

PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. MacKinnon, 2011 NSPC 87

Date: 20111118

Docket: S-4445096

Registry: Pictou

Between:

Her Majesty the Queen

v.

Alyssa Renee MacKinnon

DECISION AS TO VERDICT

Judge: The Honourable Judge Del W. Atwood

Heard: 7 October 2011 in Pictou, Nova Scotia

Charge: Sub-s. 103(3) of the Motor Vehicle Act

Counsel: Jody McNeill, for the Nova Scotia Public Prosecution
Service

Bryna Fraser, for Alyssa Renee MacKinnon

By the Court:

[1] This is a case that requires the Court to consider evidence of split-second observations and actions. Unlike, say, charges of speeding or driving with a prohibited blood-alcohol level—cases which typically involve observations of targeted vehicles over extended distances with the clock running—this is a moment-in-time charge of driving past a school bus exhibiting flashing red lights.

[2] That is what Alyssa MacKinnon is alleged to have done. Summary offence ticket number 4445096 charges Ms. MacKinnon with “failing to stop for a schoolbus [*sic*] exhibiting flashing red lights” on 4 February 2011 on Stellarton Road, Stellarton, Nova Scotia.

[3] Subsection 103(3) of the Motor Vehicle Act, R.S.N.S., 1989, c. 293 provides that:

(3) Notwithstanding any other provision of this Act, the driver of a vehicle shall stop the vehicle before passing a school bus that is exhibiting flashing red lights and is stopped on or near a highway and shall remain stopped until the school bus proceeds.

- [4] The prosecution called two witnesses: Cst. Shane MacNeil, a member of the R.C.M.P. who testified that he saw Ms. MacKinnon driving the truck she was operating past a school bus which was displaying flashing red lights and which was stopped at the intersection of Stellarton Road and Duff Street; the prosecution called the school bus driver, Mr. Theodore Peter Bos, who told the Court about stopping at that intersection to let off his last student passenger and seeing a white pick up truck going past the bus after the red flashing lights had been activated.
- [5] Ms. MacKinnon testified in her own defence; she admitted being the driver of the truck stopped by Cst. MacNeil, and admitted passing Mr. Bos's bus; however, Ms. MacKinnon was most emphatic that the bus was not displaying flashing red lights when she did so.
- [6] Fortunately, the Court has available to it more than just the conflicting evidence of the witnesses. This is because Cst. MacNeil's police cruiser was equipped with a working dash-cam, and so the Court is able to examine a video record of pertinent events. Exhibit number 1 is a DVD disc containing the relevant .mpg file.¹

¹The file label is <QHP23R00.MPG>.

[7] I apply the principles set out in *R. v. Nikolovski*² regarding the reception of video-recorded evidence. Although *Nikolovski, supra*, dealt primarily with the use of video-recorded evidence in cases when identification of the accused as the offender remains a disputed element of the offence that is being tried, Cory J. went on to make the following general comments:

Once it is established that a videotape has not been altered or changed, and that it depicts the scene of a crime, then it becomes admissible and relevant evidence. Not only is the tape (or photograph) real evidence in the sense that that term has been used in earlier cases, but it is to a certain extent, testimonial evidence as well. It can and should be used by a trier of fact in determining whether a crime has been committed and whether the accused before the court committed the crime. It may indeed be a silent, trustworthy, unemotional, unbiased and accurate witness who has complete and instant recall of events. It may provide such strong and convincing evidence that of itself it will demonstrate clearly either the innocence or guilt of the accused.

The weight to be accorded that evidence can be assessed from a viewing of the videotape. The degree of clarity

²(1996), 111 C.C.C. (3d) 403 (S.C.C.).

and quality of the tape, and to a lesser extent the length of time during which the accused appears on the videotape, will all go towards establishing the weight which a trier of fact may properly place upon the evidence. The time of depiction may not be significant for even if there are but a few frames which clearly show the perpetrator that may be sufficient to identify the accused. Particularly will this be true if the trier of fact has reviewed the tape on several occasions and stopped it to study the pertinent frames.³

There is nothing recondite about this. The Court can look at the recorded image as many times as is necessary, weigh it based on its clarity, resolution and perspective, and the Court is entitled to draw reasonable inferences from what it sees.

- [8] Exhibit number 1 situates the scene. Stellarton Road is a small-town thoroughfare which runs in a north/south direction through New Glasgow and Stellarton, on the west side of the East River. There are a number of intersecting side streets along Stellarton Road, including Duff Street which lies on the west side of Stellarton Road, forming a “T” intersection. The

³*Supra*, note 1, at paras. 28-29.

recording which constitutes Exhibit number 1 starts with a displayed time marker of 14:02:40. Cst. MacNeil was driving his police cruiser southbound on Stellarton Road with his dash-cam running. The recording shows that there was a dark-coloured hatchback, also southbound, just ahead of the officer. Intermittently though the video, a white half-ton truck can be seen heading southbound, which was proceeding ahead of the hatchback; this was the vehicle that Ms. MacKinnon was driving. At the 14:03:06 time marker, I was able to observe Mr. Bos's northbound bus for the first time. At the 14:03:08 time marker, a northbound vehicle in front of Mr. Bos's bus can be seen making a left turn off of Stellarton Road onto Duff Street. At the 14:03:12 time marker, Cst. MacNeil began overtaking the hatchback in front of him in order to stop Ms. MacKinnon. At the 14:03:13 time marker, I was able to observe a pedestrian-crossing sign on the west-side margin of Stellarton Road, which would have been clearly visible to southbound traffic; this sign was erected on the northwest corner of the Stellarton Road-Duff Street intersection. At the 14:03:14 time marker, I was able to see a passenger exiting Mr. Bos's bus. At the 14:03:15 time marker, I was able to see the red flashing lights on the bus for the first time. I have no doubt that the flashing reds had been activated earlier than this time marker; however,

distance and image resolution prevented the red-light activation moment from being captured in the video recording. At the 14:03:17 time marker, the passenger who left Mr. Bos's bus can be seen running into the southbound lane of Stellarton Road in the process of crossing the street.

[9] Based on what I observed in Exhibit number 1, and based on the testimony of the witnesses who gave evidence in this trial, I am able to make the following findings of fact. Mr. Theodore Peter Bos is a highly conscientious and safety-focussed school-bus driver who, on 4 February 2011, was about to discharge his last passenger as he approached his usual stop at the intersection of Stellarton Road and Duff Street, heading northbound on Stellarton Road. As Mr. Bos got ready and began braking for this stop, he toggled on the amber flashing traffic-control lighting on his bus, alerting oncoming and following traffic that he was about to stop. Ms. MacKinnon was operating the foremost oncoming vehicle as she proceeded southbound on Stellarton Road.

[10] As Mr. Bos rolled to a stop, he would have observed a dark-coloured northbound vehicle ahead of him coming to a stop and signalling a left turn onto Duff Street. This vehicle had to stop because Ms. MacKinnon's southbound vehicle was approaching the intersection. Focussed resolutely

on the safety of his passenger, Mr. Bos decided to keep the bus door closed, as he did not wish to let his young passenger exit the bus and walk out on Stellarton Road with another vehicle stopped so close to the front of the bus. With the door closed, the traffic-control lighting on the bus continued automatically flashing amber. At this point, Ms. MacKinnon drove past the vehicle that was stopped in front of Mr. Bos. After Ms. MacKinnon had driven past, the vehicle that was stopped in front of the bus executed its left turn onto Duff Street. Now certain that his passenger could be discharged in safety, Mr. Bos opened the door of his bus; the opening of the door, with the amber lighting having been engaged earlier, automatically switched on the flashing reds. But by this time, Ms. MacKinnon had gone past.

[11] Accordingly, I accept Ms. MacKinnon's evidence, as well as the very skilled analysis of the video recording argued by Ms. Fraser. I believe that the traffic-control lighting on Mr. Bos's bus was still flashing amber when Ms. MacKinnon drove past, and I would find Ms. MacKinnon NOT GUILTY of the charge against her.

[12] I wish to comment briefly on the evidence of Mr. Bos and Cst. MacNeil. I found both of them to be very honest and trustworthy witnesses who were recalling pertinent facts as they remembered them. The reasons I have

accepted Ms. MacKinnon's evidence over theirs is that I believe that Ms. MacKinnon's account is supported by the video recording; furthermore, I observe that, at the pertinent moment, just as Ms. MacKinnon came upon the bus, Mr. Bos's main focus was on the safety of his passenger, which divided his attention among a number of things: his passenger, the vehicle that was stopped in front of him, oncoming traffic, as well as the road conditions, in general. Mr. Bos was not a distracted driver: he was a safety-focussed driver, but whose focus was not, solely, on Ms. MacKinnon. Defence counsel brought out in cross examination of Mr. Bos an inconsistency between his testimony in court and a small portion of the statement he had given to police. I believe firmly that this inconsistency was simply an honest mistake by Mr. Bos; in some respects, it was almost inevitable, given that over five months elapsed from the date of the alleged offence until the date Mr. Bos gave his statement. This is not meant as a criticism of the conduct of the investigator—there may well have been a good reason not to have taken a statement from Mr. Bos earlier than that. However, this case underscores the fact that statement-taking is more than a means of gathering evidence; statements are useful memory aids for witnesses, particularly when those witnesses are lay people who are likely to be unaccustomed to

making records of important things they have done, seen or heard.

However, a statement can fulfil that recollection-recorded or recollection-revived purpose only when it is made or taken in a timely manner, when the memory is recent and fresh.

- [13] Similarly, Cst. MacNeil was carrying out his duties maintaining a general lookout of the roadway and the traffic. He had not targeted Ms. MacKinnon's vehicle; indeed, there was no reason for Cst. MacNeil to have done so, as there was nothing unusual about Ms. MacKinnon's driving.

- [14] The Court would like to thank counsel for the very thorough manner in which this case was tried.

DATED at Pictou, Nova Scotia, this 18th day of November 2011.

Original signed by:

Atwood P.C.J.