IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Cougias 2013 NSSC 113

Date: 20130320
Docket: SP 405681
Registry: Pictou

Between:

Her Majesty the Queen

Appellant

v.

Stavros M. Cougias

Respondent

DECISION

Judge:	The Honourable Justice N. M. Scaravelli
Heard:	December 17, 2012, in Pictou, Nova Scotia
Written Decision:	March 20, 2013
Counsel:	Andrew O'Blenis, for the Appellant
	Stavros M. Cougias, Self-represented Respondent

By the Court

[1] The Crown appeals the acquittal of the respondent of the charge:

> That on or about the 16th day of November, 2011, at or near hwy 104, Priestville, Pictou County, N.S. did unlawfully commit the offence of operating a motor vehicle on the highway while performing a stunt, contrary to Section 163 (1) of the Motor Vehicle Act.

[2] At trial, the allegation was that the respondent was driving 50 km/h or more above the lawful rate of speed which met one of the definitions of stunting under the *Highway Racing Definition Regulations.* The Crown called Constable Shane MacNeil as a witness. The respondent, self-represented, did not testify. He called one witness, Constable Jason Roy. In his decision, Provincial Court Judge Del Atwood acquitted the accused, stating that the evidence left him in a state of reasonable doubt as to whether the respondent was operating his vehicle at 50 km/h or more above the lawful rate of speed. Further, the trial judge found that speeding pursuant to s. 106A of the *Motor Vehicle Act* did not constitute and included offence within s. 163 (1) and refused to convict the accused on this ground.

GROUNDS OF APPEAL

[3] The grounds of appeal as set out the Appellant's Notice of Summary Conviction Appeal are as follows:

1. The verdict is unreasonable and cannot be supported by the evidence;

2. The Learned Trial Judge erred in law by not considering the totality of the evidence; and

3. The Learned Trial Judge erred in law in finding that s. 106A(a), 106A (b), and 106A(c) of the *Motor Vehicle Act* are not included offences of s. 163 (1).

STANDARD OF REVIEW

[4] The first ground of appeal advanced by the Appellant is that the trial court verdict is unreasonable and cannot be supported by the evidence. The standard of review to be applied by a Summary Conviction Appeal Court to a decision of a trial court was expressed by Justice Cromwell (as he then was) in *R. v. Nickerson*, 1999 NSCA 168, 178 NSR (2d) 189:

> 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.S.C.A.D.) 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. Burns, [1994] 1 S.C.R. 656 at 657 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.

[5] The test to be applied by an appeal court when considering whether a verdict should be set aside as unreasonable was explained in two leading decisions of the

Supreme Court of Canada ("SCC"): *R. Vs. Yebes*, [1987] 2 SCR, 59 CR (3d) 108 and *R. vs. Biniaris*, 2000 SCC 15, [2000] 1 SCR 381. The main principles of these decisions were outlined by Justice Cromwell (as he then was) in *R. vs. Barrett*, 2004 NSCA 38, 222 NSR (2d) 182 as follows:

> [15] This Court may allow an appeal in indictable offences like these if of the opinion that "… the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence.": s. 686(1)(a)(i). In applying this section, the Court is to answer the question of whether the verdict is one that a properly instructed jury (or trial judge), acting judicially, could reasonably have rendered: *Corbett v. The Queen*, [1975] 2 S.C.R. 275 at 282; *R. v. Yebes* [1987] 2 S.C.R. 168 at 185; *R. v. Biniaris*, [2000] 1 S.C.R. 381 at para. 36.
>
> [16] The appellate court must recognize and give effect to the advantages which the trier of fact has in assessing and weighing the evidence at trial. Recognizing this appellate disadvantage, the reviewing court must not act as if it were the "thirteenth juror" or give effect to its own feelings or unease about the conviction absent an articulable basis for a finding of unreasonableness. The question is not what the Court of appeal would have done had it been the trial court, but what a jury or judge, properly directed and acting judicially, could reasonably do: *Biniaris* at paras. 38-40.
>
> [17] However, the reviewing Court must go beyond merely satisfying itself that there is at least some evidence in the record, however scant, to support a conviction. While not substituting its opinion for that of the trial court, the court of appeal must "… re-examine and to some extent reweigh and consider the effect of the evidence.": *Yebes* at 186. As Arbour, J. put it in *Biniaris* at para. 36, this requires the appellate court "… to review, analyse and, within the limits of appellate disadvantage, weigh the evidence …"

[6] Grounds of appeal based on errors in law attract a standard review of correctness.

ANALYSIS
Unreasonable Verdict

[7] It is not the role of the Summary Conviction Appeal Court to substitute its view of the evidence for that of the trial judge. The evidence is reviewed to determine if it is reasonably capable of supporting the conclusion of the trial judge.

[8] The essential element of the offence of stunt driving requiring proof in this case was that the respondent's vehicle was travelling 50 km/h or more above the speed limit. The checkpoint where Constable MacNeil set up his position near Exit 26 had a posted speed limit of 100 km/h. Constable Roy was set up with radar at a checkpoint approximately 2 kms from Constable MacNeil near Exit 23. Prior to entering Constable MacNeil's checkpoint, Constable Roy testified he targeted the speed of the respondent's vehicle at 137 km/h.

[9] Constable MacNeil testified he received a radio transmission from Constable Roy describing the respondent's vehicle and reporting the speed. Constable MacNeil then tracked the respondent's vehicle on his radar for "4 or 5 seconds". He locked in the speed at 195 km/h and testified that he actually clocked the vehicle at 201 km/h during that time. During the course of cross examination of

Constable MacNeil, the video recording taken from Constable MacNeil's vehicle was played in court.

[10] In his decision, the trial judge concluded that Constable Roy targeted the respondent's vehicle travelling "at approximately 130 km/h". He also acknowledged the possibility that the vehicle could have accelerated to 201 km/h in the intervening 2 km to Constable MacNeil's checkpoint. The trial judge further determined he was satisfied that Constable MacNeil was qualified to operate the radar device that he was using and the device was working properly.

[11] The trial judge concluded however, at the time any pertinent observations would have been made, Constable MacNeil was distracted by his operation of the video-recording device. This finding, along with the video recording of the accused's vehicle cresting the hill and Constable Roy's evidence regarding the accused's rate of speed just prior to entering Constable MacNeil's radar range, left the trial judge in a state of reasonable doubt as to whether all the elements of the offence were made out. He stated:

> [8] . . . I had the opportunity of reviewing that video recording on several occasions. I hasten to observe that, although the video recording included a segment depicting the radar device that was actually used by Cpl. MacNeil, recording the radar display that appeared to show a locked-in speed of 198, what I would assume would have been 198 kilometres per hour, on an LED display, the radar the device is one that requires the observation and operation of a human

> radar operator. The device does not generate an evidence ticket. The device does not generate a photograph of the vehicle that is being targeted by the instrument. It requires essentially a radar operator to make visual observations, to identify vehicles based on the operator's understanding of the operation of the device, to make an informed and educated judgment regarding which vehicle is causing the instrument to display a particular measured velocity. In this particular case, Cst. MacNeil explained why he drew the conclusion that the middle display (which, as described by the constable, would have displayed the velocity of the fastest moving vehicle) in fact, showed the velocity of Mr. Cougias' vehicle. . .
>
> [10] Cst. MacNeil's evidence was that Mr. Cougias' motor vehicle was travelling essentially at twice the permissible posted rate of speed. When I observed the relevant portions of the video recording, including the portions that would have captured Mr. Cougias' motor vehicle as it was approaching the line of four vehicles that Mr. Cougias was proceeding to…as I understand it, to overtake, I did not observe that sort of excessive rate of speed. And part of that might have been due to the fact that the video recording obviously did not capture all of the pertinent portions of the scene; indeed, it is evident to the court from the 12:07:53 time marker up to the 12:08:06 time marker, the video-recording instrument was being panned in and panned out. It was only a matter of a very short number of seconds after the panning in and panning out stopped – in fact, that the 12:08:13 time marker – that Cst. MacNeil begins advancing, moving forward, moving his vehicle forward preparing to conduct the stop. So, I do find, indeed, that at the time that the pertinent observations would need to have been made, Cst. MacNeil was distracted by his operation of that video-recording device.
>
> [11] Why is it that Cst. MacNeil's radar, the middle display in that radar, was displaying the 198 numerical figure? Well, I really don't know. What I can is that the evidence of radar-operator distraction coupled with what I observed of the video recording, including the video recording of Mr. Cougias' vehicle as it crested that hill, as well as Cst. Roy's evidence regarding Mr. Cougias' rate of speed just a short distance prior to Cst. MacNeil's monitoring position, all leaves me in a state of reasonable doubt whether Mr. Cougias was operating his vehicle at 50 kilometres per hour or more above the lawful rate of speed.

[12] The appellant submits the trial judge made a finding of fact incompatible with the evidence when he stated that Constable Roy had targeted the respondent's vehicle at approximately 130 km/h. The appellant also submits the trial judge relied on his observations of the video recording as the basis for reasonable doubt

while ignoring his finding that the video did not capture all the portions of the scene. Further, the appellant submits the trial judge's finding that Constable MacNeil was distracted by his operation of the video-recording device cannot be supported by the evidence where Constable testified he was not distracted and also made his own observations about the respondent's speed. Finally, given the trial judge's finding that the radar was operating properly and his acknowledgement of the possibility of the respondent accelerating to 201 km/h between checkpoints, the appellant submits the trial judge failed to consider the totality of the evidence in reaching his verdict.

[13] I am unable to agree.

[14] Although the trial judge's finding that Constable Roy targeted the respondents vehicle at "approximately 130 km/h" is not directly aligned with his testimony of 137 km/h, it can be viewed as an accurate approximation of the speed. In any event, this inconsistency is not one of substance. The issue before the trial judge was whether the vehicle was travelling 50 km/h or more above the speed limit when it entered Constable MacNeil's checkpoint area. Given Constable MacNeil's evidence that the respondents vehicle was approximately 1 km away when it entered his area, the trial judge was cognizant of the fact that, the

respondent would have had to increase the speed of his vehicle 60 km or more over a "short distance" prior to entering the field of Constable MacNeil's radar.

[15] I am satisfied there was objective evidence to support the trial judge's conclusion that Constable MacNeil's was distracted during the operation of his radar at the relevant time. Under cross examination Constable MacNeil was somewhat inconsistent on this point.

> Q. All the transmissions back and forth between yourself and Cst. Roy and Cst. Dave MacLean would have been from within the car?
>
> A. At the time that your vehicle entered my vision, I would have no radio transmissions. I just don't have enough hands. I was…I was playing with the video cam that wasn't working so well for me that day. Zooming in when it was supposed to be zooming out, etc., plus just tracking your vehicle. I wouldn't…
>
> …Q. So, you said you were having troubles with your camera that day. So, was your attention strictly on my vehicle coming over the crest of the hill or…the blue Mitshubeshi or were you maybe distracted by the camera or…
>
> A. No, the camera was…I was looking after the camera prior to when you entered. Then I think I just kind of gave up on it 'cause I was tracking you.
>
> Q. So, this camera, It's actually basically inside the car?
>
> A. Yes.
>
> Q. And you can adjust it…you adjust it with your hands or is it with…
>
> A. Yes, there's like a keypad.
>
> Q. Okay.
>
> A. Which kind of…I use my right thumb to operate the yellow buttons on the camera.
>
> Q. And how do you aim it? Is there like an LCD screen for it or do you just point it where you need…

> A. You point it. You can zoom in and zoom out. Like, I said, unfortunately it wasn't working well that day and I since had the keypad replaced in it.

[16] When further pressed on this point following viewing of the video:

> Q. So, when I entered your vision, you were busy setting up the camera. You were somewhat distracted by setting up the camera, alining the camera's angle?
>
> A. No, I wasn't. I had given up on the camera before you entered my beam 'cause I wanted to concentrate on the highway.

[17] In addition to this evidence, the trial judge had the advantage of making his own observations of the panning in and out of the video over the relevant time sequence as described by Constable MacNeil. He highlighted the fact that the radar device is not an automatic ticket generator and that it requires human operation. In my view the video evidence is supportable of the trial judge's observations and conclusions.

[18] When viewed as a whole, the transcript demonstrates the trial judge's decision was based on an analysis and weighing of all the evidence presented at trial. Having examined the evidence, I find it reasonably capable of supporting the trial Judge's finding of reasonable doubt.

INCLUDED OFFENCE

[19] The appellant submits the trial judge erred in law in finding that speeding, contrary to s. 106(a) of the *Motor Vehicle Act*, is not an included offence of performing a stunt by driving 50 km/h or more above the lawful speed, contrary to s. 163(1) of the *Motor Vehicle Act*. S. 163(1) of the *Motor Vehicle Act* provides:

> 163 (1) Any person who operates a motor vehicle on a highway in a race, in a contest, while performing a stunt or on a bet or wager shall be guilty of an offence.

[20] Section 3 of the *Highway Racing Definitions Regulations* provides:

> **Definition of "stunt"**
> **3** In subsection 163(1) of the *Motor Vehicle Act*, "stunt" means any of the following actions:
>
> (a) attempting to lift all or some of a vehicle's tires from the surface of the highway, other than when using lift axles on a commercial motor vehicle;
>
> (b) attempting to spin or circle a vehicle without maintaining control of the vehicle;
>
> (c) driving on the portion of the highway designated for use by oncoming traffic for longer than necessary to overtake 1 or more other vehicles;
>
> (d) driving with a person in the trunk of the vehicle;
>
> (e) driving from a position in a vehicle other than the designated driver's seat;
>
> **(f) driving 50 km/h or more above the lawful rate of speed;**
>
> (g) driving without due care or attention, reasonable consideration for others on the highway or in a manner that may endanger other persons, including any of the following: . . .

[21] The offence of speeding is set out in s. 106A of the *Motor Vehicle Act*:

> 106A A person commits an offence who contrary to Sections 104 or 106 exceeds the speed limit by
>
> (a) between one and fifteen kilometres per hour, inclusive;
>
> (b) between sixteen and thirty kilometres per hour, inclusive; or
>
> (c) by thirty-one kilometres per hour or more.

[22] Included offences are governed by s. 662(1) of the *Criminal Code* which states in part:

> **662.** (1) A count in an indictment is divisible and where the commission of the offence charged, as described in the enactment creating it or as charged in the count, includes the commission of another offence, whether punishable by indictment or on summary conviction, the accused may be convicted
>
> (a) of an offence so included that is proved, notwithstanding that the whole offence that is charged is not proved; or
>
> (b) of an attempt to commit an offence so included…

[23] The trial judge concluded that speeding was not an included offence of stunt driving because stunt driving can be committed in any number of ways, and an included offence must be based on an offence included in the wording of the charge. He stated:

> I would observe that 163A is a not strictly a velocity-related offence. One can commit stunting by driving at, indeed, at a rate of speed above a lawful rate of speed when engaged in a competition but stunting can also include chasing … no, I'm sorry. I should refer to Section 3 of the *Regulation*. Stunting can include lifting a vehicle's tires off the surface of the highway, attempting to do donuts on

> the roadway, driving in the face of oncoming traffic, driving with a person in the trunk, driving from a position in a vehicle other than the designated driver's seat or driving without due care or attentions, all of which involve actions that would not necessarily involve driving at an excessive rate of speed. It is clear to the court that an included offence must be based on an offence included in the wording of the charge.

[24] The appellant submits that, in making his determination, the trial judge failed to take into account his finding that based on disclosure material provided by the crown, the accused was aware the crown was prosecuting the charge of stunting on the bases of driving 50 kms / per hour more above the lawful rate of speed.

[25] In order to obtain a conviction for an included offence, the crown must bring the offence within any of the three categories set out in s. 662 of the *Criminal Code:* (1) offences specified by statutes; (2) offences disclosed in the enactment creating the offence charged; and (3) wording in the charge that describes facts that put an accused on notice of an included offence. It is not enough that an accused is given sufficient information of the factual particulars that gave rise to the charge. The test for finding an included offence is a strict one. In R. v. G.R. [2005] S.C.R 371, the court emphasised the charging document must make the legal jeopardy of the accused "readily ascertainable" on its face.

> [2] It is fundamental to a fair trial that an accused knows the charge or charges he or she must meet. The proper focus is on what the crown alleges, not on what the

> accused already knows. An accused will often know a good deal more about the circumstances of an offence than the police or crown will ever know, but it is not enough for the crown to say to an accused "you know perfectly well what your guilty of". The basis of our criminal law is that he or she is only called upon to meet the charge put forward by the prosecution.

[27] In the present case the accused was self-represented. There is nothing in the language of s. 163 of the *Motor Vehicle Act* or the charging document that would alert the accused of the specific manner of stunt driving he was charged with. By concluding the included offence of speeding "must be based on an offence included in the wording of the charge" the trial judge correctly determined the respondent did not have sufficient notice to make his legal jeopardy "readily ascertainable" as set out in *G R*.

[28] The appellant further submits the lesser offence of speeding falls within the second category of s. 662 namely; offences described in the enactment creating the offence charged. The appellant quoted the following annotation to s. 662 as set out in the *Criminal Code*.

> To come within the words "as described in the enactment creating it" the lesser offence must be included in the offence charged as described in the enactment, albeit not in all the subsections and it is sufficient if the other offence is included in the enactment creating it. Thus on a charge that the accused "did commit robbery" common assault is an included offence since it is a lesser offence in at least one, albeit not all, the descriptions of the offence of robbery under s. 343: *R. v. Luckett*, [1980] 1 S.C.R. 1140.

[29] The Crown submits the essential elements of speeding pursuant to s. 106A of the MVA are found within the definition of stunt driving as defined in s 3(f) of the *Regulations*: it is impossible to stunt drive at 50 km/h or more over the speed limit without also committing the offence of speeding. The Crown relies on authorities from Ontario, decided under similar legislation: the Ontario *Highway Traffic Act* creates an offence of stunt driving, which is further defined by regulation to include driving at 50 km/h or more over the speed limited. These provisions were considered in *R v Stevens*, 2010 ONCJ 348, and *R v Raham*, 2010 ONCA 206. However, it appears that in those cases the charges referenced the specific definitions. In *Stevens*, the accused was "charged with performing a 'stunt' under subsection 172 (1) of the HTA, as defined by section 3, paragraph 7 of Ont. Reg. 455/07…" In *Raham*, the Court of Appeal noted that the respondent had been charged under the definition of stunt driving found in para. 7 of s. 3. That provision defines stunt driving as including "[d] driving a motor vehicle at a rate of speed that is 50 kilometres per hour or more over the speed limit". Both these cases can be distinguished on the basis that the regulations defining the offence were cited in the charges.

[30] In the present case the offence of stunt driving is created in one enactment (s. 163 of the MVA) but described in another (s. 3)(f) of the *Regulations*. Section

7(1)(e) *Interpretation Act, RSNS, 1989, C235* provides that the word enactment means " an Act or a regulation or any portion of an Act or regulation…". In my view it does not follow that the regulation which defines and describes the offence is, of itself, part of the enactment that creates the offence.

[31] If either of the charging document or s. 163 of the MVA had directed the accused to the *Regulations*, this would be sufficient notice of his legal jeopardy. Where an offence is particularized by a regulation, it appears that even a general reference to the regulations will be sufficient to identify the relevant offence. In *R. vs. Nowtash* 2012 B.C.S.C. 1593 an Information was laid under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, by which the accused was charged with failing to report the exportation of currency "in accordance with the regulations". The appeal court held that the information was good. It noted the words "in accordance with the regulations" tracked the statutory language and that it was unnecessary to identify the specific regulation.

[32] In the present case, the Information did not make direct reference to the regulations; it did not site s. 163 B of the MVA, which includes an authorization for defining "stunt" by regulation nor did the information specify that the stunt was

allegedly performed by driving 50km/h or more over the speed limit. Absent that degree of specificity, the respondent's jeopardy was not readily ascertainable.

[33] Accordingly, the appeal is dismissed.

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Justice N. M. Scaravelli