N O V A S C O T I A
COUNTY OF HALIFAX
To wit: C.H. 39467

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, on the information of John K. Card, Constable,

Respondent

- and -

CARROLL GAVIN F. GILES,

Appellant

Leslie J. Dellapinna, for the appellant.
Gerald J. Goneau, Esq., for the respondent.

1983, January 10, O Hearn, J.C.C.:- This is an appeal against a conviction under Motor Vehicle Act, R.S.N.S. 1967 c.191 s.105(2)(a). The circumstances are so similar to those in *R. v. Drillio* (C.H. 39586, unreported), which I decided on December 13, last, that at first I thought I was rehearing the same case. At 10:50 p.m. the defendant, here, passed a slow moving car on the Williams Lake Road. He did so at a point where the visibility ahead was good, according to at least part of the evidence, and where there was no other traffic at all, although the street is a residential one. There was some mist but it did not affect the visibility and there was evidence that the pavement was wet, although the defendant testified that it was in the course of drying. The only witness for the prosecution was the informant, and the only witnesses for the defence were the defendant and his passenger. In the opinion of Constable Card, the defendant's speed was 45 to 50 km an hour in a 50 km/h zone. The constable's evidence about the speed of the other vehicle, if any, is obscure. The defendant estimated the speed of the other vehicle as 20 to 25 km per hour, or perhaps somewhere between 15 and 20 m.p.h. These, of course, are not equivalent.

The trial judge accepted the estimate of 20 m.p.h., as he was entitled to do, and his decision is largely based upon a

factual appraisal, but he read into the evidence the existence of intersections that are not there, and that in itself probably justifies an order for a new trial.

There is moreover, I think, a strong indication in the transcript that he was applying the same kind of reading of s.105(3)(c) as the trial judge used in *Drillio, supra*. That is, he seemed to be demanding something in the conditions that necessitated a crossing of the centre double line. It is clear from the case law cited to him and to me, *R. v. Sonnenberg* (1977), 28 N.S.R. (2d) and 43 A.P.R. 255, Sullivan, J.C.C., which was cited and approved in *R. v. Falconer* (1978), 28 N.S.R. (2d) and 45 A.P.R. 447, by the Appeal Division, that necessity may be an element of the defence but is not necessarily so. According to MacKeigan, C.J.N.S., in *Falconer*, where a driver has gone to left of a double solid line he must satisfy the trial judge that 'having regard to all the conditions then existing, it was reasonable and prudent for the driver to have done so'.

This is a 'reasonable and prudent' defence similar to that provided in ss.92(1) and 94(2). The provision differs from those last cited in the use of the word 'due to' rather than 'in the' when referring to the conditions, so that the conditions must be the cause or occasion for crossing the centre line. This implies that there must be some cause or occasion to cross the centre line when invoking this defence, but it does not imply that it was necessary to cross the centre line, only that it was reasonable and prudent to do so. Both of the cases cited involve the passing of a slow-moving car, and in both this was conceived as a possible occasion or condition for crossing the centre line where it was reasonable and prudent to do so. Neither 'reasonable' nor 'prudent' is capable of exact definition, but they obviously involve at least the suggestion that there should be a reason for crossing the centre line and that it is clearly safe to do so.

This court is not in a position to decide the matter on the transcript, so the appeal will have to be allowed and a new trial ordered.

P. T. Quinn

A Judge of the County Court
of District Number One