
CANADA / JUDGMENT

R. v. Bennett

2012 NSPC 65

COURT

Nova Scotia Provincial Court

DECIDED

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R. v. Bennett

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Chisholm, Marc C. (Honourable Judge)

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IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Bennett, 2012 NSPC 65

Date: July 26, 2012

Docket: 2333012, 2333013, 2333014

Registry: Halifax

Her Majesty the Queen

v.

Carolyn Bennett

Judge: The Honourable Judge Marc C. Chisholm

Heard: June 14, 2012

Written Decision: July 26, 2012

Charges: CC 249(1)(a), 249.1(1), 139(2)

Counsel: Ron Lacey - Crown Attorney

Jean Morris - Defence Attorney

CHISHOLM, J.P.C. (Orally):

Introduction

- [1] This is the matter of R. v. Carolyn Bennett. The charges set out in the information before the court allege that Carolyn Jean Bennett, also known as Caroline Jean Fredericks, also known as Carolyn Jean Fredericks, on or about the 1st day of April, 2011, at or near Halifax, Nova Scotia, did operate a motor vehicle in a manner that was dangerous to the public, contrary to section 249(1)(a) of the Criminal Code; and further, that she at the same time and place aforesaid did, while operating a motor vehicle being pursued by a peace officer operating a motor vehicle, fail, without reasonable excuse and in order to evade the police officer, to stop the vehicle as soon as it was reasonable in the circumstances, contrary to section 249.1(1) of the Criminal Code; and further, that she at the same time and place aforesaid did willfully attempt to obstruct, pervert or defeat the course of justice by fleeing from police, contrary to section 139(2) of the Criminal Code.
- [2] These are criminal charges. The burden of proof rests upon the Crown. The burden is proof beyond a reasonable doubt. There is no burden on the accused to prove anything. The key issue raised at trial was whether the evidence had established beyond a reasonable doubt that the accused was the driver of a motor vehicle which was stopped by the police on Barrington Street, Halifax, Nova Scotia, at approximately 3:45 in the morning of April 1st of 2011.

Background

- [3] At approximately 3:45 a.m., April 1st, 2011, police received a call from a citizen regarding a possible impaired driver on Barrington Street, Halifax, Nova Scotia. The caller provided a description of the vehicle, specifically a red Pontiac Grand Am, four door, older model, with Nova Scotia license plate number CRA 411. Within minutes, Constables McCormick and Pulsifer located the vehicle, which was on Barrington Street, alongside the Toronto Dominion Bank building. They were operating a police van, which they pulled in behind the vehicle in question, engaged emergency lights and siren.

- [4] Both officers then exited the police van and approached the driver's door of that motor vehicle. Through an open driver's door window, they had contact with and observed the driver for between 60 and 90 seconds. They noted one passenger, believed to be a woman, seated in the front passenger seat. The driver was advised that the police were investigating a possible impaired driving offence. Both officers noted a strong odour of alcohol emanating from within the vehicle. The driver was asked to turn off the vehicle, which she did. She was asked for her papers and began to look for them. Before producing any papers, she was asked to step out of the vehicle.
- [5] At that point, she restarted the vehicle and drove off, accelerating at a high rate. Within seconds, she was out of sight of the officers, who estimated her speed to have reached 80 to 90 kilometres per hour before the vehicle went out of sight, the speed maximum being 50 kilometres per hour.
- [6] Also, before proceeding out of sight of the police, she was seen proceeding through a flashing red light at the intersection of Barrington and Duke Streets without stopping or slowing.
- [7] The police ran a system check of the license plate, Nova Scotia license plate CRA 411, and received information that the registered owner was Carolyn Bennett of 13B Birch Street, Halifax, Nova Scotia. Constables McCormick and Pulsifer attended at that address at 5:15 in the morning of April 1st of 2011. The suspect vehicle was not observed in the area. A knock on the door of Apartment 13B Birch Street did not result in anyone coming to the door.
- [8] The vehicle bearing Nova Scotia license CRA 411 was next observed by police at 7:35 in the morning of April 1st, 2011, near the Burger King restaurant in the Bayers Lake area of Halifax. Constable Beeler approached the driver of the vehicle. After advising the female driver of what he was investigating, he requested her license, registration and insurance. The driver produced a Nova Scotia driver's license bearing the name of Carolyn Bennett.
- [9] Constable Beeler gave evidence that he compared the photo on the license with the person before him and was satisfied it was the same person. He did not identify the accused before the court as that person. He did not indicate any observations of impairment. He did not recall anything about the clothing of the individual driver. He did not describe her. He did not recall the description of the driver that he had received in relation to the 3:45 a.m. incident.
- [10] He testified that there was one passenger. It was a man seated in the passenger seat, front passenger seat of that motor vehicle at that time.
- [11] Between April 1st of 2011 and June 9th of 2011, Constable McCormick testified to going to 13B Birch Street on several occasions. He testified that Ms. Bennett was not at the residence on those occasions, but on a "few" visits the suspect vehicle, that is the red Pontiac Grand Am, Nova Scotia license CRA 411, was observed parked on the street in front of 13B Birch Street.

- [12] On June 9th, 2011, Constable McCormick again attended at 13B Birch Street, Halifax, Nova Scotia. He testified that he planned to make an arrest going there that day. On that date, Ms. Bennett answered his knock on the door of Apartment 13B. He spoke with her and placed her under arrest for the offences arising from the incident of April 1st, 2011. He stated that he recognized her, that he was 100 percent certain "from the description and observations." He noted that the vehicle Nova Scotia license CRA 411 was parked on the street in front of that residence on that date. He did not indicate whether there were any other persons in the Apartment 13B on that date when he had contact with Ms. Bennett.

Applicable Law

- [13] This matter raises a couple of legal issues. The applicable law may be summarized as follows:

Eye Witness Identification Evidence

- [14] Experience of the courts has shown that eye witness identification evidence can be unreliable and calls for the court to consider the evidence with caution. See, for example, *R. v. Nikolovski*, [1996] 111 C.C.C. 3d, p. 403, a decision of the Supreme Court of Canada.
- [15] Further, the trial judge must consider the appropriateness of the process utilized to attempt to establish identification. *R. v. Sophonow #2*, [1986] 25 C.C.C. 3d, p. 415, Manitoba Court of Appeal, leave to appeal to the Supreme Court of Canada refused, citation [1986] 25 C.C.C. 3d, p. 415.
- [16] The court, as always, must consider not only credibility, but reliability of a witness's identification evidence. See, for example, *R. v. Bigsky*, [2006] S.J. No. 801, from the Saskatchewan Court of Appeal.

Circumstantial Evidence

- [17] Circumstantial evidence may establish proof of facts by inference. Based upon proven facts, the court may infer a further fact or facts where the court finds that it is reasonable to draw such an inference and that there is no other reasonable inference that may be drawn from the proven facts. On this point, reference is made to *R. v. Gothier*, [2009] B.C.J. No. 102, a decision of the British Columbia Court of Appeal.
- [18] Where, as in this case, there is both circumstantial evidence and direct eye witness evidence, no one part of the evidence must establish proof beyond a reasonable doubt. The court must assess the totality of the evidence in applying the test of proof beyond a reasonable doubt.

Analysis and Conclusions

- [19] As previously stated, the key issue on this trial was identification of the driver. The Crown's case as it related to the issue of identification rested upon the following evidence: first, the eye witness identification of the accused as the driver by Constable McCormick; second, the eye witness identification of the accused as the driver by Constable Pulsifer; and third, the circumstantial evidence connecting the accused to the motor vehicle involved in the offences, namely, that the accused was driving that vehicle on April 1st, 2011, at 7:35 in the morning in the Bayers Lake area of Halifax, some three hours and 50 minutes after the alleged offences; further, that the vehicle was owned by the accused; and finally, that the vehicle was parked on the street in front of the building in which the accused resided on June 9th of 2011 and on a few occasions between April 1st and June 9th of 2011.
- [20] Let me first turn to the evidence of Constable McCormick. Constable McCormick had no contact with the accused prior to April 1st of 2011. He had no contact with her between April 1st, 2011, and June 9th, 2011. He had one contact between June 9th, 2011, and the date of trial. Constable McCormick testified to being in a position to observe the driver of the vehicle in question for one minute to one and a half minutes. During that time, he was standing outside the driver's door, looking through an open driver's door window, standing approximately two feet from the female driver. It was 3:45 in the morning on Barrington Street in downtown Halifax. According to his evidence, there were street lights in the area, lights from the Toronto Dominion Bank building, and headlights from the police vehicle, and while he did not so indicate during his direct examination, on cross-examination he stated that he had his flashlight, which was turned on, and that he used it to look into the vehicle and at the driver. That evidence caused the court to consider whether or not the other lighting which he had previously referred to was adequate or inadequate to properly see the driver's face and features.
- [21] He made the following observations of the driver: that she was white female, mid forties, curly brown hair, short, shoulder length. He initially stated that he didn't note anything else. He could not recall anything about her clothing. Later in his testimony he said that she was dressed for downtown, not in jogging pants. He did not recall with 100 percent certainty if she had on a coat. He could not give any description of the front seat passenger other than saying it was a female. When asked whether the driver had any distinctive features, he stated white female, mid forties, brown hair, curly, and "her face kind of stuck in my mind." He testified there was nothing strikingly distinctive, "just the whole face in general, I remember it." He estimated that she was approximately five foot eight inches tall, although this based upon his observation of her while she was seated. He described her as more heavyset, not obese.

- [22] Again, in cross-examination, not having made such a statement in direct, he testified that she had glossy red eyes, but he also testified that he couldn't recall if she was wearing glasses. He didn't believe so. Also in cross-examination he testified that she had little dents in her skin, almost pock marks, under her eyes. This, for the record, was not apparent to the court, the court viewing Ms. Bennett from a distance of some 10 feet.
- [23] Constable McCormick made an in-court identification of the accused, noting that she was similar in description, although her hair style had changed. It was less curly.
- [24] Constable McCormick gave no evidence of such facial features as the size of the driver's head, the shape of the head, the shape of the jawline, whether the driver's ears were visible, if so the size and shape of the ears, the size and shape of the chin, the nose, the brow, the eyebrows, eye colour other than noting red glossy, no comment on teeth, and, other than the pock marks as indicated, no comment on skin colour, birth marks, etc.
- [25] In relation to the officer's evidence that he observed small dents like pock marks under the eyes of the driver, such an observation in the less than perfect light, given his lack of other observations of facial features of the driver, including whether she was wearing glasses, left the court with considerable doubt as to whether or not he actually noted that on that occasion or may have noted that on a subsequent contact with Ms. Bennett.
- [26] There was no evidence placed before the court as to what training Constable McCormick had received regarding making observations of a person to be able to subsequently identify them. There was no evidence as to what experience Constable McCormick had in terms of making observations of a person to enable him at a later date to properly identify them. As of April of 2011, Constable McCormick had been a peace officer for just over two years.
- [27] The court found Constable McCormick's evidence credible. His evidence demonstrated an excellent recall of the event in question, but in the court's view, an average, at best, ability to observe and describe a person's features for the purposes of a subsequent identification. In fairness to the officer, he was not expecting the driver to speed off, thus necessitating that he, at a much later date, would have to make an identification.
- [28] Between April 1st and June 9th, he was not asked to view a photo lineup to establish whether or not he, through that process, could identify the driver of the motor vehicle that he and Constable Pulsifer had stopped. He did not, at any time, observe a photo of the accused in any police or Motor Vehicle database on April 1st or at any time thereafter other than on June 9th when the accused presented her driver's license to him.
- [29] On June 9th of 2011, Constable McCormick attended at 13B Birch Street, Halifax, Nova Scotia. A red Pontiac Grand Am, Nova Scotia license CRA 411, was parked on the street in front of that address. The accused answered the door at that apartment. Constable McCormick testified that she was the person who had been driving the vehicle at 3:45 a.m. on April 1st of 2011 and that he was 100 percent certain it was the same person.

- [30] In the court's view, that process of identification of the accused on that date was flawed for two reasons. First, Constable McCormick observed only one person at that address at that time. Such an identification process did not provide a basis upon which the court may assess whether the officer was capable of distinguishing the accused from another woman of a similar size, age, weight, hair colour, etc. Second, Constable McCormick testified that he went there planning to make an arrest. While an arrest by the officer may have been conditional upon his concluding that the person at that address was the driver of the motor vehicle that he'd stopped on April 1st, the identification process raised a concern that the officer may, to some degree, have been predisposed to that belief based upon the information he had connecting the tenant of that address to the motor vehicle in question.
- [31] Furthermore, on June 9th of 2011, Constable McCormick took the accused to the police station. According to Constable Pulsifer, he was called to the station by Constable McCormick to confirm the identification of the person that Constable McCormick had arrested. According to Constable Pulsifer, he attended and confirmed, in the presence of Constable McCormick, that the person in the custody of Constable McCormick was the driver on the morning of April 1st. That process raised concerns with regard to possible cross-contamination of the identification.
- [32] Turning to the evidence of Constable Pulsifer from the beginning. He testified that he was with Officer McCormick on the morning of April 1st, 2011. His evidence mirrored the evidence of Constable McCormick regarding the events which occurred on Barrington Street opposite the Toronto Dominion Bank Building at approximately 3:45 a.m. on that date.
- [33] Relevant to the issue of identification, he stated that he was standing beside Officer McCormick at the driver's door, that he had a full view of the driver, 100 percent full on, that he noted a strong smell of alcohol coming out the driver's window, that when Constable McCormick asked the driver to step out she looked up at him and stared at him for a good five seconds or so, then turned back, turned on the vehicle and drove off.
- [34] He described the area as being "fairly well lit," with many street lights. He did not testify to the use of a flashlight by Constable McCormick. He estimated the period of time of contact with the driver as approximately one minute. He described the driver as white; female; dark, shoulder length hair, wavy; heavier set. He gave no estimate of height, indicating he couldn't really do so as she was seated. In relation to her facial features, he said there was nothing really distinctive.
- [35] On June 9th, 2011, he testified that he was called to the booking area by Constable McCormick, who said that he had located the driver from the April 1st incident. He was asked to attend to confirm the identification, which he did. He attended at booking. Constable McCormick was present doing paperwork. One woman was seated on the bench in booking, she the only woman in the booking area. He identified her.

- [36] He testified that he recalled what her face looked like. He repeated that there was nothing distinctive about her face but he recalled the face and the body structure and the hair, said, "That's about it." He testified that he was 100 percent certain it was her.
- [37] He also made an in-court identification of the accused, the basis of which he said he recalled her face, hair, body structure. Unlike Officer McCormick, he did not note any difference in her appearance, no difference in her hair. For the record, during the testimony of Officer McCormick and Officer Pulsifer, there was one other woman in the courtroom other than the accused. That other woman was of a similar weight, age, hair style and length as the accused.
- [38] When asked on cross-examination for details relevant to identification, Constable Pulsifer testified that her clothes were outdoor wear. He did not recall whether they were casual or formal, did not recall whether she was wearing any jewellery, did not recall whether she had any makeup on, and if so, any description thereof. He did not recall if she was wearing glasses. He said nothing stood out about her speech. It was not slurred. He said nothing stood out about her eyes. He testified that he had never seen the woman before April 1st and had not seen her again until June 9th, 2011. He never viewed a photo of her alone or in a photo lineup.
- [39] As with Officer McCormick, there was no evidence of what training Constable Pulsifer had received in relation to identification. He had 15 years' experience as a peace officer. In the court's view, while his evidence was credible, his evidence reflected an average, at best, ability to note features relevant to identification of a person, and given the process of identification, as with Constable McCormick, the process raised questions regarding the reliability of his identification, both on June 9th and in court.
- [40] In summary, I find the two police officers had a period of no more than 40 seconds to observe the driver's face as, for part of the perhaps 60 seconds, according to Constable McCormick, she was looking down, looking for papers. That period of observation was in less than ideal lighting while she was seated in a motor vehicle. The officers were not expecting the woman to drive off and, therefore, had no heightened reason to observe and note her features to assist them in identifying her, in this case some 10 weeks later. Both officers' description of the woman's facial features was very limited, both stating there was nothing distinctive. Their observations of her overall features were quite general in nature. The process in which each officer purported to identify the driver 10 weeks later raised serious concerns that the identification was influenced by factors other than their recognition of the woman. Their in-court identification of the accused, in the court's view, was tainted by the earlier flawed identification process.
- [41] Although there are two eye witness identifications, the process followed on June 9th, 2011, raised a concern regarding cross-contamination of each of their identifications of the accused as the driver.

- [42] These concerns affect the weight to be given to the eye witness identification evidence. That evidence must, and will be, considered as part of the totality of the evidence in determining whether or not it has been proven beyond a reasonable doubt that the accused was the driver of the motor vehicle in question.
- [43] Let me now turn to the circumstantial evidence. Constable Beeler, on April 1st, stopped what was described as a 2002 red Pontiac Grand Am, Nova Scotia license plate CRA 411, in Bayers Lake, Halifax, Nova Scotia. The female driver presented a Nova Scotia photo driver's license in the name of Carolyn Bennett. He compared the license photo to the driver and concluded they were one and the same person. He testified that the driver provided, in addition to the license, papers for the vehicle. He testified that the driver was the registered owner of the vehicle, this presumably based upon the information on the documentation. He gave the driver, whom he believed to be the owner of the vehicle, a notice under the Motor Vehicle Act to produce the driver of the vehicle as of 3:45 a.m. on that day. There was no evidence as to what, if anything, came of that demand.
- [44] Constable Beeler testified that there was one passenger in the car, a male. Constable Beeler did not recall what description was given to him of the driver as of 3:45 a.m. that morning. He did not recall what the driver at 7:35 a.m. was wearing. He did not provide any description or observations of her other than that she matched the photo on the driver's license presented. He did not note a smell of alcohol. He did not note red glossy eyes. The only factor connecting the driver at that time to the incident at 3:45 was the motor vehicle.
- [45] The description of the vehicle and the license plate number, Nova Scotia license CRA 411, stopped by Constables McCormick and Pulsifer at 3:45 a.m., April 1st, matched the description of the vehicle and license plate of the vehicle stopped by Constable Beeler at 7:35 a.m. that date, and the vehicle seen parked in front of 13B Birch Street on June 9th and a few occasions between April 1 and June 9th of that year.
- [46] This evidence persuades the court beyond a reasonable doubt that it was the same motor vehicle on each occasion. The fact that the driver of the motor vehicle which was stopped at 7:35 a.m. on April 1st produced a Nova Scotia driver's license in the name of Carolyn Bennett, and the person arrested by Constable McCormick at 13B Birch Street on June 9th, 2011, produced a driver's license in the name of Carolyn Bennett, persuades the court beyond a reasonable doubt that it was the same person on each of those two occasions. The court is also persuaded that that person is the accused before the court, Carolyn Bennett.
- [47] The evidence of Constable McCormick of seeing the motor vehicle, Nova Scotia license CRA 411, on the street in front of the 13B Birch Street on a number of occasions and of the accused answering the door of that apartment on June 9th of 2011 persuades the court beyond a reasonable doubt that Ms. Bennett, during the relevant time, was living at that address.

- [48] Constable McCormick gave evidence that a record check done on April 1st of 2011 produced information that the registered owner of Nova Scotia license CRA 411 was Carolyn Bennett of that address. That evidence of Officer McCormick was hearsay and not admissible to establish proof of those facts. There was no documentary evidence put before the court to establish proof of those facts.
- [49] Constable Beeler testified that he received from the accused at 7:35 a.m. on April 1st a driver's license and papers for the vehicle, testifying that the accused was the registered owner. The court infers that that was based on his reading of those papers and the information thereon. The papers were not introduced. There were no documents introduced to attempt to establish, on documentary evidence, that Ms. Bennett was the registered owner of that motor vehicle. Constable Beeler's action of making a demand for the driver, believed to be the owner, for the driver at 3:45 a.m. that day, was consistent with his believe that she was the registered owner, but that, in and of itself, is not proof of that fact.
- [50] The court accepts the evidence of Constable McCormick that the motor vehicle CRA 411 was parked on the street in front of 13B Birch Street on June 9th and a few occasions when he visited there between April 1st and June 9th. He did not specify what he meant by a "few occasions," nor whether that vehicle was there on each occasion when he went to 13B Birch Street after April 1st.
- [51] All of the evidence noted above persuades the court beyond a reasonable doubt that the accused does, or at least did during the relevant time period, reside at 13B Birch Street, as indicated. The evidence persuades the court beyond a reasonable doubt that the accused had a significant connection to the motor vehicle Nova Scotia license plate CRA 411 with more than occasional access to it, possession of it and permission to drive it. She may have been the registered owner thereof but that fact has not been proven beyond a reasonable doubt.
- [52] In conclusion, the evidence has satisfied the court beyond a reasonable doubt: (1), that the accused was driving the motor vehicle Nova Scotia license CRA 411 at 7:35 a.m. on April 1st in the Bayers Lake area of Halifax Nova Scotia; (2), that the vehicle stopped by the police on Barrington Street at 3:45 a.m. on April 1st, 2011, was the same vehicle stopped at 7:35 a.m. on that date being driven by Ms. Bennett; and (3), that the accused, Ms. Bennett, had a significant connection to that motor vehicle, having been the driver of it at 7:35 a.m. and that vehicle having been parked in front of her place of residence on Birch Street on a few occasions between April 1st and June 9th of 2011.

- [53] Even if the court were persuaded that it was reasonable to infer from those facts that the accused was the driver of the motor vehicle CRA 411 at 3:45 a.m. on April 1st, the court is not persuaded beyond a reasonable doubt that that is the only reasonable inference that may be drawn from those proven facts. Between 3:45 in the morning of that date and 7:35, the passenger in the motor vehicle Nova Scotia license CRA 411 changed. There was clearly ample time for a change of driver.
- [54] There was no evidence to permit a comparison of the two persons who had occupied the motor vehicle driver's seat during those two occasions, no comparison of clothing or facial features to permit the court to assess by those means whether the driver was one and the same person, other than the fact that the driver at 7:35 matched the photo ID. The photo ID is not in evidence. The description of the driver at 3:45 April 1st was so general it could apply to a significant number of women. There was no evidence before the court as to whether or not anyone, including another woman, resided with the accused on Birch Street.

Summary

- [55] While the court found the circumstantial evidence persuasive, the court found that it was not conclusive. The circumstantial evidence must be considered in combination with the eye witness evidence. The court has done so. The court has found that each aspect of the identification evidence, the circumstantial evidence and the eye witness evidence, has weakness. In considering the evidence in its totality, the court is not persuaded beyond a reasonable doubt that the evidence has established that the accused was the driver of the motor vehicle Nova Scotia license plate CRA 411 at 3:45 in the morning of April 1st, 2011.
- [56] Consequently, for those reasons, the court finds the accused not guilty of each of the three charges. Having done so, the court need not address the strength of the evidence on the other elements of the offences charged. An acquittal is entered against the accused on each of the three charges.
- [57] Ms. Bennett, you are free to go for the reasons indicated.

Judge Marc Chisholm

Judge of the Provincial Court of Nova Scotia

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