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NOVA SCOTIA COURT OF APPEAL

[Cite as: R. v. Lockerby, 1999 NSCA 122]

Pugsley, Hallett and Cromwell, JJ.A.

BETWEEN:

BRIAN LOCKERBY Appellant - and - HER MAJESTY THE QUEEN Respondent	)	Appellant in person William D. Delaney for the respondent Appeal heard: October 1, 1999 Judgment delivered: October 19, 1999

THE COURT: Leave to appeal is granted but the appeal is dismissed per reasons for judgment of Cromwell, J.A.; Hallett and Pugsley, JJ.A. concurring.

CROMWELL, J.A.:

[1] Brian Lockerby was convicted by Digby, J.P.C. of having control of a motor vehicle having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood contrary to s. 253(b) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46. His summary conviction appeal from this conviction was dismissed by Davison, J. of the Supreme Court. Mr. Lockerby now seeks leave to appeal and, if granted, appeals to this Court. The proposed appeal is restricted to questions of law alone : **Criminal Code,** section 839(1).

[2] Davison, J. sets out the background facts as follows:

> On July 9, 1997 there was a party at premises on Harris Street in the Municipality of Halifax and the appellant drove to the party in his Honda Civic motor vehicle which had a standard transmission. The appellant drank alcoholic beverages at the party which ended at 4 o'clock in the morning. The appellant and others decided to visit a restaurant on Grafton Street. Derrick Allison agreed to drive the appellant's car and Matthew Haysom and a woman named Michelle were other occupants of the car. The appellant was seated in the front passenger's seat.
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> The four persons decided to look for their friends in the restaurant and if the friends were not there, the four would go to another location to eat. Mr. Allison parked the motor vehicle in the front of the restaurant and went in the restaurant to look for the friends. He left the vehicle in neutral, with the engine running and the emergency brake engaged. After Mr. Allison left the vehicle, the other three occupants decided to enter the restaurant and eat whether or not the friends were found.

[3] Having decided to go into the restaurant, Mr. Lockerby moved from the passenger seat to the driver's seat. The trial judge accepted Mr. Lockerby's evidence that he did not get behind the wheel for the purpose of putting it in motion.

[4] Mr. Lockerby's evidence at trial on this aspect was, in part, as follows:

A. ..... basically, we decided we wanted to get something to eat regardless if they were in there or not. And I hopped over to shut the car off and put it in park, put it in gear. And at that time, the police officer came around the corner, down Grafton Street. He was looking at the car, looking at me. I was kind of, you know, nervous. He drove back around. I just kind of froze. I didn't -- you know, I didn't really want to do anything. I just wanted to wait and see what he was going to do, type of thing. And that's when he came up to the window and started asking questions.

.....

Q. Okay. When Derrick got out of the car in front of The Apple Barrel and you had a couple of minutes in the car to have a discussion with the other people in the car that you've indicated to us, what was your intention?
A. My intention was to shut the car off and put it in park, put it in gear, and go in and get something to eat.
Q. Okay. Did you drive the vehicle at all that night?
A. No, not at all. The vehicle didn't move.

.....

Q. Can you describe going from the passenger seat to the driver seat?
A. Basically, slid over into the driver's seat, shut the car off, put the car in gear, and that was basically it.
Q. And what were you going to do?
A. Park it. Just put on the -- it's like putting it in park when you put it in first.
Q. Right.
A. So if the emergency lets go, the car won't roll. Just wanted to park it and lock it up and go inside.

.....

Q. But when you're sitting in the driver's seat with the keys there and the gear shift and everything, you certainly could have driven that car if you wanted to? There's nothing stopping you if you had wanted to, I mean, technically drive the car?
A. I suppose if I wanted to, I could have, yeah.
Q. So you shifted the car. It was in neutral when it was parked or you can't remember?
A. Yeah. It was in neutral. It was running so it was in neutral and the parking brake was on. [emphasis added]

[5] While Mr. Lockerby was sitting in the driver's seat, the police arrived and the

charge leading to the conviction under appeal ensued. There is now no dispute that the proportion of alcohol in Mr. Lockerby's blood exceeded the legal limit.

[6] The grounds of appeal raised are as follows:

1. **THAT** the Learned Supreme Court Justice erred in his interpretation of the words "care and control" as found in Section 253 of the Canada Criminal Code.

2. **THAT** the Learned Supreme Court Justice upheld findings of fact made by the learned Trial Judge which were findings of fact unsupported by the evidence.

3. **THAT** the Learned Supreme Court Justice upheld misapprehended evidence relative to the issue of the appellant's care and control of the motor vehicle in question.

4. **THAT** the conviction was unreasonable or cannot be supported by the facts.

[7] Grounds 2, 3 and 4 cannot succeed. Davison, J. applied the correct legal principles to his review of the trial judge's findings of fact. Even assuming that Grounds 2, 3 and 4 raise questions of law alone, the challenged findings are supported by the evidence and there was no material misapprehension of the evidence.

[8] The appellant argues that the trial judge misapprehended the order in which the appellant used the controls of the vehicle. The trial judge stated that the appellant entered the car ".. with the intention of putting it in park and shutting off the engine." It is submitted that this misstates the evidence which was that the appellant shut off the engine first and then put the vehicle in gear. There are two answers to this submission.

The first is that it is far from clear that there is any misapprehension. In the passage to which exception is taken, the judge was referring to the intention of the appellant at the time he entered the driver's seat, not to the precise order of his actions pursuant to that intention. Secondly, I agree with Davison, J., for reasons I will develop in more detail in considering the first ground of appeal, that even on the appellant's stated order of his actions, those actions constituted control of the vehicle within the meaning of s. 253(b) of the **Code**. Even if there had been a misapprehension of the evidence and even assuming that such constituted an error of law alone, it would not be material to the result given the legal definition of control applicable to the charge.

[9] It is further argued that the trial judge misapprehended the evidence with respect to the emergency brake, in particular the appellant's evidence that it was engaged at all relevant times and that he did not touch it. The judge made no clear finding on this point and there is nothing in the record, in my view, to show any misapprehension of the evidence.

[10] In my opinion, there is no arguable point of law raised by the appeal in relation to Grounds 2, 3 and 4.

[11] The main issue on appeal is whether Davison, J. erred in law in upholding the trial judge's finding that Mr. Lockerby had control of the car within the meaning of s. 253 of the **Criminal Code**. In considering this issue, Davison, J. said:

The trial judge accepted the evidence of the accused that he did not get behind the wheel for the purpose of putting the vehicle in motion. As stated, this finding deprives the Crown of the presumption of s. 258(1)(a) and the Crown must prove beyond a reasonable doubt the appellant had "control of a motor vehicle" at a time when his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood.

I do not accept the argument that the judge lessened the Crown's burden by erroneously referring to care or control. The phrase is disjunctive and it is clear from the judge's decision he was directed to the issue of whether the Crown proved control of the motor vehicle.

I do accept the submission of the Crown that the court should have regard for the purpose of the legislation. What was the mischief the section was to prevent? As stated by Justice Ritchie in **Ford v. The Queen** (*supra*) at p. 399:

> 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. [Emphasis added.]

In **R. v. Toews** (*supra*) at p. 30 McIntyre, J. said:

> ... 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 involve a risk of putting the vehicle in motion so that it could become dangerous. [Emphasis added]

Justice McIntyre stated at p. 28:

> ... the *mens rea* for having care or control of the motor vehicle is the intent to assume care or control after the voluntary consumption of alcohol or drug.

. . . . .

Chipman, J.A. in **R. v. Miller** (1995), 137 N.S.R. (2d) 313 stated at p. 317:

> 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 findings 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.

> In this appeal, the appellant had consumed alcohol to a point that his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood and he assumed the driver's seat, made use of keys in the ignition and placed the vehicle in low gear. He had control of the motor vehicle as that term is contemplated by s. 253(b).

[12] Davison, J. reviewed the leading cases from the Supreme Court of Canada which were binding on him as they are on us. In my opinion, he did not err in law in his statement of the applicable legal principles.

[13] Mr. Lockerby's principal contention on appeal is that risk of setting the vehicle in motion is an essential element of the offence and that no such risk was present here. He argues that is not a crime to get behind the wheel of a car to turn it off and put it in gear while having more than the legal limit of alcohol in the blood. I do not accept this argument. Assuming without deciding that risk of setting the vehicle in motion is an essential element of the offence, the trial judge made a clear finding that such risk existed here. That factual finding was upheld on appeal to Davison, J. and it

is supported by the evidence. Risk is not to be assessed with the benefit of hindsight or on the assumption that the appellant's actions would, in fact, accord with his intentions. The appellant's own testimony at trial is, in my view, conclusive on this issue. He agreed in his testimony (set out above) that he was sitting in the driver's seat, with the keys in the ignition and that he could have driven the car if he had wanted to. In my view, when a person with more than the legal limit of alcohol in his or her blood has the present ability to make the car respond to his or her wishes, there is a risk that the car may be placed in motion, even where the person's intentions are not to do so.

[14] A person who has the present ability to operate the vehicle, who has its superintendence or management, is in control of it. The following review of the meaning of "control" in this context by Hill, J. in **R. v. Johan** (1998), 124 C.C.C. (3d) 249 is helpful:

> "Control" does not need definition. The man who is in a car and has within his reach the means of operating it is in control of it. [*R. v. Thompson* (1941), 75 C.C.C. 141 (N.B.C.A.) at 143-4 (as approved in *The Queen v. Toews, supra* at 7).]
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> "Control" ... is defined as "the fact of controlling or checking and directing action" also as "the function or power of directing and regulating; domination, command ..." [*R. v. Price* (1978), 40 C.C.C. (2d) 378 (N.B.C.A.) at 383-4 (as approved in *The Queen v. Toews, supra* at 8).]
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> The word "control" is frequently used as synonymous with "superintendence" and suggests the possession of a restraining or directing influence or "management". [*R. v. Slessor*, [1970] 2 C.C.C. 247 (Ont. C.A.) at 257, *per* Schroeder J.A. (in dissent in the result).]

[15] Mr. Lockerby was at the controls of the vehicle and admitted using them. He had possession and superintendence of the vehicle; he was in charge of it. Although it

was not his intention to set the vehicle in motion, he was in the position to make the vehicle do what he wanted and used the ignition key, the clutch and the gear shift to carry out his purpose. In both the everyday sense of the word and as the word is used in s. 253(b), Mr. Lockerby was in control of the vehicle. He had more than the legal limit of alcohol in his blood. That is the conduct which is criminal under s. 253(b) of the **Criminal Code**.

[16] The appellant also argued that the trial judge erred in failing to recognize that the charge against the appellant was having control of the vehicle, rather than having care or control of the vehicle. I reject this argument. I agree with Davison, J. that it is clear from the trial judge's decision that he was directed to the issue of whether the Crown had proved control of the motor vehicle.

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

Cromwell, J.A.

Concurred in:

Hallett, J.A.

Pugsley, J.A.