NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Ryan*, 2002 NSCA 153

Date: 20021204
Docket: CAC 177821
Registry: Halifax

Between:

Her Majesty The Queen

Appellant

v.

Terrance Maxwell Ryan

Respondent

Judges:	Bateman, Chipman and Oland, JJ.A.
Appeal Heard:	November 12, 2002, in Halifax, Nova Scotia
Held:	Leave to appeal granted, but appeal dismissed per reasons for judgment of Oland, J.A.; Bateman, J.A. concurring; Chipman, J.A. dissenting by separate reasons.
Counsel:	William D. Delaney, for the appellant Gregory MacIsaac, for the respondent

Reasons for judgment:

[1] On June 4, 2001 the respondent was found guilty by a Provincial Court judge of having the care and control of a motor vehicle while his ability to operate the vehicle was impaired by alcohol, contrary to s. 253(a) of the *Criminal Code*. Justice Frank C. Edwards of the Nova Scotia Supreme Court, sitting as a summary conviction appeal court judge, allowed the respondent's appeal against conviction by a decision rendered orally on February 8, 2002, with written reasons filed February 26, 2002. The Crown applies for leave to appeal, and if granted, appeals his decision under s. 839 of the *Criminal Code*.

Background

[2] The trial in Provincial Court was not a lengthy proceeding. Two persons testified, Constable Jennifer Clarke and Constable Gerard MacDonald.

[3] Constable Clarke found the respondent in the driver's seat of a vehicle parked in a driveway at 4:38 a.m. He was asleep. The constable awakened him when she knocked on the window. She testified that when the respondent opened the door, she was immediately aware of "a very strong smell of alcohol" coming from him. She also testified that his speech was "very slurred", that he had "red watery eyes", and that the strong smell of alcohol was from his breath. In the opinion of this officer, the respondent was "very intoxicated." She arrested him for impaired driving. When she asked for the keys, he produced them from his pocket. She took the keys to his friends who lived in the residence at the end of the driveway, and located insurance papers in the glove box. She searched him, placed him in the police car, and read him the breathalyzer demand, his *Charter* rights, and the police warning. This entire episode took some seven minutes.

[4] Constable Clarke then took the respondent to the detachment some ten minutes away for a breathalyzer test. There, the respondent called and spoke with a lawyer before proceeding for the test.

[5] Constable MacDonald, a breathalyzer technician since 1979, testified that the respondent was seated in his presence for approximately 30 minutes. He noted that there was a strong smell of alcohol. He also gave evidence that he had a normal conversation with the respondent through that period and that the respondent was very talkative, appeared to understand what was going on, and was cooperative. Constable MacDonald had no difficulty communicating with him. He could not recall any slurring of speech. Other than the strong smell of alcohol, he saw nothing to suggest that the

respondent's ability to drive was impaired. The breathalyzer test was never completed because of a problem with the unit.

[6] Constable Clarke then took the respondent to a residence to stay for the evening. She testified that his condition then was not particularly different from when she first met him, that he was very cooperative but very intoxicated. On cross-examination, she testified that to her, a strong smell of alcohol indicates only that a beverage with alcohol was consumed and possible impairment, but she cannot tell how much was consumed or when.

[7] Judge Embree of the Provincial Court found on the evidence that the respondent did have the care and control of a motor vehicle. He found both officers to be credible witnesses and did not consider their evidence regarding the condition of the respondent to be conflicting as they had observed him at different places and times and in different circumstances. He indicated that it is the respondent's condition at the time that he was in care or control of the motor vehicle that is relevant. In finding the respondent guilty of having the care and control of a motor vehicle while his ability to operate a motor vehicle was impaired by alcohol, he stated:

> In all the circumstances here, I accept the observations and opinions given by Constable Clarke and in particular I'm satisfied that her observations of . . . keeping in mind the context of them and all of the other evidence . . . strong smell of alcohol from the breath of Mr. Ryan, very slurred speech, red, watery eyes, and her opinion that he was heavily intoxicated, can and do supply and provide evidence beyond a reasonable doubt of Mr. Ryan's ability to operate a motor vehicle being impaired.

[8] The respondent appealed his conviction to the summary conviction appeal court judge who identified the sole issue on appeal as whether there was evidence from which the trial judge could conclude beyond a reasonable doubt that the respondent's ability to operate a motor vehicle was impaired by alcohol. He determined that there was not.

[9] The summary conviction appeal court judge considered the assessment of criminal impairment. He quoted ¶ 16 of *R. v. Landes*, [1997] S.J. No. 785 as follows:

> An opinion as to impairment, be it by the trial judge or a non-expert, must meet an objective standard of "an ordinary citizen" or a "reasonable person" in order to avoid the uncertainties associated with subjective standards, particularly when based on inferences. To that end a list of tests and observations has been developed for use by peace officers and courts in determining whether an

> accused's mental faculties and physical motor skills were impaired by alcohol to the degree of impairing the accused's ability to drive a motor vehicle. Those observations and tests include: (1) evidence of improper or abnormal driving by the accused; (2) presence of bloodshot or watery eyes; (3) presence of a flushed face; (4) odour of an alcohol beverage; (5) slurred speech; (6) lack of coordination and inability to perform physical tests; (7) lack of comprehension; and (8) inappropriate behaviour.

[10] The summary conviction appeal court judge pointed out that the smell of alcohol alone is not probative of impairment to driving ability. The offence is not the consumption of alcohol nor impairment *per se*; rather, the offence arises when the volume consumed impairs the ability to drive. He stated that red watery eyes may signify fatigue and sleep deprivation, or allergies, the common cold, dry contact lenses, or exposure to cigarette smoke. He noted that the respondent had been awoken by Constable Clarke who did not notice if there was smoke in the vehicle where she found him. The judge also observed that she was unfamiliar with the respondent's normal speech, and could not recall specific words slurred by him but had understood him during their conversation.

[11] The main difficulty the summary conviction appeal court judge had with the Crown's case was the lack of conduct or function evidence. He stated:

> There was no evidence that Mr. Ryan's coordination or balance were impaired. There was no evidence that he stumbled or was unsteady on his feet. There was no evidence of his being clumsy, dropping or spilling. There was no evidence of any "roadside" performance tests; because apparently none were conducted.
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> Taken together, the evidence of the Crown's witnesses implies the appellant had no difficulty getting in and out of vehicles, walking into the police station, making the telephone call to the duty lawyer, and cooperating with the efforts of Constable MacDonald to administer the breathalyzer test. At the very least, there is no evidence to the contrary.
>
> None of the three indicia of impairment observed by Constable Clarke could be said to impugn the accused's reaction, response, or concentration skills. Aside from slurred speech, there was no evidence suggesting lack of coordination or impaired motor functioning.
>
> . . .
>
> Constable Clarke testified that in her opinion, Mr. Ryan was "heavily intoxicated". From the evidence that I have recited, it is clear that she did not

> provide evidence upon which the Learned Trial Judge could properly evaluate her opinion. An opinion cannot stand on its own. It must be based upon the evidence. If the evidence is lacking, the opinion is meaningless.

[12] He allowed the appeal and acquitted the respondent.

Issues

[13] The Crown applies for leave to appeal and, if granted, appeals under s. 839(1) of the *Criminal Code* which provides for an appeal on any ground that involves a question of law alone. Its notice of appeal framed the issues as follows:

> 1. THAT the summary conviction appeal court Judge erred in law in applying the wrong test for appellate review of the reasonableness of a verdict.
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> 2. THAT the summary conviction appeal court Judge erred in substituting his view of the facts for that of the Provincial Court Judge at trial.
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> 3. THAT the summary conviction appeal court Judge erred in law in ruling there was no evidence supporting the trial Judge's conclusion that the respondent's ability to operate a motor vehicle was impaired by alcohol.
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> 4. Such other grounds of appeal as may appear from a review of the record on appeal.

Standard of Review

[14] The scope and standard of review in a summary conviction appeal was summarized by Cromwell, J.A. in *R. v. Nickerson*, [1999] N.S.J. No. 210 (C.A.):

> Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in **R. v. Burns**, [1994] 1 S.C.R. 656 at 657, the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was some evidence to support the trial judge's conclusions nor a new trial on the transcript.

[15] *R. v. Biniaris*, [2000] 1 S.C.R. 381 at ¶ 42 confirmed that the test for an appellate court determining whether a judgment is unreasonable or cannot be supported by the evidence was that set out in *R. v. Yebes*, [1987] 2 S.C.R. 168 at p. 185, namely: whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered. In *Yebes*, in discussing the function of an appellate court, the Supreme Court of Canada stated at ¶ 25:

> The Court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the Court must re-examine and to some extent reweigh and consider the effect of the evidence.

Analysis

[16] While its first ground of appeal submits that the summary conviction appeal court judge erred in law by applying the wrong test for appellate review of the reasonableness of a verdict, the Crown does not rely on that ground. It noted that the judge instructed himself as to the approach of appellate courts in impairment cases and quoted ¶ 13 of *Landes* as follows:

> The Supreme Court of Canada in ***R. v. Yebes***, [1987] 2 S.C.R. 168; ***R v. W.(4.)*** [sic], [1992] 2 S.C.R. 122; and ***R. v. Burke***, [1996] 1 S.C.R. 474, and the Saskatchewan Court of Appeal in ***R. v. Andrews*** [sic], [1982] 2 W.W.R. 249 at 251 clearly articulated that in reviewing and weighing the evidence before a trial judge an appellate court is limited to examining the totality of the evidence and then determining whether a properly instructed jury or trier of fact could have concluded that the appellant was guilty of the offence as charged.

[17] In its factum, the Crown acknowledged that "it is plain that the basis of the decision in this case was that the verdict of the trial Judge was unreasonable or unsupported by the evidence."

[18] The central issue in this appeal is whether the summary conviction appeal court judge erred in his application of the test for appellate review of the reasonableness of a verdict. The Crown submits that the summary conviction appeal court judge conducted a piecemeal analysis of the evidence, failed to consider the evidence as a whole, engaged in speculation, and substituted his view of the facts for that of the trial judge. It also argues

that he erred in law in dismissing Constable Clarke's opinion that the respondent was heavily intoxicated and in ruling that the trial judge could not conclude beyond a reasonable doubt that the respondent's ability to operate a motor vehicle was impaired by alcohol.

[19] In essence, the Crown submits that the summary conviction appeal court judge erred by going beyond the permissible limits of appellate review. With respect, I am unable to agree.

[20] The decision under appeal indicates that the summary conviction appeal court judge was conscious of the role of the trial judge and the scope of appellate review. He reminded himself, citing case law, that criminal impairment is a matter of fact for the trial judge to decide on the evidence and is subject to the criminal standard of proof beyond a reasonable doubt. In addressing the latter, he quoted the Alberta Court of Appeal in *R. v. Andrews*, [1996] A.J. No 8; 104 C.C.C. (3d) 392 at 404:

> The question is simply whether the totality of the accused's conduct and condition can lead to a conclusion other than that his or her ability to drive is impaired to some degree. Obviously, if the totality of the evidence is ambiguous in that regard, the onus will not be met.

[21] The evidence as to the respondent's ability to drive consisted entirely of the observations made by Constables Clarke and MacDonald. The assessment of impairment thus necessitated the drawing of inferences from that evidence.

[22] In reviewing the trial judge's decision, the summary conviction appeal court judge was not selective. He did not rely upon the evidence negativing impairment and discount or discard that supporting impairment. Nor did he question the trial judge's findings of credibility. He carefully examined, in turn, the *indicia* of impairment observed by the police officers. Where he had regard to all of the evidence, his looking at each individually does not make his examination piecemeal and thereby objectionable.

[23] The summary conviction appeal court judge identified several possible inferences other than impairment. He was of the opinion that the evidence was reasonably susceptible to more than one meaning. The other possible causes he recounted are not, in my view, so far-fetched or beyond the realm of common knowledge as to be speculative. Some, such as fatigue and sleep deprivation as a possible explanation for red, watery eyes, could relate

directly to the circumstances in which the respondent was found. No other *indicia*, such as a lack of physical co-ordination, appeared in the evidence.

[24] The summary conviction appeal court judge did not reject Constable Clarke's opinion that the respondent was heavily intoxicated out of hand or because she is not an expert. Rather he did so because, after reviewing her evidence, he was of the view that her factual observations could not reasonably support the opinion she had reached.

[25] It is my view that, having regard to particular circumstances of this case, the summary conviction appeal court judge did not err in his consideration of whether the findings of the trial judge were unreasonable or cannot be supported by the evidence. He was conscious that at trial the onus was always on the Crown to prove not that the respondent may have been drinking, but that the respondent's ability to drive was impaired. He did not disregard any of the observations of experienced police officers but considered the totality of their evidence at trial. As he is entitled on appeal, the summary conviction appeal court judge re-examined, and to some extent re-weighed that evidence to ascertain whether it is reasonably capable of supporting the trial judge's conclusion as to criminal impairment. For the reasons set out in his decision, his determination was that it was not. In coming to this conclusion, the summary conviction appeal court judge did not simply substitute his view of the evidence for that of the experienced trial judge.

[26] I would grant leave to appeal, but dismiss the appeal.

Oland, J.A.

Concurred in:

Bateman, J.A.

Dissenting Reasons for judgment:

[27] As my colleague Oland, J.A. correctly states, the central issue in this appeal is whether the summary conviction appeal court judge (the appeal judge) erred in the application of the test for appellate review of the reasonableness of the verdict. Such judge is entitled to review, re-examine and re-weigh the evidence at trial but only for the limited purpose of determining whether it was reasonably capable of supporting the trial judge's conclusions.

[28] In my respectful opinion, the appeal judge erred in carrying out this function.

[29] The appeal judge referred to the fact that there were three *indicia* of impairment relied on by Constable Clarke in forming the opinion that the respondent was heavily intoxicated — very slurred speech, red watery eyes and a very strong smell of alcohol coming from his breath.

[30] The appeal judge addressed the smell, saying that smell of alcohol alone is not probative of impairment of driving ability. He referred to *Landes*, supra, at ¶ 16 and acknowledged that the odour of alcoholic beverage is one of the *indicia* of impairment. He correctly pointed out that odour alone is not proof of impairment. He then referred to the following passage in *Landes*, supra at ¶ 21:

> *Odour of Alcohol* - Alcohol itself is odourless unless the odour detected arises from the non-alcoholic content of the drink consumed. Alan D. Gold, as he then was, in Defending Drinking and Driving Cases (Toronto: Carswell, 1995), made the following observations:
>
> > It is generally recognized that odour has no relationship to amount consumed, and is probative of little beyond the fact of some consumption of an alcoholic beverage. A strong odour tends to show recent consumption. Ironically, alcohol itself is odourless and the odour arises from the non-alcoholic content of the drink consumed.

[31] The only evidence on this subject appears from the cross-examination of Constable Clarke where she acknowledges that the chemical alcohol has no smell, but the odour comes from the alcoholic beverage. She added that when there is a strong smell of alcohol, it indicates to her that there is possible impairment.

[32] On the evidence before him the trial judge was not prepared to discount the evidence of Constable Clarke respecting the strong smell of alcohol on the

basis of the quotation from Alan Gold. This conclusion is not unreasonable and no palpable or overriding error on the part of the trial judge in coming to it appears. See *Housen v. Nikolaisen*, [2002] S.C.J. No. 31 (S.C.C.).

[33] The appeal judge referred to the red watery eyes of the respondent saying that these could signify fatigue and sleep deprivation. He noted other reasonable explanations, for example, allergies, common cold, dry contact lenses or exposure to cigarette smoke. There is no evidence in the record that the respondent suffered from sleep deprivation or any allergies, a common cold, dry contact lenses or exposure to cigarette smoke.

[34] The appeal judge then referred to the very slurred speech spoken of by Constable Clarke and relied on the fact that Constable Clarke could not recall any specific words slurred by the respondent. He referred again to *Landes*, supra, at ¶ 22 where it was said that the trial judge could properly take into account the presence of slightly slurred words as evidence of some degree of physical impairment of the ability to drive. The trial judge specifically noted that slurred speech is an impairment of a motor skill and is indicative of impairment to operate a motor vehicle.

[35] The appeal judge then said that the main difficulty with the Crown's case was the lack of conduct or function evidence. There was, he said, no evidence that the respondent stumbled or was unsteady on his feet. Aside from what he referred to as slurred speech — rather than very slurred speech — he said there was no evidence suggesting lack of co-ordination or impaired motor functioning.

[36] The appeal judge concluded that there was no evidence upon which the trial judge could conclude beyond a reasonable doubt that the respondent's ability to drive was impaired by alcohol.

[37] I accept the Crown's submission that the appeal judge analyzed the evidence pertaining to each of the *indicia* of impairment separately and in a piecemeal fashion. He discounted the significance of the very slurred speech as an element of lack of conduct or function evidence. Where he was of the view that the evidence was reasonably susceptible of more than one meaning he relied on inferences that were not supported by the evidence.

[38] The appeal judge did not, in considering whether the conclusion of the trial judge was reasonable, have regard to the evidence as a whole.

[39] As to Constable Clarke's opinion that the respondent was heavily intoxicated the appeal judge said:

> Constable Clarke testified that in her opinion, Mr. Ryan was "heavily intoxicated". From the evidence that I have recited, it is clear that she did not provide evidence upon which the Learned Trial Judge could properly evaluate her opinion. An opinion cannot stand on its own. It must be based upon the evidence. If the evidence is lacking, the opinion is meaningless.

[40] In so saying he also overlooked the circumstances under which Constable Clarke's opinion, based on the three *indicia* of impairment was formed. As the trial judge noted, it was formed in the context of the circumstances surrounding the respondent's arrest — an individual asleep at the controls of the motor vehicle at 4:38 in the morning parked in a driveway blocking other vehicles.

[41] With respect to Constable Clarke's opinion that the respondent was heavily intoxicated and the advantage possessed by the trial judge who heard her testify, I refer to the following passage from the judgment of Dickson, J. (as he then was) in *R. v. Graat*, [1982] 2 S.C.R. 819 at pp. 837-838:

> ...It is well established that a non-expert witness may give evidence that someone was intoxicated, just as he may give evidence of age, speed, identity or emotional state. This is because it may be difficult for the witness to narrate his factual observations individually. Drinking alcohol to the extent that one's ability to drive is impaired is a degree of intoxication, and it is yet more difficult for a witness to narrate separately the individual facts that justify the inference, in either the witness or the trier of fact, that someone was intoxicated to some particular extent. If a witness is to be allowed to sum up concisely his observations by saying that someone was intoxicated, it is all the more necessary that he be permitted to aid the court further by saying that someone was intoxicated to a particular degree. ...

[42] I am satisfied the appeal judge erred in applying the proper principles and in reaching the conclusion that the findings of the trial judge were unreasonable and not supported by the evidence. I would allow the appeal and enter a conviction of the respondent.

Chipman, J.A.