C.A.C. No. 109088

NOVA SCOTIA COURT OF APPEAL

Hallett, Chipman and Pugsley, JJ.A.

Cite as: R. v. Miller, 1995 NSCA 54

BETWEEN:		
HER MAJESTY THE QUEEN		Robert C. Hagell for the Appellant
	Appellant	
- and -		
ANDREW JAMES MILLER		Jim O'Neil for the Respondent
	Respondent	
		Appeal Heard: January 27, 1995
		Judgment Delivered: January 27, 1995

THE COURT: The appeal is allowed as per oral reasons for judgment of Chipman, J.A.; Hallett and Pugsley, JJ.A., concurring.

The reasons for judgment of the Court were delivered orally by

CHIPMAN, J.A.:

This is an appeal by the Crown from a decision of a judge of the summary conviction appeal court setting aside the respondent's convictions for having care and

control of a motor vehicle while "over 80" and while impaired.

On September 25, 1993, the respondent, his girlfriend and his child attended a gathering at a friend's camp in Leamington, Cumberland County, Nova Scotia. The respondent was drinking and it was agreed that his girlfriend would drive his truck home from the party.

The threesome left the party shortly before 1:00 a.m. with the respondent's girlfriend driving the truck. She pulled over once to converse with some friends who were stopped at the roadside and a second time when the vehicle stalled. She pulled over yet a third time when the respondent noticed that the brake indicator light on the dash of the vehicle was lit. The respondent had asked her whether she had put the brake on with her foot by mistake and she indicated that she did not think she had. He got out and walked around to the driver's side of the vehicle and his girlfriend slid over to the passenger side. At this time the vehicle was pulled to the side of the road partly on the pavement and partly on the shoulder.

The respondent got in the vehicle and was seated in the driver's seat. The engine was running and as he was bending down and started to pull the emergency brake off, his daughter pointed out that someone was pulling up behind them. At about the same time a knock came on the window. It was the R.C.M.P. The police officer asked the respondent if he was drinking and he replied in the affirmative. He explained that he had just come over to see about getting the brake light off and that his girlfriend had been driving.

Constable Paul Mellon of the R.C.M.P. testified that as he came up to the driver's side of the vehicle, he found the respondent in the driver's seat with the door closed and the engine running. This was at 1:10 a.m. The respondent showed **indicia** of impairment and Constable Mellon formed the belief that he was in care and control of the motor vehicle and thereupon read the respondent the breathalyzer demand, the standard police warning and the rights to counsel. The respondent was taken to the

Springhill Police Detachment and breathalyzer tests were administered. The readings obtained were 150 and 140 milligrams of alcohol in 100 millilitres of blood respectively.

The respondent was charged in an information sworn on October 19, 1993 that he had the care and control of a motor vehicle while the concentration of alcohol in his blood exceeded 80 milligrams per 100 millilitres of blood contrary to s. 253(b) of the **Criminal Code** and with having care and control of a motor vehicle while his ability to drive was impaired by alcohol or a drug contrary to s. 253(a) of the **Criminal Code**.

The respondent was tried in Provincial Court and found guilty of both offences as charged. On appeal to the summary conviction appeal court the convictions were set aside and acquittals entered.

The Crown's appeal to this Court is on the question of law alone.

The trial judge found that the respondent had overcome the presumption in s. 258(1)(a) of the **Criminal Code** that the accused who occupies the seat in the position ordinarily occupied by the person operating the vehicle is deemed to have care and control thereof in that he established that he did not do so for the purpose of setting the vehicle in motion. However, the trial judge also found that the Crown had proved beyond a reasonable doubt that the respondent did, in fact, have care and control. After referring to the Supreme Court of Canada decision of **Ford v. R.** (1982), 65 C.C.C. (2d) 392 and **R. v. Toews** (1985), 21 C.C.C. (3d) 24 the trial judge said:

> "So I suppose that's one of your extreme cases the other way. If the fellow's unconscious he's no risk to anybody and maybe the accused in this case should have drunk two dozen beer and been curled up in the back seat. I don't know. But he wasn't in the back seat. He was found behind the wheel of the vehicle. The motor was running. The keys were in the ignition. All that man had to do at any point was shift that vehicle into drive and go down the road. He could suddenly change his attitude from what it had been very easily. Let's face it the man was not sober and people who are not sober don't always exercise the

> best judgment and take the attitude well, I'm here now, and I don't know what this thing is going to do, so I guess I better drive, or I'm here now and I might as well drive the rest of the way home, it's not all that far. That is the risk because it was a course of conduct associated with the vehicle. He was sitting behind the wheel, the vehicle was quite capable of being put in drive and driven away, he was fooling around with the brake pedal, so he says and I have no great reason to disbelieve him, and trying to get the vehicle in good working order, and the risk was there that being in that position and doing those things that he would change and become dangerous. In other words, become a vehicle that was being driven by a person in a situation that the legislation is designed to prevent. He wasn't unconscious. He wasn't in the back seat. He was there with a running vehicle behind the wheel and if the police vehicle hadn't been there there was a risk in my mind that he might have shown poorer judgment than he had to that point. Now that may seem like a high standard to impose and harsh justice but it is a risk and it is a risk that the justices in the Supreme Court contemplated and the section wouldn't be worth much if people in that position could walk away simply by saying well, I wasn't going to do anything and my course of conduct up to that point that evening showed it. We don't know what's going to happen beyond that point and I think that kind of an interpretation of those words is necessary to effect the intent of the legislation. So I find the accused guilty within the meaning of **Toews** as I construe it. He was in care and control even though I'm satisfied he's rebutted the presumption that he had the intent to put the vehicle in motion but the intent to put it in motion is not an essential ingredient of the offence by judicial interpretation and there are other indicia of care and control which were present in this case and they apply to the accused. There is evidence to satisfy both counts in that event and I found the accused guilty of both counts."

The summary conviction appeal court does not have jurisdiction to retry a case. Apart from an error in law, the appeal court can only set aside a verdict on the

ground that it is unreasonable or cannot be supported by the evidence. In making this determination, the court must not merely substitute its view for that of the trier of fact but must re-examine and to some extent reweigh and consider the effect of the evidence. See **Yebes v. The Queen**, [1987] 2 S.C.R. 168.

In our opinion, the summary conviction appeal court judge in reversing the Provincial Court judge did not perform the function mandated but substituted his finding of fact for that of the Trial Court. He said:

> "This case is very unique on the facts. The Appellant was inspecting the emergency brake apparatus only. There is no evidence that he intended to have any actual control over the vehicle other than the emergency brake. To set the vehicle in motion he would have to 'change his mind' and put the vehicle in drive. The obvious risk to the occupants of the vehicle was the reason for inspecting the brake apparatus.
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> I note that in **Toews** the Defendant was found not to be in care or control even though he was found in his truck with the keys in the ignition and the vehicle's radio was playing. There must be a real and imminent potential danger to the public. The facts must be examined in each case. The real or imminent danger would have been for the Appellant's vehicle to proceed if the brakes were not operating properly.
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> This is not a case where the Appellant had assumed care or control or was driving up until the police had arrived. In many cases for example where a driver goes off the road they may not be able to continue to actually drive as the vehicle may be inoperative. The driver may still have care or control as they may not have relinquished the earlier care or control. In the present case the Appellant was not the driver. He went so far as to inspect the brake only and did not take over care or control of the entire vehicle. Mr. Toews could have changed his mind and take control of the vehicle and not just the stereo. He did not, so he was acquitted. Mr. Miller could have changed his mind and take control of the vehicle, he did not. He too should be acquitted."
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> The trial judge applied the correct law.

In **Ford v. The Queen** (1982), 65 C.C.C. (2d) 392 (S.C.C.), Ritchie, J. speaking for the majority of the court said at p. 398:

> "In the present case the appellant was found to be the owner

> of the motor vehicle in question and to have been in and out of it numerous times during the course of the evening, and there was also evidence that he turned the engine on and off a number of times in order to use the heater. These are all additional factors tending to establish care or control so that under the particular circumstances of this case rebuttal of the presumption created by s. 237(1)(a) is far from conclusive on the issue of the guilt or innocence of the appellant.
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> Nor, in my opinion, is it necessary for the Crown to prove an intent to set the vehicle in motion in order to procure a conviction on a charge under s. 236(1) of having care or control of a motor vehicle, having consumed alcohol in such a quantity that the proportion thereof in his blood exceeds 80 mg. of alcohol in 100 ml. of blood. Care or control may be exercised without such intent where an accused performs some act or series of acts involving the use of the car, its fittings or equipment, such as occurred in this case, whereby the vehicle may unintentionally be set in motion creating the danger the section is designed to prevent."

In **Regina v. Toews** (1985), 21 C.C.C. (3d) 24 (S.C.C.) McIntyre, J. speaking for the court said at p. 30:

> "This Court has recently considered the question in **Ford v. The Queen** (1982), 65 C.C.C. (2d) 392, 133 D.L.R. (3d) 567, [1982] 1 S.C.R. 231. Ritchie J., speaking for the majority, said, at p. 399 C.C.C., p. 574 D.L.R., p. 249 S.C.R.:
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> > 'Care or control may be exercised without such intent where an accused performs some act or series of acts involving the use of the car, its fittings or equipment, such as occurred in this case, whereby the vehicle may unintentionally be set in motion creating the danger the section is designed to prevent.'
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> There are, of course, other authorities dealing with the question. The cases cited, however, illustrate the point and lead to the conclusion that acts of care or control, short of driving, are acts which involve some use of the car or its fittings and equipment, or some course of conduct associated with the vehicle which would involve a risk of putting the vehicle in motion so that it could become dangerous. Each case will depend on its own facts and the circumstances in which acts of care or control may be found will vary widely. In **Ford**, the appellant's vehicle and others were in a field open to the public. A drinking party was in progress in the car, and the appellant had occupied the driver's seat and had turned on the ignition on various

> occasions to operate the heater as the party progressed. These facts were considered sufficient to establish care or control."

Although each case will depend on its own facts, the element of being in such control of the car as to be at risk of setting it in motion is the basis of the criminal liability. Here the respondent was in the driver's seat behind the steering wheel. The keys were in the ignition. The engine was running. The respondent said he "started to pull the emergency brake off" as the police arrived. In the face of this, the trial judge's finding of care and control was not unreasonable or unsupported by the evidence. It should not be disturbed. The legislation is aimed at the protection of the public. The respondent was, at the material time, at the controls of the vehicle and constituted an immediate danger to the public in the sense contemplated in the authorities.

We allow the appeal and set aside the acquittal. The trial judge erred in entering a conviction on both charges in view of the **Keinapple** principle. We restore only the conviction under s. 253(b) of the **Criminal Code**.

Chipman, J.A.

Concurred in:

Hallett, J.A.

Pugsley, J.A.