NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Lohnes, 2007 NSCA 24

Date: 20070221
Docket: CAC 267779
Registry: Halifax

Between:

Barry Russell Lohnes

Appellant

v.

Her Majesty The Queen

Respondent

Judges:	Roscoe, Cromwell and Oland, JJ.A.
Appeal Heard:	February 5, 2007, in Halifax, Nova Scotia
Held:	Leave to appeal the sentence is allowed, appeals of conviction and sentence are dismissed per reasons for judgment of Roscoe, J.A.; Cromwell and Oland, JJ.A. concurring.
Counsel:	Warren K. Zimmer, for the appellant Kenneth W. F. Fiske, Q.C., for the respondent

Reasons for judgment:

[1] Following a trial before Nova Scotia Supreme Court Justice John Murphy, sitting with a jury, Barry Lohnes was convicted of having the care and control of a motor vehicle while his ability to operate the vehicle was impaired by alcohol, and operating a motor vehicle while prohibited, contrary to sections 253(a) and 259(4) of the **Criminal Code**. He was sentenced to concurrent terms of six months incarceration on each charge followed by 24 months probation. As well, a driving prohibition of three years and eight months was imposed. He appeals both the convictions and sentence.

[2] The appellant submits that the trial judge erred by inadequately instructing the jury on the law related to the care and control presumption in s. 258(1)(a) of the **Code** and that the sentence was based on an error in principle and is manifestly excessive in the circumstances.

Evidence at trial:

[3] The theory of the defence was that Mr. Lohnes did not drive the vehicle and never had care and control of the vehicle.

[4] The evidence of the two police officers, Reeves and Rudderham, was that on May 21, 2003 at approximately 6:00 p.m. they observed a large extended cab pick-up truck stopped on a highway overpass on Portland Street, in Dartmouth near the Penhorn Mall. The truck was pulled over to the right near the concrete guard rail, and was blocking one lane of traffic.

[5] Constable Reeves testified that he was driving the police patrol wagon and first noticed the truck about 90 feet in front of him on the overpass while the police vehicle was stopped at a red light. He could see that the brake lights of the truck were on. A person, later identified as Mr. Lohnes, exited from the driver's side of the truck, walked around the front of the truck, and then came back to the driver's seat. Constable Reeves assumed the vehicle was broken down. As the police vehicle approached the stopped truck, he noticed white exhaust coming from the rear of it. Constable Reeves activated the emergency lights as he pulled the police wagon in behind the truck. After the police vehicle stopped behind the truck, Mr. Lohnes exited the truck again by the driver's side door, leaving the door open. He

walked around the front of the truck, bent down, and leaned with one hand on the hood. Constable Reeves followed him, noticing, as he walked by the driver's door, that there was a man sitting in the passenger seat wearing the seatbelt. Mr. Lohnes was then observed on the passenger side of the truck urinating on the road. Constable Reeves smelled alcohol on Mr. Lohnes' breath, and noticed that he was staggering and was very unsteady on his feet. When Mr. Lohnes was questioned about what was wrong with the vehicle his speech was slurred. He also had bloodshot eyes.

[6] Constable Reeves cautioned Mr. Lohnes, arrested him and read the breathalyzer demand. He was asked for the key to the vehicle so that it could be moved. Mr. Lohnes said he did not have the key. Constable Reeves did a pat-down type search and no key was found. The passenger, later identified as Gene Tanner, was asked if he had a key and he replied that he did not. His pockets were checked as well and no key was located.

[7] Constable Rudderham's evidence was similar to that of Constable Reeves, although he only saw Mr. Lohnes exit the truck once. He too observed the puff of exhaust smoke from the tailpipe at the rear of the truck. He followed Constable Reeves around the vehicle and noticed that in addition to the passenger there was a dog in the truck. As he approached the front of the truck he saw that the hood was slightly up and he felt that it was warm. After Constable Reeves took Mr. Lohnes to the police wagon, Constable Rudderham searched the cab of the truck for the key but did not find it. Later, he also searched an area with knee high grass below the overpass to see if the keys were there but did not find them. On cross examination he indicated that Mr. Lohnes had been trying to contact his son Vernon, who arrived with keys after the tow truck had been ordered. The passenger and the dog left the area with Vernon.

[8] A certificate of revocation of Mr. Lohnes' driver's license was entered as an exhibit by consent and it was not contested that he was disqualified from driving on May 21, 2003.

[9] Mr. Lohnes did not testify. The only witness for the defence was Ken Marsh who testified that he had been the driver of the truck on the day in question. He indicated that he visited Mr. Lohnes at his company office on Canal Street in Dartmouth in the early afternoon. After a couple of hours, he and Mr. Lohnes and

Mr. Tanner went to the Mic Mac tavern for dinner. He drove the truck, which belonged to Mr. Lohnes. Mr. Lohnes and Mr. Tanner consumed several beer at the tavern but Mr. Marsh drank Coke. After awhile they left there and went to another tavern, the Little Hub Too where Mr. Lohnes and Mr. Tanner consumed beer and Mr. Marsh drank "pop". After a couple of hours they left there and were on their way to Eastern Passage when the truck "acted up a little bit, like it was running out of fuel ". Again, Mr. Marsh said he was the driver both on the way to the second tavern and when they left there. He said that Mr. Lohnes sat in the middle and Mr. Tanner in the passenger seat. He testified that as they arrived on the Portland Street overpass the truck stalled. They stopped there and tried to get diesel fuel from the tank on the back of the truck but were not successful. They decided that Mr. Marsh should take the keys and go back to Mr. Lohnes' place of business to get a can of fuel. He said he would need the keys to get into the fuel storage area. Mr. Marsh walked back to the Hub tavern to get a ride to Canal St. He obtained the gas and returned to the overpass in his truck. By then Mr. Lohnes' truck was gone. Mr. Marsh returned the truck keys to the tavern. He did not see Mr. Lohnes again for a few months.

The jury charge:

[10] The charge to the jury contained all of the standard instructions, including those on presumption of innocence, reasonable doubt, credibility of witnesses, and circumstantial evidence. The judge set out the theories of the Crown and the defence in the following passage:

> The theory of the Crown - and again, I point out this is not evidence, this is the position of the parties. You should consider the position of the parties, and what they're asking you to conclude in the context of the evidence, as you assess it. The theory of the Crown is that on May 21st, 2003, Barry Lohnes was in control of a motor vehicle on Portland Street, in Dartmouth, Nova Scotia. He was seen in the driver's seat, operated the brakes, and turned over the engine, causing smoke to come from the exhaust. His ability to operate a motor vehicle was impaired by the voluntary consumption of an alcoholic beverage. At the same time, he was disqualified from operating a motor vehicle, and was aware of that disqualification. That is the position of the Crown.
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> The position of the Defence is that on May 21st, 2003, the police came upon a truck that was broken down at Highway 111 overpass on Portland Street. The truck was, at all times that day, being driven by Ken, Ken Marsh. Mr.

> Lohnes never drove the truck that day, and never intended to assume control, nor did he actually take control of the truck at any time. The evidence does not prove beyond a reasonable doubt that he performed some act, or series of acts involving the use of the truck, its fittings or equipment, whereby the truck could unintentionally be set in motion, creating the danger the Section is designed to protect.
>
> The truck was broken down, and could not be set in motion, either intentionally, or unintentionally. Mr. Lohnes was aware that it was out of fuel, and could not be driven. He did not sit in the driver's seat for the purpose of setting the truck in motion, because of, he was aware that it could not be moved. The presumption in Section 258 - that's of the **Criminal Code** - does not apply because of this lack of intention. There was no proof of actual control, and he should be found not guilty. The evidence relating to the signs of impairment is not sufficient to prove, not sufficient to prove an impaired ability to operate a motor vehicle beyond a reasonable doubt. In relation to the second charge, there is no evidence that he drove, no circumstantial evidence that is capable of proving beyond a reasonable doubt that he drove the truck. He should be found not guilty.

[11] Next, the trial judge set out the essential elements of the two offences and reviewed the evidence of the three witnesses both in detail and specifically in relation to the crucial issues of care and control and impairment. With respect to the presumption in s. 258(1), he said:

> Now, I'm going to discuss the ingredients of those essential elements. As I indicated, the Crown must prove beyond a reasonable doubt that Mr. Lohnes had control of the motor vehicle. The law allows the Crown to establish it in either of two ways that a person had control of a motor vehicle. Both Counsel referred to these two methods of proof in their submissions. First, the Crown may rely upon a presumption respecting control, which is contained in Section 258(1)(a) of the **Criminal Code**, or instead of relying on the presumption of control, it may rely on the evidence to establish actual control. In this case, you should consider, you must consider whether the Crown can succeed in establishing beyond a reasonable doubt that Mr. Lohnes had control of the motor vehicle, based on either approach. If the Crown establishes this element beyond a reasonable doubt, that is the element of control, by one or the other method, then this component of the offence will be established. Both methods of proof of this element are not needed. It's an alternative situation.
>
> Now, I'm first going to deal with the method of proof, based on the presumption that's contained in Section 258 of the **Criminal Code**, and you will have copies during your deliberations. It says, in essence that:

> If a person is found to have occupied the driver's seat or the position ordinarily occupied by a person who operates a motor vehicle, then that person is deemed to have had control of the motor vehicle.
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> In other words, if the Crown proves that Mr. Lohnes was in the driver's seat of the motor vehicle, he's presumed to have had control of the vehicle. The Crown must prove his position in the driver's seat beyond a reasonable doubt, before the presumption arises, and the presumption arises, unless the person found in the driver's seat establishes that he didn't occupy that seat for the purpose of setting the vehicle in motion.
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> In other words, if you find beyond a reasonable doubt that Mr. Lohnes occupied the driver's(sic), the burden is then on him to prove that he was not in that seat in order to set the vehicle in motion. Now, he doesn't have to prove that he was not in that seat to set the vehicle in motion beyond a reasonable doubt. He only needs to establish that on a balance of probabilities, (inaudible). In other words, he has to establish if the presumption arises that it was more probable than not that he was not occupying the seat for the purpose of putting the vehicle in motion. If he does that, then the Crown cannot rely on the presumption.
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> Now, the Crown presented evidence in this case concerning Mr. Lohnes' position in the vehicle, ...

[12] The judge then reviewed the evidence of the two police officers concerning the position Mr. Lohnes occupied in the truck. He continued:

> . . . If you're satisfied that the Crown has proved beyond a reasonable doubt that Mr. Lohnes was in the operator's seat, or the driver's seat, you must next consider the evidence introduced on the Accused's behalf about his purpose in being in the operator's seat.
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> Now, in this case, there was no direct evidence from the Defence about Mr. Lohnes' location in the vehicle, at the time it was stopped at the overpass. The only direct evidence was from the Crown on that issue. And, indeed, that evidence was somewhat circumstantial in that the observation was that he left the vehicle, rather than that he had been seated. Mr. Marsh testified that he had been driving, and that Mr. Lohnes was in the middle of the seat with Mr. Tanner by the passenger door, before Mr. Marsh left the truck. So the Defence evidence indicated only where Mr. Lohnes was, prior to Mr. Marsh's departure.

> Now, if you're satisfied beyond a reasonable doubt that Mr. Lohnes was in the driver's seat, but if you're also satisfied that he has proved, on the balance of probabilities, better than (inaudible) that his purpose of occupying the driver's seat was not to set the vehicle in motion, then he cannot be presumed to have had the control of the vehicle. If you find that control of the vehicle is not established, due to the presumption, what you should then consider is whether the evidence establishes that he has actual care and control, without relying on the presumption that arises from occupation of the driver's seat.
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> In other words, it's possible that the evidence adduced in the presumption that Mr. Lohnes could be found to have had control of the vehicle, if the Crown establishes beyond a reasonable doubt that he actually had. In proving control of a motor vehicle, the Crown does not have to establish that Mr. Lohnes was driving, or that he intended to drive the vehicle. If he did intend to drive the vehicle, that would be evidence to be considered in whether he had control. However, the Crown must only prove that by his actions with respect to the vehicle, he risked putting it in motion so that it could become dangerous.

[13] The trial judge then dealt with the elements and related evidence of actual control and impairment and the elements and related evidence on the second count. After the jury retired, counsel for Mr. Lohnes objected to the instruction with respect to the manner in which the judge reviewed the evidence of the defence which tended to rebut the presumption of care and control, specifically the underlined section quoted above. Counsel was of the view that the judge should have instructed the jury that there was evidence of Mr. Lohnes' intention while sitting in the vehicle. The discussion began as follows:

> MR. ZIMMER: I have one issue, My Lord. It deals with the issue of the presumption, and the overcoming of the presumption, that is whether ...
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> THE COURT: That's the control presumption?
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> MR. ZIMMER: It's the 258.
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> THE COURT: Yeah, okay.
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> MR. ZIMMER: Unless the Accused establishes that he did not occupy the seat for the purposes of motion. Your Lordship reviewed the Crown evidence, and then made the comment that the evidence introduced by the Defence regarding the location was just the evidence of Mr. Morash (sic). The evidence didn't deal with the question of - you said Mr. Morash's (sic) (inaudible), so

> Defence evidence only indicated, was only, was only indicated prior to departure, only in relation to the departure of the (inaudible), departure of Mr. Morash (sic), alright? My concern is this - is that it creates the impression that the Defence has to call evidence that directly relates to that evidence, that particular issue, that is you cast on evidence today what I refer to an evidentiary burden, and not a persuasive burden to actually call evidence, because you segregate Mr., the Defence evidence which is Mr. Morash's (sic) evidence...
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> THE COURT: Mmm hmm.
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> MR. ZIMMER: ...and you say, well, that all occurred at a time prior to the reliable police, so that you're really left with no Defence evidence to establish that he did occupy the seat with the intention, or purpose of (inaudible)...
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> THE COURT: And you don't object to my indicating there was no Defence evidence to establish that. You're just saying I...
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> MR. ZIMMER: Well, the...
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> THE COURT: There's no burden on the Defence to provide any such evidence...
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> MR. ZIMMER: But there's - that's right, and the question of whether or not it's established, or not can come from the whole of the evidence, and there is circumstan-, there's a number of circumstances that they could look at, and they could conclude that they're satisfied on a balance of probabilities that he didn't get into the vehicle, or didn't occupy the driver's seat for the purpose of setting it in motion. And that would include the fact that he got out of the vehicle, got back into it, and got out, so that the, that just the fact that he's exiting the vehicle, and not setting it in motion, because...
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> ...

[14] In the ensuing discussion it became clearer that counsel was requesting that the judge instruct the jury that for the purposes of determining whether the presumption was rebutted, they should look at all the evidence, including what Mr. Lohnes knew about whether the truck had run out of gas and could infer that he did not occupy the driver’s seat with the intention to set the vehicle in motion. Justice Murphy did not agree that there was direct evidence of Mr. Lohnes’ knowledge or state of mind to which he should specifically refer. The re-charge consisted of the following:

> THE COURT: Thank you. I notice that all members of the Jury are present. Ladies and gentlemen, Counsel have suggested that I make a short condition, or a clarification to, with respect to one point in the charge that I gave to you, and I'm going to do that now. And as I said earlier, you shouldn't treat this as any more or less significant than anything else that I've said.
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> The additional message that I want to leave with you is as follows: If you find that the Crown has established beyond a rea-, and I'm dealing now with the first count - if you find that the Crown has established beyond a reasonable doubt that Mr. Lohnes occupied the driver's seat, when you consider whether any presumptions which may arise under Section 258 has been rebutted by Mr. Lohnes, that is whether he has established, on a balance of probabilities, that he didn't occupy the driver's seat for the purpose of putting the vehicle in motion, you must consider all of the evidence. Not only evidence from the witness advanced by the Defence, but also evidence heard during direct and cross-examination of witnesses calls (sic), called by the Crown. And your consideration should include all the evidence concerning the condition of the vehicle, at the time, including what you may find Mr. Lohnes knew.

[15] After two hours of deliberation the jury returned with a question concerning the evidence about Mr. Lohnes' attempts to contact his son. The jury wanted to know whose phone was used to make the call. In response, a portion of Constable Rudderham's evidence was played back to the jury. After two more hours of deliberation, the jury returned with its verdicts of guilty on both counts.

The sentencing hearing:

[16] On May 26, 2006, Mr. Lohnes was sentenced to a period of six months incarceration. Crown counsel proposed a sentence of six to eight months in consideration of the offender's lengthy record of drinking and driving and driving while prohibited offences. Mr. Lohnes was seeking a sentence to be served in the community, or an intermittent sentence, or a conditional discharge with a curative treatment provision pursuant to s.255(5) of the **Code**.

Issues:

[17] The appellant raises two issues on appeal:

> (1) That the Learned Trial Judge failed to instruct or inadequately instructed the jury on the law related to the presumption of Section 258(1) of the **Criminal Code of Canada**;
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> (2) That the Learned Trial Judge, in imposing sentence, failed to consider and weigh all the relevant factors which resulted in a sentence which was excessive.

Jury charge on the presumption:

[18] The presumption in issue is contained in s. 258(1) of the Code:

> 258. (1) In any proceedings under subsection 255(1) in respect of an offence committed under section 253 or in any proceedings under subsection 255(2) or (3),
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> (a) where it is proved that the accused occupied the seat or position ordinarily occupied by a person who operates a motor vehicle, vessel or aircraft or any railway equipment or who assists in the operation of an aircraft or of railway equipment, the accused shall be deemed to have had the care or control of the vehicle, vessel, aircraft or railway equipment, as the case may be, unless the accused establishes that the accused did not occupy that seat or position for the purpose of setting the vehicle, vessel, aircraft or railway equipment in motion or assisting in the operation of the aircraft or railway equipment, as the case may be;

[19] The appellant submits that the trial judge erred by not specifically instructing the jury as to the importance of the intent of the accused in coming to a decision as to whether he had established that he did not occupy the driver's seat for the purpose of putting the vehicle in motion, and by failing to specifically review the evidence relied on by the defence to rebut the presumption.

[20] The appellant submits that the judge should have advised the jury that it was not necessary for the defence to present direct evidence of Mr. Lohnes' intentions, but that they could infer from the evidence of the police officers and Mr. Marsh that Mr. Lohnes knew the truck was out of gas and inoperable and therefore his intent could not have been to put the vehicle in motion. The appellant relies on **R. v. Fraser** (1990), 96 N.S.R. (2d) 128; N.S.J. No. 117 (C.A.) to assert that the failure to review the evidence in this way amounts to an error in law.

[21] In **Fraser**, a case where the accused relied on self defence, the court allowed an appeal where the trial judge did not relate the evidence to the issues. Chipman, J.A. for the court said:

> [39] The appellant submits that the trial judge's charge on s. 34, s. 35 and s. 37 was, overall, inadequate. It is said that he explained these sections to the jury without relating their provisions to the evidence. The appellant's counsel referred to the following passage from the trial judge's charge:
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> > "... In this case, it is difficult to separate each piece of evidence as it applies to each particular self-defence section of the **Criminal Code**, so I will review the evidence with you as a whole a little later and out of that may come some help to you in applying the evidence or sections of it to each particular **Criminal Code** self-defence section."
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> [40] Following an explanation of the **Code** sections, the trial judge then summarized the evidence at length. He did not, however, relate any of this evidence to the issues raised. ...
>
> [41] The duty of a trial judge to review the evidence and relate it to the issues has been restated by this Court recently in. **R. v. Reddick** (1989), 91 N.S.R. (2d) 361 where Macdonald, J.A. said at p. 363:
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> > "In my opinion the trial judge was under a duty to review the substantial portions of the evidence and relate that evidence to the issues. The leading authority on this point is **R. v. Azoulay**, [1952] 2 S.C.R. 495; 15 C.R. 181, where Taschereau, J., said at p. 182:
> >
> > > '... The rule which has been laid down, and consistently followed is that in a jury trial the presiding judge must, except in rare cases where it would be needless to do so, review the substantial parts of the evidence, and give the jury the theory of the defence, so that they may appreciate the value and effect of that evidence, and how the law is to be applied to the facts as they find them ...'
> >
> > It is true that counsel, particularly Mr. Williams for the defence, reviewed the evidence in some detail in their addresses to the jury. That, however, did not relieve the trial judge of the duty of relating the salient features of the evidence to the issues raised ... An accused is entitled to have his defence fully and fairly put to the jury. That cannot be accomplished unless the evidence that touches on the defence is referred to ..."

> [42] It is not sufficient simply for the judge to leave the whole evidence for the jury - in bulk as it has been said. The judge must refer to those parts of the evidence relative to the theories of the Crown and the defence and relate that evidence to the principles of law that have been explained to the jury. See **R. v. Azoulay**, supra; **R. v. Whynot** (1983), 61 N.S.R. (2d) 33 at p. 44; **R. v. Delong** (1989), 31 O.A.C. 339 at p. 353; and **R. v. Deegan** (1979), 49 C.C.C. (2d) 417 at p. 434.

[22] I do not agree that the trial judge here fell into the error of not relating the evidence to the issues in the charge. As he proceeded through the various elements of the offences the judge pointed out all the evidence that specifically related to that issue. In addition he read the theory of the defence as prepared by the appellant's counsel which referred to all the evidence the accused said tended to rebut the presumption. In the re-charge the judge specifically indicated that the jury should look at all the evidence, including the evidence about the condition of the truck and what Mr. Lohnes knew. Any defect in the original charge was repaired by the re-charge. Since there was no evidence from Mr. Lohnes , there was no direct evidence of his knowledge or intention that the judge could refer to.

[23] A jury charge need not be perfect: **R. v. Jacquard**, [1997] 1 S.C.R. 314, at ¶ 32. Having reviewed the jury charge here in light of the deficiency alleged by the appellant, I do not think that the charge, as supplemented by the additional instruction, constituted misdirection. The trial was brief and the evidence and issues were not complex. Although the judge could have specifically referred to the evidence of Mr. Marsh when he spoke of how the appellant could rebut the presumption, it was not obligatory. The applicable test in **Jacquard**, *supra*, is that an appellate court must be satisfied that the charge left the jury with a sufficient understanding of the facts as they relate to the relevant issues. In my opinion, this charge meets that standard.

[24] As ably pointed out by the Crown in its factum, if there had been an omission in the charge as contended by the appellant, this would be an appropriate case to apply the curative provisions of s. 686(1)(b)(iii) of the **Criminal Code**. The appellant has not challenged the jury charge on the second count that he was driving while prohibited. The jury was properly instructed that the presumption did not apply to the second charge. Any error in the charge regarding the presumption did not impugn the finding of guilt on the second count. Obviously the jury must have concluded that the appellant had driven the truck. There was no direct

evidence that he drove the truck, but as stated by Crown counsel in his factum, there were a couple of logical paths open to the jury:

> 30. The jury could have found, by inference, that the appellant got the truck running and engaged the transmission and moved the truck a short distance after Marsh had left in search of diesel fuel. A second, and more plausible, explanation is that the jury simply rejected the testimony of the Defence witness and found the appellant had driven his truck to the spot where it had come to a stop on the overpass. This was an inference open to the jury to draw and here, the respondent submits, the jury's question assumes great significance. Surely the testimony of Constable Rudderham raised in the collective mind of the jury a troubling question about the evidence of Marsh: Why would the appellant attempt to contact his son, Vernon, when he knew Marsh had left in search of diesel fuel with which to fill the truck's tank and get the vehicle moving. The jury no doubt asked itself why the appellant asked for his son and not Marsh. At this juncture it is well to recall Marsh's evidence that, after he returned to the overpass to find both the truck and his friend gone, he returned the keys to the truck to the tavern and continued on his way home and had no contact with the appellant for two months.

[25] I would dismiss the first ground of appeal.

Sentence appeal:

[26] The appellant submits that the trial judge erred in not imposing a sentence which provided for a curative treatment program after finding that the appellant was in need of such treatment and by imposing a sentence that was manifestly excessive given the fact that the appellant had never been incarcerated previously.

[27] The standard of review on an appeal from sentence is as stated by Justice Oland in **R. v. Longaphy** (2000), 189 N.S.R. (2d),102 N.S.J. No 376 (Q.L.) at ¶ 20 (C.A):

> [20] A sentence imposed by a trial judge is entitled to considerable deference from an appellate court. A sentence should only be varied if the appellate court is satisfied that the sentence under review is " clearly unreasonable": **R. v. Shropshire (M.T.)**, [1995] 4 S.C.R. 227; 188 N.R. 284; 65 B.C.A.C. 37; 106 W.A.C. 37; 102 C.C.C. (3d) 193 at pp. 209-210. Absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence if the sentence is "demonstrably unfit": **R. v. C.A.M.**, [1996] 1 S.C.R. 500; 194 N.R. 321; 73

> B.C.A.C. 81; 120 W.A.C. 81; 105 C.C.C. (3d) 327 (S.C. C.) at p. 374. The Supreme Court of Canada reiterated this standard of appellate review in reviewing a conditional sentence in **R. v. Proulx (J.K.D.)**, [2000] 1 S.C.R. 61; 249 N.R. 201; 142 Man. R. (2d) 161; 212 W.A.C. 161; 140 C.C.C. (3d) 449 at § 123-126.

[28] The trial judge reviewed the pre-sentence report, a report from an addictions counsellor who had been treating Mr. Lohnes, and his criminal record. The PSR indicated that the appellant was 60 years old, married with adult children, and the owner of several businesses. He admitted to the probation officer that he had a problem with alcohol and advised that he was attending counselling sessions in that respect. It was reported that he had previously complied with the conditions of a probation order and appeared to be a suitable candidate for supervision in the community and further addictions counselling.

[29] The report from Sam Rendell, the addictions counsellor, indicated that Mr. Lohnes had met with him for weekly individual counselling sessions and group support for four months. Mr. Rendell believed that Mr. Lohnes wished to continue the program and wanted to make positive changes to solve his alcohol problem.

[30] Mr. Lohnes' criminal record, prior to the convictions now under appeal, consisted of 15 **Criminal Code** matters, including six prior convictions for driving while prohibited, four impaired driving, one breathalyzer refusal and one breach of probation. As well he had 10 **Motor Vehicle Act** convictions, six of which were for driving while disqualified.

[31] In his oral decision, Justice Murphy referred to all the various sentencing options that were available, the relevant principles of sentencing codified in s. 718 and the extensive record of driving while disqualified and drinking and driving offences. Regarding the record, he said:

> The driving while disqualified and driving while suspended charges are, as I indicated, very troublesome because they show a consistent disregard by Mr. Lohnes for orders issued by the Court. When the Court imposes an order that someone not drive or when the public authorities impose - the motor vehicle branch imposes an order that someone not drive, breaching that order is a serious matter, particularly on a repeated basis, because it shows a disregard for obeying the law. In fact, I would go so far in the cases a number of times when Mr. Lohnes has been convicted of disobeying such orders as suggesting it comes very

close to acting in defiance of the law. I've had to consider those prior convictions in assessing the penalty which would be imposed today.

[32] With respect to the possibility of imposing a sentence pursuant to section 255(5), he said:

> With respect to the conditional discharge under Section 255, the **Code** makes it clear that there are two criteria to be considered. And the section provides as follows:
>
> > Notwithstanding Section 730, subsection (1) the Court may, instead of convicting a person of an offence committed under Section 753, after hearing medical or other evidence, if it considers that the person is in need of curative treatment in relation to his consumption of alcohol or drugs and that it would not be contrary to the public interest by order direct that the person be discharged under 730 on conditions prescribed in a probation order [and so on].
>
> I have concluded in this case, and it's advanced by the Defence and not seriously contested - not contested at all by the Crown, that Mr. Lohnes is a person who is in need of curative treatment. His record clearly demonstrates the difficulty that he has had alcohol. The probation report references that, and Mr. Rendell's report indicates that Mr. Lohnes has a drinking problem and is in need of curative treatment.
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> ...
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> There is no indication that the curative treatments - the benefit from the curative treatment requires a particular pattern of attendance with Mr. Rendell or one that can only be available with Mr. Rendell if Mr. Lohnes is not serving a custodial sentence. There's nothing in Mr. Rendell's report which addresses that. I am satisfied, as I've indicated, that Mr. Lohnes is in need of curative treatment.
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> The second aspect under the conditional discharge section, 255, sub (5), is whether it would be contrary to the public interest if Mr. Lohnes were granted a conditional discharge. And I have concluded in this case that it would be contrary to the public interest to grant Mr. Lohnes a conditional discharge contemplated by Section 255.
>
> The Crown has emphasized, and I have noted, the general deterrence requirement under Section 718 and it's well recognized in sentencing principles that other members of society must be deterred from committing crimes. There is

the matter of general deterrence and there is the matter of specific deterrence in Mr. Lohnes' case. I'm not convinced that in this case Mr. Lohnes will be deterred from committing further offences despite the expressions he's made today unless he receives a period of incarceration.

The record speaks for itself, and it speaks loudly. Mr. Lohnes has had every possible option and opportunity to try and to change his drinking and driving, and his driving while disqualified through fines ranging from small amounts up to significant amounts and through probation, license suspension and various other means which are available at law, and he has not responded to those over a period of many years, continuing most recently up until February of 2005 when he was last fined contrary to Section 259, subsection (4) of the **Criminal Code.**

In my view, it would be contrary to the public interest to provide a condition discharge to Mr. Lohnes today. He would not, in my view, be specifically - be sufficiently deterred from committing further offences given the record that many opportunities to be deterred on that - in that context before have been rejected.

And secondly, and more importantly, the matter of general deterrence must be addressed. Drinking and driving is an evil in our society which is no longer tolerated. Driving while disqualified on multiple occasions - in this case it appears as many as twelve - constitutes a disregard and a disrespect for the law which the judicial system cannot tolerate. It would be contrary to the public interest to - not to address those offences with the record that Mr. Lohnes has short of a custodial sentence.

So in my view, it would be contrary to the public interest to impose a conditional discharge in this case. The Court cannot in the public interest condone further drinking and driving and driving while disqualified offences given the record that Mr. Lohnes has.

[33] The judge then distinguished the cases relied on by defence counsel, and rejected the suggestion of a conditional sentence, saying:

In this case, I'm not satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with fundamental purpose and principles of sentencing. Mr. Lohnes has shown a disregard for public safety while driving while under the influence of alcohol and while impaired and while disqualified, and in my view, there is a safety issue for the community unless he receives sufficient specific deterrence. And fines have

> not been shown or other penalties have not been shown to constitute that deterrence given his disregard for those sorts of penalties.
>
> Further, in my view, it would not be consistent with the fundamental principles of sentencing to impose a conditional sentence in circumstances where an accused has demonstrated a repeated disregard for Court orders and has had many opportunities to comply with Court orders and has simply refused to do so.

[34] The judge then imposed a sentence of six months incarceration on each charge to be followed by 24 months probation. In addition to the mandatory conditions, he ordered that Mr. Lohnes attend for any assessment, treatment and counselling for alcohol addiction and substance abuse which may be recommended by the probation officer and that he participate in and cooperate with any assessment, treatment or counselling program recommended by the probation officer to the probation officer's satisfaction. As well, a three year eight month driving prohibition was ordered.

[35] The appellant contends that the judge erred in finding that a s. 255(5) order would not promote specific and general deterrence and by saying that every other possible sentencing option had been previously tried. In relation to the latter error the appellant submits that the judge failed to take into account the “step” theory and the “gap” principle.

[36] The appellant relies on **R. v. Debaie**, [1991] N.S.J. No. 374 (Co. Ct), and **R. v. Earle**, [1989] N.S.J. No. 129 (Co. Ct.), two cases where conditional discharges with curative treatment orders were imposed in similar circumstances, and **R. v. Ashberry,** [1989] O.J. No. 101; 30 O.A.C. 376; 47 C.C.C. (3d) 138; 68 C.R. (3d) 341 (Ont. C.A.) where the court explained that a s. 255(5) order does not undermine specific deterrence and may provide protection for the public.

[37] In **Ashberry**, Justice Griffiths discussed the test to be applied in determining whether a conditional discharge with a treatment order was not contrary to the public interest commencing at page 161 (C.C.C.):

> Among the considerations relevant to the question of whether a given case is sufficiently exceptional to warrant recourse to the curative treatment/conditional discharge provisions of s. 255(5) of the Code are:

(a) The circumstances of the offence and whether the offender was involved in an accident which caused death for serious bodily injury. The need to express social repudiation of an offence where the victim was killed or suffered serious bodily injury will generally militate against the discharge of the offender. Parliament has seen fit to expressly provide for more onerous sentences in those cases (s-ss. 255(2) and (3)).

(b) The motivation of the offender as an indication of probable benefit from treatment. One can expect that a person facing a sentence of imprisonment may quite readily agree that he or she will take treatment for alcoholism and give up alcohol. The important question is the bona fides of the offender in giving such an undertaking. The efforts of the offender to obtain treatment before his or her conviction is of some importance. If the offender has a history of alcohol-related driving offences and has never before sought treatment for his or her condition, then one may regard with some suspicion his or her efforts to obtain treatment at this stage, when faced with a probable term of imprisonment.

(c) The availability and calibre of the proposed facilities for treatment and the ability of the participant to complete the program.

(d) A probability that the course of treatment will be successful and that the offender will never again drive a motor vehicle while under the influence of alcohol.

(e) The criminal record and, in particular, the alcohol-related driving record of the offender. Normally, where the offender has a previous record of alcohol-related driving offences there is a high risk of the offence being repeated and a greater need for a sentence emphasizing specific and general deterrence. The offender with a previous bad driving record will obviously have a higher burden of satisfying the court that his or her case is exceptional and that a discharge with curative treatment is appropriate and in the public interest.

However, if all other conditions are met, specifically where the evidence establishes both the need for treatment and the probability of rehabilitation, the offender's bad driving record should not by itself deprive the offender of the remedy of a discharge with appropriate safeguards imposed as conditions of probation under s. 255(5) of the Code. The multiple offender may well be a more suitable candidate for curative treatment because of his or her chronic alcoholism or drug addiction. In addition, the fact that he or she has on a number of prior occasions received fines or sentences of imprisonment may lead the court to conclude that these penalties have had no deterrent effect on the offender and that the public interest would best be served by directing curative treatment under a formal supervised program.

[38] The application of these factors to this case does not persuade me that the trial judge erred in principle in determining that it was not in the public interest to discharge Mr. Lohnes. The first factor is inapplicable. With respect to the second, it does not appear on the record before us that there was convincing evidence of Mr. Lohnes' motivation to change his habits. He did not begin seeing Mr. Rendell until two years after the present charges were laid, just a few weeks before the trial. Furthermore, there was no evidence of either the calibre of the program being proffered or its chances of success. As noted by Justice Griffiths, although a long record of drinking and driving offences should not by itself eliminate the possibility of a discharge, the longer the prior record, the higher the burden on the offender to satisfy the court that his case is exceptional, and therefore in the public interest.

[39] The appellant also alleges that the trial judge was wrong to conclude that every other sentencing option had been tried, because he has never had a conditional discharge or a conditional sentence or an intermittent sentence. The comment the appellant takes issue with is the underlined statement quoted above at ¶ 32 which begins: "Mr. Lohnes has had every possible option and opportunity to try and to change his drinking and driving....". While it is correct to say that there were other sentencing options which had never been imposed, this misstatement of fact is not an error in principle which would permit intervention by this court. The judge was correctly emphasizing the very long record and the consistent failure of Mr. Lohnes to change his criminal behaviour, despite the numerous fines, probation orders and other penalties imposed upon him.

[40] The appellant argues that by not imposing one of the lesser types of penalties, such as a conditional sentence, the judge ignored the so called "step" or "jump" theory. For his previous four impaired driving offences, Mr. Lohnes had been fined. It is submitted that it is too big a step to go from a fine to six months incarceration. The appellant did not offer any authority for this argument.

[41] Clayton Ruby, in *Sentencing* (Sixth Edition), (Toronto, Butterworths, 2001), sets out the reasoning behind the "jump effect" commencing at page 339:

> § 8.74 One of the features often disclosed by an examination of a criminal record is the fact that the sentence imposed or to be imposed in the instant case is considerably longer than any previously imposed. Even when there is a marked

> increase in the seriousness of the crime committed, there should not be too great a "jump" in the length of the sentence imposed. This is really no more than the principle that less will do, then more is superfluous, now reflected in section 718(d) of the Criminal Code. Accordingly in **Re Morand and Simpson**, (1959), 30 C.R. 298 (Sask. C.A.); **Duguay** (1979), 9 C.R. (3d) S-30 (B.C.C.A.) the Saskatchewan Court of Appeal noted, as one of the reasons for reducing a sentence from four years to three years, that the longest sentence previously imposed was two years. Sentences will also be reduced if they represent an excessive increase over previous sentences. Similarly in **Alfs**, [1974] O.J. No. 1046, (1974), 17 C.L.Q. 247 (Ont. C.A.) the Ontario Court of Appeal noted that the appellant had never received a custodial term before and for that, among other reasons, the court varied a four-year sentence for armed robbery to one of time served, being about ten months followed by one year's probation. A principle is emerging. It is evident from **Sloane**, [1973] 1 N.S.W.L.R. 202 where a jump from a non-custodial sentence to eight years' imprisonment was described as one which "offends in principle".
>
> § 8.75 This principle does not justify increasing the sentence beyond that imposed previously; rather it is a rule that tends to limit such an increase - where otherwise appropriate and necessary - to one imposed in an incremental manner.

[42] In this case although Mr. Lohnes had been fined for his last four offences, he had been imprisoned once before in 1994 for two months for refusing the breathalyzer. In my view, consideration of the jump effect on a sentence appeal must be undertaken in the context of the standard of review, cited above, which recognizes that the sentencing judge is entitled to significant deference and that unless the sentence is demonstrably unfit or clearly unreasonable it will be upheld. In this case, the lengthy record suggests a complete disregard for court orders. Although the probation officer reported in the PSR that the last probationary term was completed without incident, it appears from the record that during that last term of probation, imposed in June 1998 for 18 months, Mr. Lohnes was convicted of two counts of driving while prohibited. To impose a penalty such as a conditional discharge or a conditional sentence in the expectation that deterrence would be achieved through compliance with the conditions, in light of the appellant’s history of ignoring court orders, would, in my opinion, be overly optimistic. In the circumstances of this case, proceeding to six months incarceration from fines, many of which to Justice Murphy’s consternation remained unpaid, did not offend the jump principle to such a significance to justify our interference.

[43] The appellant also suggests that the sentence offends the gap principle, also explained in Mr. Ruby's text, commencing at page 340:

> § 8.78 Since both sentencing and crime are human endeavours, it is natural for the courts to give credit to someone who has made an honest effort to avoid conflict with the criminal law. In the nature of things, an effort such as this will often not be completely successful, but if a substantial period of time passes without convictions, this is often a matter which will be taken into consideration. As put by Cross: "Assuming that it is not merely the outcome of lucky non-detection, the trouble-free period shows in these cases that the offender is not a professional criminal, and therefore the public needs less protection from him." It shows that there is some hope of rehabilitation.

[44] Counsel for the appellant argued that the gap principle applies here because of the time periods between Mr. Lohnes' convictions for impaired driving. The record indicates that his previous offence dates for the s. 253 charges were January 1992, March 1995, January 1997 and March 2001. The date of the offence for the matter under appeal was May 21, 2003. I do not think this pattern indicates any appreciable gap, and the submission fails to take into account the other offences the appellant was convicted of in the intervening periods, specifically those pursuant to s. 259(4) in 1998, 1999 and 2003. Most significant is the conviction for driving while prohibited for which he was sentenced only one week before the matters presently under appeal.

[45] I do not agree that the gap principle applies here or that the trial judge erred in failing to give any credit on that account.

[46] As stated by Justice Bateman in **R. v. Cromwell**, 2005 NSCA 137, in most cases of drunk driving denunciation and general deterrence are the prominent objectives of sentencing. Although no one was injured as a result of the matters under appeal, the following passage from **Cromwell** bears repeating:

> [28] Drunk driving is an offence demanding strong sanctions. In **R. v. MacLeod** (2004), 222 N.S.R. (2d) 56; N.S.J. No. 58 (Q.L.)(C.A.), the Crown appealed an 18 month conditional sentence for impaired driving causing bodily harm and leaving the scene of an accident. Cromwell, J.A., writing for the Court, in allowing the appeal and substituting a sentence of 18 months imprisonment for the driving offence and six months consecutive for leaving the scene, said:

> [22] This and other courts have repeatedly said that denunciation and general deterrence are extremely weighty considerations in sentencing drunk driving and related offences: see for example, [citations omitted] I accept the point that generally incarceration should be used with restraint where the justification is general deterrence. However, I also accept the view of the Ontario Court of Appeal in **Biancofiore**, shared by the Supreme Court of Canada in **Proulx**, that offences such as this are more likely to be influenced by a general deterrent effect. As was said in **Biancofiore**, "... [T]he sentence for these crimes must bring home to other like-minded persons that drinking and driving offences will not be tolerated." (at para. 24) I would add that this is all the more important where, as here, the respondent's drunk driving caused serious physical injury to an innocent citizen and where, by fleeing the scene of the "accident", the offender has shown disregard for the victim's condition and disrespect for the law.

[29] The sentence must provide a clear message to the public that drinking and driving is a crime, not simply an error in judgment. Those who would maim or kill by driving their vehicles while impaired are as harmful to public safety as are other violent offenders. The proliferation of this crime and the risk that it will be seen by society as less socially abhorrent than other crimes heightens the need for a sentence in which both general deterrence and denunciation are prominent features. Referring again to **Biancofiore**, *supra*, *per* Rosenberg, J.A.:

> [26] The drinking and driving offences occupy a unique position in the criminal law. Unlike most other criminal offences, such as crimes of violence or crimes against property, the stigma attached to the drinking and driving offences is often not matched by the objective gravity of these crimes. . .
>
> [27] . . . Section 718 directs that "the fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society". As Ms. Gallin pointed out, it is too easy for otherwise law-abiding people to view what happened in this case as an " accident", an unfortunate consequence of an error in judgment, rather than the commission of a criminal offence. Sentencing courts should be careful to ensure that they do not bolster that view of serious drinking and driving offences.
>
> [28] The pressing need to ensure that the drinking and driving offences not be destigmatized might not be met by a conditional sentence in this case. . . .

> [30] Denunciation as a component of sentencing is intended to communicate society's collective condemnation of the offenders conduct (**R. v. M.** (C.A.) , [1996] 1 S.C.R. 500; S.C.J. No. 28 (Q.L.) (S.C.C.) *per* Lamer, C.J.C. at para 81).

[47] In my opinion the sentencing judge committed no error in principle, nor is the sentence manifestly excessive in the circumstances. I would allow leave to appeal the sentence but dismiss the appeals of conviction and sentence.

Roscoe, J.A.

Concurred in:

Cromwell, J.A.

Oland, J.A.