IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Bretti, 2005 NSSC 195

Date: 20050707
Docket: CR. Am. 244562
Registry: Amherst

Between:

Brian Bretti

Appellant

v.

Her Majesty the Queen

Respondent

DECISION

Judge:	The Honourable Justice J.E. Scanlan
Heard:	07 July 2005, in Amherst, Nova Scotia
Written Decision:	15 July 2005
Counsel:	Mr. Douglas B. Shatford, Q.C., for the appellant Mr. Bruce C. Baxter, for the respondent

By the Court:

[1] This is an appeal of a conviction dated March 24th, 2005 for an offence contrary to section 106A(c) of the *Motor Vehicle Act*. The offence was alleged to have occurred, and in fact found by the trial court judge to have occurred on October the 7th, 2003. As noted by Mr. Shatford, there are three grounds of appeal: (1) related to the issue as to whether or not the identity of the appellant was proven at trial; (2) as to whether or not in fact there was evidence to support a finding of fact that the appellant exceeded the posted speed limit; and (3) that the trial judge erred in law in allowing an amendment to the charge from the original count as shown on the information 106A(a) to 106A(c) of the *Motor Vehicle Act*.

[2] A review of the factum and the transcript suggests that on October the 7th, 2003, Constable Naud of the R.C.M.P. was monitoring traffic on highway 104 near Thomson, approximately five miles east at exit 7. The evidence was that he noted his radar screen showing a speed of 141 kilometres per hour. The appellant had initially been charged, as I noted, under section 106A(a) which applies in offences where the vehicle exceeds the posted speed limit between 1 and 15 kilometres per hour. Subsection (c) would apply if the speed limit is exceeded by 31 kilometres per hour or more, and it brings with it an increased penalty.

[3] At the close of the crown's case the crown made a motion to amend the charge to conform with the evidence. Section 601(6) of the *Criminal Code* makes it clear that the issue of whether or not to order an amendment is a question of law, and that's important in terms of this appeal. I refer to section 601(4), the applicable sections are (b) through (e), and it sets out the factors which must be considered in determining whether or not to allow an amendment. The enumerated factors include a consideration of:

> (b) the evidence taken on the trial, if any;
>
> (c) the circumstances of the case;
>
> (d) whether the accused has been misled or prejudiced in his defence by any variance, error or omission mentioned in subsection (2) or (3); and

> (e) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.

[4] In the present case, the motion to amend was made at the close of the crown's case. No objection was taken at that time by defence counsel. There was no request for an adjournment, nor any request to re-examine the witness or witnesses.

[5] I must, and a trial court must, consider all of the factors set out in 601(4), but I refer specifically to a case, *R. v. P.(M. B.)* [1994] 1 S.C.R. 555 and note that one of the fundamental principles in determining whether or not to allow an amendment is whether the accused will suffer prejudice, that's a primary consideration or fundamental consideration. In that case, the court was concerned because the accused had tipped his hand in deciding to call evidence, and it was after the accused had tipped his hand that the crown sought to amend. In other words, trial tactics or strategies were already disclosed when the request was made to amend.

[6] Here the amendment had nothing to do with defence strategies and a decision as to whether or not to call evidence. The evidence that was revealed on examination and cross examination of the R.C.M.P. officer simply disclosed there was a specific speed in a speeding case. No evidence suggested anything other than 141 kilometres per hour. Even though it is a determination of law, I would not lightly interfere with the trial judge's decision to allow the amendment. I see nothing in terms of prejudice related to the fairness of the trial process which would have prevented the amendment.

[7] I suppose that there is always an inherent process whenever you allow an amendment. For example, there is reference in *Martin's Criminal Code*...I'll see if I can find it here...*R. v. Cousineau* (1982), 1 C.C.C. (3d) 293. In that case the Ontario Court of Appeal indicated the amendment should have been allowed so as to properly describe the stolen property in the amendment. Reference to the wrong property in the indictment would have resulted in an acquittal, yet the amendment was permitted. The Court of Appeal said it should have been permitted. How could that be any less prejudicial than in this case where acquittal was not in the works? The amendment would only effect the penalty. The appellant knew that he was facing a speeding charge, and the essence of the offence did not change. Pursuant to section 7 of the *Summary Proceedings Act*, provisions of the *Criminal Code* are incorporated in or apply to provincial statute trials. Section 606(2) allows the amendment

where there is a variance between the evidence and the charge. I'm satisfied the trial judge did not err in allowing the amendment.

[8] The two remaining grounds of the appeal are really appeals based on assertions that there were errors in findings of fact. Appeal courts should be reluctant to interfere with a trial judge's findings of fact, unless they are perverse or absent any basis in terms of the evidence. In the present case, there was evidence before the trial judge whereby she could reasonably conclude that the appellant was travelling at a speed of 141 kilometres per hour. There was extensive examination and cross examination on that issue as to the radar readings applying to the vehicle in question.

[9] As to the issue of identity of the appellant, there was evidence before the trial judge as to the identity of the accused. The officer referred to the fact that when he stopped the vehicle, the appellant identified himself. I'm referring to page 3 of the transcript. The officer says;

> At that time I proceeded to go and stop the vehicle and I had the vehicle stopped and at that point asked the driver for his driver's license. He was identified by his driver's license as Mr. Bretti.

In addition there is reference to the insurance and permit which were examined by the officer.

[10] The appellant in fact responded to the summons and the summary offence ticket and appeared in court in response to that summons.

[11] I'm satisfied there was evidence upon which the trial judge could reasonably find that the accused was identified and that the speed was 141 kilometres per hour, and I would dismiss the appeal.

J.