SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Garland*, 2014 NSSC 445

Date: 2014-12-19
Docket: S.H. No. 428447A
Registry: Halifax

Between:

Claudette Ellen Garland

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Rosinski
Heard:	December 3, 2014, in Halifax Nova Scotia
Counsel:	Alan G. Ferrier, Q.C., for the Appellant Joshua J. Judah for the Respondent

By the Court:

Overview

[1] Justice of the Peace, Judith A. Gass, acting as a judge of the Provincial Court, convicted Ms. Garland on May 8, 2014 in relation to the offence that:

> She, on or about the 1st day of May 2013 at, or near, 6515 Quinpool Road, in the County of Halifax, Province of Nova Scotia, did unlawfully commit the offence of failing to yield to pedestrian in crosswalk or stopped facing crosswalk on roadway which vehicle is traveling in roadway divided by median, contrary to s. 125(2) of the *Motor Vehicle Act*.

[2] Ms. Garland appeals to this court to overturn the conviction. She has also filed a motion to adduce "fresh evidence," and seeks this court's leave to have such evidence admitted in its consideration of her appeal.

The statutory basis for the appeal herein

[3] Appeals are creatures of legislation. They all must find their roots in soil deliberately deposited by legislators.

[4] Rule 63.02 of Nova Scotia Civil Procedure Rules (Summary Conviction Appeal), reads:

> This Rule applies to a summary conviction appeal under part 27 of the *Criminal Code*, which includes an appeal of a decision in both federal summary conviction proceedings and, by operation of the *Summary Proceedings Act*(Nova Scotia) a provincial summary conviction proceeding.

[5] This appeal arises from a provincial summary conviction proceeding. Through the operation of s. 7 of the *Summary Proceedings* Act, R.S.N.S. 1989, c. 450, Rule 63, and ss. 813 and 822 of the *Criminal Code* the appeal is to this court sitting as a Summary Conviction Appeal Court (SCAC).

[6] Sections 813 and 822 of the *Criminal Code* read:

> 813(1) Except where otherwise provided by law,
> (a) the defendant in proceedings under this Part may appeal to the appeal court
> (i) from a conviction or order made against him,…"

[7] The "appeal court" is defined in section 812, in the case of Nova Scotia, as "the Supreme Court".

[8] Section 822 reads:

> 822(1) Where an appeal is taken under section 813 in respect of any conviction, acquittal, sentence, verdict or order, sections 683 to 689, with the exception of subsections 683(3) and 686(5) apply, with such modifications as the circumstances require.

[9] Part 21 of the *Criminal Code* (Appeals – Indictable Offences) includes ss. 673 – 696.

[10] Section 683 contains a list of general procedural powers available to courts of appeal. Relevant for present purposes is section 683(1)(d), which is the statutory basis for a motion to adduce fresh evidence. It reads:

> "683(1) For the purposes of an appeal under this part, the Court of Appeal may, where it considers it in the interests of justice,…
>
> (d) receive the evidence, if tendered, of any witness, including the appellant, who is a competent but not compellable witness;…"

[11] Section 686 (1) reads:

> "On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the Court of Appeal
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> (a) may allow the appeal where it is of the opinion that
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> (i) the verdict should be set aside on the grounds that it is unreasonable or cannot be supported by the evidence,
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> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (iii) on any ground there was a miscarriage of justice;
>
> (b) may dismiss the appeal where
>
> (i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,
>
> (ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph(a),
>
> (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph(a)(ii) the appeal might be decided in favour of the appellant, is of the opinion that no substantial wrong or miscarriage of justice has occurred, or

> (iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the Court of Appeal is of the opinion that the appellant suffered no prejudice thereby;…"

The merits of the motion to adduce fresh evidence

[12] While s. 683(1)(d) of the *Criminal Code* provides the statutory authority for appeal courts to receive so-called "fresh evidence", the jurisprudence has set out the appropriate considerations. These are nicely summarized by Cromwell J.A. (as he then was) in *R. v. Wolkins*, 2005 NSCA 2 :

> "[57] Both the SCAC [Summary Conviction Appeal Court] and this Court have a wide discretion to admit new evidence on appeal where it is in the interests of justice: *Criminal Code*, s. 683(1). Case law has structured the exercise of this discretion in the various contexts in which new evidence may be advanced.
>
> [58] **Fresh evidence tends to be of two main types: first, evidence directed to an issue decided at trial; and second, evidence directed to other matters that go to the regularity of the process or to a request for an original remedy in the appellate court. The legal rules differ somewhat according to the type of fresh evidence to be adduced**. Mr. Wolkins advances evidence of both types.
>
> [59] **Fresh evidence on appeal which is directed to issues decided at trial generally must meet the so-called *Palmer* test**. A key component of that test requires that the proposed fresh evidence could not have been available with due diligence at trial: *R. v. Palmer*, [1980] 1 S.C.R. 759 at 775. This rule makes it clear that the place for the parties to present their evidence is the trial. If evidence that with due diligence could have been called at trial were admitted routinely on appeal, finality would be lost and there would be less incentive on the parties to put forward their best case at trial. **The rule requiring due diligence at trial is therefore important because it helps to ensure finality and order, two features which are essential to the integrity of the criminal process**: *R. v. G.D.B.*, [2000] 1 S.C.R. 520 at para. 19. In that paragraph of *G.D.B.*, the Supreme Court adopted these words of Doherty, J.A. in *R. v. M.(P.S.)* (1992), 77 C.C.C. (3d) 402 at 411:
>
> While the failure to exercise due diligence is not determinative, it cannot be ignored in deciding whether to admit "fresh" evidence. The interests of justice

referred to in s. 683 of the *Criminal Code* encompass not only an accused's interest in having his or her guilt determined upon all of the available evidence, but also the integrity of the criminal process. Finality and order are essential to that integrity. The criminal justice system is arranged so that the trial will provide the opportunity to the parties to present their respective cases and the appeal will provide the opportunity to challenge the correctness of what happened at the trial. Section 683(1)(*d*) of the *Code* recognizes that the appellate function can be expanded in exceptional cases, but it cannot be that the appellate process should be used routinely to augment the trial record. Were it otherwise, the finality of the trial process would be lost and cases would be retried on appeal whenever more evidence was secured by a party prior to the hearing of the appeal. For this reason, the exceptional nature of the admission of "fresh" evidence on appeal has been stressed: *McMartin v. The Queen*, *supra*, [1964] S.C.R. 484, at p. 148.

The due diligence criterion is designed to preserve the integrity of the process and it must be accorded due weight in assessing the admissibility of "fresh" evidence on appeal.

In my view, these considerations are equally relevant in the context of an appeal from sentence. Accordingly, due diligence in producing fresh evidence is a factor that must be taken into account in an appeal from sentence, on the same basis as the other three criteria set out in *Palmer*.

[60] **But finality and order, important as they are, must give way in the interests of justice. Accordingly, the due diligence criteria is not applied inflexibly and yields where its application might lead to a miscarriage of justice**: *R. v. G.D.B., supra* at paras. 17-21; *R. v. Lévesque, supra* at para. 15. The due diligence requirement is one factor to be considered in the "totality of circumstances": *G.D.B.* at para. 19. In considering whether the due diligence requirement has been met, the appellate court should determine the reason why the evidence was not available or was not used: *G.D.B.* at para. 20. The absence of an explanation or the fact that the failure to call the evidence was a deliberate tactical choice will weigh against its admission: *R. v. Warsing*, [1998] 3 S.C.R. 579 at para. 51.

[61] **The other category of fresh evidence concerns evidence directed to the validity of the trial process itself or to obtaining an original remedy in the appellate court. In these sorts of cases, the *Palmer* test cannot be applied and the admissibility of the evidence depends on the nature of the issue raised**. For example, where it is alleged on appeal that there has been a failure of disclosure by the Crown, the focus is on whether the new evidence shows that the failure may have compromised trial fairness: see *R. v. Taillefer*; *R. v. Duguay*, [2003] 3 S.C.R. 307 at paras. 73-77. Where the appellant seeks an original remedy on appeal, such as a stay based on abuse of process, the evidence must be credible and sufficient, if uncontradicted, to justify the appellate court making the order sought: see e.g. *United States of America v. Shulman*, [2001] 1 S.C.R. 616 at paras. 43-46. Where the appellant alleges that his trial counsel was

> incompetent, the fresh evidence will be received where it shows that counsel's conduct fell below the standard of reasonable professional judgment and a miscarriage of justice resulted: see *R. v. G.D.B.*, supra."
>
> [my emphasis added]

[13] The appellant argues that it is "in the interests of justice" to receive as fresh evidence, the affidavit of Ms. Garland. Paragraphs 4 and 5 thereof read:

> That I was concerned, after the conviction, that the court had given no weight to the fact that the investigating officer, Constable Larry Roberge, indicated he was alone on the day in question(see appeal book – transcript of trial – page 11 at lines 3 – 6) and that I have testified that two officers were in the police vehicle with one exiting from the passenger side, and Constable Roberge exiting from the driver side(see appeal book – transcript of trial – page 19 – lines 4 –7).
>
> That after taking these concerns to legal counsel after my conviction, I made a formal application to the Halifax Regional Police pursuant to the Freedom of Information and Protection of Privacy Act on May 21 2014, and I received a written response dated June 4, 2014, a true copy of which is attached hereto and marked exhibit "A" to this my affidavit.

[14] Paragraphs 7, 8 and 10 thereof read:

> That my legal counsel received from counsel for the respondent by fax the 14th day of July 2014, additional disclosure/can says from constables LeBlanc and Roberge dated July 9, 2014, two copies of which are attached and marked exhibits "B" and "C" to this my affidavit.
>
> That further my legal counsel has received from legal counsel for the respondent proposed affidavits [from Constables Roberge and LeBlanc] for the fresh evidence application which I have attached hereto and marked as exhibits "D" and "E" to this my affidavit.
>
> That I was not aware prior to the trial of this matter that I could obtain details of the police officers' activities under the provisions of the Freedom of Information and Protection of Privacy Act.

[15] At trial, the only witnesses were Constable Roberge for the Crown, and Ms. Garland in her own defence.

[16] Constable Roberge testified that he observed a car go through a marked crosswalk at the intersection of Quinpool Road and Quinn Street, narrowly missing a pedestrian in the middle of the crosswalk. He did not lose sight of the car and pulled it over at the Irving gas station approximately 200 feet up the street. He was traveling alone in his police vehicle. He identified Ms. Garland as the sole occupant and driver of the offending vehicle. On cross examination, Ms. Garland asked him whether he was alone in his vehicle, and he responded: "Yes. I am a single unit vehicle".

[17] Ms. Garland testified: "There were two officers in the vehicle. One officer exited from the passenger side and came up and stood at the front of my passenger side, just ahead of the headlight, with his arms folded and staring at me. The other officer, which was officer Roberge, came up to the driver's side. I rolled down my window and I said, 'what's the matter officer?'."

[18] In her submission to the presiding judge, she stated:

> I don't feel I'm guilty of the charge because there are holes in the accounting of officer Roberge`s timeline and he does insist that he was alone at the time, but there was another officer in the vehicle. So I am disputing the charge completely.

[19] Ms. Garland submits that the "fresh evidence", being the can- says and affidavits of Constables Roberge and LeBlanc, establish that there were two officers present at the scene.

[20] In those documents, the officers state that although they were working separately, Constable Roberge in a marked "police" vehicle, and Constable LeBlanc on "beat" or walking patrol, coincidentally they were both present when Ms. Garland was ultimately pulled over at the Irving gas station.

[21] Ms. Garland's counsel puts it this way in her brief:

> If allowed, the motion will introduce evidence and crown disclosure(not provided prior to trial) that:
>
> > 1-Officer Roberge was not alone at the time the appellant's vehicle was stopped
> >
> > 2-Officer LeBlanc was not in officer Roberge's vehicle at the time of the alleged offence or prior to the stop (contrary to the appellant's specific evidence stating otherwise)
> >
> > 3-the stop occurred in the location described in the appellant's evidence at trial (Circle K east of the Connaught Avenue intersection) and not as described in Officer Roberge`s trial testimony.

[22] The Crown relies on Justice Saunders comments for the Court in *R. v. Fraser* (2011 NSCA 70 at paragraph 34) regarding the four factors that must be demonstrated before "fresh evidence" should be admitted. It argues that: Ms. Garland was not diligent; the proposed fresh evidence does not concern a decisive

issue; while the affidavits of the officers are reasonably capable of belief they do not support Ms. Garland's position on appeal, but rather support the conclusion of the trial judge; and similarly the proposed fresh evidence would not cast doubt on the conviction, but rather tends to undermine the credibility of Ms. Garland. It submits the proposed evidence does not meet the test for fresh evidence.

[23] The premise of Ms. Garland's motion is that there was a second officer (Cst. LeBlanc) in Constable Roberge`s police car when she was stopped, and that had he been available at trial he could have given testimony favorable to her position regarding the offence charged.

[24] The record reveals that Ms. Garland had the opportunity to question Cst. Roberge , and did specifically ask him if he was alone in the vehicle, which he confirmed (trial transcript page 11 lines 2 – 6). Ms. Garland also confirmed "I have a copy of the disclosure", which included the handwritten notes of Cst. Roberge(trial transcript page 13 lines 2 – 13). Thereafter, Ms. Garland elected to give evidence on her own behalf. The Crown did not cross examine her.

[25] The affidavit evidence of the officers only conflicts with Ms. Garland's testimony insofar as she testified:

> "There were two officers in the vehicle. One officer exited from the passenger side and came and stood at the front of my passenger side, just ahead of the

> headlight, with his arms folded and staring at me. The other officer, which was Officer Roberge came up to the driver's side. I rolled down my window and I said 'what's the matter officer?'. I was completely bewildered at that point. I had no idea why they pulled in behind me."

[26] I conclude that Ms. Garland has not demonstrated each of the four factors. The offence date and trial date were a year apart. Crown disclosure was provided to Ms. Garland. It only included references to Cst. Roberge. If Ms. Garland truly believed there were two officers in the police car that stopped her, she was put on notice well before trial, that she would have to make further efforts to ascertain the identity and any associated disclosure regarding the second officer. She did not do so. She was not diligent. While Ms. Garland might have an argument that the evidence is reasonably capable of belief, the officers' proposed evidence is not such that, if believed, when taken with other evidence adduced at trial, it could be expected to have affected the result.

[27] I dismiss the motion to have fresh evidence admitted.

The merits of the appeal

[28] The notice of appeal reads as follows:

> The presiding Justice of the Peace erred by:
>
> > i-failing to properly apply the principles as set forth in the Supreme Court of Canada decision of R v W.(D.) [1991] 1 S.C.R. 742

> ii-not allowing the appellant, during the course of her testimony, to refer to written notes, made by the appellant, the date of the alleged offence, to refresh her memory;
>
> iii-failing to consider the importance of a dispute between the evidence of the appellant and the arresting officer as to whether the arresting officer was alone or in the company of another police officer. The presiding Justice of the Peace determined that this issue was of no consequence. Given the fact that the evidence of the arresting officer and the appellant were diametrically opposed the issue of whether the arresting officer was alone or not, went to the heart of the issue to be considered by the presiding Justice of the Peace. That during the hearing of this appeal the appellant will make an application to introduce fresh evidence obtained by the appellant after the conviction which established that the arresting officer was in the company of another police officer at the time of the appellant's arrest.

Standard of Review

[29] Ms. Garland has alleged that the trial judge erred in law in failing to apply the fundamental principles of the presumption of innocence and the requirement for proof beyond a reasonable doubt, to the issue of credibility in this case. For this court to intervene, I must conclude that the trial judge was incorrect in applying the law to the issue of credibility.

[30] Ms. Garland has alleged that she was not permitted to refer to her written notes to refresh her memory. This ground of appeal is best characterized as an allegation that a miscarriage of justice has occurred, because Ms. Garland's right to a fair trial has been undermined.

[31] Lastly Ms. Garland has alleged that the trial judge failed to consider the importance of her evidence that there were two police officers in the police vehicle on the day in question, in contrast to the evidence of Constable Roberge that he was alone in his marked "police" vehicle.

[32] The appropriate standards of review were referred to by Justice Cromwell (as he then was) in *R. v. Nickerson*, 1999 NSCA 168:

> **5** Unlike appeals to this Court in summary conviction matters, appeals to the Summary Conviction Appeal Court on the record may address questions of both fact and law. Hallett, J.A., for the Court, recently described the role of the Summary Conviction Appeal Court judge in R. v. Miller (1999), 173 N.S.R. (2d) 26 (C.A.) at pp. 27-29:
>
> On an appeal to a summary conviction appeal court (in this Province, the Supreme Court of Nova Scotia), from a summary conviction, on the ground that the verdict is unreasonable or unsupported by the evidence, the duty of the Supreme Court judge as an appellate court is explained in Yebes v. The Queen (1988), 36 C.C.C. (3d) 417. McIntyre, J., for the Court, stated at p. 430:
>
> ..... The function of the Court of Appeal, under s. 613(1)(a)(i) of the Criminal Code, goes beyond 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. The process will be the same whether the case is based on circumstantial or direct evidence. (emphasis added)
>
> .....
>
> On an appeal from a conviction for a criminal offence on the ground that the guilty verdict is unreasonable, the appellate court judge is required to review, and to some extent, reweigh the evidence to determine if the verdict is unreasonable. Assessing whether a guilty verdict is unreasonable engages the legal concept of reasonableness (Yebes, supra at p. 427). Thus, the appellate review, on the grounds set out in s. 686(1)(a)(i) of the Code entails more than a mere review of the facts. The appellate court has a responsibility, to some extent, to do its own assessment of the evidence and not to automatically defer to the conclusions of

> the trial judge which is what the appellate court judge seems to have done in this appeal.
>
> **6** The scope of review of the trial court's findings of fact by the Summary Conviction Appeal Court is the same as on appeal against conviction to the Court of Appeal in indictable offences: see sections 822(1) and 686(1)(a)(i) and R. v. Gillis (1981), 60 C.C.C. (2d) 169 (N.S.S.C.A.D.) per Jones, J.A. at p. 176. **Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence**. As stated by the Supreme Court of Canada in R. v. Burns, [1994] 1 S.C.R. 656 at 657, the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. **In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was some evidence to support the trial judge's conclusions nor a new trial on the transcript.**
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> [my emphasis added]

[33] More recently, Justice Bryson, sitting as a chambers judge in *R. v. Alkhatib* 2013 NSCA 91, reiterated the differences in the approach taken by the Court of Appeal when reviewing an appeal heard by a summary conviction appeal court (a superior court justice), in contrast to that of a superior court justice acting as a summary conviction appeal court:

> **13** Justice Farrar in *R. v Pottie*, 2013 NSCA 68 explained the standard of review for summary conviction appeals:
>
> [15] In the recent decision of **R. v. Francis**, 2011 NSCA 113, Fichaud, J.A. considered the standard of review to be applied in an appeal pursuant to s. 839(1)(a) of the **Criminal Code**. In summary, there are two standards of review at play in summary conviction matters; the first is the standard of review to be applied by the SCAC judge when reviewing the trial decision; and the second being the standard we apply to the decision of the SCAC judge.
>
> [16] The standard of review for the SCAC judge when reviewing the trial judge's decision, absent an error of law or miscarriage of justice, is whether the trial judge's findings are reasonable or cannot be supported by the evidence. In undertaking this analysis the SCAC court is entitled to review the evidence at

> trial, re-examine it and re-weigh it, but only for the purposes of determining whether it is reasonably capable of supporting the trial judge's conclusions. The SCAC is not entitled to substitute its view of the evidence for that of the trial judge.
>
> [17] Our jurisdiction is grounded in the error alleged to have been committed by the SCAC judge. It is not a *de novo* appeal from the trial judge. This Court must determine whether the SCAC judge erred in law in the statement or application of the principles governing its review (see **Francis,**para.7; see also **R. v. R.H.L.**, 2008 NSCA 100; **R. v. Travers**, 2001 NSCA 71; **R. v. Nickerson**, 1999 NSCA 168, para.6). This distinction is important when considering whether to grant leave; the error we must identify is in the SCAC judge's decision.

Position of the appellant (Ms. Garland)

[34] Counsel notes that the trial judge did not expressly refer to the principles enunciated in the Supreme Court of Canada's decision, *R. v. W.(D.)* 1 SCR 742. Specifically, he suggests that the trial judge failed to consider the evidence of Ms. Garland on its own merits first. The failure to do so reflected the trial judge's approach that credibility was to be determined based on the whether the officer's, or Ms. Garland's, testimony was preferable. He argues that: the trial judge "simply rejected the appellant's testimony on the basis that she accepted the officer's version. She failed to weigh the appellant's evidence on its own merits."

[35] Counsel says this is reflected in the fact that the trial judge first recounted the officer's evidence, then referred to Ms. Garland's evidence, without any further reconciliation of why the trial judge concluded at pg. 27(5-12):

> And it seems to me or the person he describes as going, is not the person it seems to me that Ms. Garland is describing as the person she thought were approaching the crosswalk. He was right there to monitor. And I think beyond a reasonable doubt, I'm sure he's right, that this was a pedestrian, and simply Ms. Garland didn't see the pedestrian and drove straight through because she was looking somewhere else. So I do find her guilty of the charge beyond a reasonable doubt.

[36] Counsel argues that the trial judge failed to consider the diametrically opposed evidence from the two witnesses on:

(i) Where the officer engaged his lights and siren;

(ii) Where the officer stopped the appellant; and

(iii) Whether the officer was operating at any time alone or with another officer.

[37] Regarding the notes of Ms. Garland, counsel argues that they were made around the time of the traffic stop in question, and they account for the detailed memory Ms. Garland had of the events of the day when she testified. Counsel notes that Ms. Garland was only permitted to refer to her notes at the end of her testimony.

[38] At this juncture I will note that the exchange went as follows:

> The Court – okay. Do you want to look at your notes and make sure you have everything?

> Ms. Garland – thank you. I haven't forgotten anything, but it's… May I… It's my first time in court, so please bear with me. May I make note of something that officer Roberge said in comparison to a timeline of when he said it happened and when I recounted happening?
>
> The Court – yeah
>
> Ms. Garland – yes? Oh, officer Roberge stated that he immediately put the lights and sirens on as… at the crosswalk. But it was a good 500 meters past that before he engaged the lights and the siren. We were already gone through the Connaught Avenue intersection. And he was behind me when I was sitting there at the red light.
>
> The Court – okay
>
> Ms. Garland – and it was past that, that he put the lights and sirens on. I just wanted to clarify that.
>
> [Pages 20 (5) – 21 (2) transcript A.B. Tab2]

Position of the Respondent (Crown)

[39] Counsel submits the key issue in dispute at trial was the identity of the vehicle and driver that Constable Roberge saw go through the crosswalk in question, nearly striking a pedestrian therein.

[40] Counsel notes that judges are presumed to know the law and need not articulate their reasoning process in detail in their decisions. He suggests that there is nothing in the decision which should lead this court to conclude that the presumption noted has been rebutted.

[41] Ms. Garland's notes were available for her use, and she confirmed that she was able to testify to everything she intended to before the end of her testimony.

[42] Crown counsel disputes the assertion that the trial judge improperly dismissed as of no consequence, ("but it doesn't really turn on that") Ms. Garland's testimony and submission that there were two police officers in the police vehicle which stopped her that day.

Was Ms. Garland refused permission to refer to her written notes to refresh her memory, and if so was a miscarriage of justice occasioned?

[43] At trial, Ms. Garland apparently began to read her handwritten notes into the record, before Crown counsel interrupted, and the court directed her to testify from memory. However the court added:

> Just put your notes aside for a second and just tell us what happened. And then you can check your notes and make sure you got everything. Okay?… [And before she had completed her testimony the court asked her] do you want to look at your notes and make sure you have everything?

[44] To the latter question Ms. Garland responded:

> Thank you. I haven't forgotten anything, but it's… May I… It's my first time in court, so please bear with me. May I make note of something that officer Roberge said in comparison to a timeline of when he said it happened and when I recount it happening?

[45] The court gave her the opportunity and she went on to say:

> Officer Roberge stated that he immediately put the lights and siren on as… at the crosswalk. But it was a good 500 meters past that before he engaged the lights and the siren. We were already gone through the Connaught Avenue intersection. And he was behind me when I was sitting there at the red light. And it was past that, that he put the lights and sirens on. I just wanted to clarify that.

[46] Ms. Garland was given the opportunity to refresh her memory from her notes, and confirmed that she had nothing further she wished to testify to.

[47] This ground of appeal fails.

Did the trial judge err in her application of the principles of the presumption of innocence and the requirement for proof beyond a reasonable doubt?

[48] Trial judges are presumed to know the law. In the absence of an argument about the sufficiency of reasons, that presumption remains until an appellant can point to indicia in the judge's decision which directly or indirectly bring into question the presumption. Moreover, judges are entitled to accept as credible, all, some or none, of a witness' testimony; and to give those accepted aspects accordingly different degrees of weight.

[49] Ms. Garland argues that the trial judge erred by having assessed Constable Roberge's evidence first, finding it credible, and then moving on to review Ms. Garland's testimony, and by virtue of her findings regarding Constable Roberge's evidence, rejected Ms. Garland's evidence, as credible, or alternatively, that her evidence raised a reasonable doubt.

[50] Thus, it is argued that the trial judge merely compared the evidence of Constable Roberge and Ms. Garland. She determined that Constable Roberge's

evidence was preferable, and found Ms. Garland guilty on that basis. Ms. Garland suggests that the trial judge did not go on to determine whether her evidence raised a reasonable doubt, or there was otherwise a reasonable doubt based on the evidence or the absence of evidence, regarding the elements of the offence.

[51] The only essential element of the offence herein that was seriously in dispute was the identity of the vehicle and driver that nearly struck a pedestrian in the middle of the crosswalk which Constable Roberge was monitoring .

[52] The Crown had the burden to prove beyond a reasonable doubt that it was Ms. Garland's vehicle which nearly struck a pedestrian in the middle of the crosswalk which Constable Roberge was monitoring.

[53] Using the three-step approach suggested by the Supreme Court of Canada in *R. v. W(D)*, [1991] 1 SCR 742 would have required the trial judge to ask herself:

> (i) If I believe the testimony of the accused that it was not her vehicle which nearly struck the pedestrian, I must acquit;
>
> (ii) If I do not believe the testimony of the accused that it was not her vehicle which nearly struck the pedestrian, but I am left in a reasonable doubt by it, I must acquit;

(iii) Even if I am not left in doubt by the evidence of the accused, I must ask myself whether on the basis of the evidence that I accept, I am convinced beyond a reasonable doubt by that evidence that the accused's vehicle was the one which nearly struck the pedestrian.

[54] Framing the analysis required in that manner, permits a more precise understanding of the legal arguments made by the Crown and defence in this case.

[55] Ms. Garland's testimony was to the effect that she drove her car through the crosswalk in question, but that the lights were not flashing when she went through, and that her attention was drawn out her driver's side window to a mother and two young children who were "at the crosswalk", and who she had been watching approach the crosswalk area.

[56] She testified that she thought the police stopped her because she failed to yield to those pedestrians at the crosswalk. Ms. Garland suggests that her position at trial was that there was no one in the crosswalk when she went through the crosswalk. However, she did not specifically say this in her testimony, nor did she allude to it in her argument.

[57] Constable Roberge testified:

I was parked on Quinn Street approximately 15 – 20 feet from the intersection of the crosswalk. I had a clear line of sight and I had no obstructions in my view. On that date, once I was satisfied everything was in place, I commenced to monitor the crosswalk. I observed a pedestrian come up along my vehicle. So I'm parked on the right-hand side of Quinn Road or Quinn Street. The pedestrian is on my left on the sidewalk. He walks up to the crosswalk, faces the crosswalk, activates the crosswalk lights. The vehicles in both lanes westbound, so outbound, came to a stop.

Q-Is that on the same side of street as you?

A- The same side as the pedestrian.… The vehicles on the in-bound or east bound lane, curb lane, so the farthest lane away from me, came to a stop. At that point, the pedestrian stepped out into the crosswalk. The lights were still activated. Made it to the centerline, which is a double yellow line. When the pedestrian got to the centerline, I observed a vehicle traveling eastbound or inbound on the inside lane, which is closest to the yellow line, drive straight through and made no attempt to stop.… So this is a four lane home roadway. The pedestrian was halfway directly at the yellow line, however did not cross over the yellow line on to the other side yet… I would say in total that all vehicles were stopped for about 5 to 6 seconds before the pedestrian stepped out… With the position that I'm parked on Quinpool or on Quinn Street, I have a view approximately about 30 feet down… to my right down Quinpool Road, so I can see the vehicles that are actually coming up the hill… I observed that vehicle as the vehicle in the outbound lane had come to a stop… When I observed that there was another vehicle coming into the center lane, that vehicle was back about 100 feet from the intersection or from the crosswalk.

Q-And were the lights going at that time?

A- Yes they were

Q-And were the cars stopped in movement in all three lanes at this particular, at this particular point?

A- Yes they were.

Q-And did you observe that vehicle as it approached the crosswalk?

A- Yes, I did. The vehicle was driving at a constant speed and made no attempt to stop…

Q-My last question is, the pedestrian, were they actually within the boundaries of that crosswalk at the time that this happened?

A- They were directly between both crosswalk lines

Q-Ever lose sight of that vehicle from the time that you observed it go through the crosswalk until the time you pulled it over?

A- Never lost sight. That vehicle was stopped about 200 feet up to my left from the crosswalk."

[58] Constable Roberge was not asked if there was a mother and two young children standing at the crosswalk, at same time it was alleged that Ms. Garland nearly struck the pedestrian who was in the midst of crossing.

[59] As noted earlier, Ms. Garland was not asked specifically asked whether she saw someone in the crosswalk as she went through the crosswalk. Nor did she say that she would have seen anyone there had they been there.

[60] Arguably, therefore, there is no conflict between the testimonies of Constable Roberge and Ms. Garland, regarding the presence of pedestrian in the crosswalk at the time her car went through the crosswalk.

[61] As the Crown argued in its summation, Constable Roberge was concentrating on viewing the crosswalk area, whereas Ms. Garland at that point was focused on the mother and two children. Ms. Garland did not testify that she saw the police vehicle which should have been evident. Thus, the Crown argued, her inattention is what accounts for not having seen the pedestrian in the crosswalk.

[62] This suggestion is consistent with her own testimony that:

> I was on the inbound lane on the inside [nearest to the curbside] and there was a dark SUV in front of me and they were stopped, but there was traffic in front of that stopped as well. There seemed to be a string of traffic. **I don't know what**

> **was up ahead that they were waiting for, but they were stopped well ahead of the cross walk as well. So I pulled out behind the black SUV and proceeded in the center lane. And at that time I remember looking over to the left and noticing the new sign**… A chiropractic office at 6777 Quinpool… at the **same time I observed three people coming down the sidewalk** to the outbound direction… There were some kind of an **incident going on between the female adult and the smallest child**.
>
> [my emphasis added]

[63] As has been stated repeatedly by courts, the issue at the end of the day in a criminal trial is not credibility, but reasonable doubt. Moreover, "**Where on a vital issue, there are credibility findings to be made between conflicting evidence called by the defence or arising out of evidence favorable to the defence of the crown's case**, the trial judge must relate the concept of reasonable doubt to those credibility findings" –per Blair, JA for the court in *R. v. DB*, 2011 ONCA at para.114.

[64] Thus, my focus is on whether the record demonstrates, or permits the inference to be drawn, that the trial judge had an appreciation for, and properly applied, the criminal standard of proof to the whole of the evidence. What conflicting evidence was there between Cst. Roberge and Ms. Garland regarding whether it was her vehicle that nearly struck the pedestrian?

[65] In the case at Bar, the trial judge stated:

> … The person he [Constable Roberge] describes as going [across the crosswalk] is not the person it seems to me that Ms. Garland is describing as the person she

> thought were approaching the crosswalk. The officer says this person was right in the middle of the crosswalk. He was right there to monitor. And I think beyond a reasonable doubt, I'm sure he's right, that this was a pedestrian, and simply Ms. Garland didn't see the pedestrian and drove straight through because she was looking somewhere else. So I do find her guilty of the charge beyond a reasonable doubt.

[66] Although succinctly stated, it is clear that the trial judge accepted Constable Roberge's evidence about the location of the pedestrian in the crosswalk and the vehicle/driver that nearly struck them; which was not contradicted by Ms. Garland's evidence, except that she disputed peripheral matters such as: where the officer engaged his lights and siren; where the officer stopped the appellant; whether the officer was operating at any time alone or with another officer. Moreover, Cst. Roberge's uncontradicted evidence was that he did not lose sight of the offending vehicle.

[67] The trial judge stated that she was satisfied on the evidence beyond a reasonable doubt, that there was a pedestrian in the crosswalk, and that it was Ms. Garland's vehicle that passed through the crosswalk nearly striking that pedestrian.

[68] There is no persuasive argued basis to overturn the judge's decision in this respect. This argument of the appellant fails.

Conclusion

[69] Having reviewed the arguments presented by the appellant, there is no basis to overturn the conviction. Therefore I dismiss the appeal.

[70] Although the court can impose costs on the unsuccessful party, I do not find it in the interests of justice to do so in this case. Each party shall bear their own costs.

Rosinski, J.