunningham was by far her largest and was mostly "chug- a-lugged".
>
> Judge Reardon had the opportunity of seeing these witnesses and assessing their credibility on a first hand basis. While it would obviously have been preferable had he cited the "examples" as to why he discounted their evidence, he nonetheless did discount it emphatically. Their evidence was, as he said, "very suspect".

Counsel for the appellant submits to this Court that, while the summary conviction appeal judge was correct in finding that the trial judge had erred, he "erred in law in failing to allow the appeal".

The submission of the appellant is, in essence, that the verdict of the summary conviction appeal judge was unreasonable. An appeal on the basis that a verdict is unreasonable is not an appeal upon a question of law alone. In **R. v. Kent** (1994), 92 C.C.C. (3d) 344 Major, J. said at p. 352:

> In an appeal from an acquittal, an appellate court has no jurisdiction to consider the reasonableness of a trial judge's verdict. Its jurisdiction is limited by s. 676(1)(a) of the Criminal Code to questions of law alone:
>
> 676. (1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal
>
> > (a) against a judgment or verdict of acquittal of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone;
>
> The question of whether the proper inference has been drawn by a trial judge from the facts established in evidence is a question of fact: **Lampard v. The Queen**, [1969] S.C.R. 373. Evidentiary sufficiency is also a question of fact: **R. v. Warner**, [1961] S.C.R. 144. As such, there was no error of law with which the Court of Appeal could interfere in this case. It therefore erred in setting aside the appellant's acquittal.

While speaking in the context of an appeal from an acquittal, the words of Major, J. are of general application on the issue of what constitutes a 'question of law alone'.

In R. v. Burns, [1994] 1 S.C.R. 656, McLachlin, J. spoke of the duty of a judge on appeal when considering a submission that the verdict was unreasonable. She said at p.663:

> In proceeding under s. 686(1)(a)(i), the court of appeal is entitled to review the evidence, re-examining it and re-weighing it, but only for the purpose of determining if it is reasonably capable of supporting the trial judge's conclusion; that is, determining whether the trier of fact could reasonably have reached the conclusion it did on the evidence before it: **R. v. Yebes**, [1987] 2 S.C.R. 168; **R. v. W. (R.)**, [1992] 2 S.C.R. 122. Provided this threshold test is met, the court of appeal is not to substitute its view for that of the trial judge, nor permit doubts it may have to persuade it to order a new trial.
>
> The Court of Appeal in this case reviewed the evidence fully, as it was entitled to do. This review, however, did not lead it to conclude that the trial judge's conclusion was unreasonable, nor that it could not be supported by the evidence. ...That being the case, the Court of Appeal should not have set aside the verdict of the trial judge.

The summary conviction appeal judge, having reviewed the transcript, stated his reasons for rejecting the evidence of the defence witnesses. He did not simply adopt the findings of the trial judge.

He concluded that the evidence of the defence witnesses was not credible. There is no indication that he considered the trial judge's comments on Constable Bouchard's past veracity in forming his opinion of the evidence. In making an independent assessment of credibility, he applied a test more favourable to the accused than had he simply determined whether the trial judge could reasonably have reached the conclusion he did as to the evidence of the defence witnesses.

In **R. v. Surette** (1993), 123 N.S.R. (2d) 152 Hallett, J.A. stated that it is not open to this Court, on an appeal from a summary conviction appeal court, to review the sufficiency of the evidence and determine if the summary conviction appeal judge drew the proper inferences from the evidence.

It is not necessary to consider whether the summary conviction appeal judge was correct in his finding that the trial judge erred by not giving reasons for rejecting the evidence of the defence witnesses. I note, however, the comments of Iacobucci, J. in **R. v. Barrett** (1995), 96 C.C.C. (3d) 319 (S.C.C.) at p. 320:

> While it is clearly preferable to give reasons and although there may be some cases where reasons may be necessary, by itself, the absence of reasons of a trial judge cannot be a ground for appellate review when the finding is otherwise supportable on the evidence or where the basis of the finding is apparent from the circumstances. The issue is the reasonableness of the finding not an absence or insufficiency of reasons. In this case, the basis for the ruling of the trial judge on the voir dire is clear. The only issue was credibility. The trial judge's ruling demonstrated that he did not accept the evidence of the accused. In these circumstances, the failure of the trial judge to state the basis of his decision on the voir dire did not occasion an error of law or miscarriage of justice.

In this regard I refer, as well, to the decision of this Court in **R. v. Kenneth Milton Murphy**, C.A.C. No. 108627, January 13, 1995.

I would grant leave but dismiss the appeal.

J.A.

Concurred in:

Roscoe, J.A.

Pugsley, J.A.

C.A.C. No.111122

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Appellant	)	
- and -	)	REASONS FOR JUDGMENT BY:
	)	
HER MAJESTY THE QUEEN	)	
	)	BATEMAN ,J.A.
Respondent	)	
	)	
	)	
	)	