SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Durdle*, 2015 NSSC 227

Date: 2015-07-22
Docket: CRH, No. 434790
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Michael Dylan Durdle

Respondent

Judge:	The Honourable Justice Patrick J. Duncan
Heard:	July 22, 2015, in Halifax, Nova Scotia
Written Decision:	July 29, 2015
Counsel:	Jim Janson, for the Applicant Mark Bailey, for the Respondent

By the Court:

Introduction

[1] The respondent, Michael Durdle, was charged that he did on or about the 23rd of June 2014, at or near Shearwater, Nova Scotia, unlawfully commit the offence of failing to drive or operate a motor vehicle in a careful and prudent manner contrary to section 100(2) of the **Motor Vehicle Act** R.S.N.S. 1989 c. 293. A trial of this charge was heard on November 4, 2014 before a Justice of the Peace (the Adjudicator) who reserved decision until November 19, 2014. At the second court appearance, the Adjudicator stated:

> I had it... I had begun, as I so frequently do, thinking I'll have a written decision. I have acquitted Mr. Durdle but I haven't got my written decision and I was so busy today I didn't even get my calendar. And the only date I know for sure that I'm back in the courtroom is a date nobody wants to be here, which is December 22nd.

[2] After some discussion the Adjudicator states that on December 22nd she would provide reasons for the decision. As of the date of today's hearing, being July 22, 2015, no reasons have been provided by the Adjudicator.

[3] The Crown filed a Notice of Appeal on December 24, 2015 citing one ground of appeal, that:

> The learned Adjudicator erred in law by not giving reasons for her decision, thereby not resolving evidence issues and providing no basis for meaningful appellate review.

[4] The appellant's factum was filed April 1, 2015 for a May 6, 2015 hearing date. The respondent appeared on May 6 and requested time to engage legal counsel. The matter returned to court on May 21. Mr. Durdle was present as was his legal counsel. The respondent's factum was ordered to be filed by June 30, 2015 and the hearing set for today's date. The respondent has not filed a factum. He and his legal counsel are present and after reviewing the appellant's submissions consent to an order granting the appeal. I will, nevertheless, provide my reasons for agreeing to grant the order requested.

Issue

[5] Did the Adjudicator err in law by failing to provide reasons for decision, thereby preventing a meaningful appeal?

Powers of a Summary Conviction Appeal Court

[6] This appeal has been brought pursuant to section 813(b)(i) of the **Criminal Code**. Section 822 prescribes that sections 683 to 689 of the **Code**, with the exception of subsections 683(3) and 686(5), apply with such modifications as necessary. The remedies available on this appeal are set out in section 686(4):

> (4) If an appeal is from an acquittal… the court of appeal may
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> (a) dismiss the appeal; or
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> (b) allow the appeal, set aside the verdict and
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> (i) order a new trial, or
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> (ii) except where the verdict is that of a court composed of a judge and jury, enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law, and pass a sentence that is warranted in law, or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.

Standard of Review

[7] The appellant alleges that the failure to provide sufficient reasons is an error of law. Saunders J.A. writing *Ulnooweg Development Group Inc. v. Wilmot*, 2007 NSCA 49 stated that in determining the applicable standard of review, an appeal court must characterize the question under appeal:

> [25] An appeal is not a second trial. Our powers at the appellate level are constrained. On questions of law the judge must be right. Such questions are tested on a standard of correctness. Matters of fact, or inferences drawn from facts are owed a high degree of deference and will not be disturbed unless they resulted from palpable and overriding error. Matters said to be mixed questions of fact and law are also tested using the palpable and overriding error standard, unless the mistake can be easily linked to a particular and extricable legal principle, which will then attract a correctness standard. Where, however, the legal principle is not readily extricable, the question of mixed law and fact will be reviewable on the standard of palpable and overriding error…

[8] In *R. v. Walker* 2014 NSSC 423, MacAdam J. was confronted with an identical problem, a verdict in a **Motor Vehicle Act** prosecution where the Adjudicator rendered a verdict without reason. He wrote:

Sufficiency of reasons

[10] The leading decision on sufficiency of reasons is *R. v. Sheppard*, 2002 SCC 26, The court confirmed in *Sheppard* that, while a failure to give reasons is not an error of law in itself, a deficiency in the reasons that prejudices the appellant's right to appeal by preventing meaningful appellate review can serve as a basis to overturn a decision. It is not enough that the trial court "did a poor job of expressing itself" (para. 26). Binnie J., for the court at para. 28, elaborated on what is required to establish that the court is unable to conduct meaningful appellate review:

> 28 It is neither necessary nor appropriate to limit circumstances in which an appellate court may consider itself unable to exercise appellate review in a meaningful way. The mandate of the appellate court is to determine the correctness of the trial decision, and a functional test requires that the trial judge's reasons be sufficient for that purpose. The appeal court itself is in the best position to make that determination. The threshold is clearly reached, as here, where the appeal court considers itself unable to determine whether the decision is vitiated by error. Relevant factors in this case are that (i) there are significant inconsistencies or conflicts in the evidence which are not addressed in the reasons for judgment, (ii) the confused and contradictory evidence relates to a key issue on the appeal, and (iii) the record does not otherwise explain the trial judge's decision in a satisfactory manner. Other cases, of course, will present different factors. The simple underlying rule is that if, in the opinion of the appeal court, the deficiencies in the reasons prevent meaningful appellate review of the correctness of the decision, then an error of law has been committed.

[11] Where an appeal court considers the sufficiency of reasons, it "should read them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered", according to McLachlin C.J.C., for the court, in *R. v. R.E.M.*, 2008 SCC 51, at para. 16. Reasons will be sufficient if "read in context" they "show why the judge decided as he or she did. The object is not to show how the judge arrived at his or her conclusion, in a "watch me think" fashion. It is rather to show *why* the judge made that decision": *R.E.M.* at para. 17 (emphasis in original).

[12] In *R.E.M.* the Chief Justice discussed the manner in which an appeal court should approach the sufficiency of credibility findings by the court below. She said, at paras. 48-51:

> The sufficiency of reasons on findings of credibility - the issue in this case - merits specific comment. The Court tackled this issue in [*R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17], setting aside an appellate decision that had ruled that the trial judge's reasons on credibility were deficient. Bastarache and Abella JJ., at para. 20, observed that "[a]ssessing credibility is not a science". They went on to state that it may be difficult

> for a trial judge "to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events", and warned against appellate courts ignoring the trial judge's unique position to see and hear the witnesses and instead substituting their own assessment of credibility for the trial judge's.
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> While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence and convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.
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> What constitutes sufficient reasons on issues of credibility may be deduced from [*R. v. Dinardo*, [2008] 1 S.C.R. 788, 2008 SCC 24], where Charron J. held that findings on credibility must be made with regard to the other evidence in the case (para. 23). This may require at least some reference to the contradictory evidence. However, as *Dinardo* makes clear, what is required is that the reasons show that the judge has seized the substance of the issue. "In a case that turns on credibility ... the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt" (para. 23). Charron J. went on to dispel the suggestion that the trial judge is required to enter into a detailed account of the conflicting evidence: *Dinardo*, at para. 30.
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> The degree of detail required in explaining findings on credibility may also, as discussed above, vary with the evidentiary record and the dynamic of the trial. The factors supporting or detracting from credibility may be clear from the record. In such cases, the trial judge's reasons will not be found deficient simply because the trial judge failed to recite these factors.

Analysis

[9] In the present case, the appellant has cited a number of instances where there are said to be “significant inconsistencies and conflicts in the evidence”. Central to

the determination of this case was the Adjudicator's assessment of the credibility of the Crown and defences witnesses which evidence was, in material particulars, in direct opposition to each other.

[10] As the charge suggests, the issues for the Adjudicator to resolve included the date of the alleged misconduct, territorial jurisdiction, jurisdiction over the person, identification of the accused as the alleged offender, and the evidentiary basis to assess whether it was proven beyond a reasonable doubt that the respondent operated a motor vehicle in a careless and imprudent manner.

[11] The Crown called two witnesses and the respondent testified on his own behalf. The first witness for the prosecution was Steven Perrin. He testified that he observed the respondent's vehicle being operated in an erratic manner: speeding up and slowing down repeatedly, accelerating quickly from a stop light, and operating at excessive speeds while travelling on urban streets and parkways in Dartmouth. He was sufficiently concerned that he recorded a description and the licence plate number of the respondent's vehicle and called it in to the police for them to investigate.

[12] The second witness was Cst. Phil Power, who responded to Mr. Perrin's complaint which was described to him as one of "racing". He spoke directly to Mr.

Perrin to obtain particulars of the complaint. Based on the description of the respondent's vehicle he was able to locate it at Windsor Street and Connaught Avenue in Halifax. Cst. Power testified that in his opinion the vehicle was travelling approximately 100 km/h in a 50 km/h zone when he first saw the vehicle. He stated that the respondent braked quickly, as if he had seen the police officer, and by the time the officer got a radar lock on the respondent's vehicle it was travelling at 83 km/h. The officer engaged his emergency equipment to hail the respondent to stop, which he did. Cst. Power identified the respondent as the operator of the vehicle.

[13] The respondent's testimony acknowledged that he was operating a motor vehicle at the time and in some of the places alleged by the Crown. Mr. Durdle denied that he operated the vehicle in a careless and imprudent manner. He denied speeding and suggested his vehicle wasn't capable of driving at high speeds. His testimony on both material and collateral matters of fact were in direct conflict with the testimony of the officer and the civilian witness.

[14] The Crown submits that the lack of reasons makes it impossible to discern the facts or the legal principles on which the Adjudicator relied. Formal reasons are not necessary where the reasons for the acquittal can be deduced from the record (see *Sheppard* at paras. 46 and 55), however, the Crown says that is not possible

here. As such, the Crown requests that the appeal be allowed, the acquittal set aside, and a new trial ordered.

Conclusion

[15] I am satisfied that the absence of reasons for the Adjudicator's decision to acquit is a barrier to effective appellate review. The respondent's evidence is in direct conflict on key issues with that of the Crown witnesses. I cannot say with any confidence why the Adjudicator came to the conclusion she did. As such, I am not in a position to determine whether there was any error in the substance of the Adjudicator's decision. Accordingly I set aside the acquittal and remit the matter to the Provincial Court for setting of a date for a retrial.

Duncan, J.