

Date: 20140407
Docket: 13/24
Citation: *R. v. Bussey*, 2014 NLCA 18

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

BETWEEN:

DAVID BUSSEY

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: Welsh, Rowe and Hoegg JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 201201G1141

Appeal Heard: March 10, 2014
Judgment Rendered: April 7, 2014

Reasons for Judgment by Welsh J.A.
Concurred in by Rowe and Hoegg JJ.A.

Counsel for the Appellant: Robert E. Simmonds Q.C.
Counsel for the Respondent: Francis Knickle Q.C.

Welsh J.A.:

[1] David Bussey was found guilty of exceeding the speed limit in a construction zone contrary to section 110.1 of the *Highway Traffic Act*, RSNL 1990, c. H-3. His defence was that there were no signs indicating that he was driving in a construction zone. His appeal to the summary conviction appeal court was unsuccessful. He now seeks to appeal to this Court.

[2] The issue considered here arises from the trial judge's refusal to allow Mr. Bussey to reopen his case to recall a witness. Leave to appeal is required and is restricted to a question of law.

BACKGROUND

[3] A reduced speed limit is imposed under the *Highway Traffic Act* where a road is under construction and the area is identified as a construction zone by signs placed at the beginning and end of the zone. Mr. Bussey had entered onto the Ring Road, traveling west, via a ramp from Torbay Road on which he had been proceeding southbound. The ordinary speed limit on the relevant section of the Ring Road is 100 kilometres per hour; in a construction zone, unless otherwise posted, the limit would be 60 kilometres per hour. A police officer testified that Mr. Bussey had been traveling at 92 kilometres per hour.

[4] When the officer stopped Mr. Bussey and issued him a traffic ticket, Mr. Bussey indicated that he had not seen a construction zone sign. According to the police officer, the construction zone began to the east of the ramp used by Mr. Bussey and, therefore, at a point ahead of where Mr. Bussey entered onto the Ring Road. The officer testified that there was no construction actually taking place on the portion of the Ring Road on which Mr. Bussey traveled before accessing an off ramp. Of the two entrances located to the east of the ramp used by Mr. Bussey, one was the ramp permitting access to the Ring Road for vehicles traveling northbound on Torbay Road.

[5] Mr. Bussey testified that he was certain he had not seen a construction zone sign. When he and his colleague, Mr. Savoury, who had been a passenger in his car, arrived at their place of business, Mr. Bussey asked Mr. Savoury to retrace their route and take pictures of any signs. Mr. Savoury picked up a driver and took pictures from the passenger's seat. The

photographs were entered as an exhibit. None of the photographs show a construction zone sign. However, the police officer testified that there was a sign at the end of the access ramp used by Mr. Bussey.

[6] A factor that became relevant in the trial judge's assessment of the evidence is that Mr. Savoury and his driver approached the area to access the Ring Road by proceeding northbound on Torbay Road, the opposite direction from that of Mr. Bussey. Had Mr. Savoury's vehicle followed the correct approach to the Ring Road from that direction, he would have turned right using an access ramp that led under Torbay Road and entered the Ring Road to the east of the ramp used by Mr. Bussey. However, in his testimony, Mr. Savoury said his vehicle had turned left. If this had occurred, it would have resulted in the vehicle traveling on the access ramp provided for southbound traffic on Torbay Road, the ramp used by Mr. Bussey.

[7] After both the Crown and defence had closed their cases, during submissions by counsel, the trial judge asked counsel for Mr. Bussey for clarification of Mr. Savoury's evidence regarding which ramp had been used when the photographs were being taken. In response, counsel asked to recall Mr. Savoury. The trial judge refused that request, saying, "The opportunity for that has passed."

[8] Mr. Savoury's evidence on that point and the trial judge's query were critical to the finding in his oral decision that the offence had been proven. The summary conviction appeal judge dealt with the question of the trial judge's refusal to allow Mr. Savoury to be recalled with the following (2013 NLTD(G) 34, 334 Nfld. & P.E.I.R. 331):

[28] In this situation the defence were summing up, and the trial judge was asking for a clarification of some photos that were taken by Mr. Savoury. The judge in his discretion felt that at that point it would be improper to allow Mr. Simmonds to recall Mr. Savoury on a point he raised. It could be argued that this would be unfair to the Crown. The trial judge, based on what he had before him, did not feel it was appropriate. The trial judge did not err on this issue. It is not what another judge may do in the circumstances, it was [a] discretionary ruling which should not be interfered with on an appeal.

ISSUES

[9] At issue is whether the criteria have been satisfied for granting leave to appeal from the decision of the summary conviction appeal court. If so, the question is whether the summary conviction appeal judge erred in his

analysis of the trial judge's exercise of discretion in refusing to allow Mr. Bussey to reopen his case in order to recall a witness.

ANALYSIS

Leave to Appeal

[10] An appeal from the decision of a summary conviction appeal court dealing with an offence under the *Highway Traffic Act* is governed by section 839(1) of the *Criminal Code (Provincial Offences Act, SNL 1995, c. P-31.1, section 6)*. Pursuant to section 839(1), an appeal may be brought to this Court, with leave, "on any ground that involves a question of law alone".

[11] The test to be applied in determining whether leave should be granted is set out in *R. v. Newfoundland Recycling Ltd.*, 2009 NLCA 28, 284 Nfld. & P.E.I.R. 153:

[9] Thus, to obtain leave to appeal pursuant to s. 839(1):

(a) the appeal must "be taken on a ground that involves a question of law alone", and

(b) the ground(s) of appeal must be such that:

(i) either the ground of appeal has a "reasonable possibility of success", or

(ii) "the proposed question of law [has significance] to the administration of justice".

[12] I am satisfied that this appeal raises a question of law and that the appeal has a reasonable possibility of success. Regarding the question of law, deference to a discretionary decision of the trial judge is subject to the requirement that the discretion be exercised judicially. The summary conviction appeal judge failed to address or consider this requirement. That omission amounts to a failure to apply a relevant principle of law. Further, in the circumstances, the trial judge's abrupt dismissal of counsel's request to reopen his case to recall a witness is a basis on which to conclude that the appeal has a reasonable possibility of success.

[13] Accordingly, I would grant leave to appeal.

The Appeal

The Law

[14] The decision in *R. v. Hayward* (1993), 86 C.C.C. (3d) 193 (Ont. C.A.), provides a helpful test where, as here, the defence applies to reopen its case before a decision has been rendered. The test has three prongs which focus on ensuring that the defendant has the opportunity to exercise his right to make full answer and defence to the charge while ensuring fairness to both the defendant and the Crown. In summary, in determining whether to allow the defence to reopen its case:

- (1) The trial judge “should first be satisfied that the proposed evidence is relevant to a material issue in the case” (page 197);
- (2) If so, “the trial judge must consider the potential prejudice to the other party should he or she permit the reopening of the evidence” (page 198); and finally,
- (3) The trial judge “must also consider the effect of permitting a reopening of the evidence on the orderly and expeditious conduct of the trial” (page 198). This component must be considered in the context of ensuring the defendant’s right to make full answer and defence while taking account of fairness to both the defendant and the Crown.

[15] Failure by the trial judge to exercise his or her discretion judicially by considering these and any other relevant factors constitutes an error in law.

Application of the Law

[16] The question of whether to permit defence counsel to recall Mr. Savoury must be considered in context. The issue of which ramp Mr. Savoury used to access the Ring Road, and whether it was the same ramp as was used by Mr. Bussey, was raised by the trial judge, not by the Crown. Indeed, the issue was raised during submissions by counsel after both the Crown and defence had closed their cases. In addition, the nature of the judge’s question could not be construed as a matter of clarification of Mr. Savoury’s testimony. Rather, it was a matter of evidence for which only Mr. Savoury could provide an explanation. In the circumstances, it would have been inappropriate for defence counsel to give the trial judge the

clarification he sought. The issue having been raised by the trial judge, it is clear that the evidence was relevant to a material issue.

[17] Further, the issue was critical to the trial judge's finding that the offence was proven beyond a reasonable doubt. Having concluded that Mr. Savoury did not use the same ramp, the trial judge did not consider whether, having entered the Ring Road at a point to the east of the ramp used by Mr. Bussey, Mr. Savoury would, in any event, have seen and taken a photograph of the sign which the police officer testified was at the end of the ramp used by Mr. Bussey. Assuming Mr. Savoury took the ramp accessing the Ring Road to the east of the ramp used by Mr. Bussey, the trial judge did not consider why there was no sign on one ramp while there was a sign on the other ramp, both of which led, by different routes, into what the police officer testified was a construction area. Having refused to hear Mr. Savoury's explanatory evidence, in convicting Mr. Bussey, the trial judge drew conclusions about the placement of construction zone signs based on his determination that Mr. Savoury had not used the same ramp as Mr. Bussey. In so doing, he proceeded without giving due consideration to whether the evidence was sufficient to prove the offence beyond a reasonable doubt.

[18] Regarding the second component of the test, there was no indication that allowing the defence to reopen its case would have resulted in prejudice to the Crown. The summary conviction appeal judge's comment that to permit defence counsel to recall Mr. Savoury could arguably be unfair to the Crown is conjecture without foundation. A reading of the transcript reveals that the trial judge did not either put the question of prejudice to the Crown, or seek the Crown's submission on the defence request.

[19] As to a possible effect on the orderly and expeditious conduct of the trial, this was not a long trial. There is no indication that it would have been difficult to recall Mr. Savoury who had finished his testimony just minutes before. The question arose during counsels' submissions and before the trial judge rendered his decision finding Mr. Bussey guilty of the offence. There is no basis on which to conclude that a negative effect on the conduct of the trial would have resulted from allowing the defendant's counsel to recall Mr. Savoury.

[20] The conclusion follows that the summary conviction appeal judge erred in law when he failed to consider whether the trial judge had exercised

his discretion judicially when he refused to allow Mr. Bussey to reopen his case in order to recall Mr. Savoury to give explanatory evidence.

[21] In the circumstances, it cannot be determined how the explanatory evidence of Mr. Savoury may have affected the outcome of the trial. Since an acquittal is not the only possible verdict, a new trial is required.

DISPOSITION

[22] I would grant leave to appeal from the decision of the summary conviction appeal court. I would allow the appeal, quash the conviction and remit the matter for a new trial.

B. G. Welsh J.A.

I Concur: _____

M. H. Rowe J.A.

I Concur: _____

L. R. Hoegg J.A.