C A N A D A
PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX **C.H.77634**

I N T H E C O U N T Y C O U R T
OF DISTRICT NUMBER ONE

BETWEEN:

HER MAJESTY THE QUEEN,

Respondent

- and -

CHRISTOPHER DARRACH,

Appellant

Ms. M.E. Donovan, solicitor for the Respondent.
Tim Hill, Esq., solicitor for the Appellant.

1992, September 2, Cacchione, J.C.C.:- The appellant Chritopher Darrach was charged that he on the 22nd of October 1991 did fail to yield the right of way to a vehicle already in an intersection when making a left turn contrary to s.122(3) of the **Motor Vehicle Act** R.S.N.S. 1989 c.293.

At the conclusion of the trial where three witnesses testified on behalf of the Crown and two witnesses testified on behalf of the Appellant, the learned Provincial Court Judge stated

> I do find that the charge is made out on the evidence. I don't have a reasonable doubt on the issue. It seems that Mr. Darrach failed to yield the right of way to a vehicle already in the intersection. So for that reason I would enter a conviction. (Transcript p.56)

The appellant appeals his conviction on the following grounds

> 1. the learned Provincial Court Judge erred in law, there being no evidence that the Appellant contravened the provisions of s.122(3) of the Motor Vehicle Act;
>
> 2. the learned Provincial Court Judge erred in law, there being no evidence that any vehicle approaching the intersection constituted an immediate hazard;
>
> 3. the learned Provincial Court Judge erred in law, in failing to consider the obligation of drivers approaching an intersection to yield to drivers making a left turn within the intersection.

A review of the evidence discloses two different versions of how the accident occurred. In brief, the appellant's evidence was that he had stopped his motor vehicle and engaged his turn signal indicator in preparation for a left turn. When the traffic light turned amber the appellant proceeded to make his turn and was struck by an oncoming vehicle driven by Ms. Hallett. The appellant testified that the oncoming motor vehicle was approximately 100 meters away from the intersection when he commenced making his turn.

The Crown evidence through its witnesses Hallett and O'Handley was that the Hallett motor vehicle entered the intersection on a green light and the signal light turned amber while the Hallett vehicle was in the intersection.

Section 122(3) of the **Motor Vehicle Act** R.S.N.S. 1989 c.293 reads as follows:

> The driver of a vehicle within an intersection intending to turn to the left shall yield to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard, but said driver having so yielded and having given a signal when and as required by law may make the left turn, and other vehicles approaching the intersection from the opposite direction shall yield to the driver making the left turn.

As can be seen from the learned trial judge's decision she made a specific finding of fact that the Hallett motor vehicle was in the intersection when the accident occurred. A review of the transcript of evidence discloses that there was sufficient evidence before the trial judge to enable her to make this finding. In **Stein Estate et al. v. The Ship "Kathy K" et al.** (1975), 6 N.R. 359, Mr. Justice Ritchie stated at p.366

> These authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that they are not to be reversed unless it can be established that the learned trial judge made some palpable and overriding error which affected his assessment of the facts. While the Court of Appeal is seized with the duty of re-examining the evidence in order to be satisfied that no such error occurred, it is not, in my view, a part of its function to substitute its assessment of the balance of probability for the findings of the judge who presided at the trial.

The learned trial judge had the opportunity of hearing and seeing the witnesses and of making determinations on their credibility. Although not directly stated in her judgment, it can be inferred from her verdict that she chose to accept the evidence of the Crown witnesses and to reject that of the Appellant and his witness. In **Travelers Indemnity Company of Canada v. Kehoe** (1985), 66 N.S.R. (2d) 434 Mr. Justice Macdonald commented upon the respective duties of the trial and appellate court. At p. 437 he stated

> This and other appellate courts have said time after time that the credibility of witnesses is a matter peculiarly within the province of the trial judge. He has the distinct advantage, denied appeal court judges, of seeing and hearing the witnesses; of observing their demeanor and

> conduct, hearing their nuances of speech and subtlety of expression and generally is presented with those intangibles that so often must be weighed in determining whether or not a witness is truthful. These are the matters that are not capable of reflection in the written record and it is because of such factors that save strong and cogent reasons appellate tribunals are not justified in reversing a finding of credibility made by a trial judge. Particularly is that so where, as here, the case was heard by an experienced trial judge.

Considering the evidence that was before the trial judge her finding that the appellant failed to yield the right of way to a vehicle already in the intersection cannot be said to be unreasonable. Accordingly the appeal is dismissed without costs.

A Judge of the County Court of District Number One