IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Rennehan, 2005 NSSC 370

Date: 20051027
Docket: CRY 242820
Registry: Yarmouth

Between:

Her Majesty the Queen

Appellant

v.

Percy Desma Rennehan

Defendant

Judge: The Honourable Justice Gregory M. Warner

Heard: At Yarmouth, Nova Scotia on October 27, 2006

Written Release of Decision: March 3, 2006

Counsel: James A. Fyfe, counsel for the Crown

Philip J. Star, Q.C., counsel for the defendant

By the Court: (Orally)

[1] This is an appeal by the crown from the acquittal of Percy Desma Rennehan on a charge of failing the breathalyzer.

[2] The standard of review, in a summary conviction appeal, was summarized by Mr. Justice Cromwell of our Court of Appeal in *R v. Nickerson*, 1999 N.S.J. 210, as follows:

> 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,* 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.

[3] Since *R v. Biniaris* 2000 SCC 15, which decision could have had some impact upon *R v. Nickerson*, the standard of review has been confirmed by our Nova Scotia Court of Appeal in *R v. Andrea* of 2004 N.S.C.A. 130 at paragraph13. This is the test that I have applied in this appeal.

[4] The crown sets forward two grounds of appeal. The first is that the trial judge erred in failing to conclude that the crown had established that the vehicle operated by the accused was a motor vehicle.

[5] The trial judge said he considered *R v. Breen*, 1986 CarswellNfld 94, a decision of the Newfoundland District Court; *R. v. Rich*, 1977 CarswellNS 172 (NSSC), a decision of Mr. Justice Sullivan regarding the phrase "snow machine"; and *R. v. McCraken* [1995] A.J. 1205, a decision of an Alberta Provincial Court dealing with the word "truck."

[6] In this case, the court decided at page 43 as follows:

> I do not consider that on the available evidence that I can take judicial notice that the only thing we could conclude was that a pickup is a motor vehicle. It would have been different perhaps if, as in *R v. McCraken,* there had been reference to the word "truck" in addition to the other circumstantial evidence relied upon by the crown.

> I am, therefore, unable to conclude that on the evidence before me there is proof beyond a reasonable doubt that the defendant was operating a motor vehicle as required in relation to both counts.

[7] The crown contends that, in view of other parts of the evidence, there is no reasonable doubt that the pickup was a motor vehicle. The evidence, beginning at page 3 at line 9,of Constable Pelletier is as follows:

> A. I noted the vehicle, a greenish pickup, driving northbound on highway 330 in Newellton and I noted the driver was not wearing his seatbelt. I turned my police vehicle around, activated the emergency equipment and the vehicle pulled over on the side of the shoulder of the road. I approached the driver, requested to see his driver's licence, insurance, permits and vehicle permit.
>
> Q. What type of vehicle was that?
>
> A. Yes, to my recollection, it was a green pickup with one occupant.

[8] At page 4, beginning at line 9, the officer gives the further evidence:

> When speaking with the driver, I asked him for his driver's licence, insurance and permit. He wouldn't look at me. He wouldn't look out the side window. He kept looking straight ahead.

[9] And, as crown counsel pointed out in argument today, at page 7 beginning at line 10, the officer was asked, "What about with respect to his ability to operate a motor vehicle?" and the answer was, "I believe that he was impaired by alcohol."

[10] During oral argument before the trial judge adjourned for briefs, in relation to Mr. Star's argument that, "a pickup might not be a motor vehicle," and that, "there was ambiguity", the court said, at page 24 of the transcript beginning at line 4, "That's an interesting point because I know if someone says, 'car' that has been determined to be the same evidence that it was a motor vehicle. Does a 'pickup' necessarily mean, 'truck'?"

[11] And, at line 9, the court said, "Do I have to take judicial notice that reference to a pickup might be a truck or is that something in the social context that we live in that would permit me to infer that?" To which Mr. Star replied that, in his view, "it was equivocal," and that, "a truck, a car, a Pontiac, we can take judicial notice of..."

[12] In *R v. Breen*, Mr. Justice Barry, of the District Court, overturned a conviction. An officer had referred to the object of the charge as being a vehicle. Paragraph 2 of Justice Barry's decision reads, "He saw a vehicle pull out of a driveway of a residence marked municipal number 91... It was

essential that the crown adduce evidence to establish that the vehicular object in which the appellant was found was a motor vehicle." He found the definition of a 'vehicle' to be, "any conveyance in or by which people or objects are transported," and said, "clearly then, the word 'vehicle' in its ordinary dictionary meaning does not refer to a conveyance powered by a motor." He noted the definition of a motor vehicle was, "a vehicle that is drawn, propelled or driven by means other than by muscular power," so he went on to find there was a reasonable doubt. The Newfoundland Court of Appeal made short shrift of that ruling in a one page decision. It held: "Although none of the crown witnesses referred specifically to a motor vehicle, the evidence adduced established beyond a reasonable doubt that the vehicle being driven by the Respondent at the time of the proven offence was a motor vehicle as defined." In this case, only the District Court decision (not the Court of Appeal decision) was cited to the trial judge.

[13] At trial, the crown referred the court to *R v. Rich* where the court made a finding that a snow machine was clearly a motor vehicle. He cites *R v. Macaulay*,(1975) 25 C.C.C.(2d) 1, in which the phrase 'O.D.'d', was held to mean 'overdosed'. He cited *R v. McCraken* where the court found a vehicle and a truck to be a motor vehicle.

[14] The defence says that there is uncertainty and ambiguity. It cites a British Columbia Supreme Court decision *R v. Mills*, 1997 CarswellBC 3033, which relies upon the Supreme Court of Canada decision in *Marcotte v. Canada*, (1974) 3 N.R. 613, which held that a real ambiguity or a doubt of substance was to be resolved in favour of the accused.

[15] The text, Sullivan and Dreidger on the Construction of Statutes, 4th edition, by Ruth Sullivan (2002, Butterworths), at page 24 under the heading, "Judicial Notice" reads as follows:

> Courts are entitled to take judicial notice of facts that in their opinion are indisputable. This includes (a) facts that are notorious in the sense that everyone knows and accepts them; they belong to the store of information that every educated member of society takes for granted, and (b) facts that can be demonstrated to be true by resorting to sources that are easily accessible and whose authority are accurate are accepted by all.

[16] The text cites *R v. Williams*, [1998] 1 S.C.R. 1128, and *R v. S.(R.D.)* [1997] 3 S.C.R. 484, as authority.

[17] In addition to its use in the context of the evidence of Constable Pelletier, I found that the word "pickup", in my desk dictionary - The New Lexicon Webster's Encyclopaedia Dictionary of the English Language Canadian

Edition, means, as a noun: "a picking up, for example, of a ball from the ground; a device in a phonograph which converts the vibration of the needle into electrical impulses; a person whose acquaintance one makes casually especially for the purpose of lovemaking; and a light truck used especially for deliveries."

[18] Said in the context of this case, is there any doubt that a "pickup" is "a light truck used especially for deliveries"? There is absolutely no doubt that a 'pickup' means a vehicle and, as used by Pelletier, fits, as much as a car, a truck or a Pontiac within the reasoning of decisions for which no reasonable doubt was found to exist. In the context of Constable Pelletier's evidence: "the vehicle, a greenish pickup" driving on highway 330; the driver without a seatbelt; "the vehicle" pulling over to the side of the road; the driver not looking out the side window; and the officer giving keys to the tow truck operator - there is no doubt that it was a vehicle. To use the definition of motor vehicle in the Criminal Code, it was a vehicle driven by any means other than muscular power.

[19] I find that the first ground is a good ground of appeal; the use of the word "greenish pickup", in the context of the evidence of Constable Pelletier, should have left no doubt in the trial judge's mind that the reference was to a motor vehicle as defined in the Code.

[20] Applying the test in *R v. Nickerson*, that was an unreasonable finding, that could not be supported by the evidence.

[21] With regards to the second issue - whether the reference, in the Certificate of Analysis, to a "Breathalyzer R model 900a, an approved instrument as defined in subsection 254(1)" is proof beyond a reasonable doubt that the sample was taken into an approved instrument, the crown has cited *R v. Cameron, 1977 CarswellNS 110 (NSCA), R v. Kelly, 1987 CarswellPEI 18 (PEICA), R. v. Gregorwich, 1975 CarswellAlta 164 (ACA), and R. v. Field,* 2001 CarswellSask 164 (SaskPC). We have reviewed these cases during oral argument.

[22] The trial judge found, beginning at the middle of page 43, as follows:

> With respect to the identification of the approved instrument, the court must be mindful of the fact that the use of the certificate in these proceedings provides the crown with an easier method of proof of the essentials contained in the certificate. The crown benefits from this shortcut and precision would not seem to be an onerous expectation. Indeed, if it is determined prior to trial that on examination there was a problem with the certificate, the crown always has the opportunity to call the qualified technician to prove the necessary essentials.

> I have considered the submission of the crown that identifies a line of authority that establishes that if there is a statement in the certificate that is an approved instrument in tandem with an incomplete description of the device that was not inconsistent with the approved instrument order then it would not be fatal.
>
> I have concluded in the case before me there was a complete description of the device and it was not in accord with those devices listed in the order.

[23] He then applied the reasoning in *R v. Gosby, 1974 CarswellNS 6 (NSCA),* and *R v. Grace, 1979 CarswellNS 5 (NSCA),* and determined that the terms must be strictly construed and where an ambiguity exists, it must be interpreted in favor of the accused.

[24] The accused points out that the 900a is not an approved instrument. It argues that this case is not like the other cases cited by the crown where the description was not inaccurate but was rather partial or contained surplusage. He asked the court to take up the lead from *R v. Chung*, 2004 CarswellOnt 5576 (OCJ), *R v. Gosby* and *R v. Grace*.

[25] The live issue before the trial judge and this court is whether the reference to a Breathalyzer R model 900a, creates a reasonable doubt as to whether the instrument was an approved instrument.

[26] It is clear that five of the fifteen approved instruments in the Approved Breath Analysis Instruments Order are Breathalyzer instruments. None of them have a small "a"; one of them has a large "A". Should this court assume that there was no instrument known as a Breathalyzer R model 900a? Should it assume that the officer made an error despite his failure to correct it during his oral evidence? While it may be reasonable to assume, as the crown submits, that the officer made an error in substituting a small "a" for the large "A", there is no evidence before the court that there is, in fact, an error in the certificate - that the tests were not done with a small "a" model Breathalyzer, or that such a model does not, in fact, exist.

[27] The accused is entitled to the benefit of any reasonable doubt. Applying the test in *Nickerson*, this court cannot say that the trial judge erred in finding a doubt as he stated at the middle of page 43 to the top of 44 of his decision.

[28] For that reason, the appeal is dismissed.

J.