SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Davidson, 2011 NSSC 55

Date: 20110208
Docket: 339627
Registry: Halifax

Between:

Her Majesty The Queen

Appellant

v.

Lisa Davidson

Respondent

Judge:	The Honourable Justice Patrick J. Duncan
Heard:	January 12, 2011, in Halifax, Nova Scotia
Final Written Submissions:	February 4, 2011
Counsel:	Katherine E. Salsman, for the appellant Lisa Davidson, self represented

By the Court:

Introduction

[1] The respondent, Lisa Davidson, was charged that she did, on or about the 13th day of March, 2010, at or near Halifax, Nova Scotia, unlawfully commit the offence of failing to stop at an amber light, contrary to section 93(2)(c) of the **Motor Vehicle Act,** R.S.N.S. 1989, c. 293.

[2] Ms. Davidson was found not guilty following a trial in Provincial Court. The Crown appeals that finding.

Background

[3] Cst. Mike Fortier of the RCMP testified at trial that he observed the respondent operating a motor vehicle travelling east on Sackville Drive in Halifax Regional Municipality on the date set out in the Summary Offence Ticket (SOT). The respondent's vehicle approached a three way intersection where Riverside Drive ends at Sackville Drive.

[4] Cst. Fortier was in a marked police vehicle, travelling in the same direction. The officer concluded that the traffic light facing the respondent's vehicle at the intersection was amber and then red at about the time the respondent's vehicle entered the intersection.

[5] Based on his observations the officer initiated a traffic stop and served Ms. Davidson with a Summary Offence ticket for a breach of section 93(2)(c) of the **Motor Vehicle Act**, which reads:

> (2) The drivers of vehicles, pedestrians, and all other traffic approaching or at an intersection or on a part of the highway controlled by any of the traffic signals mentioned in subsection (1) shall act in obedience to the traffic signals in accordance with the following instructions:
>
> ...
>
> > (c) yellow or amber light - all traffic facing this signal shall stop before entering an intersection at the place marked or the nearest side of the crosswalk but not past the signal unless the stop cannot be made in safety;
>
> but, in each case, vehicular traffic shall yield the right of way to pedestrians lawfully in a crosswalk and all other traffic lawfully proceeding through an intersection or on a highway;

[6] The matter came on for trial before an adjudicator. Cst. Fortier was the sole witness. The respondent was not present in person but was represented by her husband.

[7] The decision of the Adjudicator was not lengthy and so I reproduce it here in full:

> This is a charge of violating section 93 (2) (c) of the **Motor Vehicle Act** which provides that all traffic facing a yellow or amber light shall stop before entering an intersection at the place marked or the nearest side of the crosswalk but not past the signal unless the stop cannot be made in safety.
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> The only evidence that I have this evening is from Constable Mike Fortier who is with the RCMP in Lower Sackville, who on the date the ticket was issued, was patrolling on Sackville Drive in HRM. And he, in an area of 50 km an hour limit, was approaching a three-way intersection at Riverside. He was in the lane closest to the sidewalk of two lanes that were approaching from that westerly direction. He viewed a Tiburon that was in the other lane. He saw the light turn yellow, then red and his testimony was that, "she was not engaged in that intersection in as far as I could tell, when the light turned red." In his own lane, there were two vehicles in front of him. He pulled her over, initially, for going through a red light, he said. He only lost sight for about a second but it was the same vehicle.
>
> He indicated that there was a clear and unobstructed view for about half a kilometer of the sign which was clear and visible and properly maintained by the right authorities. That the light was working inasmuch as the sequence of green, yellow, red was observed on this particular light at that time. He described his vantage point as being about two vehicles back and that meant that he did allow that he was somewhat obstructed by that. But that wasn't described further. He estimated that he might have been about 50 m back of the Tiburon at the time that it went through the intersection. His view was that by the time the light turned,

> the vehicle had not crossed the line. He doesn't know how long the light was amber but nothing would have prevented it from making a stop. Both the vehicles in front of him, he indicates, stopped.
>
> I don't have a lot of information about those vehicles, about other traffic that might have been in the lane that the Tiburon was in, about traffic conditions elsewhere in the intersection. I'm not sure I even heard what the speed was that the Tiburon was traveling at the time or the approximate speed. Although there was a reference to other cars going at 50.
>
> His initial take on the matter was relative to it not being fully engaged in the intersection, as far as he could tell, when the light turned red. If he's unsure that it was … wasn't fully engaged in the intersection as far as he could tell, when the light turned red, it's hard to be sure to the requisite degree beyond a reasonable doubt, with respect to yellow, in particular, when there isn't a lot of background information to … to support what the conditions are and to allow me to determine what objectively a person would do under those circumstances. Consequently, I must acquit the accused.

Issues

[8] The appellant states the issues to be:

1. Did the learned trial judge err in law by requiring that evidence be submitted regarding matters which were not required elements of the offence?

2. Did the learned trial judge err in law by making a finding that was not supported by the evidence?

Analysis

Issue 1. *Did the learned trial judge err in law by requiring that evidence be submitted regarding matters which were not required elements of the offence?*

[9] The position of the appellant is that the trial judge erred in law by placing a burden on the Crown to prove beyond a reasonable doubt that the respondent could have stopped at the intersection safely. The Crown submits that the phrase *"unless the stop cannot be made in safety"*, taken from section 93(2)(c) **MVA**, is intended as a defence to the charge, not as an element of the offence requiring positive proof by the Crown.

[10] The section requires that the driver stop at the appointed place when confronted with an amber light. It is mandatory that they do so. Once the evidence establishes that no stop was made, then the court must consider whether it would have been unsafe to stop.

[11] This ground of appeal poses the question: "Who has the onus of proving that to stop the vehicle, as required by the law, could not be done safely?"

Standard of Review

[12] In *R. v. Taylor* 2008 NSCA 5, Saunders J. wrote of the standards of review:

> 35 Appeals restricted to questions of law alone generally engage a standard of correctness. *Housen v. Nikolaisen,* [2002] 2 S.C.R. 235.
>
> 36 The interpretation of a legal standard has always been considered a question of law. The application of a legal standard to the facts, while a question of law for jurisdictional purposes, is treated as a mixed question of law and fact for standard of review purposes. *R. v. Araujo et al* (2000), 149 C.C.C. (3d) 449 (S.C.C.); *R. v. Oickle,* [2000] 2 S.C.R. 3, at para. 22; and *R. v. Grouse,* [2004] N.S.J. No. 346, at para. 32-44 (C.A.).
>
> 37 A question of mixed fact and law may, upon further reflection, constitute a pure error of law subject to the correctness standard. *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1; *Housen, supra*.
>
> 38 Legal conclusions based on factual conjecture, possibility, or speculation on important matters where there is a complete absence of evidence on the record, will constitute a misapplication of the law requiring appellate intervention. See for example *R. v. Torrie,* [1967] 3 C.C.C. 303 (Ont. C.A.); *R. v. Coote,* [1970] 3 C.C.C. 248 (Sask. C.A.); and *R. v. Leblanc*, (1981), 64 C.C.C. (2d) 31 (N.B.C.A.).
>
> 39 As noted by Chipman, J.A. in *R. v. White* (1994), 89 C.C.C. (3d) 336 at 351:

> These cases establish that there is a distinction between conjecture and speculation on the one hand and rational conclusions from the whole of the evidence on the other. The failure to observe the distinction involves an error on a question of law. This court is, therefore, empowered and obliged to intervene when such error has occurred.

[13] In *White v. E.B.F.*, 2005 NSCA 167, Saunders, J.A. wrote:

> 15] In *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, the Supreme Court of Canada considered the standard of review on appeal from a trial court. Iacobucci and Major J.J., writing for the majority, summarized the standard as follows:
>
> > (a) The standard of review for a question of law is one of correctness (¶ 8);
> >
> > (b) The standard of review for findings of fact is one of "palpable and overriding error," meaning that the error must be readily or plainly seen (¶ 10);
> >
> > (c) Factual inferences from underlying findings of fact are subject to a "palpably wrong" test as well (¶ 25);
> >
> > (d) The standard of review for mixed questions of fact and law can vary depending on the circumstances. An incorrect application of the legal standard can expose the mixed question of fact and law to a correctness standard of review (¶ 31).

[14] This ground of appeal poses a question of law alone, and therefore the standard of review is one of correctness.

[15] The adjudicator outlined what he thought to be a lack of evidence as to the surrounding conditions at the time of the incident and concluded:

> His [Cst. Fortier's] initial take on the matter was relative to it not being fully engaged in the intersection, as far as he could tell, when the light turned red. If he's unsure that it was … wasn't fully engaged in the intersection as far as he could tell, when the light turned red, it's hard to be sure to the requisite degree beyond a reasonable doubt, with respect to yellow, in particular, when there isn't a lot of background information to … to support what the conditions are and to allow me to determine what objectively a person would do under those circumstances. Consequently, I must acquit the accused.
>
> (Emphasis added)

[16] I agree with the appellant that the adjudicator placed a burden on the Crown to prove beyond a reasonable doubt that the exception did not apply.

[17] Section 794(2) of the **Criminal Code of Canada,** RSC 1985, c C-46 provides that the burden of proving an "exception, exemption, proviso, excuse or qualification prescribed by law [that] operates in favour of the defendant is on the defendant."

[18] Section 7(1) of the Nova Scotia **Summary Proceedings Act**, R.S.N.S. 1989, c. 450, incorporates s. 794(2) of the **Criminal Code** into all provincial summary conviction offences in Nova Scotia. Section 7(1) of the **Summary Proceedings Act** reads:

> Except where and to the extent that it is otherwise specially enacted, the provisions of the **Criminal Code** (Canada), except section 734.2, as amended or re-enacted from time to time, applicable to offences punishable on summary conviction, whether those provisions are procedural or substantive and including provisions which impose additional penalties and liabilities, apply, *mutatis mutandis*, to every proceeding under this Act.

[19] It is well-settled law that in Nova Scotia, s. 794(2) of the **Criminal Code** places the onus of proving an exception to a provincial offence on the accused.

[20] In *R. v. DMH* (1991), 109 NSR (2d) 322 (NSCA), a youth was charged with igniting a fire within 1000 feet of a forest without a burning permit, contrary to s. 23(3) of the **Forests Act,** R.S.N.S. 1989, c. 179. The trial judge acquitted on the basis that the Crown had failed to prove the youth did not have a permit. The Crown appealed. The Court of Appeal held that holding a permit was a statutory exception to the offence, and that s. 794(2) of the **Criminal Code** relieved the

Crown of the onus of proving that an exception did not exist. The Court held, at paras 6-8:

> In our opinion, s. 794(2) clearly relieves the Crown of the burden of negativing the exception herein and is merely an extension of the common law principle developed over the years in relation to regulatory offences prohibiting acts by persons other than those authorized by law. See the cases of *R. v. Soderberg* (1965), 45 C.R. 309, 51 W.W.R. 233, 49 D.L.R. (2d) 665 (B.C. S.C.); *R. v. Lee's Poultry Ltd.* (1985, 43 C.R. (3d) 2889, 7 O.A.C. 100, 12 C.R.R. 125, 17 C.C.C. (3d) 539; *R. v. Edwards*, [1975] 1 Q.B. 27.
>
> Furthermore, this rule applies to a prosecution under s. 23 of the **Forests Act**. Section 6(1) of the **Young Persons Summary Proceedings Act**, R.S.N.S. 1989, c. 509, adopts the **Summary Proceedings Act**, R.S.N.S. 1989, c. 450, which incorporates by reference all the provisions of the **Criminal Code** of Canada in prosecutions against young persons relating to provincial statutes. Thus s. 794 of the **Criminal Code** applies.
>
> The failure to have a burning permit is not an element of the offence charged against the respondent but an exception or exemption which, if proven by the respondent, could justify his acquittal. *See R. v. Staviss* (1943), 16 M.P.R. 508, 79 C.C.C. 105, [1943] 1 D.L.R. 707 (N.S.C.A.), and *R. v. MacInnis* (1982), 54 N.S.R. (2d) 62, 112 A.P.R. 62 (C.A.).

[21] In my view, the words "unless the stop cannot be made in safety", contained in section 93(2) of the **Motor Vehicle Act**, function as an exception or defence to the offence of failing to stop at an amber light, and not as an element of the offence. The burden then is on the accused to prove that the exception should justify an acquittal. In concluding otherwise the adjudicator erred in law.

Issue 2: *Did the learned trial judge err in law by making a finding that was not supported by the evidence?*

[22] The court in *R. v. Nickerson*, [1999] N.S.J. 210 (N.S.C.A.), set out the "scope of review" where there is a challenge to the trier's findings of fact:

> 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.

[23] In *R. v. Clark*, [2005] 1 S.C.R. 6, Justice Fish discussed the appellate court's standard of review of a trial court's findings of fact and inferences drawn therefrom:

> [9] ... Appellate courts may not interfere with the findings of fact made and the factual inferences drawn by the trial judge, unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. The imputed error must, moreover, be plainly identified. And it must be shown to have affected the result. "Palpable and overriding error" is a resonant and compendious expression of this well-established norm: *see Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *Lensen v. Lensen*,[1987] 2 S.C.R. 672; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33.

[24] Oland J.A. writing on behalf of the court in *Oakland/Indian Point Residents Assn. v. Seaview Properties Ltd.* 2010 NSCA 66 wrote of "palpable and overriding error":

> 13 The "palpable and overriding error" standard accords the trial judge's findings of fact or inferences of fact a high degree of deference. An error is palpable if it is which is plainly seen or clear. It is overriding if, in the context of the whole case, it is so serious as to be determinative in the assessment of the balance of probabilities with respect to that factual issue: *Housen*, *supra* at para. 1 to 5.

[25] The evidence in the trial of this matter was uncomplicated. The officer testified that "traffic was moderate" and that there were "two cars in front of him", stopped for the light, when the respondent's vehicle passed him and entered into the intersection. It was "clear" and the area around the intersection was visible.

[26] The adjudicator's doubt about whether the respondent could not stop safely for the light appears to have been based in part on the officer's opening testimony where he stated:

> The Tiburon was not yet engaged in that intersection completely, as far as I could tell at that point in time, when the light did turn red.
>
> (A.B. p. 22; lns. 6-8)

[27] However, Cst. Fortier was later asked to explain what he meant by this answer and he replied:

> Well , I mean, by the time ... at the incident as far as, you know, what I've got in my notes and what I can remember of it, the time that the light turned red, that that vehicle had not yet crossed the line where it should have stopped, that threshold where it should have stopped.
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> (A.B. p. 26; lns 4-8)

[28] When asked what color the light was when the vehicle went through the intersection he stated: "Red". (A.B. p. 26 ln. 22). When asked whether there was anything that "... would have prevented the vehicle from making a stop", he replied: "No". (A.B. p. 27; ln 16)

[29] When asked what other traffic did when the light turned amber, the officer indicated that " Both vehicles in front of me did stop". (A.B. p. 28; ln 4).

[30] The findings of fact that were made by the adjudicator were correct in sofar as they went, but he concluded that there was insufficient evidence available upon which to assess whether it was safe to stop. His inability to find as a fact that it was not unsafe to stop for the amber light constituted a palpable and overriding error, that was underpinned by his application of an incorrect legal standard.

[31] This incorrect application of the legal standard to the facts renders this a question of law that is subject to a correctness standard of review. See, *Housen, supra*, at para. 31.

[32] The evidence was clear and unequivocal. The respondent failed to stop for the amber light. That evidence is unchallenged. To avoid liability Ms. Davidson needed to show that there was evidence upon which to conclude that it would have been unsafe to stop. There was no such evidence. Other vehicles made the stop

safely before the respondent arrived at the intersection. The officer saw no safety concerns for the respondent's ability to stop.

[33] The Respondent is not required to call evidence, but in not doing so, she rested the proof of the available exception on the evidence called. That evidence, if anything, proved the contrary to be true.

Summary

[34] I conclude that an accused has the burden of proving the exception provided in section 93(2)(c) of the **Motor Vehicle Act,** and that the adjudicator erred in law by placing the burden on the Crown to negative the exception.

[35] I further conclude that the evidence proved beyond a reasonable doubt that the Respondent failed to stop for the amber light at the time and location alleged in the SOT.

[36] There was no evidence before the trial court upon which to conclude that it was unsafe for the Respondent to stop her vehicle. To the contrary, there was

evidence that it was safe to do so. In the absence of any evidence to support the application of the exception, a correct application of the law to the facts should have resulted in the Respondent being found guilty as charged.

Disposition

[37] This appeal has been brought pursuant to section 813(b)(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 (4) of the **Criminal Code,** which reads:

> (4) If an appeal is from an acquittal or verdict that the appellant or respondent was unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal may
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> (a) dismiss the appeal; or
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> (b) allow the appeal, set aside the verdict and
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> (i) order a new trial, or
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> (ii) except where the verdict is that of a court composed of a judge and jury, enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law, and pass a sentence that is warranted in

> law, or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.

[38] The appeal is allowed and the verdict of acquittal is set aside. But for the errors of law committed by the adjudicator the accused should have been found guilty. As a result, I find the respondent guilty.

[39] I remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.

Duncan J.