



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

Citation: *R. v. Pottle*, 2016 NLCA 22

Date: May 12, 2016

Docket: 201501H0093

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

AND:

STANLEY POTTLE

RESPONDENT

Coram: Rowe, Harrington and Hoegg JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador
St. John's

Appeal Heard: January 19, 2016 and April 8, 2016

Judgment Rendered: May 12, 2016

Reasons for Judgment by Rowe, J.A.

Concurred in by Harrington and Hoegg JJ.A.

Counsel for the Appellant: Frances Knickle Q.C.

Counsel for the Respondent: Jason Edwards

Rowe J.A.:

FACTS

[1] This is an appeal against conviction for three charges of driving while prohibited, contrary to s. 259 of the *Criminal Code*. In the alternative, it is an appeal from sentence for the same charges.

[2] On May 2, 2013, Stanley Pottle was convicted of a breach of s. 259 of the *Criminal Code*. The offence was alleged to have occurred on March 22, 2013. He was sentenced to 30 days in jail and given a one-year driving prohibition.

[3] On March 12, 2014, Mr. Pottle was convicted of a breach of s. 259 of the *Criminal Code* for breaching the foregoing s. 259 driving prohibition. He was sentenced to 29 days in jail and a further three-year driving prohibition.

[4] On March 4, 2015, Mr. Pottle was convicted of contravening s. 259 of the *Criminal Code* by breaching the s. 259 driving prohibition dated March 12, 2014. He was sentenced to 60 days in jail, a 10-year driving prohibition and one year probation.

[5] The Crown has since become aware that Mr. Pottle was improperly convicted on May 2, 2013 of driving while prohibited under s. 259 of the *Criminal Code*. The Crown states that on May 2, 2013 there was no legal basis on which to charge Mr. Pottle with a contravention of s. 259. At the time the offence was alleged to have occurred, Mr. Pottle was not prohibited from driving, as s. 259 has been interpreted.

[6] The Crown states the improper conviction on May 2, 2013 led to subsequent s. 259 driving prohibitions and convictions, resulting in unfairness to Mr. Pottle.

[7] The Crown indicated that it did not become aware of this situation until after the limitation period for the filing of a notice of appeal had expired. Accordingly, the Crown sought an extension of time to appeal the convictions. This Court granted the extension.

[8] The Court indicated to counsel for the Crown and for Mr. Pottle that it wished to receive argument concerning the rule against collateral attack

with respect to the second and third convictions. The matter was adjourned to permit counsel to prepare such argument.

[9] At the subsequent hearing, the Court reserved its decision with respect to the appeal against convictions. As well, the Court advised counsel that, if either wished to, leave was granted to appeal the sentences for the second and third charges.

[10] Subsequently, the Crown appealed the sentences for the second and third charges. A further hearing was held concerning the appeal against the sentences. The Court reserved its decision on the sentences.

ISSUES

[11] The issues are:

(1) should the conviction for the first charge be set aside on the basis that Mr. Pottle was not prohibited from driving (within the meaning of s. 259 of the *Criminal Code*);

(2) should the convictions for the second and third charges be set aside or would that be contrary to the rule against collateral attack;

(3) if the conviction for the first charge is set aside, but the convictions for the second and third charges are not set aside, should the sentences for the second and third charges be varied?

ANALYSIS

(1) Should the conviction for the first charge be set aside?

[12] The Crown concedes that Mr. Pottle was not properly convicted on the first charge (in May 2013), as he was not prohibited from driving within the meaning of s. 259 of the *Criminal Code*. Accordingly, that conviction is set aside.

(2) Should the second and third convictions be set aside?

[13] The Crown argues (and counsel for Mr. Pottle agrees) that it would be unfair for Mr. Pottle's convictions for the second and third charges to stand, given that his conviction and the resulting prohibition from driving arising from the first charge led to the second charge and that his conviction and the resulting prohibition from driving arising from the second charge led to the

third charge. However, other than a general statement that the convictions for second and third charges were unfair, counsel had no good answer to the rule against collateral attack.

[14] The rule has several components, one of which is that an order made by a court with the jurisdiction to do so is binding until set aside. See *R. v. Wilson*, [1983] 2 S.C.R. 594 at 604, per McIntyre J. and *R. v. Pastro* (1998), 42 C.C.C. (3d) 485 (Sask. C.A.) at 498-9 per Bayda C.J.

[15] In this case, Mr. Pottle was convicted for the first charge in May 2013. Pursuant to s. 259, he was prohibited from driving for one year.

[16] Mr. Pottle was convicted for the second offence in March 2014, less than one year after the first conviction. Thus, at the time of the second charge, he was prohibited from driving by virtue of his conviction for the first charge. It does not matter that now we have set aside the first conviction, pursuant to which he was prohibited from driving for one year. That prohibition was valid at the time; Mr. Pottle breached it and, as such, he was properly convicted under s. 259 on the second charge.

[17] A parallel situation exists with respect to the second and third charges. The second conviction was in March 2014; Mr. Pottle was prohibited from driving for three years. He was convicted on the third charge a year later in March 2015.

[18] Applying the rule against collateral attack, the appeal against the second and third convictions is dismissed.

(3) Appeal Against Sentence

[19] While the rule against collateral attack requires this Court to affirm the second and third convictions, one can readily recognize the sense of unfairness to Mr. Pottle to which the Crown referred.

[20] As well, the mandatory minimum sentences under s. 259 are lesser when Mr. Pottle's conviction on the second charge, in effect, becomes a first offence and when his conviction on the third charge becomes, in effect, a second offence.

[21] In light of the foregoing and having regard to the submissions of counsel, we would vary the sentences to be the mandatory minimums set out in s. 259:

(a) the March 2014 (second charge, now first offence) conviction: one-year driving prohibition; and

(b) the March 2015 (third charge, now second offence) conviction: two-year driving prohibition.

[22] The one-year prohibition from the March 2014 conviction has expired; the two-year prohibition from the March 2015 conviction will expire in March 2017.

CONCLUSION

[23] The appeal against the May 2013 conviction is allowed and that conviction is set aside. The appeal against the March 2014 and the March 2015 convictions is dismissed and those convictions are affirmed.

[24] The sentences for the two remaining convictions are varied to become a one-year driving prohibition for the March 2014 conviction and a two-year driving prohibition for the March 2015 conviction.

M. H. Rowe J.A.

I Concur: _____

M. F. Harrington J.A.

I Concur: _____

L. R. Hoegg J.A.