IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Haylock, 2008 NSSC 267

Date: (20080910)
Docket: Cr. Am. 286455
Registry: Amherst

Between:

Catherine D. Haylock

Appellant

v.

Her Majesty The Queen

Respondent

DECISION

Judge: The Honourable Justice J. E. Scanlan

Heard: August 18, 2008, in Amherst, Nova Scotia

Counsel: F. Philip Carpenter, Articled Clerk and Kelly Mittelstadt, Solicitor for the Appellant
Michelle D. James, Solicitor for the Respondent

By the Court:

This is an application by the Appellant to introduce fresh evidence on appeal. It relates to an issue that was not raised by the Appellant or Crown at trial.

Background

[1] The Appellant was convicted on September 5, 2007on the following offence:

> **THAT SHE** on the 21st day of November 2006 at or near Rt 4 West Wentworth, County of Cumberland, Nova Scotia did unlawfully commit the offence of failing to complete driver's current daily log to last change in duty status, contrary to section 17(c) of the Commercial Vehicle Drivers' Hours of Work Regulations.

[2] The Appellant appealed that conviction. The Appellant represented herself at trial. She states that she was aware of a difference between federal and provincial regulations of her trucking business but she was unaware of any specific material difference between the Provincial Commercial Vehicle Drivers' Hours of Work Regulations, N.S. Reg. 226/90 and the Federal Commercial Vehicle Drivers' Hours of Service Regulations, 1994, SOR/94-716. Ms. Haylock now argues the issue of whether her operating company was a federal or provincial undertaking was not adjudicated at trial and it was not raised by her at trial. She also suggests that neither the learned Trial Judge nor the Crown Attorney

prosecuting the offence raised the issue and that it was the duty of the Court or the Crown to raise that issue.

[3] Counsel for Ms. Haylock now argue the issue of whether Ms. Haylock was engaged in a federal versus provincial undertaking could make a difference. They have filed an amendment to the original grounds for appeal to reflect the constitutional and jurisdictional issue. Ms. Haylock's counsel now apply to this Court seeking to introduce additional evidence which counsel for Ms. Haylock concede is essential if they are to succeed on their appeal.

[4] Section 683(1)(d) of the **Criminal Code** provides:

> For the purpose 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.

This provision is incorporated into the summary conviction appeals process by virtue of s.822.

[5] I refer to the case of **R. v. Stolar**, [1988] 1 S.C.R. 480. At para. 14 the Court described the procedure that should be followed when an application is made to a Court of Appeal for the admission of fresh evidence. The test for determining whether the evidence of factual circumstances should be admitted by the Court of Appeal is set out in **Palmer v. R.**, [1980] 1 S.C.R. 759. In **Palmer** the Court noted a referral to a number of factors including the following.

> (1) the evidence should generally not be admitted if by due diligence it could have been adduced at trial, provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see **McMartin v. R.**;
>
> (2) the evidence must be relevant, in the sense that it bears upon a decisive or potentially decisive issue in the trial;
>
> (3) the evidence must be credible, in the sense that it is reasonably capable of belief, and
>
> (4) it must be such that, if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the trial.

[6] The evidence Ms. Haylock seeks to adduce is her affidavit and exhibits which purport to show an active international and interprovincial trucking corporation operated by Ms. Haylock through her company, KateCo Transport, through the years 2005 to 2007.

[7] I consider and apply the various factors as set out in the **Palmer** case to the circumstances of the present case. As noted in **R. v. M. (P.S.)** (1992), 59 O.A.C. 1, the criterion of due diligence, is not a condition precedent to admission of "fresh" evidence in criminal appeals, but it is a factor to be considered in deciding whether the interest of justice warrant the admission of the evidence. In the present case the accused argues that she was self-represented at the trial and did not realize the difference between the provincial and the federal regulations was of significance and, therefore, the issue was not of significance to her.

[8] In the present case even after legal counsel were engaged in the appeal, representations were made to the Court by her counsel that there was not going to be a constitutional issue raised.

[9] On January 31, 2008, the Appellant's counsel filed an affidavit with the Court in support of an application to amend the notice of appeal. Attached as exhibit "E" to that affidavit was a letter from the Crown. The letter referred back to a conversation held on January 21, 2008 and confirmed a discussion about the necessity of a fresh evidence application. The Crown was advised subsequently

that no such application would be made and that it was not necessary. It was only after the Respondent Crown factum was filed that Appellant's counsel alerted Justice McDougall to the possibility that such an application to adduce fresh evidence might be necessary.

[10] Appellant counsel have now changed their position conceding the appeal cannot succeed without the fresh evidence. Appellant counsel argue that some leniency should be given to the Appellant for not raising the complex issue of interjurisdictional immunity and introducing evidence of her status as a federally regulated undertaking.

[11] In the context of the present case the Court appreciates that a self-represented accused may not recognize the importance of the distinction as between the federal and provincial regulations. In that sense the circumstances of the present case diminish the impact of the failure to exercise due diligence at trial. It is troubling for the Court, however, that during the appeal procedure, Appellant counsel have been flip flopping on their position. At the end of the day, I am satisfied the question remains one of whether the interests of justice demand that

the new evidence should be admitted if factors two, three, and four, as set out in the **Palmer** case can be satisfied.

[12] At page 9 and 10 of the Applicant/Appellant's factum counsel submits that it should have been for the Trial Judge and the Crown Attorney to raise the issue of the federal nature of her trucking operations. She now places the blame on both the Trial Judge and Crown Attorney for not having sought out the evidence as to the federal nature of her undertaking. At paragraph 19 of the Appellant's brief the Appellant says:

> The Appellant respectfully submits that when the evidence of her international and interprovincial operations arose in evidence the honourable trial judge was under a duty to raise the issue of federal regulatory jurisdiction and invites (sic) submissions.

[13] I do not accept that submission. It was not for the Crown or Trial Judge to raise the jurisdictional or constitutional issue when in fact there was no evidence before the Trial Judge which would support such an argument. If that evidence was available before the Provincial Court it would not be necessary for the Applicant/Appellant to make the present application which she now seeks to introduce.

[14] The due diligence test should be applied based on whether evidence was reasonably available to the accused at trial, not just based on the fact she did not know it might be important. On appeal her counsel has flip flopped on the issue of whether it may be important. When accused are self-represented it must be understood that there must be some finality to the trial process. Self-represented parties must also be diligent in presenting all relevant evidence at trial. This case was not a criminal prosecution but a regulatory offence. Some would argue the same deference is not owed to an accused in a non-criminal matter.

[15] It is important for this Court to adhere to the rules and policies that provide a degree of finality whether persons are represented or not. As noted in this case even after the Appellant retained counsel representations were made to the Court that no fresh evidence application would be made. To allow fresh evidence, in the circumstances of the present case, would open flood gates so that a trial or appeal would never reach a degree of finality. It would open the door to repeated applications to adduce fresh evidence and raise new issues at each and every stage of the appeal process. As noted, within this appeal, Appellant's counsel made specific representations on the issue of fresh evidence and now change their

position only after the Crown raised the issue in their brief. To allow this approach would not promote the inexpensive and efficient determination of provincial regulatory offence prosecutions. On the contrary it would mean that regulatory prosecutions, whether federal or provincial, may never attain a degree of finality.

[16] Even if I was convinced that the Appellant had exercised due diligence the application must fail based on other factors as set out in **Palmer**. I am not satisfied that the evidence bears on a decisive or potentially decisive issue. The Appellant has not satisfied me that the issue of whether Ms. Haylock's corporation is a federally regulated interprovincial and international trucking operation has any relevance to the offence of which she was convicted. Ms. Haylock was the driver of the motor vehicle in question and she was charged and convicted under the provincial regulations. There is nothing in the evidence before me which would indicate that Ms. Haylock, as an individual, is a federally regulated undertaking even though her corporation may be a federally regulated undertaking. The evidence the Appellant now seeks to adduce is immaterial to the issue of whether or not Ms. Haylock, as a driver, committed an offence pursuant to the provincial

regulations. On that basis alone, I am not satisfied the fresh evidence which the Appellant now seeks to adduce could have affected the outcome of the trial.

[17] The application is dismissed.

J.

09/10/08