SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Schlawitz, 2009 NSSC 230

Date: 20090730
Docket: SD 284357
Registry: Digby

Between:

Ulrich Schlawitz

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Patrick J. Duncan
Heard:	May 13th, 2009, Digby, Nova Scotia
Written Decision:	July 30, 2009
Counsel:	Ulrich Schlawitz, Appellant, self represented
	Rosalind Michie, for the Respondent

By the Court:

INTRODUCTION

[1] After a lengthy trial in Provincial Court that concluded on July 12, 2007, Mr. Schlawitz was found guilty of the offence that he:

> on or about the 29th of July, 2006, at or near Lighthouse Road, Digby, Digby County, Nova Scotia, failed to drive a motor vehicle in a careful and prudent manner, contrary to Section 100(2) of the **Motor Vehicle Act.**

[2] For this he was fined the sum of $387.50, of which $100 was remitted, making the amount payable $287.50.

[3] On August 13, 2007, Mr. Schlawitz filed a Notice of Appeal against the conviction.

[4] The appeal hearing has been adjourned on a number of occasions at the request of Mr. Schlawitz, and as a result of his ongoing health problems.

FACTS

[5] The facts as found by the learned trial judge are that, at the time and place alleged, the appellant drove a vehicle that was unregistered, had no licence plate and had no valid motor vehicle inspection. He drove for approximately 1 km along a public highway while the left rear tire was flat, causing the tire to shred. There were other mechanical issues, causing smoke to enter the passenger compartment of the vehicle. The appellant operated the vehicle knowing of the problems and the hazard it created to himself and to others, yet continued to drive until abandoning the vehicle in a wooded area and then walking to his nearby home where he went to sleep.

[6] When Mr. Schlawitz returned to the vehicle, he found that police had already located it and towed it away. The police took this action as they suspected the vehicle

to have been involved shortly before in an injury causing motor vehicle accident. The suspect vehicle left the scene without stopping to render assistance or provide information. The trial judge concluded that there was no evidence upon which to conclude that the appellant's vehicle was in fact the same one that left the scene of the accident.

[7] The Crown adduced evidence from two witnesses, both members of the RCMP. The first responded to the initial motor vehicle accident complaint and, after interviewing the injured party in a hospital, conducted a search that resulted in locating the appellant's van as described above. The second officer assumed control of the investigation from that point and was involved in arresting Mr. Schlawitz.

[8] Following his arrest, the appellant made a lengthy statement to the police which statement was entered into evidence at his trial with the agreement of the appellant. It admitted to the essential facts, but offered his explanations for his actions. Mr. Schlawitz testified in his own defence and confirmed again the essential

facts of what happened, but made the point that he believed that his actions were careful and prudent having regard to all of the circumstances, including the road conditions, weather conditions and presence of the public.

ISSUES ON APPEAL

[9] The following are the grounds set out exactly as in the Notice of Appeal prepared and filed by the appellant, acting on his own behalf:

> Grounds of Appeal for Conviction by trial of alleged violation of
>
> 100(2) of the Motor Vehicle Act.
>
> Errors in Law
>
> Denial of Natural Justice
>
> 1. Failure of the Court to permit the tendering of exhibits by the Defence.
> 2. Admission by the Court of exhibits tendered by the Prosecution said exhibits of which have no relevant bearing on the matter of the trial

and of which serve, against legal propriety, to skew the Prosecution's position favorably regarding the matter of the trial.

3. Admission of verbal testimony by the two Crown witnesses said testimony of which constitutes hearsay.

4. Denial of the Court of a motion for non-suit from the Defence with respect to that the Prosecution failed to produce the only alleged witnesses (exactly two in number) having witnesses the alleged action for which the matter was at trial said denial suggesting a severe adverse inference whereby the conclusion may reasonably be made that the said alleged witnesses had nothing favorable to present for the Prosecution and whereby the Defence was denied opportunity to cross-examine said witnesses with respect to the alleged infraction (100(a) MVA.)

5. Admission by the Court from the Prosecution of a written "transcript" of interrogation by RCMP of the Defendant said transcript which is not the product of an official court reporter.

6. Admission of an alleged audio transcript of the interrogation (5, above) said audio transcript coming into existence based on the Defendant's agreement to be interviewed/interrogated contingent upon audio and video recordings of the interrogation being made

concomitantly. The prosecution alleges that the video transcript failed to be produced, hence violating the contingency.

7. Defendant's motion with respect to (6), above, denied.

8. The digital audio transcript of the RCMP interrogation of the Defendant, originally recorded in digital format, and as played before the Court, has numerous 'skips', 'cracks', and other auditory anomalies in its aural presentation thereby making suspect the authenticity of said transcript.

9. Assumptions construed as fact by the Court and demonstrated as so by the Court's explicitly verbalizing assumptions exactly as though said assumptions were viewed by the Court as matters/statements of fact.

10. Case law presented by the Prosecution is significantly and qualitatively distinguishable from the matter at hand and is thereby inapplicable with respect to weight given it with respect Court's having made its findings.

11. The Court, in its preamble to its verdict, used "assumptions' as 'matters of fact' whereby in so assuming, the verdict handed down was at least in part determined by construing the aforementioned assumptions as matters of fact.

12. The Court, in delivering the verdict, states that the Defendant struck another vehicle. The trial was exactly and only with respect to Summary Offence Tickets (SOTS) and whereby the nature and circumstances of the particular Sots precludes the submission of material suggestive of the erroneous implication that the Defendant, or anyone else, struck another vehicle at approximately 1240 hrs July 29th, 2006 on Lighthouse Road, for which, also, and as an aside, there is in fact no such evidence; nonetheless, the Court permitted the tendering by the Prosecution fo such erroneous material and the accompanying implication. The Court stated explicitly that any materials, by their very nature, referring to allegations that the Defendant, or anyone else, struck another vehicle, or that there occurred a motor vehicle accident at approximately 1240 hrs, July 29, 2006 on Lighthouse Road, Digby County are constituent of hearsay. Apparently, paradoxically, the Court in its preamble to deliver of the verdict, stated that the Defendant struck another vehicle.

13. The Court transformed a subsection of testimony given to the Court by a witness for the Prosecution into a self-appointed “reasonable inference” with respect to the witness having had described very precisely (only) some “disturbed gravel” whereby the self-appointed “reasonable inference” was converted by the Court into a matter of

fact that what was indeed observed by the witness was significant gouging and serious disruption of the road surface.

14. The Court stated that the matter of existence of a road-edge or shoulder was never dealt with, implying that it should have been.

15. The Court states that the Defendant ran through bushes in a bathrobe, implying an effort to escape detection in relation to the offence for which he was convicted. However, the Court neglected to point out that this action was, rather and instead, corroborative of the Defendant's desire as stated during interrogation by RCMP, and for reasons entirely unrelated to the matter at hand, to avoid contact with a pick-up truck and its occupant(s), said pick-up truck of which was unsolicitedly and corroboratively referenced by a crown witness during examination, on a logging road as opposed to an evasion of police detection.

16. There exists a tendency throughout the trial for the Court to hold a focus on certain prosecutorial positions, arguments, exhibits, testimonies in a manner that is negatively prejudicial to the Defence whereby presentations by the Defence are not granted, by the Court, equal credence despite their relative similarity in terms of being germaine(sic) to the matter at hand.

Exampla Gratia: The Court, shortly prior to delivering its verdict, asked the Defendant to verify the accuracy of a photograph of which had been tendered by the Prosecution; however, the qualifier or disclaimer given by the Defendant during trial, of which in conjunction with testimony given by Crown witnesses with respect to the relevancy of the photograph, and of which directly served as a matter of fact counter to the apparent weight favorable to the Prosecution that the Court was seeking to affirm in the photograph by the act of requesting of the Defendant its veracity, was granted no weight.

Exampla Gratia: The Court stated, as a matter of fact, that the Defendant was driving a vehicle of which he knowingly believed to be mechanically deficient; however, at no point has the Defendant stated that he believed the vehicle to suffer said alleged deficiency.

17. The Defendant being a self represented layman (cf. ”fool”) made numerous efforts to tender exhibits and voice objections whereby on each occasion the Court instructed the Defendant that the temporal order at which the Defendant was engaging these activities was in each instance not in the meeting with trial procedure protocol regarding temporarily, with implication that the Court would inform the Defendant at some pont, either immediately or at the appropriate time, when to forward his concerns.

No such indications as to the appropriate times for display of the Defendant's desired actions and presentations were made.

18. *Mens Rea* was taken into consideration as a determining factor during the Court's deliberations despite that on a Strict Liability Offence only the *Actus Reus* need be proven beyond a doubt and whereby *Mens Rea* is not relevant; *Mens Rea* was considered in effort to determine the *Actus Reus* of 'negligence' despite the qualitative distinction between the two. 'Negligence' with respect to a strict liability offence is not determinable by *Mens Rea*. An *Actus Reus* is an *Actus Reus* regardless of *Mens Rea*: this point is most particularly important in assessing a Strict Liability Offence.

19. And such other grounds that may appear.

POWERS OF A SUMMARY CONVICTION APPEAL COURT

[10] This appeal has been brought pursuant to section 813(a)(i) of the **Criminal Code**. The powers of a summary conviction appeal court are, in accordance with the provisions of section 822 (1) of the **Criminal Code**, as found in section 686 (1) of the **Criminal Code**, which reads:

686(1) Powers

On the hearing of an appeal against a conviction . . . , the court of appeal

(a) may allow the appeal where it is of the opinion that

(i) the verdict should be set aside on the ground that

it is unreasonable or cannot be supported by the evidence,

(ii) the judgment of the trial court should be set aside on the

ground of a wrong decision on a question of law, or

(iii) on any ground there was a miscarriage of justice;

(b) may dismiss the appeal where

(i) the court is of the opinion that the appellant, although he

was not properly convicted on a count or part of the indictment,

was properly convicted on another count or part of the indictment,

(ii) the appeal is not decided in favour of the appellant on

any ground mentioned in paragraph (*a*),

(iii) notwithstanding that the court is of the opinion that

on any ground mentioned in subparagraph (*a*)(ii) the appeal

might be decided in favour of the appellant, it is of the

opinion that no substantial wrong or miscarriage of justice

has occurred; or

(iv) notwithstanding any procedural irregularity at trial, the

> trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;

STANDARD OF REVIEW

[11] The issues raised by the appellant, when properly characterized, encompass the range of grounds set out in s. 686(1)(a).

[12] The applicable standard of review where there are challenges to the judge's findings of fact and the reasonableness of his decision, is as set out in the case of *R. v. Nickerson*, [1999] N.S.J. 210 (N.S.C.A.):

> 6 The scope of review of the trial court's findings of fact by the Summary Conviction Appeal Court is the same as on appeal against conviction to the Court of Appeal in indictable offences: see sections 822(1) and 686(1)(a)(i) and *R. v. Gillis* (1981), 60 C.C.C. (2d) 169 (N.S.C.A.) per Jones, J.A. at p. 176. 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. B. (R.H.)*, [1994] 1. S.C.R. 656 (S.C.C.) 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.

[13] This position was reaffirmed by Saunders J.A. in *R v Naif* 2004 NSCA 142, an appeal of the decision of Justice Tidman who, acting as a SCAC judge refused the appeal of the accused from his conviction for an offence contrary to section 97(1) of the **Motor Vehicle Act** R.S.N.S. 1989 c. 293:

> 10 Justice Tidman's role, sitting as a summary conviction appeal court, was to determine whether the verdict of the provincial court adjudicator was unreasonable or could not be supported by the evidence. But for an error of law or a miscarriage of justice, the test to be applied by a summary conviction appeal court is whether the trial judge's findings are unreasonable or cannot be supported by the evidence. See for example, *R. v. Nickerson* (1999), 178 N.S.R. (2d) 189 (C.A.).

ANALYSIS

[14] Mr. Schlawitz listed 18 grounds of appeal. They are in no particular order, sometimes rambling, and asserted without reference to the bases upon which a summary conviction appeal court may intervene in the decision of the trial judge. As a result I have reordered them into groups that share common characteristics. I have paraphrased the appellant's concerns as he outlined them in writing, together with the concerns he provided in oral argument.

Admissibility of Evidence Rulings: Issues 1, 2, 3, 5, 6 and 8

1. That the learned trial judge erred in law by refusing to admit exhibits presented by the accused.

[15] The appellant says that the learned trial judge erred in refusing to admit photographs of the interior of the wheel wells of the accused's vehicle, some automotive parts and a motor vehicle accident report.

[16] Mr. Schlawitz sought to establish that there was damage done to the vehicle in the process of towing and therefore the damaged physical state of the vehicle was exaggerated. He maintained that the vehicle was still operable at the point of his abandoning the vehicle, but acknowledged that notwithstanding any subsequent damage, there was no tire left on the wheel by the time he stopped.

[17] The appellant attempted to introduce the auto parts in his cross examination of Cst. Lussier. The officer could not identify the parts nor give any opinion evidence about automotive mechanics. The trial judge correctly ruled that the officer was not able to give evidence on the parts and that they were not admissible through him. The appellant testified to the fact that he found the parts in the grass around the area where his vehicle had been, and that the photos were taken some time after seizure of the vehicle. He asserted that they came off of the vehicle after he stopped driving it. The trial judge questioned him and heard the appellant's theory, but was satisfied that these were not relevant having regard to the accused's own admissions as to the state of the vehicle at the point of his abandoning it. The verdict ultimately reflected that evidence. I find no error in the judge's decision.

[18] Similarly, the judge listened to the appellant's explanation as to the significance of the images contained in the photographs of the wheel well. He determined that they were not relevant having regard to the appellant's own testimony as to the state of the vehicle while he was operating it. Further, there was a photograph in evidence of the vehicle that was an accurate representation of the damage before it was towed. The trial judge based his decision on the state of the vehicle in that photo, so the subsequent act of towing was irrelevant to his determination. I find no error in the trial judge's conclusion.

[19] The accident report was prepared by Cst. Bernier for the Registry of Motor Vehicles. When the appellant first raised it with Cst. Bernier in cross-examination, he did so as part of a narrative about the accuracy of the diagram of a curve in the road. The trial judge instructed the appellant to pose a question. He reminded the appellant of the purpose of cross-examination and that the best evidence was that of the witness. He allowed the appellant to examine the author of the report about statements contained in it. The appellant did not pursue this line of inquiry further and the Report was not admitted.

[20] I find no error in the judge's findings or approach.

2. That the learned trial judge erred in law by admitting Crown evidence that was not relevant

[21] The appellant submits that the trial judge erred in admitting photographs of the injured person and his scooter, which the appellant would say was prejudicial and not probative.

[22] The learned trial judge, of his own accord, queried the Crown as to the admissibility of these photographs and ruled that they were not admissible for any purpose other than as part of the narrative of the officer in indicating how he determined that he had reasonable grounds upon which to believe that an offence had been committed. The trial judge specifically concluded that he was not satisfied that the appellant had been in collision with the scooter and disregarded this evidence in reaching his verdict.

[23] I am satisfied that the trial judge made no error in the matter of the admission of these photographs.

3. That the learned trial judge erred in law by admitting hearsay evidence tendered by the Crown

[24] The appellant could offer no specific examples of inadmissible hearsay. A review of the transcript does not offer him any support in the assertion. To the extent that hearsay evidence was adduced it was properly before the court as part of the officer's narrative and not for the truth of its contents.

5. That the learned trial judge erred in law by admitting into evidence an unofficial transcript of the accused's statement to the police

[25] The transcript was not admitted into evidence as alleged. It was used as an assist to the court. The learned trial judge made it clear that the audio recording of the statement, which was admitted into evidence, was the best and original evidence upon which he would rely. There was no error.

6. and 7. That the learned trial judge erred in law by allowing into evidence an audio recording of his statement made to the police

[26] The appellant takes no issue with the admissibility of his statement, only the format in which it was presented to the court. The police intended to rely on a video taped version of the statement taking, with an audio recording being made as a back up. The video in this case did not operate properly and the best evidence available of the appellant's statement to police was the audio recording. The police may be commended for their caution which resulted in the court having the opportunity to hear the accused's statement. There was no error.

8. The audio recording of the statement made by the accused to the police was defective.

[27] The audio recording, even if imperfect, was relevant to points in issue, and was the best evidence available. The appellant had the opportunity to cross-examine Cst. Bernier as to the accuracy of the recording but elected not to do so. The appellant also had the opportunity to testify as to the accuracy of the recording. There were no substantive flaws noted in the accuracy of the recording. I find no error in the decision to admit the tape into evidence.

Procedural Errors: Issues 4 and 17:

4 (a) That the learned trial judge erred in law by refusing to grant a motion for directed verdict;

[28] Upon the appellant's motion for a directed verdict the learned trial judge

correctly stated the applicable legal test and concluded, after a brief review of the facts, that there was sufficient evidence to put the accused to his defence.

[29] The evidence before the court included the accused's statement to police, particulars of which were corroborated by photographs of his vehicle and observations made by the investigator. The evidence showed the accused to have been operating a vehicle that had significant mechanical deficiencies, and over a considerable distance on public highways. There was ample evidence before the court upon which to conclude that the motion should fail.

(b) Failure by the crown to call relevant or necessary witnesses

[30] Witnesses essential to the proof of the prosecution case were called and subject to examination. There was no obligation upon the Crown to call witnesses that, in its' judgment, were not necessary or relevant to the proof of the case. There is no suggestion that the Crown was aware of, or failed to put forward, witnesses who

had evidence that would call the crown's case into doubt.

[31] The learned trial judge gave a very clear explanation to Mr. Schlawitz as to the role of witnesses and the obligations upon the Crown. He also explained the right of the appellant to call witnesses, or not, as he saw fit.

[32] There is no evidence or representation before me to support a conclusion that essential witnesses that should have been called were not. Further I conclude that it was open to the appellant to call additional witnesses, which he elected not to do. This ground of appeal is not substantiated.

17. That the fairness of the trial was impacted by the court's refusal to grant the accused permission to tender evidence or make statements into the record

[33] The learned trial judge was exceedingly careful in ensuring the appellant's

right to a fair trial. Faced with a self represented litigant prone to prolix speeches that were frequently off point, the judge patiently and repeatedly interjected to keep the appellant focused on proper examination as to relevant and material points to his own defence. The trial, which would ordinarily have been accommodated in a half day continued over parts of three days.

[34] The court has the right and, certainly in this case, the obligation to control its own process. I can find no error in the manner in which the trial judge managed the trial. In particular, there is no instance that I have been pointed to where the judge made errors in his determinations of the admissibility of evidence, nor where he interjected to get the appellant "on track" in his conduct of the trial.

Decision is unreasonable or not supported by the evidence: Issues 9, 11, 12, 13, 14, 15, 16:

12. The learned trial judge erred by considering evidence in his decision of a motor vehicle accident which evidence was prejudicial to the accused and not relevant to the matter before the court

[35] In his decision as to the motion for directed verdict, the trial judge specifically concluded the opposite of what the appellant alleges in this ground. The court stated:

> Much has been said with respect to an accident. That there had been an accident between a scooter and the van. It was part of the Crown's case but there is no admissible evidence that, in fact, there was a collision between the van and the scooter. The evidence that was presented was part of reasonable grounds, but it was hearsay
>
> .

[36] And again in the final decision the trial judge stated:

> We leave aside the issue of accident as I have mentioned in my decision on the motion for a directed verdict. There is no admissible evidence on that accident, nor is there admissible evidence of particular speed related and forming part of the reasonable grounds of the officers of the observations a certain person made of the van on Broad Cove Road.

9. That the learned trial judge erred by finding as fact matters which were not supported by the evidence and instead were "assumptions"

11. That the learned trial judge made findings of fact that were unsupported by the evidence

13. That the learned trial judge made findings of fact that were unsupported by the evidence by improperly attaching weight to evidence of gouging and disruption to the road surface

14. That the learned trial judge erred in speaking of a shoulder of the road when there was no or inadequate evidence before the court on the state of the roadside.

15. That the learned trial judge erred in concluding that the accused's actions were consistent with an intent to evade the police, when it was equally consistent with an innocent explanation

16. That the learned trial judge erred in concluding that defendant knowingly operated a mechanically deficient motor vehicle

[37] The facts of this case were uncomplicated. Much of the most inculpatory evidence came from the accused himself in his admissions as to the state of the vehicle while he was operating it, the area over which he drove, his awareness of the state of the vehicle and his decision to abandon the vehicle. The physical and photographic evidence corroborated his evidence in material particulars.

[38] The dispute arises because the accused concluded at the time, and still maintains, that notwithstanding these acknowledged circumstances the evidence could not support a finding of guilt. I disagree with the appellant in this.

[39] The factual findings the appellant referred to in these grounds were, in some cases, not relied upon by the court to reach its' verdict. e.g. reference to the "road

edge or shoulder of the road". To the extent that the trial judge may have included reference to information that was extraneous to his decision he did so without error, attaching no weight or little weight.

[40] Where the trial judge drew inferences from the evidence, he did so appropriately. For example, the judge's reference to the gouging and disruption to the road surface was made in the context of how that information caused the police to believe that it was an area where the suspect vehicle they sought had passed. It was also consistent with the damage to the tire that existed as the vehicle was being operated. These were inferences and conclusions that were open to the trial judge to draw based on the evidence before him.

[41] The facts relied upon by the learned trial judge were all found in the evidence of the accused. One example can be found at pages 257 to 259 where the appellant, testifying in his own defense, acknowledged that he drove for some distance after the tire went flat, but offers his explanation as to why he did so, characterizing it as more

prudent to have continued to drive than to have stopped. He outlined the grades of the road, the likely places to stop and the speeds that he felt were appropriate, having regard to the condition of his vehicle and the area he was traversing. He concludes, at page 259:

> **A.** I believe that in relation to the points that you mentioned that put me on the defensive, left rear tire blown, fast enough to go up hills and too great of a speed to go home. That's what I wrote in short notation.
>
> I believe that I have addressed those three matters with respect to that there were no uphill grades subsequent to the tire blowing and I believe that I've given a rationale for continuing on straight instead of turning right that fits with prudence, not imprudence.

[42] I am satisfied that the factual determinations relied upon by the learned trial judge were amply justified on the evidence before him.

[43] I find no errors arising from these grounds of appeal.

Other errors of law: **Issues 10 and 18**

10. That the learned trial judge erred in law by relying on cases presented by the prosecution which were distinguishable and not relevant to the case of the accused

18. That the learned trial judge erred in his understanding of the* mens rea *relevant to a strict liability offense.

[44] The appellant suggests alternatively that the trial judge misunderstood the law and misapplied the law to the facts.

[45] The provision of the **Motor Vehicle Act** of which the accused was convicted reads:

Duty to drive carefully

100 (1) Every person driving or operating a motor vehicle on a highway or any place ordinarily accessible to the public shall drive or operate the same in a careful and prudent manner having regard to all the circumstances.

(2) Any person who fails to comply with this Section shall guilty of an offence.

[46] This is a strict liability offence. *Mens rea* need not be established. Once the prosecution proves beyond a reasonable doubt that the defendant committed the prohibited act, the defendant may successfully defend where he establishes on the balance of probabilities a reasonable belief in a mistaken set of facts or that reasonable care was taken. *see*, *R. v. Sault Ste. Marie (City)*, [1978] S.C.R. 1299.

[47] The trial judge entered into discussions with the appellant at various points in

the trial to assist him in his understanding of the elements of the offence and possible defenses. He made the following comments to Mr. Schlawitz at the outset of the trial and during his evidence in chief:

> You are presumed innocent of these charges and Ms. Michie has the burden to prove these beyond a reasonable doubt. And that burden never shifts to you; however, because these are strict liability offences, Ms. Michie does not have to prove the intention to commit the offence and the *mens rea* and it is open to you to present evidence of a lack of negligence or mistake of facts ...
>
> Keep in mind that the Crown must prove the charge ultimately beyond a reasonable doubt.
>
> (at page 6)
>
> Strict liability means in addition ... once ... even once the Crown can prove the *actus reus* beyond a reasonable doubt so that the evidence becomes fact, it is always open to the Defence to show that the Defence acted in ... without negligence or through mistake of facts....

> Imprudent and careless driving is usually defined as someone that ... something that prudent and careful people will not do.
>
> (at page 260)

> The ... open to the Defence is the ... are the defences to a strict liability offence of lack of negligence or mistake of facts. It is up to the Defence to show those since it is the Defence that knows best the evidence that could be relevant.
>
> (at page 261)

[48] These passages demonstrate that the trial judge had correct legal principles in mind as he listened to the evidence and rendered his decision.

[49] The Crown, in its closing argument, referred the learned trial judge to his own decision in *R. v Creaser* (1994) 131 N.S.R. (2d) 302 as a useful review of the relevant authorities. I quote from that decision:

22 The Ontario Court of Appeal in *R. v. Wilson* (1970) 1 C.C.C. (2d) 466 said

> Each case must, of necessity, turn on its own facts. Mere inadvertent negligence whether of the slightest type or not, will not necessarily sustain a conviction for careless driving. In each instance the Crown must prove beyond a reasonable doubt that the accused either drove his vehicle on the highway without due care and attention, or that he operated it without reasonable consideration for other persons using the highway. One of these two ingredients must be proven to support a conviction under this section.

23 Further in *R. v. Beauchamp* (1953), 106 C.C.C. 6, at p. 9, it stated:

> ...The offence of careless driving is of a quasi-criminal nature. It is something which goes beyond mere error in judgement. It indicates a measure of indifference, a want of care for the matter in hand and an indifferent regard for the rights of others.

> The standard of care and skill to be applied has been long established and is not that of perfection. (p. 12)

And

> .. It is whether it is proved beyond a reasonable doubt that the accused, in the light of existing circumstances of which he was aware or of which a driver exercising ordinary care should have been aware, failed to use the care and attention or to give to other persons using the highway the consideration that a driver of ordinary care would have used or given in the circumstances. The use of the care "due care", which means care owing in the circumstances, makes it quite clear that, while the legal standard of care remains the same in the sense that it is what the average careful man would have done in like circumstances, the factual standard is a constantly shifting one, depending on road, visibility, weather conditions, traffic conditions that exist or may reasonably be expected, and any other conditions that ordinarily prudent drivers would take into consideration. It is a question of fact, depending on the circumstances in each case. (p. 13)

24 In considering s. 100(2), Hall, J.C.C. (as he then was), in *R. v. Yorkston* (1991)106 N.S.R. (2d) 103, held that

> 1) The standard of care and prudence that the motorist is obliged to exercise is the same whether the proceeding is of civil or quasi-criminal nature.
>
> 2) There is a significant difference in the standard of proof to fix liability. In the former it is on the balance of probabilities or preponderance of evidence and in the latter beyond a reasonable doubt.
>
> 3) The failure to take care must be assessed in light of all the circumstances and the fact that there has been an accident does not necessarily establish such lack of care.
>
> 4) The conduct of the motorist must be deserving of punishment in assessing that factor, and a crucial aspect is whether there was any intentional risk taking.

[50] In this case, the learned trial judge was referred to a number of cases that outlined the law with respect to the issues before the court. The only one that he specifically referred to in his decision was *R. v Yorkston* (1991) N.S.R. (2d) 103. He said:

> Referring to one of the principles in *R. v. Yorkston* (1991), 106 N.S.R. (2d) 103. The imprudent and careless driving looks at obviously all the circumstances but particularly looks at whether the defendant has assumed intentionally a particular risk.

[51] His analysis continued, at pages 305-6:

> It is a proper standard of care, it is not just for one's own safety or one's passengers but it is also for the actual and potential users of the highway. That is why it is an offence to commit this careless and imprudent driving on a public highway because you have to keep in mind those other people.
>
> On the facts of this case, Mr. Schlawitz very consciously continued to drive in spite of feeling the mechanical apparatus or apparatii decaying fast and it

was a split-second decision as he was coming down the hill and if he were to brake to get around that corner he was not going to get up that hill and get home and, thus, he continued on. He had enough momentum. Indeed, there is in his evidence, perhaps some panicking, very certainly a desire to remove the vehicle from the highway. He speaks of motion and momentum and keeping the vehicle going as I have already alluded to.

The prudent thing to have done, Mr. Schlawitz, at that time was in spite of your apprehension of having to deal with the police again, was to discharge your duty to yourself and mostly to the other users of the highway and pull off the highway, stop the vehicle, pull as far as you could off the paved portion and call for help unless you could fix it yourself. Not to do so and continuing to drive a vehicle whose mechanicals were decaying, who had smoke in the cabin and did not have a left, inflated rear tire was imprudent and careless within s. 100(2) of the **Motor Vehicle Act**.

There was no mistake of facts there that I can see. Indeed, Mr. Schlawitz was quite aware of what was around him as far as his vehicle was concerned and there is no due diligence to avoid committing the *actus reus* and I must, in light of all the above, Mr. Schlawitz convict you.

[52] After reviewing the trial judge's comments and conclusions in their totality, and assessing them against the relevant law, I am satisfied that he correctly instructed himself as to the law and allowed no improper consideration to enter into his decision making.

CONCLUSION

[53] The decision of the learned trial judge was reasonable and supported by the evidence. I conclude that he committed no errors of law in the conduct of the trial, nor in crafting his decision.

[54] The appeal is dismissed.

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DUNCAN J.