SUPREME COURT OF NOVA SCOTIA

Citation: *Cape Breton (Regional Municipality) v. Morrison*, 2017 NSSC 347

Date: 20170118
Docket: SYD No. 452225
Registry: Sydney

Between:

Cape Breton Regional Municipality

Appellant

v.

Angie Morrison

Respondent

Judge:	The Honourable Justice Patrick J. Murray
Heard:	October 12, 2016, in Sydney, Nova Scotia
Decision:	January 18, 2017
Counsel:	Sean MacDonald, for the Appellant, CBRM Tyler MacLennan, for the Respondent, Angie Morrison

By the Court:

[1] This is an appeal from the decision of Adjudicator, Robert Crosby, QC, whereby he granted a Defence motion for a directed verdict. The verdict resulted in the charge against the Respondent, Angie Morrison, being dismissed.

[2] Ms. Morrison (also referred to as the Accused) was charged with failing to stop at a stop sign, contrary to section 133(1) of the *Motor Vehicle Act* of Nova Scotia, R.S.N.S. 1989, c. 293. The stop sign was located in a "two way stop" intersection, in North Sydney. A collision occurred involving an ambulance and a taxicab.

[3] The cab driver gave evidence at trial as did his passenger. Neither the driver or the passenger in the ambulance gave evidence. Instead, the Crown called two police officers. Neither of the officers witnessed the accident.

[4] A summary of the facts as contained in the Appellant's Factum is as follows:

> 1. On October 5, 2015, the Respondent was involved in a collision resulting in the following charge: failing to stop at a stop sign pursuant to section 133(1) of the *Motor Vehicle Act*, R.S.N.S. 1989, c. 293.
>
> 2. The Appellant appeals from the decision given on May 3rd, 2016 by His Honour Mr. Robert Crosby, QC, an Adjudicator of the Provincial Court of Nova Scotia. The decision appealed from was a directed verdict dismissing the charge against the Respondent.

[5] There three (3) grounds set out in the Notice of Appeal are as follows:

> 1. The learned adjudicator committed an error of law by providing a directed verdict to the Respondent on a ground not put forward by the Respondent;
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> 2. The learned adjudicator committed an error of law by failing to provide the Appellant with an opportunity to re-open its case to address the issue raised by the learned adjudicator; and
>
> 3. The learned adjudicator committed an error of law by failing to provide any or alternatively, proper, consideration to relevant evidence.

Background

[6] At the conclusion of the Crown's case, the Defence moved for a directed verdict, stating that the Crown had not proven it's case. The Defence argument in summary form is as follows:

- S. 133 of the Motor Vehicle Act does not apply in the case of ambulances responding to an emergency, as long as the driver sounds an audible signal and drives with due regard for safety;
- There was no evidence at all that the driver went through a stop sign;
- The officers did not witness the driver going through a stop sign nor were they in a position to testify that she did;
- As a result there was no evidence to support a finding of guilt for the charge laid under s. 133(1);
- Even if there was some evidence (such as the computer data, if the Court were prepared to accept it) there was no evidence that the driver didn't drive her vehicle with due regard for the safety of all persons using the highway.

[7] The Crown argued in response that the motion should be dismissed. The Crown argument in summary form is as follows:

- The driver of the taxi cab had no duty to pull over to the side of the road, as stated by the Defence, as he heard the siren, but then it stopped;
- There is a limited exception for drivers engaged in emergency vehicles, but there is a limit to it, and they must have due regard to the circumstances;
- The chart or printout (from EHS) shows a flat line with respect to speed. There's no evidence of a slow down. The evidence is clear they had a stop sign. Now such effort was made, until seconds before the collision;
- There was clear evidence of a building on the corner of the intersection that blocked the view from both directions and this should have in the circumstances caused the Defendant to slow down to ensure no one was coming from that direction.

[8] The matter was adjourned for decision on an evidentiary point, and for decision on the motion for directed verdict.

[9] When the matter resumed on May 3, 2016 the Adjudicator asked counsel to briefly summarize "where they were" in terms of when they last adjourned.

[10] Both Crown and Defence confirmed that the Adjudicator had reserved decision on the admissibility of a report sought to be tendered by the Crown.

[11] With this report the Crown sought to establish through electronic information, that the vehicle failed to obey the stop sign. The report was to include information on the various speeds of the vehicle when it was being driven.

[12] The Adjudicator ruled the document admissible, but stated he would determine what weight he would accord to it. He later ruled he was not prepared to accept the report for the proof sought by the Crown. (page 78, line 16 of the transcript)

[13] Returning to his decision on the directed verdict motion, the Adjudicator raised with counsel, the issue of whether the identity of the Defendant as the driver had been established in evidence.

[14] The Adjudicator addressed counsel as follows:

> MR. ADJUDICATOR: All right. …With respect to the motion for a directed verdict I will give the Crown an opportunity to address the issue of identification on the driver. When I reviewed my notes, um it's not clear from my notes, but I'll stress those are my notes. I didn't go back and listen. Do you recall anything specific in the evidence that would identify the accused as actually directed ah… identify the accused as the driver of the ambulance? (page 76)

[15] The Crown responded by stating:

> MR. MacDONALD: Unfortunately, I have the same difficulty where it was some time ago and there's no record. But if I do recall correctly, I believe the evidence of Constable Hall was the he served the ticket on Mrs. Morrison. And through his ah, investigation he was satisfied that she was the driver of the ambulance. The evidence of the driver of the taxi and his passenger, I think you're fair in your assessment that I don't, I don't think their evidence touched on that point. But I do believe the evidence of Constable Hall addressed that issue. And again, that's if I recall correctly. (page 77)

[16] The Defence submitted by stating:

> MR. MacPHEE: Well, clearly Constable Hall wasn't present following the accident. I think he, it was pretty clear from his evidence that he didn't attend the scene until the following day. It was assigned to him by, I think, Officer Farrell, Sergeant Farrell. Anything Constable Hall may have learned um, I would assume would have been, and he can't repeat what other people have told him, that would be hearsay, but ah, I don't recall any specific evidence, I don't think, either of the… As my friend's acknowledged I don't think either the driver or the passenger of the cab identified the driver. (page 77)
>
> MR. ADJUDICATOR: All right.
>
> MR. McPHEE: So, you're left with whether there is sufficient evidence to identity the driver of the vehicle. I think there are other issues, obviously, we're raised in our motion for a directed verdict ah… (page 78)

[17] The Adjudicator then gave his decision dismissing the charge by granting the directed verdict. As the decision is brief, I will summarize it in its entirety:

> For my purposes here um, I have a motion before me for a directed verdict essentially saying that the Crown has not raised a prima facie case.
>
> There are many other issues um, to be dealt with or that would be dealt with, with respect to Mr. McPhee's comments with respect to section 133, subsection (4) and I appreciate that there are other ramifications that will flow from this, this case.
>
> However, there is insufficient evidence to prove beyond a reasonable doubt that the accused was operating the vehicle at the time. Therefore a conviction under section 133(1) cannot be supported and the matter is dismissed. Thank you. (page 79)

Standard of Review

[18] The issue I must decide is whether the Adjudicator erred in granting the motion for a directed verdict. The error alleged is one of law, and therefore the standard of review that has been agreed upon is one of correctness. It is not a deferential standard.

Ground 1 – Ground not put forward by Respondent

[19] The Appellant submits the Adjudicator erred by granting the motion on a ground not argued by the Respondent, stating it was the Adjudicator himself who raised the identity issue.

[20] The Appellant says it was not proper for the Adjudicator to find that the Crown did not establish identity because the Defence did not argue this on their motion. As a result the Appellant is arguing that the Adjudicator erred.

[21] I have carefully considered this ground of appeal and find that it is without merit.

[22] Whether it was the defence at trial who raised the issue or whether the issue was raised by the court, does not change or alter the Adjudicator's role, which was to base his decision on the evidence before him.

[23] Regardless of whether the Defence argued the issue, the Crown's burden remained the same. That is, to prove the essential elements of the offence.

[24] In addition whether the issue of identity was raised by the Crown or Defence, the test to be applied by the Adjudicator remains unchanged. It is the same test whether or not the Defence raises it in argument.

[25] That said it is at least arguable that the Defence did raise the issue of identity, when the Crown had completed or closed its case.

[26] I refer to the following submission by Defence counsel at trial:

> MR. McPHEE: … Well, first of all, before we even get into the second part of this, of this clause, there is absolutely no evidence before the court here tonight that the driver of the ambulance, Ms. Morrison, that she went through a stop sign. No evidence at all. (page 68)
>
> …
>
> But, even if that is the case, and even if you were to accept that, that proposition, there is no evidence that this driver, this ambulance driver didn't drive her vehicle with due regard for the safety of all persons using the highway. There's no evidence of that at all. (page 69)

[27] While the Defence argument was mainly that it had not been proven the driver went through the stop sign, one may discern from it that identity of the driver ("this driver") may also be an issue. It obviously "twigged" with the Adjudicator when he reviewed the matter, as evident by the his question to counsel.

[28] Without belaboring the matter, it should not have come as a total surprise to counsel that the court might have this concern on the evidence.

[29] The decision on the directed verdict motion came shortly after submissions and resulted in the trial being shut down quickly. It is apparent the Crown was taken back with the granting of the motion and the abrupt ending to the trial.

[30] The Crown argues it should have been given an opportunity to "re-open" their case. In that sense, Grounds 1 and 2 of this appeal overlap.

[31] I confirm for the above reasons that Ground 1 is dismissed. I have been provided with no legal authority that would preclude the trier of fact from making a finding based on the evidence before them.

[32] I turn now to Ground 2.

Ground 2 – No opportunity for Crown to re-open its case

[33] The second ground of appeal is whether the Adjudicator erred by failing to provide the Appellant with an opportunity to re-open its case to address the issue of identity raised by the Adjudicator.

[34] The crux of the Appellant's argument is that the Crown should have been given such an opportunity. The Appellant submits the decision came quickly, (within minutes) and was unexpected.

[35] Referring to ***R v. Dill***, 2005 ABQB 49 (CanLII), the Appellant argues the Defence would not have had to meet a different case but the same case, if the Crown had been permitted to re-open. The Crown says its case was always premised on the Accused being the driver.

[36] The Crown further argues on this appeal that the fundamental principle, as referred to in ***R v. P (M.B.)***, 1994 CanLII 125 (SCC), is based on prejudice to the Accused. The Appellant submits here, that real prejudice is not whether the

Accused will continue to face a motion for non suit. (***R v. Smith***, 2011 SKQB 324 (CanLII))

[37] The Appellant submits that a mere technicality, omission or inadvertence by the Crown should not be permitted to hamper the administration of justice. In this case, the Appellant argues that the Adjudicator focused too narrowly on the inadvertence of the Crown.

[38] The Crown argues the critical issue on the directed verdict motion was whether the Accused stopped at the stop sign. Instead of focussing on that issue, the Appellant says the Adjudicator went in a different direction. He focused on the narrow issue of identity, raised exclusively by the Adjudicator and not put forward by the Respondent.

[39] By doing this, the Appellant submits the Adjudicator erred.

[40] The Respondent submits no request was made, formal or informal, by the Crown to re-open its case. They say the time to have done so would have been before the Adjudicator made his decision on the directed verdict.

[41] Because no formal request was made by the Crown, the Adjudicator was not required, nor did he give consideration to such a request.

[42] The Respondent argues that had such a request been made, it would have been opposed on the basis that the Appellant would surely have "filled it's holes".

[43] In addition, the Respondent submits that this was more than a mere technicality. Rather, the identity of the driver was a critical part of the Crown's case.

[44] I have given serious consideration to this ground, and this includes the Appellant's concern with the "quickness" of things, from the point of view of trial fairness.

[45] While I believe this concern holds some merit, I find the Adjudicator would have been acting out of the norm to have offered or asked the Crown whether it wished to make a motion to re-open its case.

[46] None of the cases referred to by the Appellant provide clear authority that it is an error in law for a trial judge not to provide an opportunity to the Crown to re-open its case where no such opportunity is sought by the party seeking to re-open.

[47] In the cases relied upon by the Appellant, including ***R v. G (S.G.)***, [1997] 2 SCR 716; ***R v. McKenna***, (1956) 40 Cr. App. R. 65; ***R v. Gowling***, 2012 ABPC 38; and ***R v. Huluszkiw***, [1963] 1 O.R. 157, the Crown in each of these cases made application to re-open its case.

[48] It is important to consider that the deciding factor in such applications is prejudice. Without an application, the court is unaware of the evidence the Crown intends to "re-call", so as to assess whether the motion should be granted.

[49] It is not apparent that placing the onus on the court to initiate such a motion is in keeping with the administration of justice.

[50] The cases provided by the Appellant illustrate that the trial court has complete discretion, that will not be interfered with unless an injustice has resulted.

[51] While the Crown feels an injustice has resulted here, I concur with the Respondent that this was more than a mere technicality. This was a driving offence, and proof of the identity of the driver is essential.

[52] Thus, even if a motion or application to re-open had been made, the granting of such a motion was by no means automatic. As exceptional as such applications are, it is rarer still that such an order would be granted without it being sought.

[53] The caselaw further illustrates the window of discretion to re-open begins to close as the trial proceeds through the first second and third stages, with emphasis on the protection of the Accused as the trial proceeds.

[54] I recognize that although the trial in question had just completed its first stage, that the administration of justice is very much a valid consideration.

[55] I further recognize that rules of procedure should not go as for as depriving the trier of fact of important evidence. There is however a burden of proof to be met. In criminal cases that burden is squarely on the Crown. In criminal cases any doubt should be resolved in favour of the Accused.

[56] Having considered this issue in its entirety, I find there was no error of law by the Adjudicator for the above reasons.

Ground 3 – Failing to consider or properly consider relevant evidence

[57] The third ground of appeal is whether the Adjudicator failed to provide any consideration or alternatively, proper consideration to relevant evidence.

[58] The Appellant submits there was sufficient evidence that would have warranted the dismissal of the directed verdict.

[59] The Appellant argues that there was circumstantial evidence, and that it was strong enough to lead to the inference that the identity of the Accused had been proven.

[60] The Respondent submits that such an inference does not reasonably follow from the evidence relied upon by the Appellant, which evidence is contained at pages 56 – 57 of the trial transcript.

[61] The Respondent states the only time her name was mentioned was in a question to Constable Hall, as to whether he issued a ticket to Ms. Morrison.

[62] The Respondent submits, that simply issuing a ticket in a person's name cannot satisfy the Appellant's evidentiary burden regarding identity.

[63] The Appellant in its response factum states that the Respondent is failing to consider the testimony of Constable Hall in regard to Laura MacLean, whom he identified as the passenger in the ambulance.

[64] The Appellant refers to this evidence at page 56 and 57 as follows:

> MR. MacDONALD: So how many witnesses did you speak to?
>
> A: I spoke to two.
>
> Q: Okay. and who are they?
>
> A: Sheila Karst and Laura MacLean.
>
> Q: Laura MacLean. And who is Laura MacLean?
>
> A: She is the passenger, the paramedic in the ambulance.
>
> Q: Okay. did you ever speak to the driver of the…
>
> A: I did.
>
> Q: …the ambulance?

A: I did.

Q: Okay. When did you speak with her?

A: I spoke with her um, on the 29th of October.

Q: Okay.

A: At the north division office.

Q: Just as a matter of clarification as well, was it you who issued the ticket that brings…

A: It was.

Q: …us here tonight?

A: Yes.

Q: to Ms. Morrison?

A: Yes.

Q: When did you that?

A: When did I do that?

Q: Yeah.

A: That day, the 29th.

Q: The 29th. Okay. and after the 29th what role did you play in the investigation of this matter that brings us here this evening?

A: After the 29th?

Q: After the 29th.

A: That was it once the charge was laid.

[65] The Appellant submits that it can reasonably be inferred that by speaking to and identifying the passenger, Constable Hall was able to make a "clear determination" as to who was in fact, the driver.

[66] The crux of the issue in deciding this appeal lies in the treatment given to the evidence by the Adjudicator, in his decision at trial. It is alleged by the Appellant that he failed to properly consider the evidence or consider it at all.

[67] Referring to ***R v. O' Kane***, 2012 MBCA 82 (CanLII), the Appellant refers to paragraph 44 on the issue of identity. In effect the Appellant acknowledges the Crown must prove at trial not only that an offence has been committed but that the

Accused is the one who committed it. It further acknowledged that this element, known as identity, can be proven by either direct or circumstantial evidence, or by a combination of the two. (***O'Kane*** at paragraph 44)

[68] As evidenced by the decision in ***R v. Calnen***, 2015 NSSC 331 (CanLII), whether or not to grant a motion on a directed verdict is a question of law. In ***Calnen***, Justice Chipman stated at paragraph 9:

> The question to be addressed is whether there is sufficient evidence such that a reasonable jury properly instructed could find the accused guilty. Subject to a limited exception in relation to circumstantial evidence, the trial judge is not to weigh or assess the evidence **beyond satisfying himself or herself that there is admissible evidence adduced by the Crown in relation to each element of the offence.** (Emphasis added)

[69] In ***Calnen*** the court conducted a limited weighing of the circumstantial evidence in determining whether there was sufficient evidence on all the elements of the offence, which in that case was second degree murder.

[70] In the present case it seems the Adjudicator similarly turned his mind to whether there was sufficient evidence to establish or make out the offence in question.

[71] In determining whether he made his determination properly, I have reviewed the authorities in *Criminal Pleadings and Practice In Canada, E. G.* Ewaschuk (2nd Ed. at 16:4035). Where the evidence is totally circumstantial, and assuming the circumstantial evidence is found to be proven, the issue is whether it would be reasonable for a jury to infer guilt. (***R v. Charemski*** [1998] 1 S.C.R. 679).

[72] In the present case there is no jury but the trier of fact must apply the same test.

[73] What had been proven here is that the officer spoke to a person he understood to be the driver and gave that person a ticket. The officer did not witness her driving and there is no evidence that she acknowledged or admitted to being the driver.

[74] There is evidence that the officer spoke to the passenger but that evidence is no stronger than that as to who the driver was, except the last name of the driver as alleged, was mentioned by Constable Hall.

[75] The Constable satisfied himself that the Accused was the driver but failed to satisfy the Court that she was the driver of the vehicle.

[76] The Adjudicator concluded this was not sufficient evidence to infer guilt.

[77] There are essentially two difficulties with the decision of the Adjudicator. One is, he did not expressly state the test as set out in ***United States of America v. Sheppard***, [1977] 2 R.C.S. 1067, for a directed verdict. The second is, that he did not expressly conduct a limited weighting of the evidence in order to determine whether it was reasonable for a jury to draw the inference the Crown seeks to have drawn.

[78] With respect to the test not having been properly stated, this is acknowledged by the Respondent. The Respondent states however, that the test was properly applied.

[79] In ***Sheppard*** the court held there must clearly be some evidence for every essential element of the crime.

[80] In ***R v. Dennis***, 2012 ONSC 1878 (CanLII), relied upon the Applicant, the trial judge clearly applied the wrong test for a directed verdict.

[81] In the present case, it is not so clear that the Adjudicator applied or even stated the wrong test. I say this for the following reasons.

[82] First, a trial judge is presumed to know the law and therefore, the fact that the test was not stated is not of itself an error.

[83] Secondly, what the Adjudicator stated in his decision in terms of the test, is whether the Crown had established a *"prima facie"* case.

[84] In Black's Law Dictionary (6th Ed.), a *prima facie* case is described as "a case which consists of *sufficient evidence to get the Plaintiff past a motion for directed verdict* on a jury case, or motion to dismiss in a non jury case".

[85] While the reference to "Plaintiff" would not apply here, as that is in the civil context, the analogy would still apply in the criminal context, as it pertains proving the essential elements of the offence.

[86] In the present case there was some evidence of identity, but whether it was sufficient for a jury properly instructed to infer guilt was in my respectful view,

was not entirely clear. It certainly was not clear to the Adjudicator, whom I find in his reasons turned his mind as to whether each element of the offence had been proven.

[87] I concur with the Respondent that the evidence before the Adjudicator does not lend itself to a strong inference that the Appellant was the driver. While there was some evidence, it was tentative.

[88] Simply put, can it be said to be a clear error of law if the trial judge turned his mind to whether sufficient evidence existed to get the Crown past a motion for directed verdict.

[89] According to the authorities such a ***R. v. Arcuri***, 2001 SCC 54 (CanLII), the answer would be "no", because there are elements upon which the Crown has not advanced direct evidence, and those elements may not be reasonably inferred from the circumstantial evidence.

[90] I conclude that this is the case here. I therefore find, as brief as the Adjudicator's reasons were, that he committed no error of law. I make this finding considering the record in its totality.

[91] I wish to acknowledge that the Appellant's argument as to trial fairness was not without merit. Considering the whole of the evidence however, the Crown neither requested further time to respond nor an opportunity to re-open its case.

[92] In these circumstances to suggest the Adjudicator should have proceeded otherwise, presents or begins to present a degree of unfairness to the Accused.

[93] In the result the Appeal is dismissed.

[94] May I say in conclusion that the submissions of counsel, both oral and written were appreciated and helpful to the Court.

[95] Order accordingly.

Murray, J