SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Power, 2013 NSSC 257

Date: 20130703
Docket: Hfx 406276
Registry: Halifax

Between:

Christopher Andrew Power

Appellant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice Glen G. McDougall

Heard: July 3, 2013, in Halifax, Nova Scotia

Written Decision: August 14, 2013

Counsel: Donald Pressé, for the appellant
Joshua J. Judah, for the respondent

By the Court:

[1] This is an appeal from a conviction for failing to stop at a STOP sign pursuant to s. 133(1) of the *Motor Vehicle Act*, R.S.N.S., 1989, c. 293 (as amended).

ISSUES

[2] Counsel for the appellant Christopher Andrew Power submits that the issues in this appeal are as follows:

> (1) The trial judge erred in law by making findings of fact not supported by the evidence and/or unreasonable findings of fact in finding that the Crown had proved its case beyond a reasonable doubt;

> (2) The Trial Judge erred in law in making the finding of fact of identification based on the credibility of the witness as opposed to the witness' ability and opportunity to observe and accurately identify the driver of the vehicle;
>
> (3) The Trial Judge erred in law by placing an onus on the Appellant to prove his innocence thereby reversing the burden of proof;

[3] The Court acknowledges having received and read the facta of counsel for the appellant and the respondent. I have also heard the oral submissions of counsel for the appellant and crown counsel. I appreciate counsels' efforts in filing thorough and well-researched briefs as well as the quality of their oral submissions.

[4] I need not recite in detail the facts of this case. Both counsel have provided an accurate summary of the evidence. Furthermore, I have read the transcript of the evidence presented at trial and I am satisfied that the facts are not really in dispute save for what has been termed as a misapprehension of the evidence or a conclusion reached by the Learned Adjudicator that is not supported by the evidence of which I will speak more of later.

STANDARD OF REVIEW:

[5] The proper standard of review in appeals of lower court decisions was summarized by Saunders, J.A., in the case of **Wilmot** v. **Ulnooweg Development Group Inc.**, 2007 N.S.C.A. 49 (N.S.C.A.). At para. 24, Justice Saunders said:

> [24] Deciding the appropriate standard of review depends on how one characterizes the particular question that is under scrutiny.

He goes not to say at para. 25:

> [25] An appeal is not a second trial. Our powers at the appellate level are constrained. On questions of law the judge must be right. Such questions are tested on a standard of correctness. Matters of fact, or inferences drawn from facts are owed a high degree of deference and will not be disturbed unless they resulted from a palpable and overriding error. Matters said to be mixed questions of fact and law are also tested using the palpable and overriding error standard, unless the mistake can be easily linked to a particular and extricable legal principle, which will then attract a correctness standard. Where, however, the legal principle is not readily extricable, the question of mixed law and fact will be reviewable on the standard of palpable and overriding error. See for example *Housen v. Nikolaisen et al.* [2002] 2

> S.C.R. 235; *H.L. v. Canada (Attorney General),* [2005] 1 S.C.R. 401, [2005] S.C.J. No. 24; *Campbell-MacIsaac v. Deveaux and Lombard*, [2004] N.S.J. No. 250, 2004 NSCA 87; *McPhee v. Gwynne-Timothy* [2005] N.S.J. No. 170, 2005 NSCA 80; *Flynn v. Halifax (Regional Municipality)* [2005] N.S.J. No. 175, 2005 NSCA 81; and *Secunda Marine Services Ltd. v. Liberty Mutual Insurance Company,* [2006] N.S.J. No. 266, 2006 NSCA 82.

[6] With respect to the standard of review in deciding whether a verdict is unreasonable the Supreme Court of Canada said this, in **R.** v. **P. (R.)**, 2012 SCC 22, at paras 9 and 10:

> [9] To decide whether a verdict is unreasonable, an appellate court must, as this Court held in *R. v. Yebes*, [1987] 2 S.C.R. 168, and *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 36, determine whether the verdict is one that a properly instructed jury or a judge could reasonably have rendered. The appellate court may also find a verdict unreasonable if the trial judge has drawn an inference or made a finding of fact essential to the verdict that (1) is plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding, or (2) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge (*R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3, at paras. 4, 16 and 19-21; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190).
>
> [10] Whereas the question whether a verdict is reasonable is one of law, whether a witness is credible is a question of fact. A court of appeal that reviews a trial court's assessments of credibility in order to determine, for example, whether the verdict is reasonable cannot interfere with those assessments unless it is established that they "cannot be supported on any reasonable view of the evidence" (*R. v. Burke*, [1996] 1 S.C.R. 474, at para. 7).

[7] Earlier I mentioned that I would have more to say regarding the Learned Adjudicator's misapprehension of the evidence. In large part she convicted the appellant based on the credibility of the off-duty police officer who first spotted the appellant's vehicle as it failed to stop at a STOP sign as it turned right on to the Beaverbank Road in Lower Sackville.

[8] One of the reasons why she accepted Cst. Larkin's testimony is that he had had previous encounters with the appellant. According to the Learned Adjudicator's decision she found that there had been three prior occasions when the officer had the chance to either observe Mr. Power or to have a face-to-face encounter.

[9] This is clearly in error. Cst. Larkin testified that he had only seen the appellant twice before the evening that he said he saw Mr. Power behind the wheel of the vehicle that had failed to stop at the STOP sign. At least he could recall two specific times.

[10] There was no face-to-face encounter between Cst. Larkin and Mr. Power prior to the events that led to the charge that is now before this Court on appeal.

[11] This misapprehension of the evidence combined with Cst. Larkin's ability to recall, for example, whether the side windows of Mr. Power's truck were tinted or not or the lighting conditions at the time he briefly glanced in the direction of the appellant's vehicle as it turned right off the Beaverbank Road or the prevailing weather conditions that evening or any facial features or any identifying characteristics of the accused, all question the reliability of the eye witness identification that the Learned Adjudicator relied on to convict the appellant.

[12] The Learned Adjudicator based her decision on credibility, not reliability. She seems to have conflated the two. This exposes the major weakness in relying on eye-witness testimony to identify an accused party.

[13] It is not a question of credibility, for most witnesses who testify as to the identity of an accused really believe they are able to do so. Rather it is a question of reliability. Without some evidence pointing out peculiar and somewhat unique characteristics of the individual being identified or evidence that a witness actually knows the individual from prior experience not simply a few chance opportunities to see the person, the Court should be very reluctant to convict based upon the rather weak eye witness testimony such as was offered in this particular case.

[14] The police officer could not offer any real identifying features that would point to the appellant as the driver of the vehicle that evening. To convict on such scant evidence was an error of law. Furthermore, the Learned Adjudicator, in my opinion shifted the burden of proof by stating, in her decision, that no evidence was presented to offer an alternate theory.

[15] It is clear from the reasons given that her expectations were that if the appellant had not been driving the vehicle he should have told the officer this when he was

served with the summary offence ticket. This flies in the face of an accused person's right to silence.

[16] Indeed that right is as fundamental to our system of criminal justice as the right of all persons charged with an offence to be presumed innocent. It is protected by the *Canadian Charter of Rights and Freedoms*. It is for the prosecution to prove that an individual charged with an offence is guilty beyond a reasonable doubt. An accused person does not have to prove his or her innocence. It is enough for an accused person to simply raise a reasonable doubt in order to avoid a finding of guilty.

[17] I also note that the Learned Adjudicator began to deliver her oral decision immediately after the close of the defence's case. She had to be reminded by counsel that they were entitled to sum up before a decision was rendered. Perhaps this was simply an oversight on her part or an example of her exuberance to render a decision. I am satisfied that it was simply an oversight and nothing more.

[18] In any event, counsel for the defence was right to interrupt her to ask for the opportunity to offer closing submissions which the adjudicator granted.

FINAL DISPOSITION ON APPEAL:

[19] After carefully reviewing the evidence presented at trial and the reasons offered in support of the decision, I conclude that the Learned Adjudicator erred in law by making findings of fact not supported by the evidence and/or made unreasonable findings of fact in concluding that the Crown had proved the case against the appellant beyond a reasonable doubt.

[20] I also find that the Learned Adjudicator erred in law in basing her decision on eye-witness identification that was based solely on her assessment of the credibility of the one Crown witness who testified without considering the reliability of that identification evidence.

[21] The Learned Adjudicator did not even mention reliability in her decision and there is nothing in her reasons to show that she had even embarked on such an exercise. She had a duty to do so. [Reference the S.C.C. decision in **R.** v. **Reitsma** [1998] 1 S.C.R. 769, at paras. 38, 40 and 41.]

[22] Finally, what appears, on-the-record, to be a shifting of the burden to the accused to prove his innocence is also an error of law.

[23] When everything is considered the appeal is granted and a verdict of acquittal is substituted for the initial verdict of guilty.

McDougall, J.