Cite as: R. v. Jordan, 1989 NSCO 16

CANADA C. P. No. 12,269

PROVINCE OF NOVA SCOTIA

COUNTY OF PICTOU

IN THE COUNTY COURT JUDGE'S CRIMINAL COURT

OF DISTRICT NUMBER FIVE (CRIMINAL)

BETWEEN:

HER MAJESTY THE QUEEN, on the information of
JOHN S. MACDONALD - RESPONDENT

- and -

MARK WAYNE JORDAN - APPELLANT

Before the Honourable Judge H. J. MacDonnell, a Judge of the County Court for District Number Five

Elizabeth Van den Eynden and Bruce MacIntosh, of Counsel for the Appellant

T. Robert Parker, Q.C., of Counsel for the Respondent

Pictou, N. S.

D E C I S I O N

1989, February 23, MacDonnell, H. J., J.C.C.

On September 20th, 1988, Mark Wayne Jordan was convicted by His Honour Judge Robert Stroud, a Judge of the Provincial Court of Nova Scotia, on the charge:

> That Mark Wayne Jordan did, on or about the 22nd day of June, A.D., 1988, at or near Melmerby Beach, in the County of Pictou, Provin-

ce of Nova Scotia, unlawfully operate a motor vehicle contrary to Section 90(1) of the Motor Vehicle Act, R.S.N.S., 1967, c.191.

Jordan was ordered to pay a fine of $100.00 and costs of $10.00, with thirty days to pay, and that his driver's license be suspended for a seven (7) day period commencing October 20, 1988.

Jordan appealed his conviction to this Court on the following grounds:

1. That there was no evidence before the Court to support a finding:

(a) that the Appellant was the operator of the motor vehicle;

(b) that the Appellant was operating the motor vehicle contrary to Section 90(1) of the Motor Vehicle Act (supra);

(c) that the Appellant was the identified Defendant in this matter.

2. That in the alternative, the verdict was unreasonable, in that the weight of the evidence was such that it was unsafe to rest a conviction upon.

3. That the Learned Judge erred in law in holding that the conservation officer appointed pursuant to the Crown Lands Act, S.N.S. 1987, Ch. 5 as amended, is a peace officer with the authority to lay charges under the Motor Vehicle Act (supra).

4. That the Learned Judge erred in law in holding that the summary offence ticket issued and served upon the Defendant was valid.

Section 90(1) of the Motor Vehicle Act reads:

> 90(1) Every person driving or operating a motor vehicle on a highway or any place ordinarily accessible to the public shall drive or operate the same in a careful and prudent manner having regard to all the circumstances.

The sole witness at the trial was John Spencer MacDonald, who identified himself as being a Conservation Officer with the Department of Lands and Forests in Nova Scotia.

MacDonald's testimony was to the effect that he had been a member of the Conservation Force for three years, and in the Summer months of 1988 had been assigned to do peace keeping and law enforcement duties in the Provincial Parks in Pictou County.

On June 22nd, 1988, at approximately 10 p.m., he was on duty in Melmerby Park, near Melmerby Beach, Pictou County. He was accompanied by Cst. Dwayne Rutledge, of the New Glasgow Police Department, and was operating a marked Lands and Forests vehicle. It was dark, and MacDonald and Rutledge were seated in the parked Lands and Forests vehicle when he observed two vehicles approaching from the direction of the second parking lot towards the third parking lot in the Park.

The two vehicles appeared to be travelling at a high rate of speed. The only other vehicle in the area was a light blue Monte Carlo parked in the third parking lot. The approaching vehicles were approximately three car lengths apart, and MacDonald was approximately 500 to 550 meters from the vehicles when he first saw them. The vehicles had their headlights on, and there was a considerable amount of rocks and dust being thrown up from their passage. The witness indicated that in his opinion they were exceeding the posted speed limit of 30 kilometres per hour. He estimated the speed of the vehicles at approximately 50 kilometres an hour.

Upon entering the third parking lot, the first vehicle did a high speed turn, and came to a stop. MacDonald described

the first vehicle as doing one circle, and identified it as a 1987 Trans Am, which was later identified as being owned by Wayne Jordan, the father of the Appellant. At the time the Jordan vehicle made the circle described by MacDonald as a "donut", the Monte Carlo was parked about 20 yards to the north, and the second vehicle was approximately three car lengths behind.

When the vehicle allegedly operated by Jordan came to a stop, the second vehicle continued to do four or five more circular turns in front of the first vehicle, whereupon MacDonald turned on the lights of his vehicle, and drove to the parking lot stopping in front of the two vehicles.

MacDonald's evidence as to what happened next is as follows from the transcript at page 14:

> Q. Tell us what happened when you went up to the two vehicles?
>
> A. I told the accused he would be charged with careless and imprudent driving and he was given ..
>
> Q. Was that Mark Wayne Jordan?
>
> A. Yes sir.
>
> Q. How did the gentleman identify himself?
>
> By Mr. Bruce MacIntosh
>
> Objection. Sorry Your Honour as long as we are not going to get into statements of the gentleman himself.
>
> By the Court
>
> No that was not the question
>
> Q. How did the gentleman identify himself please?
>
> A. He gave me his license, his drivers license.

Q. What was that name please?

A. Mark Wayne Jordan.

Q. What was his address?

A. Box 766, Foster Avenue, Stellarton, B0K 1S0.

Q. Did you ascertain who the registered owner of that vehicle was?

A. Yes it was I believe Wayne Jordan the gentleman's father.

Q. When you went up to the vehicle was there any other persons in the vehicle apart from Mark Wayne Jordan?

A. There were three other people in the vehicle besides the driver and at the time I noticed there was none wearing a seatbelt.

Under cross-examination as to identification of the accused, Jordan, MacDonald's evidence at page 28 of the transcipt is:

Q. It is quite fair to say Mr. MacDonald that you cannot swear to us today that it was in fact Mr. Jordan who was driving that motor vehicle?

A. No he was just behind...

Q. At the time that the donuts were or the turn was performed? You can't swear that it was Mr. MacDonald?

A. No.

Q. Just to reiterate that point Mr. MacDonald your evidence is before us now you cannot swear to the fact that Mr. Jordan was operating the 1978 Trans AM at the time the time the turns were made?

A. It was a 87 Trans AM mam and Mr. Jordan was in the seat normally occupied

by the driver when I approached the vehicle.

Q. When the vehicle was stopped and you approached the vehicle but you cannot swear that when that 1978 Trans AM was maneuvering in that turn you cannot swear to us today ..

By the Crown

It seems to me the witness has already answered that question two if not three times.

By Ms. Van den Hynden(Sic)

I just thought it should be clarified Your Honour. I had asked various questions at that time and I had used a wrong name, I used Mr. MacDonald instead of Mr. Jordan and I just wanted to be clear on the record.

By the Court

I will let you ask it one more time but I agree with Mr. Parker but if you feel it is necessary to clear up the record.

Q. Just to conclude Mr. MacDonald on that point, you can't swear that at the time the car was making the maneuver of the turn that Mr. Jordan was sitting in the drivers seat and operating that motor vehicle?

A. At the time in the turn mam no.

MacDonald then issued Summary Offence ticket, No. 1058010, in the name of Mark Wayne Jordan, and gave a copy of the ticket to the person behind the wheel of the motor vehicle.

MacDonald in his testimony identified some pictues of the area taken the next day, and reiterated that the evening in question was dry, there were no persons walking or strolling in the area of the third parking lot, and that he was approximately 300 meters away when the Jordan vehicle entered the third parking lot at a rather high rate of speed.

Following submissions of Counsel, Judge Stroud rendered his oral decision, and completed and signed the court record on the reverse of the Summary Offence Information, by endorsing a finding of guilty, showing the fine and costs, as well as the license suspension, and stating that judgment was given on September 20th, 1988, at Provincial Court at New Glasgow.

For some unexplained reason, the Trial Judge, following the filing of the Notice of Appeal, filed an amended decision, which in some respects varied from the original decision delivered at the conclusion of the trial.

Counsel on behalf of Jordan and the Crown agree that the Provincial Court Judge lost jurisdiction following the delivery of his decision and the entry of conviction on the Information.

I agree with Counsel's submissions, and find that once Judge Stroud had given his oral decision convicting Jordan, and endorsed the same on the reverse of the Summary Offence Information, he became functus officio. Thus, on the appeal, this Court can only look at, and take into consideration, the original oral decision delivered by the Trial Judge at the conclusion of the hearing.

Judge Stroud in his oral decision delivered at the conclusion of the hearing, said in part as follows:

> "On the identity issue it is true that the only testimony we have on identity or anything else for that matter is that of Constable MacDonald and it is true according to my notes that he did not identify the accused in the Courtroom today. He may not have been able to identify him I don't know, the question was not asked but he did identify him as the person who showed him his driver's license on the night in question and identified himself by way of that drivers license on that occasion. As to the question as to the fail-

> ure of Constable MacDonald to be able state with absolute certainly that the accused was driving the vehicle at the time it went through the manouvers described by him as a donut or sharp sudden turning, to me that is the only evidence I have as to the circumstances of what happened. He saw the maneouver shortly thereafter, and I think it was shortly thereafter it doesn't take very long for the second vehicle to go through three quick turns and for Constable MacDonald to approach the vehicle from a distance of some 300 to 350 meters takes a relatively short period of time and he gave evidence that the accused was behind the drivers seat at that particular time, in the position normally occupied by the driver. As I say that is the only evidence I have and on the absence of any conflicting evidence I have identity evidence as far as I am concerned."

At the conclusion of his oral decision, Judge Stroud stated:

> "In this case all I have is the evidence of the Crown which in my opinion provides prima facie proof beyond a reasonable doubt on all elements of the offence. The way is open for evidence to be induced and I don't make any comment as to the failure of the accused to testify because that would be improper. The evidence is clear that there are three other individuals in the vehicle with the accused in the vehicle on that occasion who could have very well shed more light on the questions raised as to identity, circumstances on that occasion but I don't have that evidence before me so I am therefore left with what I consider to be a prima facie case, proof beyond a reasonable doubt of all the elements of the offence so under the circumstances I find the accused guilty as charged."

Counsel for the Crown and the Appellant state in their submissions on the jurisdiction of this Court on appeal pursuant to a matter taken under Section 748 of the Criminal Code that this Court has the same scope of review as a Court of Appeal Judge

pursuant to Section 613(1)(a) of the Criminal Code. Counsel appear to be in agreement on this Court's appellate power, however, draw different conclusions from the cases they cite.

Counsel for the Appellant refers to the decisions in *R. v. Gillis* (1981) 60 C.C.C. (2d) 169; *R. v. Sanghi* (1971) 6 C.C.C. (2d) 123, and *R. v. Gale* (1984) 15 C.C.C. (3d) 143, in support of his submissions as to the power of this Court.

Counsel for the Crown refers to the case of *R. v. Backman*, (1983) 53 N.S.R. (2d) in support of his interpretation of this Court's powers as an Appeal Court.

In considering the grounds of Appeal, this Court is aware of the limitation of its powers in acting as an Appellate Court.

In *Harper v. The Queen* (1982), 65 C.C.C. (2d) 193, Mr. Justice Estey, delivering the majority judgment of the court, said at p.210:

> "An appellate tribunal has neither the duty nor the right to reassess evidence at trial for the purpose of determining guilt or innocence. The duty of the appellate tribunal does, however, include a review of the record below in order to determine whether the trial Court has properly directed itself to all the evidence bearing on the relevant issues. Where the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence, then it falls upon the reviewing tribunal to intercede."

In *Yebes v. The Queen*, 36 C.C.C. (3d) 417, McIntyre, J., in delivering the judgment of the Supreme Court of Canada stated at p. 430:

> "The function of the Court of Appeal, under s. 613(1)(a) of the Criminal Code, goes be-

> yond merely finding that there is evidence to support a conviction. The court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the court must re-examine and to some extent reweigh and consider the effect of the evidence. This process will be the same whether the case is based on circumstantial or direct evidence."

The issue raised by grounds 1(a) and (c) in the Notice of Appeal is:

> Have the Crown proved beyond a reasonable doubt that the Appellant, Mark Wayne Jordan, was the operator of the motor vehicle observed approaching the parking lot in the Melmerby Beach Park at a high rate of speed, and operating the said motor vehicle in a circular motion in the parking lot on the night in question.

On behalf of the Appellant it is submitted that the witness, MacDonald, was unable to identify the driver at the time the offence occurred, his only evidence being that someone who produced a driver's license marked "Mark Wayne Jordan" was sitting behind the driver's seat when he arrived on the scene.

Further, there is no evidence that at the trial MacDonald identified the Appellant, Mark Wayne Jordan, as one and the same person who he saw in the driver's seat, and who produced a driver's license on the night in question.

In support of his submissions as to identity, Counsel for the Appellant cites *R v. MacLean* (1973) 11 C.C.C. (2d) 568. In that case the factual situation was somewhat similar, an officer stopped a vehicle and asked the driver to produce his license

and vehicle permit. Upon the driver complying, the officer read the driver's license, and asked "Are you George Robert MacLean, the person named in this license" and the driver indicated that he was. On trial, the officer under cross-examination, admitted that he was unable to identify the driver during the proceedings.

On Appeal, the late MacLellan, C.C.J., at page 572 stated:

> " I have reached the conclusion that there has not been sufficient proof of identity of the offender in this case. I think I am entitled to take cognizance of the fact that there are many persons in Nova Scotia of Scotch-Irish descent and that the surname "MacLean" is not a distinctive name in Nova Scotia nor are the Christian names of "George " and "Robert" unusual in Nova Scotia families. It seems to me that there might be many persons in Nova Scotia who carry the patronym of "MacLean" and have given names of "George" and "Robert". If I am entitled to take cognizance of these facts, then I reach the conclusion that there has been no sufficient identification of the person who now appears before me."

Counsel for the Crown submits that Jordan, by giving his driver's license which contained his name and address, sufficiently identified himself to the officer. In support of this submission he refers to the cases of *R. v. Lively* (1969) C.R.N.S. 128; *R. v. Diamond* (1977) 17 N.S.R. 242, and *R. v. Streatch* (1951) 12 C.R.N.S. 193.

Crown Counsel did not address the question of identification of the Appellant by the sole witness for the Crown, MacDonald, during the trial.

In *R. v. Lively* , the late O'Hearn, C.C.J., said at page 129:

> " There is quite a large amount of authority in the cases that identity of name is

> *prima facie* evidence of identity. See the cases cited in Tremeear's Annotated Criminal Code, 6th ed., p.1064 and in 18 Canadian Abridgement, pp.318 *et seq.*, including *Thayer v. Vance* (1847), 3 N.S.R. 269, a decision of our Appeal Division. The weight of this evidence of course depends to a large extent upon the distinctiveness of the name; thus in a case before Levy Co. Ct. J., *Regina v. Smith*, the defendant was referred to only as "Mr. Smith" and the learned Judge understandably found this a little vague. I find the names "Clayton Lively" and Clayton Oslo Lively" somewhat more distinctive than "Mr. Smith" and I have no doubt either in fact or in law that the Clayton Lively who was stopped by Constable Fitzsimmons on the occasion in question is the Clayton Oslo Lively who was charged in the information herein, and who signed the notice of appeal."

Section 735(1)(2) of the Criminal Code, in force at the time of trial reads:

> 735.(1) Where the prosecutor and defendant appear, the summary conviction court shall proceed to hold the trial.
>
> (2) A defendant may appear personally or by counsel or agent, but the summary conviction court may require the defendant to appear personally and may, if it thinks fit, issue a warrant in Form 7 for the arrest of the defendant, and adjourn the trial to await his appearance pursuant thereto.

It would appear from this section that it is not necessary for a defendant to appear personally at his trial in a summary conviction matter. However, the record indicates that that the Appellant was present at his trial. The record fails to disclose when or by whom the not guilty plea was entered, the only indication being a tick mark in the block "not guilty" on the reverse of the Summary Offence Information. The remarks of Crown Counsel and the Trial Judge at the opening of the trial

indicates some confusion as to when the not guilty plea was entered. The face of the Summary Offence Information called upon the defendant to appear before the presiding justice at New Glasgow, July 25th, 1988, at 9:30 a.m. It would be presumably at this time that someone entered on behalf of the defendant the not guilty plea.

The transcript of evidence plainly discloses that MacDonald, the sole witness for the Crown, at no time identified the Accused, Jordan, as being the driver of the motor vehicle which was observed travelling at a high rate of speed through the Melmerby Beach Park, and making an alleged dangerous manoeuvre in the third parking lot on the night in question. MacDonald's evidence was merely that when he arrived at the vehicle, which at that time had its lights and engine off, he found a person in the driver's seat who produced a driver's license with the name Mark Wayne Jordan. Under cross-examination, MacDonald admitted that he could not swear at the time the car was making the manoeuvre that the Accused, Jordan, was operating the motor vehicle.

The learned Trial Judge was obviously in error when he stated in his decision:

> "He may not have been able to identify him I don't know, the question was not asked but he did identify him as the person who showed him his driver's license on the night in question and identified himself by way of that drivers license on that occasion."

The transcript contains no such evidence.

It is abundantly clear that MacDonald did not identify the Accused, Jordan, during the trial as the person operating the vehicle at the time and place in question. Further, MacDonald, on cross-examination admitted that he could not swear that the

Accused, Jordan, was operating the motor vehicle at the time and place which led to the summary conviction information being laid.

The learned Trial Judge in his concluding remarks in his decision refers to three other individuals in the vehicle who could very well have shed more light on the question raised as to identity, and appears to overlook that it is the duty of the Crown to prove it's case beyond a reasonable doubt. The Crown was required to prove the identity beyond a reasonable doubt of the operator of the motor vehicle observed being driven in a manner which was not careful and prudent in the Melmerby Beach Park on the night in question. The Crown could have called the other persons in the car to prove the identity of the operator, and also had available the police officer, Rutledge, who accompanied the witness MacDonald. However, the Crown elected to rely on the evidence of MacDonald, who by his own admission on cross-examination, could not identify the Appellant, Jordan, as being the operator of the motor vehicle at the time and place it was allegedly being driven in a manner contrary to Section 90(1) of the Motor Vehicle Act.

The learned Trial Judge misdirected himself as to the law in his finding that the Appellant, Jordan, was identified as the person operating the motor vehicle at the time and place set out in the Summary Conviction Information. This conclusion is not supported by the evidence, and is obviously in error. The evidence taken as a whole did not establish the identity of Jordan as being the operator of the motor vehicle beyond a reasonable doubt.

Having concluded that the Trial Judge erred in law in

finding that the Crown proved the identity of the operator of the motor vehicle observed as allegedly failing to comply with the provisions of Section 90(1) of the Motor Vehicle Act at the time and place shown in the Information, it is not necessary to rule on the other grounds of Appeal.

I would allow the Appeal, set aside the conviction and sentence, and enter an acquittal.

H. J. MacDonnell,
Judge of the County Court
for District Number Five

IN THE COUNTY COURT OF DISTRICT NUMBER 5

ON APPEAL FROM

THE PROVINCIAL COURT

BETWEEN:

HER MAJESTY THE QUEEN

- and -

MARK WAYNE JORDAN

HEARD BEFORE: His Honour Judge Robert Stroud

PLACE HEARD: New Glasgow, N.S.

DATE HEARD: September 20, 1988

CHARGE: Did unlawfully commit the offence of careless and imprudent driving contrary to Section 90(2) of the Motor Vehicle Act.

COUNSEL: R. Parker, Esq. Q.C. for the Prosecution
Elizabeth Van den Eynden and Bruce MacIntosh for the defence.

C-A-S-E O-N A-P-P-E-A-L