IN THE SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Guthro*, 2005 NSSC 297

Date: 20051101
Docket: SH No. 232556A
Registry: Halifax

Between:

Charlie Guthro

Appellant

v.

Her Majesty The Queen

Respondent

Judge:	The Honourable Justice M. Heather Robertson
Heard:	June 1, 2005, in Halifax, Nova Scotia
Written Decision:	November 1, 2005
Counsel:	David S. Green, for the appellant Andrea E. Jamieson, for the respondent

Robertson, J.:

[1] This appeal arises from a decision of David Johnson, Adjudicator in the Provincial Court of Nova Scotia, who convicted the appellant for driving a motor vehicle while his license was suspended contrary to s. 287(2) of the *Motor Vehicle Act*, F.S.N.S. 1989, c. 293, as amended. The offence occurred on February 13, 2003.

[2] The appellant plead not guilty and the trial was held on May 17, 2004. Following written submissions, the decision was delivered on September 27, 2004.

[3] At the trial, the Crown called one witness, Constable Guy Napier of the Halifax Regional Police Force. The appellant testified as did three other witnesses, his son Dennis Guthro who testified it was he who drove the car; Jacqueline Noble, a patron at the nearby gas station, where the ticket was issued; and Neil Upham, an attendant at the service station.

[4] The appeal centers upon the adjudicator's acceptance of Constable Napier's evidence and the reliability of the evidence, i.e., his glimpse of the appellant driving his auto as a sole occupant while unlicensed versus the defence witnesses who testified that the appellant was not the driver of the vehicle but that his son was.

[5] The grounds of appeal are:

1. The Honourable Adjudicator erred in not properly interpreting the provisions of s. 287(2) of the *Motor Vehicle Act*, R.S.N.S. 1989, c. 298, as amended;

2. The Honourable Adjudicator erred by relying solely upon the evidence of only one Crown witness, a police officer, and apparently rejecting in total the evidence of the Appellant and three other civilian witnesses;

3. The Honourable Adjudicator erred by failing to give the benefit of reasonable doubt to the Appellant;

4. The verdict was unreasonable and cannot be supported by the evidence;

5. There was insufficient evidence to prove that the Appellant was in fact the driver of a motor vehicle driving while suspended;

6. Such other grounds as may appear from a reading of the record.

[6] The scope of the appellate review in a summary conviction appeal is well settled.

[7] In *R. v. Ryan*, [2002] N.S.J. No. 514 (C.A.) Justice Oland reviewed the jurisprudence on the standard of review in summary conviction appeals at paras. 14 and 15 of the decision:

> 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.

R. v. Biniaris, [2000] 1 S.C.R. 381 at para 42 confirmed that the test for an appellate court determining whether a judgment is unreasonable or cannot be supported by the evidence was that set out in R. v. Yebes, [1987] 2 S.C.R. 168 at p. 185, namely: whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered. In Yebes, in discussing the function of an appellate court, the Supreme Court of Canada stated at para 25:

> 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.

[8] Crown counsel have also cited *R. v. Stone* (1996), 148 N.S.R. (2d) 46, 1996 CarswellNS 55 (C.A.); *R. v. Davis* (1996), 148 N.S.R. (2d) 68, 1996 CarswellNS 52 (C.A.) cases which I have reviewed.

[9] On the issue of credibility of a witness, determined at the trial level they rely on *Re Cole Estate* (1994), 131 N.S.R. (2d) 296, 194 CarswellNS 111 (C.A.), a case in which Roscoe J.A. cited with approval the test articulated by MacDonald J.A. in *Travelers Indeminity Co. of Canada v. Kehoe* (1985), 66 N.S.R. (2d) 434 at para. 15:

> This and other Appellate Courts have said time after time that 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; of observing their demeanor and conduct, hearing their nuances of speech and subtlety of expression and generally is presented with those intangibles that so often must be weighed in determining whether or not a witness is truthful. These are the matters that are not capable of reflection in the written record and it is because of such factors that save strong and cogent reasons appellate tribunals are not justified in reversing a finding of credibility made by a trial Judge. Particularly is that so where, as here, the case was heard by an experienced trial Judge.

[10] The Crown also cited *R. v. W. (R)*, [1992] 2 S.C.R. 122, 1992 CarswellONT 90 wherein McLachlin J., as she then was, commented on the scope of appellate review turning on findings of credibility. At para. 21 she stated:

> 21 It is thus clear that a court of appeal, in determining whether the trier of fact could reasonably have reached the conclusion that the accused is guilty beyond a reasonable doubt, must re-examine, and to some extent at least, reweigh and consider the effect of the evidence. The only question remaining is whether this rule applies to verdicts based on findings of credibility. In my opinion, it does. The test remains the same: could a jury or judge properly instructed and acting reasonably have convicted? That said, in applying the test the court of appeal should show great deference to findings of credibility made at trial. This Court has repeatedly affirmed the importance of taking into account the special position of the trier of fact on matters of credibility ... The trial judge has the advantage, denied to the appellate court, of seeing and hearing the evidence of witnesses. However, as a matter of law it remains open to an appellate court to overturn a verdict based on findings of credibility where, after considering all the evidence and having due regard to the advantages afforded to the trial judge, it concludes that the verdict is unreasonable.

[11] The evidence of Constable Napier was that while waiting to enter Caldwell Road, he was stopped at a stop sign on Sherwood Street which forms a T with

Caldwell Road. He testified that he saw the appellant driving his vehicle along Caldwell Road, at posted rate of speed of 50 km per hour. He testified that he had approximately five seconds to observe the appellant driving the vehicle and that he saw only one occupant in the vehicle. He testified that he called in the vehicle license plate number and he received information back that the license of the registered owner of the vehicle was suspended.

[12] He testified that this plate query was completed in approximately two minutes. He then testified that he did a u-turn to follow the vehicle. He stated that about a half a block past Sherwood Street he came up to a gasoline gaming establishment called Treaty Gas, where he observed the appellant's vehicle parked just beyond the front door of the establishment. He stated that he then walked to the rear of the then empty vehicle and saw that its plate matched the plate number of his query. At this point a male exited the service station who Constable Napier testified was the appellant; the man he had seen driving the vehicle minutes earlier.

[13] Constable Napier said he requested of him a driver's license, vehicle registration and vehicle insurance. Constable Napier then testified:

> I made the gentleman aware of the reason that I requested the documentation and that was why I was carrying out an investigation with regards to a suspended driver. Immediately this gentleman stated to me ... [objection dealt with by the Court and disallowed] "Can't you give me a break."

[14] Mr. Guthro the appellant, in his evidence explained his statement by testifying that Constable Napier had not specified why he wanted to see his documentation and that he believed the reason for the request was that he had failed to turn in his license pursuant to a letter he had received from the Registry of Motor Vehicles in December 2002 after his license had been suspended and that he would therefore receive another expensive ticket.

[15] He testified that the ticket had been handed to him folded and that not until he returned inside the service station did he realize the nature of the ticket. He said he flipped out and that is when people spoke up, referring to the witnesses Neil Upham and Jacqueline Noble, who agreed he had not been the driver of the vehicle.

[16] The appellant also testified that just before this, Constable Napier had asked him to move his vehicle away from the pump, twice, but he had refused saying that he could not, he had no license and that he then went inside to ask his son to move the car.

[17] The appellant's son Dennis Gutho testified that he had been ill that morning and was at home when a friend called from the local high school requesting help, as his vehicle would not start and needed a jump. He testified that he drove his father's car, but had asked his father to come along. He testified that on the way to Cole Harbour High they needed gas and stopped at Treaty Gas where he, still feeling unwell, rushed from the car and went into the service station to the bathroom where he remained for some time.

[18] This evidence was supported by the evidence of the two independent witnesses Neil Upham and Jacqueline Noble, both of whom said they did not know the appellant before that day and had both volunteered to go to court and testify that he was not the driver of the vehicle because they had seen Dennis Guthro get out of the driver's side of the vehicle and rush into the service station. Both these witnesses in the course of their testimony had confused passenger side with driver side door and quickly corrected their testimony and testified that Dennis Guthro did get out of the driver's side of the vehicle.

[19] A significant issue arising out of the evidence before the adjudicator was whether the vehicle was driven by a sole occupant or whether both Guthro's were in the vehicle as well as their mixed breed dog.

[20] This is an issue that the adjudicator did not address. Indeed the adjudicator made no significant review of the evidence before him.

[21] The adjudicator stated:

> I had subsequent opportunity to peruse by way of transcript. The accused inter alia indicated he was not driving the vehicle, and the other witnesses globally, either by inference or direct reference, indicated the accused was not the driver of the vehicle.
>
> I closely observed the deportment and demeanour of all witnesses in this matter. I was particularly impressed by the demeanour of the Crown's witness, Cst. Napier. I found his evidence to be detailed, forthright, unreserved, unequivocal, and in

> particular, unwavering on cross-examination. On the other hand, I found the witnesses for the accused and their evidence to be, in some cases, convenient, somewhat confused, illogical, unconvincing and, on the whole, uncompelling. I therefore accept the evidence of Cst. Napier in this matter and reject the evidence of the aforementioned witnesses presented by counsel for the accused.
>
> Given the experience of the Crown's witness, his location at the time, the time of day, duration of opportunity, and distance from the accused's vehicle on initial contact, together with the aforementioned explanation of the accused to the officer, I am satisfied that the Crown has established to my satisfaction a prima facie case, having proved all the elements of the offence necessary for a conviction, and on the basis of the acceptable evidence I have heard, I'm satisfied beyond a reasonable doubt of the guilt of the accused in this matter.

[22] The adjudicator accepted the evidence of Constable Napier over that of the appellant and the three other corroborating witnesses. The adjudicator found the Constable Napier's evidence to be more credible. He appeared to relate the credibility of the Crown's witness to the confidence and experience of this witness in giving his testimony.

[23] The adjudicator fell into error by failing to address whether the appellant's evidence raised a reasonable doubt as to his innocence, particularly on the central issue of whether the vehicle was solely occupied.

[24] Absent of finding on this issue, the credibility of Constable Napier's evidence is brought into question. By not making a find on the critical issue of whether there was a sole occupant in the vehicle, this tends to suggest more strongly that the adjudicator engaged in an "either/or" analysis in accepting the evidence of the Crown's witness over that of the four witnesses for the defence.

[25] The adjudicator did not instruct himself in accordance with the test set out in *R. v. W. (D.)*, [1991] 1 S.C.R. 742 (S.C.C.) where the case rested solely on his findings of credibility.

[26] As Cory J. stated at p. 8 there are three steps which must be addressed onthe issue ot credibility:

> First, if you believe the evidence of the accused, obviously you must acquit.

> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[27] The adjudicator should have made clear findings of credibility based on the evidence before him. In this case the evidence before the adjudicator was clearly capable of being evidence to the contrary so as to raise a reasonable doubt. The adjudicator failed to examine the evidence in this light and make findings of credibility based on the weight of the evidence before him.

[28] I allow this appeal of the conviction. I find it would be impractical to order a new trial at this date and accordingly order that a verdict of acquittal be entered.

Justice M. Heather Robertson