COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***R. v. Winfield***,
2009 YKCA 9

Date: 20090624
Docket: 08-YU620

Between:

Regina

Respondent

Patricia Ann Winfield

Appellant

Before: The Honourable Mr. Justice Donald
The Honourable Mr. Justice Frankel
The Honourable Madam Justice D. Smith

On appeal from the decision of the Supreme Court of the Yukon Territory, September 19, 2008, dismissing the appeal from conviction of the Territorial Court of Yukon, March 5, 2008: *R. v. Winfield*, 2008 YKTC 30; *R. v. Winfield*, 2008 YKSC 69

Acting on her own behalf:	P.A. Winfield
Counsel for the Respondent:	J.M. Hartling
Place and Date of Hearing:	Whitehorse, Yukon Territory May 28, 2009
Written Submissions Received:	June 8 and 11, 2009
Place and Date of Judgment:	Vancouver, British Columbia June 24, 2009

Written Reasons by:
The Honourable Mr. Justice Frankel

Concurred in by:
The Honourable Mr. Justice Donald
The Honourable Madam Justice D. Smith

Reasons for Judgment of the Honourable Mr. Justice Frankel:

Introduction

[1] Patricia Ann Winfield seeks leave to appeal and, if leave is granted, appeals from the decision of Mr. Justice Gower of the Supreme Court of the Yukon Territory, dismissing her appeal from conviction by Judge Lilles of the Territorial Court of Yukon, on a charge of careless driving, contrary to s. 186 of the *Motor Vehicles Act*, R.S.Y. 2002, c. 153. That charge was initiated by what is commonly referred to as a "traffic ticket". As a result of her conviction, Ms. Winfield was fined $200.00, and ordered to pay a $30.00 victim fine surcharge. In support of her application and appeal, she has filed an application to adduce fresh evidence.

[2] For the reasons that follow, I would dismiss the application to adduce fresh evidence, and refuse leave to appeal.

Factual Background

[3] The incident underlying the conviction occurred on September 22, 2007. The facts are set out in detail in both the reasons of the trial judge (2008 YKTC 30, 65 M.V.R. (5th) 315), and of the summary conviction appeal judge (2008 YKSC 69, 70 M.V.R. (5th) 207). In short, the complainant, James Ambrose, testified that he was driving his truck northbound on the two-lane North Klondike Highway pulling a 26-foot trailer when Ms. Winfield proceeded to pass him on the left in a pick-up truck at a high rate of speed. This occurred while another vehicle was coming towards them. Mr. Ambrose said that to avoid a collision with the on-coming vehicle it was necessary for him to apply his brakes and pull over to the right, with a risk that his vehicle would tip and roll on the soft shoulder of the roadway. He further stated that the southbound vehicle also pulled over to its right to avoid Ms. Winfield's vehicle, and that at one point all three vehicles were alongside each other.

[4] Ms. Winfield's version of events differed significantly from that of Mr. Ambrose. She testified that she initially followed Mr. Ambrose's truck and trailer

believing it to belong to a friend. She said that when she realized that it was not her friend's vehicle she decided to pass it, and did so in a safe manner. She said that when she was three-quarters of the way past Mr. Ambrose's truck and trailer she noticed a car coming towards her. As that car slowed down and pulled-over she was able to complete the pass safely, and returned to her own lane. According to Ms. Winfield, the three vehicles were never abreast.

[5] In convicting, the trial judge accepted the evidence of Mr. Ambrose over that of Ms. Winfield. He said that Mr. Ambrose was an "exceptional witness".

[6] Ms. Winfield filed a notice of appeal from her conviction on March 17, 2008. At the hearing of that appeal on September 3, 2008, she advanced a single ground, namely, that the verdict was unreasonable or cannot be supported by the evidence. In rejecting this ground, the summary conviction appeal judge considered and applied the authorities relevant to a challenge to a trial judge's findings of fact and assessment of credibility. In the end, the summary conviction appeal judge concluded that, on the evidence, it was open to the trial judge to reach the conclusions that he did.

Grounds of Appeal and Fresh Evidence Application

[7] In her factum, Ms. Winfield sets out her grounds of appeal as follows:

1. There has been a miscarriage of justice [*Criminal Code*] s. 686(1)(a)(iii) by:
   - i. *Charter* Breach and biased investigation;
   - ii. Interference by [the] RCMP in witness testimony;
   - iii. Submission of incorrect and inadmissible information into Crown summary;
   - iv. Use of incorrect and inadmissible information in Judge's summary; and
   - v. Improper interference by Judge during testimony of both appellant and complainant.
2. That the Trial Judge applied different standards to the appellant and complainant with respect to assessment of their credibility and their evidence.
3. That the Trial Judge failed to apply the Burden of Proof properly.

4. The Trial Judge did not properly apply *R. v. W.(D.)* [[1991] 1 S.C.R. 742], because he failed to consider whether the appellant's evidence raised a reasonable doubt and he engaged in faulty reasoning.

5. The Trial Judge misapprehended the evidence and ignored frailties of the complainant's evidence.

[8] Ms. Winfield's application to adduce fresh evidence consists of the following:

(a) An affidavit sworn by Ms. Winfield on May 15, 2009, to which she has attached the following documents:

(i) a copy of a letter Ms. Winfield's counsel sent to the trial judge after he had reserved his decision, stating that counsel had been advised by the Director of Transportation Engineering "that two lane highways are not designed to allow three vehicles to pass abreast", and that the parties agree that no admissible evidence with respect to the design of two-lane highways was presented at the trial. (This letter is referred to in para. 16 of the trial judge's reasons.);

(ii) a copy of a letter dated November 19, 2008, that the trial judge sent to the Yukon Judicial Council in response to a complaint filed by Ms. Winfield alleging that the trial judge allowed the investigating police officer to engage in conduct in the courtroom that interfered with her giving her evidence. The trial judge stated that he did not observe any behaviour that either merited his intervention, or influenced his decision; and

(iii) "To Whom It May Concern" letter dated March 28, 2008, written by a friend of Ms. Winfield that Ms. Winfield says was given to her own counsel and Crown counsel after the trial. Ms. Winfield says that this letter pertains to her credibility in relation to her evidence that initially she believed the truck and trailer behind which she was driving belonged to someone she knows;

(b) An affidavit, sworn November 27, 2008, from a person who says she was present during Ms. Winfield's trial, and observed the investigating officer engaging in "distracting" behaviour; and

(c) An affidavit sworn May 15, 2009, from a person who says she was present during Ms. Winfield's trial, and observed the investigating officer doing the following during her testimony: whispering, raising his hands in the air, rolling his eyes, speaking out loud to contradict her evidence, shaking his head in disagreement with her evidence, and coughing in such a manner that Ms. Winfield could not be heard. This person also states that on March 27, 2008, she "provided" a notarized letter attesting to these same facts.

[9] It is to be noted that Ms. Winfield does not, in her own affidavit, depose that the investigating officer engaged in any improper or distracting conduct.

Analysis

[10] The Legislative Assembly has conferred jurisdiction on this Court to hear an appeal from a summary conviction appeal court by s. 7(2) of the *Summary Convictions Act*, R.S.Y. 2002, c. 210:

> Despite subsection (1), the provisions of the *Criminal Code* (Canada) in force on April 30, 1978, relating to appeals in respect of summary convictions apply *mutatis mutandis* to appeals from proceedings in respect of an offence against an enactment.

[11] On April 30, 1978, s. 771(1) of the *Criminal Code*, R.S.C. 1970, c. C-34, provided that the decision of a summary conviction appeal court could be appealed to a court of appeal "with leave of that court ... on any ground that involves a question of law alone". This provision is now s. 839(1) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[12] It is important to keep in mind that an appeal to a court of appeal in a summary conviction matter is not a second appeal from the trial court. Rather, it is an appeal from the decision of the summary conviction appeal court. Accordingly, the focus of a leave application, and the appeal if leave is granted, is on whether any error of law was committed by the summary conviction appeal judge: *R. v. Emery* (1981), 61 C.C.C. (2d) 84 at 85 (B.C.C.A.), leave refused, [1981] 2 S.C.R. vii; *R. v. M.(C.S.)*, 2004 NSCA 60, 185 C.C.C. (3d) 471 at para. 26; *R. v. R.(R.)*, 2008 ONCA 497, 234 C.C.C. (3d) 463 at para. 24.

[13] To obtain leave to appeal from the decision of a summary conviction appeal court, the applicant must establish that (a) the ground of appeal involves a question of law alone, (b) the issue is one of importance, and (c) there is sufficient merit in the proposed appeal that it has a reasonable possibility of success. The overriding consideration in the exercise of the discretion to grant or refuse leave is the interests of justice: *R. v. Cai*, 2008 BCCA 332, 258 B.C.A.C. 235 at para. 26 (Chambers); *R. v. Gill*, 2008 BCCA 259 at para. 3 (Chambers).

[14] In *R.(R.)*, Mr. Justice Doherty discussed the approach to be taken in deciding whether to grant leave to appeal the decision of a summary conviction appeal court. In this connection, he stated:

> [27] The requirement that the applicant obtain leave to appeal in s. 839 provides the mechanism whereby this court can control its summary conviction appeal docket. Access to this court for a second appeal should be limited to those cases in which the applicant can demonstrate some exceptional circumstance justifying a further appeal.
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> ...
>
> [37] In summary, leave to appeal pursuant to s. 839 should be granted sparingly. There is no single litmus test that can identify all cases in which leave should be granted. There are, however, two key variables — the significance of the legal issues raised to the general administration of criminal justice, and the merits of the proposed grounds of appeal. On the one hand, if the issues have significance to the administration of justice beyond the particular case, then leave to appeal may be granted even if the merits are not particularly strong, though the grounds must at least be arguable. On the other hand, where the merits appear very strong, leave to appeal may be granted even if the issues have no general importance, especially if the convictions in issue are serious and the applicant is facing a significant deprivation of his or her liberty.

[15] In so far as Ms. Winfield seeks to attack her conviction on the basis that the trial judge misapprehended the evidence or failed to properly assess credibility, I would not grant leave to appeal. These proposed grounds have no significance beyond this particular case. The summary conviction appeal judge addressed the various arguments put forward by Ms. Winfield and, in so doing, had regard to the pertinent law. Further, I see no merit in these proposed grounds. In light of this, it would not be in the interests of the administration of justice to afford Ms. Winfield an opportunity to, in effect, reargue her appeal.

[16] Nor would I grant leave to permit Ms. Winfield to raise the numerous grounds of appeal that were not argued before the summary conviction appeal court. To begin, some of them do not allege any error of law. Further, and in any event, by reasons of the way in which the trial was conducted, there is a lack of a trial record with respect to many of them. Ms. Winfield seeks to overcome the evidentiary gaps in the record by means of her fresh evidence application.

[17] Appellate courts are reluctant to permit an appellant to raise an entirely new issue on appeal. The courts are even more reluctant to allow this to occur when an appellant has not raised the proposed new issue on an earlier appeal. The orderly and fair progress of litigation requires that a party raise issues in a timely way. For example, in this case Ms. Winfield's grounds of appeal refer to a "*Charter* Breach", which I take to be an assertion that during the investigation of Mr. Ambrose's complaint the police, in some way, infringed her rights under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. However, no *Charter* breach was alleged either at trial or on the summary conviction appeal, and Ms. Winfield's factum is silent as to the nature of the breach. With respect to the allegation that the investigating officer interfered with Ms. Winfield's testimony, she was clearly in a position to advance this ground at the summary conviction appeal, but chose not to do so.

[18] Although appellate courts have discretion to permit a new issue to be raised, that discretion is one to be exercised sparingly. To take a less stringent approach would allow an appellant to transform an appeal into a new, and entirely different, proceeding, one divorced from how the trial was conducted. This is particularly so when the new issue is one that cannot be finally resolved without another trial. Apposite is the following from the judgment of Madam Justice Weiler in *Kalman v. Graham*, 2009 ONCA 77, 245 O.A.C. 130:

> [18] The general rule is that appellate courts will not entertain entirely new issues on appeal. The rationale for the rule is that it is unfair to spring a new argument upon a party at the hearing of an appeal in circumstances in which evidence might have been led at trial if it had been known that the matter would be an issue on appeal: *Ontario Energy Savings L.P. v. 767269 Ontario Ltd.*, 2008 ONCA 350, at para. 3. The burden is on the appellant to persuade the appellate court that "all the facts necessary to address the point are before the court as fully as if the issue had been raised at trial": *Ross. v. Ross* (1999), 181 N.S.R. (2d) 22, at para. 34 (C.A.), per Cromwell J.A.; *Ontario Energy Savings* at para. 3. This burden may be more easily discharged where the issue sought to be raised involves a question of pure law: see e.g. *R. v. Vidulich* (1989), 37 B.C.L.R. (2d) 391 (C.A.); *R. v. Brown*, [1993] 2 S.C.R. 918, per L'Heureux-Dubé J., dissenting. In the end, however, the decision of whether to grant leave to allow a new argument is a discretionary decision to be guided by the balancing of the interests of justice

> as they affect all parties; *R. v. Warsing*, [1998] 3 S.C.R. 579, per L'Heureux-Dubé J., dissenting; *R. v. Sweeney* (2000), 50 O.R. (3d) 321 (C.A.); *Vidulich* at 398-99.
>
> [Emphasis added]

See also: *R. v. Tomlinson*, 2009 BCCA 196 at para. 37.

[19] To repeat, at trial the sole issue was whether Ms. Winfield drove her vehicle in a careless manner when she passed Mr. Ambrose's vehicle. In resolving that issue the trial judge rejected Ms. Winfield's evidence, and accepted that given by Mr. Ambrose. The summary conviction appeal judge, in dealing with the only ground raised before him, held that it was open to the trial judge to make the credibility and factual findings that he did, and that he committed no legal errors in doing so. Given this background, and given that this matter involves a traffic ticket that resulted in a modest fine, I do not consider that it would serve the interests of justice to permit Ms. Winfield to reformulate both her defence and her grounds for challenging her conviction.

Conclusion

[20] I would dismiss the application to adduce fresh evidence, and refuse leave to appeal.

The Honourable Mr. Justice Frankel

I AGREE:

The Honourable Mr. Justice Donald

I AGREE:

The Honourable Madam Justice D. Smith