



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

Citation: *R. v. Smyth*, 2019 NLCA 73

Date: November 12, 2019

Docket Number: 201901H0035

BETWEEN:

JOSEPH SMYTH

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: Fry C.J.N.L., Hoegg and Goodridge JJ.A.

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

Appeal Heard: June 21, 2019

Judgment Rendered: November 12, 2019

Reasons for Judgment by: Hoegg J.A.

Concurred in by: Fry C.J.N.L. and Goodridge J.A.

Counsel for the Appellant: Jerome P. Kennedy Q.C.

Counsel for the Respondent: Arnold W. Hussey Q.C.

Hoegg J.A.:

INTRODUCTION

[1] The wilful obstruction of justice is a serious offence. It is an offence of specific intent, in that a conviction requires proof of a heightened *mens rea*. This means that an offender must not only have intended to carry out the actions leading to the charge, but he or she must also have intended to obstruct the course of justice by carrying out those actions.

[2] When a police officer swears that he or she has reasonable grounds to believe an offence has been committed knowing the offence has not been committed, the officer sets in motion a legal process requiring an innocent person to appear in court, muster a defence, and risk being wrongfully convicted. A police officer who does such a thing jeopardizes the integrity of the justice system by deliberately using it for an improper purpose, thereby wilfully obstructing justice. It is especially serious for a police officer to be convicted of wilfully obstructing justice, for the offence goes to the heart of police work and the trust society places in the police to carry out their duties according to law.

[3] In this case, Joseph Smyth, a constable with the Royal Newfoundland Constabulary, was convicted of obstructing justice for knowingly issuing a ticket to Sayed Husaini for which he had no reasonable grounds. Mr. Smyth had sworn that he had reasonable grounds to believe that Sayed Husaini breached a provision of the *Highway Traffic Act*, RSNL 1990, c. H-3, by driving through a red light. However, Mr. Husaini did not drive through a red light; he drove through a green light. At the same time Mr. Smyth issued three other tickets to Mr. Husaini alleging other breaches of the *Highway Traffic Act*.

[4] The incident giving rise to the issuance of the four tickets involved Mr. Husaini driving his orange motorcycle on May 12, 2017. Mr. Husaini had a dashcam recorder on his motorcycle which showed that he had driven through a green light. When Mr. Husaini received notice of the trial dates set for the four alleged *Highway Traffic Act* breaches, he brought the dashcam recording to the attention of the RNC authorities and all four tickets were withdrawn. Nevertheless, Mr. Husaini made a complaint about Mr. Smyth. The complaint was investigated, and ultimately Mr. Smyth was charged with wilfully obstructing justice for “issuing a summary offence ticket to Sayed Husaini knowing the offence alleged had not been committed.”

[5] Mr. Smyth was convicted of the offence after trial. He appeals his conviction, alleging that the Trial Judge erred in convicting him by:

1. failing to find that he had the specific intent to obstruct justice;
2. not properly considering his (Mr. Smyth's) testimony;
3. improperly using video evidence;
4. not properly considering the expert evidence of a treating psychologist; and
5. improperly restricting defence counsel's cross-examination of Mr. Husaini in breach of his (Mr. Smyth's) right to make full answer and defence.

Mr. Smyth also argues that the verdict is unreasonable and cannot be supported by the evidence within the meaning of section 686 of the *Criminal Code*.

[6] For the reasons that follow, I would allow Mr. Smyth's appeal. In my view, the Judge erred in convicting Mr. Smyth by failing to find that he specifically intended to obstruct justice. The Judge correctly identified the issue but did not find that Mr. Smyth specifically intended to obstruct justice or reach a conclusion that Mr. Smyth's specific intent was established. He also failed to consider the evidence which supported a lack of intent to obstruct justice and explain why he did not find it persuasive. As well, the Judge failed to properly consider Mr. Smyth's defence of mistake in that he did not explain why he was not left in a reasonable doubt by it.

BACKGROUND

[7] While on patrol in Paradise on May 12, 2017, Mr. Smyth received information on the Royal Newfoundland Constabulary (RNC) police radio that an orange motorcycle was spotted on Torbay Road, in the east end of the city of St. John's. An orange motorcycle had been the subject of reckless driving allegations on social media, and an orange motorcycle was also the vehicle to which Mr. Smyth had given short chase for excessive speeding in a school zone a few weeks or so earlier. When he heard the information, Mr. Smyth made his way towards Torbay Road, several kilometers away. En route, he stopped for 19 minutes on the Outer Ring Road to issue a speeding ticket. When he exited the Outer Ring Road, he drove onto Torbay Road heading south. As Mr. Smyth approached the intersection of Torbay Road and Highland Drive, he spotted an

orange motorcycle driving north on Torbay Road, in effect coming toward him from the opposite direction. He saw it proceeding northbound through the intersection as he (Mr. Smyth) drove into the southbound left turning lane and because he believed he had a red light, he believed Mr. Husaini had driven through a red light.

[8] When Mr. Smyth was able, he executed his turns and drove north on Torbay Road. He testified that while waiting to execute and executing his turns, he was glancing over his left shoulder and saw the orange motorcycle weaving through traffic while heading north on Torbay Road. When he caught up to the motorcycle he pulled it over. Because the traffic on Torbay Road was heavy, he asked Mr. Husaini to move to the Starbucks parking lot on Stavanger Drive where it would be safe to meet.

[9] Once on the Starbucks parking lot, Mr. Smyth discussed with Mr. Husaini the social media complaints of reckless driving as well as the driving infractions Mr. Smyth said he had just witnessed. Mr. Smyth also observed that one of Mr. Husaini's motorcycle tires was so bald that some of the steel belt was visible.

[10] Mr. Smyth issued four tickets to Mr. Husaini. They were for (1) driving through a red light, (2) failing to signal when passing, (3) improper passing, and (4) driving with defective equipment (the bald tire). The ticket at issue in this case is the ticket for driving through a red light.

The Trial

[11] At trial, Mr. Husaini described Mr. Smyth's interaction with him as unprofessional. He said that Mr. Smyth told him he would give him every ticket possible. He said he found the interaction repulsive, that the officer stepped toward him in a threatening manner, and that he saw his gun. However, Mr. Husaini testified that when Mr. Smyth mentioned the red light infraction, he actually thought he had gone through a red light because Mr. Smyth seemed honest. He did not deny that he was driving close to the centre line between the two northbound lanes or that he was passing other vehicles as he drove north on Torbay Road after driving through the intersection. Mr. Husaini acknowledged that Mr. Smyth advised him he could dispute the tickets in Traffic Court. He also acknowledged that his motorcycle tire was bald but said he did not consider it dangerous to drive on.

[12] Mr. Smyth described his interaction with Mr. Husaini as routine. His testimony, as described in paragraph 7 above, was effectively that the

southbound turn light was red for him so he assumed that the orange motorcycle had a red light as well. He acknowledged that other northbound traffic had proceeded through the intersection with the motorcycle, but said that this could be because the red light was fresh. He said that while executing his turns, he was looking over his left shoulder and saw the motorcycle weave through two lanes of northbound traffic and pass vehicles without signaling.

[13] Mr. Smyth accepted that Mr. Husaini drove through a green light. Mr. Smyth said that he believed at the time that Mr. Husaini had gone through a red light, but after seeing the video, realized he was mistaken. He explained that his judgment of the situation was based on split second views over his left shoulder while he was navigating left turns to proceed north through traffic to pursue the orange motorcycle. Mr. Smyth said that it is not uncommon for drivers to refute allegations of driving infractions so when Mr. Husaini challenged Mr. Smyth on the tickets, Mr. Smyth advised Mr. Husaini that he could dispute the tickets in Traffic Court.

[14] Much of Mr. Husaini's driving and the contact between him and Mr. Smyth was captured by Mr. Husaini's dashcam recorder. The video recording was entered into evidence.

[15] The Crown called a witness from the City of St. John's Traffic Department to explain how the traffic lights at the intersection of Torbay Road and Highland Drive operate. The witness explained that, due to the lights being prompted by traffic, when a vehicle in the southbound left-turning lane on Torbay Road at the intersection of Torbay Road and Highland Drive had a red light (like Mr. Smyth believed he had), the light for traffic proceeding in the opposite direction could be green (like Mr. Husaini had). However, the Judge found that the left arrow in the northbound lane was off and therefore the lights were green in both directions when Mr. Husaini drove through the intersection. This means that Mr. Smyth wrongly believed that he had a red light and wrongly assumed that Mr. Husaini also had a red light.

[16] The Crown argued that Mr. Smyth was "out to get" Mr. Husaini in order to get even with him because he had successfully fled from Mr. Smyth a few weeks before. In this regard, several internal RNC emails were admitted into evidence which showed RNC efforts to identify and locate the driver of the orange motorcycle on the earlier occasion so as to address the social media concerns. Mr. Smyth's supervisor testified about the investigative work done by Mr. Smyth and others in this regard. The supervisor also gave evidence respecting the volume of summary offence tickets issued by the RNC police in

given years, of which many would be in relation to traffic offences, and the fact that many of them were challenged in court. He stated that he had never known of an obstruction of justice charge against an officer for issuing a traffic ticket.

The Judge's Decision

[17] The Judge did not accept the Crown's argument that Mr. Smyth was "out to get" Mr. Husaini. The Judge stated that Mr. Smyth's pursuit of the orange motorcycle was good police work in response to the concerns expressed on social media. The Judge also found that there was no malice or unusual behavior demonstrated by Mr. Smyth toward Mr. Husaini (as shown on the video) saying "there was nothing noticeable in the behavior of either party" and "[nothing] noteworthy said or done by the officer at the time of writing the ticket". The Judge also noted Mr. Husaini's evidence that Mr. Smyth told him he was going to give him (Mr. Husaini) every ticket possible, but said that "that is the job of a policeman".

[18] The Judge summarized his assessment of the evidence respecting the RNC investigation into the reckless driving complaints:

[9] As regards the police investigation, it is true that Mr. Smyth was conducting an investigation into the activities of the driver of the motorcycle which was the focus of the social media complaints. A number of emails were entered into evidence (consent #7) and the court heard from Mr. Smyth and Paul Didham regarding these. The emails were also reviewed by Andrew Steele, the investigator from the Alberta Serious Incident Response Team (ASIRT). The GPS tracking device in the unmarked patrol vehicle being operated by Mr. Smyth on May 12th was also entered into evidence and in all of this there is nothing to suggest that it was other than a routine investigation conducted in a competent and professional manner.

[19] The Judge considered the evidence respecting the operation of the lights at the intersection and the dashcam video and compared it with Mr. Smyth's testimony. He concluded that the timing of Mr. Husaini's travel did not jive with Mr. Smyth's evidence and that what Mr. Smyth said he saw was not accurate, calling it "inexplicable". He did not accept that Mr. Smyth made a mistake as to the color of Mr. Husaini's light:

[31] ... But I do not find that there was an error. I do not believe Mr. Smyth saw what he believed to be a red light. There is nothing here that could lead one to the conclusion that Mr. Husaini went through a red light short of an out and out hallucination. Everything that occurred and everything Mr. Smyth would have observed, even if only for a split second or several seconds, would lead any competent driver to the opposite conclusion, given the colour of the traffic signals (green), the

flow of traffic and the actions of all the cars around him; all the cars, both moving and stopped.

[20] Despite his findings that Mr. Smyth was not motivated to “get” Mr. Husaini and that Mr. Smyth had not acted unprofessionally throughout his investigation of the matter and in his interaction with Mr. Husaini, the Judge convicted Mr. Smyth of wilfully obstructing justice, saying:

The only way he could have concluded the light was red would be in defiance, in spite of what he saw, not because of what he saw. I find him guilty as charged.

THE LAW

[21] In *R. v. Beaudry*, 2007 SCC 5, the Supreme Court of Canada considered the *mens rea* required to establish the offence of obstruction of justice. In *Beaudry*, a police officer was found guilty at trial for wilfully obstructing justice by failing to administer a breathalyzer test to a fellow police officer in circumstances which clearly indicated that the fellow officer was driving while impaired. The evidence showed that Mr. Beaudry had disregarded his duty to properly investigate the offence by failing to administer the breathalyzer to his fellow officer and by advancing a recently concocted excuse for exercising his discretion not to charge him. As well, there were evidentiary conflicts between the initial incident reports and the trial evidence of Mr. Beaudry and defence witnesses which raised credibility concerns. The Supreme Court of Canada upheld the trial judge’s conviction, saying that his findings of fact were ample support for his “perfectly reasonable” conclusion that Sgt. Beaudry had acted out of favoritism and had thereby wilfully intended to obstruct justice.

[22] At paragraph 52 of *Beaudry*, Charron J. clarified that obstruction of justice is a specific intent offence, and that in order to convict for that offence, actual intent to obstruct justice must be proved:

..., it must be determined whether the offence of obstructing justice, the parameters of which are well established, has been committed. To sum up, the *actus reus* of the offence will be established only if the act tended to defeat or obstruct the course of justice (*R. v. May* (1984), 13 C.C.C. (3d) 257 (Ont. C.A.), per Martin J.A.; see also *R. v. Hearn* (1989), 48 C.C.C. (3d) 376 (Nfld. C.A.), per Goodridge C.J. N., aff’d [1989] 2 S.C.R. 1180 (S.C.C.)). With respect to *mens rea*, it is not in dispute that this is a specific intent offence (*R. v. Charbonneau* (1992), 13 C.R. (4th) 191 (Que. C.A.)). The prosecution must prove beyond a reasonable doubt that the accused did in fact intend to act in a way tending to obstruct, pervert or defeat the course of justice. A simple error of judgment will not be enough. An accused who acted in good faith, but

whose conduct cannot be characterized as a legitimate exercise of the discretion, has not committed the criminal offence of obstructing justice.

[23] All crimes are composed of an *actus reus* and *mens rea*. *Mens rea* is the intention that must be proved in order to convict. While most criminal offences are crimes of general intent, there are some crimes of specific intent. In crimes of general intent, the *actus reus* is the action that is the foundation for the charge, and the *mens rea* is the intention to commit the *actus reus*. The *mens rea* in specific intent offences is something more than the simple intent to commit the *actus reus* of the offence; it is an intent that goes to the consequences or potential consequences of, or ulterior purpose for, the *actus reus*.

[24] In *R. v. Tatton*, 2015 SCC 33, the Supreme Court of Canada attempted to clarify the difference between crimes of general intent and crimes of specific intent. At paragraph 21, Moldaver J. observed:

21 ... The mental element of specific intent crimes is no more “specific”, in the everyday sense of the word, than the mental element of general intent crimes. Rather, as we shall see, the distinction lies in the complexity of the thought and reasoning processes that make up the mental element of a particular offence, and the social policy underlying the offence.

[25] At paragraph 35, Justice Moldaver explained the *mens rea* of general intent crimes by referencing the offence of assault:

For general intent crimes, the mental element simply relates to the performance of an illegal act. Such crimes do not require an intent to bring about certain consequences that are external to the *actus reus*: *Bernard*, at p. 863; *George*, at p. 877 (per Fautaux J.). Assault is a classic example. The accused must intentionally apply force; however, there is no requirement that he intend to cause injury. Likewise, crimes of general intent do not require actual knowledge of certain circumstances or consequences, to the extent that such knowledge is the product of complex thought and reasoning processes. In each instance, the mental element is straightforward and requires little mental acuity.

At paragraph 37, he described the *mens rea* in specific intent crimes as involving a “heightened mental element,” saying:

... For such crimes, the accused must not only intend to do the act that constitutes the *actus reus*, he must also act with an ulterior purpose in mind: *Manning and Sankoff*, at p. 386. For example, assault with intent to resist arrest is an offence containing an ulterior purpose. The accused must not only commit the assault, he must also act with

the ulterior purpose of resisting arrest. It is irrelevant whether he actually succeeds in resisting arrest; the offence simply requires that he act with that purpose in mind.

[26] Justice Moldaver summarized the *mens rea* required for crimes of specific intent at paragraph 39:

... specific intent offences contain a heightened mental element. That element may take the form of an ulterior purpose or it may entail actual knowledge of certain circumstances or consequences, where the knowledge is the product of more complex thought and reasoning processes. Alternatively, it may involve intent to bring about certain consequences, if the formation of that intent involves more complex thought and reasoning processes. General intent offences, on the other hand, require very little mental acuity.

[27] In *R. v. Boulanger*, 2006 SCC 32, the Supreme Court of Canada addressed the *mens rea* required in specific intent offences. *Boulanger* involved the offence of breach of trust by a public officer. At paragraph 57, McLachlin C.J.C. explained the kind of evidence which could support a finding of specific intent:

57 As with any offence, the *mens rea* is inferred from the circumstances. An attempt by the accused to conceal his or her actions may often provide evidence of an improper intent: *Arnoldi*. Similarly, the receipt of a significant personal benefit may provide evidence that the accused acted in his or her own interest rather than that of the public. However, the fact that a public officer obtains a benefit is not conclusive of a culpable *mens rea*. Many legitimate exercises of public authority or power by a public servant confer incidental advantages on the actor. As Widgery J. (as he then was) stated in *R. v. Llewellyn-Jones* (1966), 51 Cr. App. R. 4, at p. 7:

... I would not be prepared to say that it would be misconduct for this purpose for a registrar to make a decision which did affect his personal interests, merely because he knew that his interests were so involved, if the decision was made honestly and in a genuine belief that it was a proper exercise of his jurisdiction so far as the beneficiaries and other persons concerned came into it. [Cited by Widgery L.C.J. in *Dytham*, at p. 394.]

[28] Other cases have also grappled with the nature of the intent to obstruct justice.

[29] In *R. v. Murray* (2000), 48 O.R. (3d) 544, 186 D.L.R. (4th) 125, a criminal defence lawyer was accused of attempting to obstruct justice by failing to disclose to police videotaped evidence of serious crimes committed by his client. The lawyer's evidence was that he believed that he had no legal duty to disclose the evidence in the circumstances. He was acquitted of the charge

because the Judge had a reasonable doubt about the lawyer's intention to obstruct justice by failing to disclose the evidence.

[30] *R. v. Nelson*, 2016 SKCA 127 involved a police officer who was found guilty at trial of wilfully obstructing justice by suppressing evidence which had the effect of interfering with a prosecution. The Saskatchewan Court of Appeal allowed the officer's appeal on the basis that the judge had "failed to consider material evidence going to the issue of criminal intent, while overemphasizing evidence which went to the impropriety of and the consequences of the accused's actions" (at para. 9).

[31] *R. v. Villaroman*, 2016 SCC 33 also pertains. In *Villaroman*, the Supreme Court of Canada ruled that "inferences consistent with innocence do not have to arise from proven facts" (at para. 35), and a trier of fact should, in applying the principle of reasonable doubt, consider other plausible theories and possibilities "which are inconsistent with guilt" when assessing circumstantial evidence (at para. 37).

ANALYSIS

[32] The Judge did not accept the Crown's argument that Mr. Smyth was "intent on punishing" Mr. Husaini. Nothing in the video suggested that Mr. Smyth was anything other than professional in his dealings with Mr. Husaini. As well, the Judge concluded that the internal emails disclosed that the RNC investigation was routine police work competently and professionally undertaken to address a public concern. I also note Mr. Smyth's uncontested testimony that he took approximately 45 minutes to get to Torbay Road from Paradise, having executed a 19-minute traffic stop en route. This does not show the zealotry one might expect to see if Mr. Smyth was "out to get" Mr. Husaini.

[33] In this case, the heightened *mens rea*, or specific intent, that had to be proved was not only that Mr. Smyth intended to give Mr. Husaini the ticket for driving through a red light, but that he knew that Mr. Husaini had driven through a green light and gave him the ticket in spite of that knowledge, thereby intentionally and wrongfully subjecting Mr. Husaini to the rigors of being a defendant in the criminal justice system. Deliberately using the justice system for a wrongful purpose is wilful obstruction of justice.

[34] It appears that the Judge did not accept Mr. Smyth's explanation for why he thought Mr. Husaini went through a red light. However, I find the Judge's

words problematic. He said “I do not believe Mr. Smyth saw what he believed to be a red light. There is nothing here that could lead one to the conclusion that Mr. Husaini went through a red light short of a hallucination.” At trial, and in his ASIRT statement, Mr. Smyth explained that he saw Mr. Husaini drive through the intersection on what he assumed was a new red light because he believed he (Mr. Smyth) had a red light. Although Mr. Smyth stated in his notes that Mr. Husaini went through a red light, Mr. Smyth did not say he saw that Mr. Husaini’s light was red. The Judge’s statement may indicate that he misapprehended Mr. Smyth’s evidence. However, possible misapprehension is not a basis for overturning a verdict; misapprehension must be actual (*R. v. Sinclair*, 2011 SCC 40 at para. 53).

[35] In any event, the Judge made, in my view, a more material error by failing to address whether Mr. Smyth had the specific intent to obstruct justice. Instead, the Judge focused on the fact that Mr. Husaini’s light was green when he drove through it. With the benefit of the video recording and the City’s traffic officer, he reasoned that no competent driver could have been so mistaken about the colour of the light, even observing the situation for a split second or several seconds. The Judge therefore concluded that Mr. Smyth must have deliberately issued the ticket to Mr. Husaini knowing his light was not red. In effect, he reasoned that it was so obvious the light was green that Mr. Smyth could not possibly have thought it was red. With respect, the issue is not what any competent driver would have concluded about the colour of the light. The issue is Mr. Smyth’s subjective intention to obstruct justice. The Judge’s reasons respecting the colour of the light, without more, do not, in my view, equate to wilfully obstructing justice by knowingly issuing a ticket for which there are no reasonable grounds. What is required is some evidence, such as the prospect of personal benefit or the absence of good faith, from which an inference of wilfulness can be drawn.

[36] The Judge was entitled to disbelieve Mr. Smyth’s explanation for believing Mr. Husaini drove through a red light, but he was still required to find that Mr. Smyth wilfully obstructed justice by deliberately issuing the ticket knowing he did not have the grounds to do so. In this regard, Cory J.’s three-step analysis in *W.D.* is instructive. In Justice Cory’s analysis, even when a Judge does not accept the evidence of an accused, he or she must be satisfied that the evidence they do accept supports convicting beyond a reasonable doubt. It is this last step that I find missing in the Judge’s decision.

[37] Although the Judge referenced the law stipulating that the offence was one of specific intent, he did not apply that law to the facts and argument before

him. He did not refer in his reasoning to the requirement for wilfulness to obstruct justice to be proved or evidence of wilfulness or evidence from which he could infer such wilfulness. In this regard, I refer to Chief Justice McLachlin's words in *Boulanger* (at para. 57) and note that Mr. Smyth's trial evidence did not vary from his initial notes or his statement to the ASIRT investigator and that he acknowledged his mistake and did not come up with any new explanation for his actions. Neither was there evidence that Mr. Smyth had attempted to conceal his actions, nor that he gained personal benefit by issuing the ticket to Mr. Husaini. And, as stated above, the Judge found no evidence of malice and that Mr. Smyth's carriage of the file was professional throughout. And, nothing in the emails detailing police communications respecting finding the orange motorcycle showed that Mr. Smyth had an animus toward Mr. Husaini or that he was intent on punishing him.

[38] As well, Mr. Smyth argued that there was evidence that tended to show that he did not intend to willfully obstruct justice. If he were so intent on obstructing justice, why did he freely admit, in his notes, in his interview with ASIRT, and in his testimony, that other traffic was also moving through the intersection with Mr. Husaini in the few seconds he observed the situation, or why did he stop for 19 minutes to issue a ticket en route to Torbay Road?

[39] As well, I note that the Judge was unable to say that three of the four tickets issued to Ms. Husaini were improper:

[8] As regards the validity of the other tickets, I cannot say, from a review of the video and the testimony, whether they were improper. As was argued by Defence counsel, the view of the video is restricted, to say the least. The ticket regarding the bald tire is generally conceded by all to be valid. The only determination that can be made is that even if Mr. Smyth did not say he was going to give every ticket possible, it would appear that this is in fact what he did, at least according to what is on the video and according to what he said he saw the driver of the motorcycle doing. But, that is the job of a policeman.

One is left to question why Mr. Smyth would deliberately issue a fourth ticket knowing that it was based on false information if he felt he already had reasonable grounds to issue three other tickets.

[40] In convicting Mr. Smyth, the Judge's reasoning does not touch on the heightened *mens rea* required or evidence going to whether Mr. Smyth wilfully put into play a legal process knowing that it was based on false information. The Judge's reasoning seems to be that the evidence that the light was green was

so overwhelming that it was not possible for Mr. Smyth to be mistaken about it. With respect, this is not enough.

[41] Neither is it enough for the Judge to say that he did not believe Mr. Smyth in rejecting his defence. While a trial judge is not required to address in his reasons each piece of evidence adduced at trial, a judge should consider “plausible theories” and “reasonable possibilities” which are inconsistent with guilt. In this case, the Judge focused exclusively on the color of the light and did not consider Mr. Smyth’s defence in any meaningful way or explain why he was not left in a reasonable doubt by it (*Villaroman*, at paragraph 37).

[42] The law respecting the defence of mistake stipulates that the mistake does not have to be proved, it only has to raise a reasonable doubt. This was the thrust of the Court’s reasoning in *Murray*, where Mr. Murray’s stated belief that he was not obligated to pass over evidence to the Crown raised a reasonable doubt that he intended to obstruct justice. In *Nelson*, the trial judge had failed to consider whether and how the evidence supported, or did not support, wilful obstruction. In this case, the Judge erred in failing to reconcile the evidence with proof of the requirement for the heightened *mens rea* and that Mr. Smyth had the specific intent to obstruct justice.

[43] In my view, for the above reasons the conviction cannot stand. I would therefore allow the appeal and order a new trial.

L. R. Hoegg J.A.

I Concur:_____

D. E. Fry C.J.N.L.

I Concur:_____

W. H. Goodridge J.A.