SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Ranni, 2011 NSSC 209

Date: 20110601
Docket: Syd. No. 344620
Registry: Sydney

Between:

Her Majesty the Queen

Respondent

v.

Donald Ranni

Appellant

Judge:	The Honourable Justice Cindy A. Bourgeois
Heard:	April 28, 2011, in Sydney, Nova Scotia
Written Decision:	June 1, 2011
Counsel:	D. Shane Russell, for the Respondent Allan F. Nicholson, for the Appellant

By the Court:

[1] The Appellant, Donald Ranni, appeals from the decision of the Honourable Judge John MacDougall rendered December 1, 2010, whereby he was convicted on a charge of driving while disqualified, contrary to Section 259(4) of the *Criminal Code of Canada*.

Issues:

[2] In the Notice of Summary Conviction Appeal, the grounds of the appeal are stated as follows:

> 1. That the trial judge erred in his interpretation and application of the law governing Sections 259(1), 259(4), and 260(1) of the *Criminal Code of Canada*.
>
> 2. Such other and further grounds of appeal as may appear upon receipt of the transcript of the trial and/or decision.

[3] In both the written and oral submissions, both parties exclusively dealt with the first issue outlined above. The sole issue before the Court is very narrow and specific, and is perhaps best articulated by the Appellant in his original trial brief dated October 15, 2010, as follows:

> The requirement under s. 260(1)(c) of the *Criminal Code* had not been complied with at the time the Prohibition Order was made; specifically, the order did not specify that the penalty, on Indictment, was not to exceed five years as opposed to two years set out in the order itself. The defective order could not, therefore, ground a conviction under s. 259(4) of the *Code* as compliance with s. 260(1)(c) of the *Code* is a precondition to a conviction for driving while disqualified under s. 259(4).

Powers of a Summary Conviction Appeal Court:

[4] This appeal is brought pursuant to Section 813(a)(i) of the *Criminal Code*. Section 822 applies, providing amongst other things, that ss. 683 to 689 (with two exceptions and modifications) apply. These provisions outline the powers and limitations of a court of appeal.

[5] Relevant to the matter before me, Section 686(1)(a), (b) and (2) provide:

> 686(1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, 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 that 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:

[6] The Appellant did not address the appropriate standard of review to be applied in the present instance. The Crown however, acknowledges that the standard, given the nature of the issue on appeal, is one of correctness.

[7] It has been long recognized that the standard of review for an alleged error of law is correctness. However, the required analysis does not conclude once an error has been identified on the part of the trial judge. A further step is required for a full and proper review. This is succinctly articulated by Beveridge, J.A. in ***R. v. Spinney***, 2010 NSCA 4 at paragraph 30 as follows:

> [30] In a general way, s. 686(1)(b)(iii) permits an appeal court to uphold a conviction despite the existence of one or more errors of law. To conclude that there has been a harmless error, the Crown must establish that the errors did not result in a substantial wrong or miscarriage of justice. This requires that the appeal court be satisfied that there is no reasonable possibility that the verdict would have been different had the error in law not been made (see **R. v. Merz** (1999), 46 O.R. (3d) 161 (C.A.)). Furthermore, the application of the proviso raises a question of law alone (**R. v. Mahoney**, [1982] 1 S.C.R. 834).

Facts:

[8] The facts of the matter presently before me are straightforward and undisputed. A review of the trial transcript discloses that this was similarly so before the trial judge. On April 18, 2009, the Appellant was found to be operating a motor vehicle on a public roadway in Sydney, Nova Scotia. At that time, the Appellant was subject to a Prohibition Order, dated May 22, 2008, under which he was prohibited from driving for a period of one year.

[9] There is no issue that the Appellant was aware of the existence of the Order. He signed an Endorsement on its face declaring:

> I acknowledge receipt of a copy of this Order, that the Order was read by/or to me, and I was informed of the provisions of Section 259(4) of the Criminal Code of Canada".

[10] The face of the Order also includes the following:

> SECTION 259(4) OF THE CRIMINAL CODE OF CANADA STATES AS FOLLOWS:
>
> Everyone who operates a motor vehicle, vessel, or aircraft or any railway equipment in Canada while disqualified from doing so
>
> > (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

> (b) is guilty of an offence punishable on summary conviction.

[11] As acknowledged by the Crown, the above wording of Section 259(4) is reflective of an earlier version of the provision. It was amended in 2000 to provide for a longer possible period of incarceration. At the time of the Prohibition Order, and at present, Section 259(4) provides for the following penalties:

> (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
>
> (b) is guilty of an offence punishable on summary conviction.

[12] It is this utilization of an outdated version of Section 259(4) on the face of the Prohibition Order, which is at the heart of this appeal.

Position of the Parties:

[13] The Appellant asserts that a charge under Section 259(4) requires the Court to also consider the provisions of Section 260(1) which provides:

> 260(1) If a court makes a prohibition order under section 259 in relation to an offender, it **shall cause**
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> (a) the order to be read by or to the offender;
>
> (b) a copy of the order to be given to the offender; and

> (c) the offender **to be informed** of subsection 259(4). (Emphasis added)

[14] It is the Appellant's view that in order to provide the foundation for a conviction under Section 259, that the requirements of Section 260(1) must be met and proven by the Crown. It is asserted that due to the error on the face of the Prohibition Order respecting the potential term of incarceration, the Appellant was not properly "informed of subsection 259(4)", as required.

[15] The Appellant asserts that although the Learned Trial Judge referred to the appropriate *Code* sections, as well as the appropriate case authorities, he did not correctly apply the law. He points in particular to the trial judge's conclusions as follows:

> If I accept the position of the Ontario Court of Appeal, the burden is on the crown as a precondition to enforcing a charge under s. 259 to satisfy me that Mr. Ranni was informed that should he drive while disqualified the crown could elect to proceed by indictment and he could suffer serious penal consequences. Is it fatal that Mr. Ranni was advised that the maximum penalty could be two years not five years[?] I think not. It is not mandated that particular words be used to express the intent or purpose of [P]arliament as set forth in s. 259(4). The duty imposed as Glithero stated, is to impress upon the offender a breach of the prohibition order could result in serious penal consequences and I think that was done. It is a penitentiary term that was referred to whether it is two years,

> four years or five years, six years or seven years, I do not think is a material distinction. In this case Mr. Ranni was appropriately informed that serious penal consequences could flow in the event of a conviction for [a] 259 violation.

[16] The Appellant asserts that contrary to what the Learned Trial Judge indicated in his decision, "it does matter if the penitentiary term referred to in the section is two, four, five, six or seven years. At the very least, the length of sentence determines the type of sentences available to the offender and parole eligibility in the event the sentence imposed exceeds two years. In the case at bar, the Appellant was both un-informed and mis-informed as to the penal consequences rising from driving while subject to a prohibition order."

[17] The Crown submits that the Learned Trial Judge carefully considered the relevant *Code* provisions, reviewed the appropriate case authorities, and made no error in the application of the law to the circumstances before him. The Crown's position is succinctly set out at paragraph 12 of its Appeal brief as follows:

> 12. It was and remains the Crown's position that the language used in the prohibition order of May 22, 2008 was sufficiently in compliance with the s. 260(1)(c) requirement that: "The offender be informed of subsection 259(4)". Putting aside the technicalities and semantics the wording complied in substance. The key here and the issue for the Provincial Court, was what it means to be "informed". The Learned Trial Judge ultimately agreed with the Crown's position and went on to conduct an

> analysis into what was required according to the Ontario Court of Appeal in **R. v. Molina** to ensure that the accused was "informed".

[18] Although the Crown acknowledges that the case law relied upon by the Appellant, most notably ***R. v. Molina*** 2008 ONCA 212 and ***R. v. Crawley*** 2009 NSPC 72 are applicable to the issue before the Court, the Appellant's interpretation of same is said to be misguided. At paragraph 14 of the Appeal brief, this is argued as follows:

> 14. It is submitted that the cases referred to by the Appellant specifically, **R. v. Molina** and **R. v. Crawley** do not stand for the proposition that the contents of s. 259(4) have to be written word for word or copied directly into the body of the prohibition order itself. The accused has to be adequately informed of the penal consequences but nowhere in any of the cases did either Court required that the order contain a word for word regurgitation of the *Criminal Code* sections. If the courts intended for this to be the case, they clearly would have said so. This was not the case. As pointed out in the Appellant cases there is no requirement that magic words be used and each case must be assessed on its own merits. The question of whether or not a particular offender is "informed" is to be assessed on a case by case basis. Again, the wording has to comply in substance only. The Learned Trial Judge agreed . . .

[19] The Crown asserts that the Appellant was adequately "informed" of the provisions of Section 259(4) as determined by the Learned Trial Judge. The Appellant knew that he faced a significant possible period of incarceration. The

clerical error of stating a maximum penalty of two years, versus five years should the Crown proceed by way of indictment, was irrelevant. The Crown further asserted that this is certainly so in the present case, as the Crown chose from the outset, to proceed against the Appellant summarily.

[20] The Crown further asserted that recent decisions have shown a "judicial shift away from overly technical defence arguments" and that this Court should take a similar approach.

Analysis:

[21] As stated earlier, both parties agree that the Learned Trial Judge, in undertaking an interpretation of the relevant *Code* provisions, appropriately referenced several case authorities. The real issue is whether he was correct in his interpretation.

[22] I agree that the reasons of both the Summary Conviction Appeal Judge, Glithero, J. ([2006] O.J. No. 3806) and the Ontario Court of Appeal in ***R. v.***

Molina, ***supra***, provide valuable guidance with respect to the proper interpretation of section 260(1).

[23] At the Court of Appeal, three separate appeals, all relating to the interpretation of Section 260(1), and in particular, the alleged deficiencies found in three prohibition orders, were considered. As the Crown asserts that the nature of the deficiencies in those three instances were much more serious than in the present instance, Blair, J.A.'s description of the nature of the inadequacies is helpful:

> 7. [T]he prohibition order provided to, and signed by, Mr. Molina simply warned that everyone who operated a motor vehicle, etc. while disqualified is "upon conviction, guilty or an offence and is liable to a term of custody and supervision". Mr. Pejic's prohibition order was drafted in the same language. In the case of Mr. Bell, the comparable warning was that upon conviction for operating a vehicle while disqualified the offender "is liable to a term of imprisonment". None of these warnings brought home to the appellants the specifics of s. 259(4), namely that they could be found guilty of an indictable offence and imprisoned for up to five years or found guilty of an offence punishable on summary conviction.

[24] Upholding and adopting the reasoning of Glithero, J., the Ontario Court of Appeal found that in the three instances before it, the warnings contained on the probation orders were insufficient to comply with the requirements of Section 260(1)(c). Blair J.A. explains the Court's conclusion in that regard as follows:

> 21. I agree with the result reached by the summary conviction appeal judge and with the reasons he articulates, namely (a) that the orders were defective or deficient in that they did not advise the appellants that they could be charged with an indictable offence and receive up to five years in jail if they drove while disqualified, and (b) that there is no reason to presume that the court clerk, in explaining the orders to the appellants, went beyond the terms prescribed in the orders in doing so. As the summary conviction judge noted at para. 25 of his reasons:
>
> > Far from making it probable that the act [required by s. 260(1)(c)] had been done, the evidence available to the trial court here made it unlikely that there was compliance with Section 260(1) in that the only evidence on point, the signature and acknowledgment of the accused, relates to a deficient and inadequate level of warning. There is no basis upon which to utilize the presumption of regularity to assume, as proof, that the officer who witnessed the signature of Mr. Molina went beyond the form of the order that the accused signed, and either read from a correct version of an order, or advised orally out of his own knowledge. There would be no point in having the accused sign and acknowledge a lesser and deficient form of warning if in fact the accused had been provided with a proper warning.

[25] Blair, J.A. further added:

> 23 . . .The requirement that an offender disqualified from driving be "informed of subsection 259(4)" means more than that the offender be simply advised of its existence; **"informed" means that the details of the significant penal exposure triggered by the application of that section must be brought home to the offender.** Nothing less than that prerequisite is an element of the offence of driving while disqualified. Informing an offender about the penal

> consequences of a breach is not simply a routine formality or procedural detail. (Emphasis added)

[26] As both Counsel have pointed out to the Court, ***Molina, supra***, has been the subject of recent judicial consideration in this Province. In ***R. v. Guilbault***, 2010 NSSC 26, Farrar, J. (as he then was) considered the decision, and in particular, whether it stood for the proposition that the "presumption of regularity" did not apply to the terms of section 260(1). Similar considerations where taken by Gibson, A.C.J. in ***R.v. Crawley, supra***.

[27] I have reviewed both decisions carefully. In my view, neither decision is inconsistent with, nor suggests an alternate interpretation of the requirements under section 260(1), than that contained in ***R. v. Molina, supra***. As noted above, both decisions addressed the "presumption of regularity"as a live issue. In the present instance, the Learned Trial Judge determined, accurately in my view, that this presumption could not be relied upon by the Crown (see page 53 of the appeal transcript), a determination which was not challenged before me.

[28] I now turn to the decision under appeal. To found a conviction under section 259(4), the Crown bears the burden of establishing that the requirements of section

260(1) have been met. There is no contest with respect to the first two requirements, however, the Crown must establish that the Appellant was "informed of subsection 259(4)". The Learned Trial Judge, in convicting the Appellant determined that the wording contained in the Prohibition Order was sufficient to meet this requirement. With respect, I disagree.

[29] I acknowledge that neither the *Criminal Code*, nor the case authorities explicitly state that the word for word *Code* provision must be provided either on the face of a Prohibition Order, or verbally, to an offender. It is clear however, that being "informed of subsection 259(4)" has to be more than simply bringing to an offender's attention the mere existence of the provision. As stated in ***Molina, supra*** the offender must be advised of the "details of the significant penal exposure" that may arise, in the event he or she determines to breach. In the present case, the Prohibition Order in question certainly attempted to advise the Appellant of the "details", and outlined on its face, what purported to be the actual provisions of Section 259(4), including the potential penal consequences. However, the "details" were not accurate.

[30] In my view, being "informed of subsection 259(4)" must, implicitly mean that an offender is **accurately** informed, and more so, **not misled** regarding the potential penal consequences of his subsequent behaviour. This approach appears to be endorsed in ***Molina***, by Glithero, J., who states:

> 24. In my opinion the warning used on the face page of the prohibition order was deficient in not adequately and accurately informing the prohibited person of either the serious nature of the procedure available, nor of the penalties available if he or she should operate a vehicle while prohibited. The wording that was used is misleading as it is more consistent with a *Youth Act* sentence than it is with the sentence that is in fact available.

[31] At the conclusion of trial, the Learned Trial Judge accepted the Crown's argument that the Appellant having been inaccurately advised of a two year potential penalty in the event of a future breach of the Prohibition Order, was sufficient to inform the Appellant of the seriousness of the offence, and meet the obligation of section 260(1). The Learned Trial Judge went on in his decision to express the view that whether the accurate penitentiary term was "two years, four years or five years, six years or seven years" was an immaterial distinction, as the Appellant was aware that serious penal consequences would flow from a conviction.

[32] I agree entirely with the position of the Appellant that there is a substantial distinction between a two year and five year maximum penitentiary term of imprisonment. The accurate penalty is more than double that actually conveyed to the Appellant. The information contained on the face of the Prohibition Order was inaccurate and misleading as to the potential jeopardy the Appellant faced should a breach occur, and as such cannot be considered to have appropriately "informed" him of such, as is required by Section 260(1). As such, the Learned Trial Judge erred in law in determining otherwise.

[33] I further reject that the conviction should be upheld on the basis that when charged, the Appellant was advised that the Crown intended to proceed summarily. This position, stated after the Appellant made a determination to drive on April 18, 2009, did nothing to correct retroactively, the misleading information contained on the Prohibition Order, or to better inform him of the penal consequences of his actions, as is required by Section 260(1).

[34] The error of law in this instance goes to the heart of the issue before the Court. This is not a situation where, notwithstanding the error, the conviction can be upheld. As such, the appeal is allowed and the conviction set aside.

J.