IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Muise, 2005 NSSC 104

Date: 20050505
Docket: SN No. 218776
Registry: Sydney

Between:

Ernest Wayne Muise

Appellant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice Frank Edwards

Heard: April 25, 2005, in Sydney, Nova Scotia

Counsel: Francis X. Moloney, Esq., for the appellant
Wayne Hutchison, Esq., for the respondent

By the Court:

[1] The Appellant appeals his conviction by a Provincial Court Judge on a charge of operating a motor vehicle while his ability to do so was impaired by alcohol and/or drugs contrary to Section 253(a) of the Criminal code.

[2] The relevant facts are brief. The Appellant was involved in a motor vehicle accident. He then went to a nearby home owned by the other person involved in the accident. An RCMP officer soon arrived and, following his observations of the Appellant, gave the Appellant a breathalyzer demand. The subsequent readings of 70 milligrams per cent did not square with the officer's assessment of the Appellant's degree of impairment. The Appellant gave a warned statement to the police officer in which he admitted that, in addition to drinking two to three beer, he had taken prescription medication earlier that day.

[3] At trial, the Crown called a toxicologist who gave evidence regarding the effect of drinking in combination with the ingestion of certain medication. Three lay witnesses and the police officer gave evidence regarding their observations of the Appellant on the night in question. After considering the evidence, the trial

judge rendered an oral decision (6 pages of transcript) in which he concluded that the Appellant had been impaired by alcohol and/or drug.

[4] Impairment is an issue of fact for the trial judge [***R. v. Stellato*** (1993) 12 O.R. (3d) 90 (Ont. C.A.)]. The grounds of appeal are that the verdict is unreasonable and cannot be supported by the evidence. The Appellant also argues that the trial judge gave insufficient reasons for his decision. In the main, however, the grounds of appeal relate to the trial judge's findings of fact.

[5] In ***Miller v. R.*** (1999) No. 149303, our Court of Appeal has stated the following at page 3:

> "On appeal from a conviction for a criminal offence on the ground that the guilty verdict is unreasonable, the appellate court judge is now 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* (1988) 36 CCC (3d) 417 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] Also in ***Langille v. Midway Motors Ltd.,*** (2002) 202 NSR (2d) 398, our Court of Appeal in paragraph 10 commented upon assessment of facts and findings of credibility:

> "... This Court has repeatedly stated, with respect to findings of fact, that the appellate court should only interfere where the trial judge has made a palpable or overriding error which affected his assessment of the facts. Further, 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, and of observing their demeanor and conduct. Because of these factors, unless strong and cogent reasons are given, appellate courts are not justified in reversing a finding of credibility made by a trial judge. See: *Cole et al v. Cole Estate* (1994), 131 N.S.R. (2d) 296, *Stein v. The Ship 'Kathy K'*, [1976] 2 S.C.R. 802; and *Travellers Indemnity Co. of Canada v. Kehoe* (1985), 66 N.S.R. (2d) 434."

[7] Accordingly, I have reviewed, and to some extent, reweighed the evidence to determine if the verdict is unreasonable. Having done so, I am satisfied that the learned Judge has made no palpable or overriding error which affected his assessment of the facts. Further, I can offer no strong or cogent reasons for interfering with his findings of credibility. In short, I am satisfied that the guilty verdict was one that the trial judge, acting judicially, could reasonably have rendered.

[8] I am therefore dismissing the Appeal and affirming the decision of the trial judge.

Order accordingly.

J.