

IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Amanda Rose MacCarthy, 2004 NSPC 67

Date: October 29, 2004
Case No.(s): 1356969
Registry: Halifax

Between:

Her Majesty the Queen

v.

Amanda Rose MacCarthy

Judge: The Honourable Judge C. H. F. Williams, JPC

Heard: Decision rendered orally on October 29, 2004
in Halifax, Nova Scotia

Written decision: Released on December 29, 2004

Counsel: Dennis W. Theman, for the Crown
Lonny J. Queripel, for the Defence

By the Court

Introduction

- [1] In the early morning of August 17, 2003, residents of the quiet residential area of Charles Road, Timberlea in the Halifax Regional Municipality were awakened by the sounds of screaming tires and a loud bang. Upon investigation, they discovered that a vehicle operated by the accused, Amanda Rose MacCarthy, had struck a parked unoccupied vehicle and had come to a stop in an adjacent flower garden. The accused, upon inquiry, offered that she had swerved to avoid hitting a cat and that she had not consumed any alcohol. When the police and emergency services arrived on the scene the police, upon their observations, felt that the accused had consumed alcohol that impaired her ability to drive. As a result, they charged her with operating a motor vehicle when impaired by alcohol or a drug.

Summary of Evidence and Evidential Findings of Facts

- [2] I accept and find that the accused was the sole occupant and operator of the vehicle and that it was involved in a single car accident. I also find, on the evidence that I accept, it is reasonable to conclude and I do conclude that the accused had consumed alcohol. Several witnesses testified that they smelled alcohol emanating either from her breath or from her person. However, the degree and potency of the smell varied from witness to witness. Other subjective indicia of impairment were identified such as slurred speech, glossy eyes but, on the evidence, although they suspected impairment by alcohol, the police did not give her a blood or breath demand although they detained her for about four hours.
- [3] This case therefore raises two fundamental issues:
- (1) Was the accident an integral part of the accused driving? In other words, if as could reasonably be inferred from the total evidence, the police presumed that she had consumed alcohol, did her consumption of alcohol affect her functional ability to such a degree that it also affected and impaired her ability to operate her motor vehicle?
 - (2) Or, was the accident a distinct and separate cause independent of her presumed consumption of alcohol?

Analysis

- [4] Constable Barb MacInnis, the arresting officer, who was the first police officer on the scene,

saw the accused seated on a step. When she requested the accused to walk to the police cruiser she noted that her gait was staggered. She also noted that the accused slurred her speech and had glossy eyes. Significantly, although she had the accused in her vehicle for about nine minutes the Constable did not detect any smell of alcohol. She attributed this to a poor sense of smell. Nonetheless, she concluded that the accused ability to operate a motor vehicle was impaired by alcohol and therefore arrested her for impaired driving. It was only when the accused was in the ambulance before she was transported to the hospital did the officer detect any smell of alcohol emanating from the accused and this was sometime after she had arrested the accused for impaired driving.

- [5] Constable Duella Tuttle spoke to the accused when she was confined to Constable MacInnis' vehicle. In arriving at the conclusion that the accused was highly intoxicated, Constable Tuttle relied upon her strong sense of smell and the fact that in her opinion the accused had very glossy eyes, slurred her speech, was agitated and smelled of alcohol. However, she could not recall any particular words that the accused slurred and, although the accused eyes were glossy they were not bloodshot.
- [6] Peter van de Ven who was the first person on the scene described the accused as shaken and confused. She offered that the accident occurred because she swerved to avoid hitting a cat and that she had not been drinking. He did not note any smell of alcohol emanating from the accused and in his view she did not slur her speech. Glenna van de Ven who was also on the scene with her husband observed that the accused was shaking all the time, crying and was upset. She did not smell any alcohol emanating from the accused.
- [7] Overall, in my opinion, the evidence disclosed that, at the accident scene, the accused was visibly shaken, upset and emotional. Because of the accident, it would appear that the police reasoned that, in all the present circumstances and on their observations, the logical causative factor was impairment by alcohol. On the evidence, on their investigating a motor vehicle accident, the police formed the belief soon after their first contact with her that the accused had alcohol in her system and also believed that the accused, within the statutory determined period to rely upon the presumption of impairment, had committed the offence of impaired driving.
- [8] Generally, it seems to me that an important aspect of proof beyond a reasonable doubt is a sense of order. Therefore, on this premise, each presentation of the evidential grounds that must be covered should be clearly defined and explained by witnesses. In my opinion, this includes not only a description of the alleged misconduct but also a real nexus between the accused and all the legally relevant elements that constitute the delict.
- [9] Here, no one actually saw the manner of the accused driving before the collision. Thus, there is no direct evidence of the manner of her driving, including the speed of the vehicle, before the accident. However, it seems to me that the accident scene itself and the observations of witnesses who arrived on the scene, after the accident, when added to the immediate observed conduct of the accused, in a properly coordinated case could provide

sufficient and satisfactory proof that could corroborate circumstantially the assumption that the accused had consumed alcohol that impaired her functional ability to the degree that her ability to operate and control her motor vehicle was impaired by her consumption of alcohol.

- [10] I say that when I considered and assessed the total evidence and my observation of the witnesses as they testified. On the issue of alcohol consumption, I concluded that there existed credible evidence to believe and accept that the accused had indeed consumed alcohol. The police officers and the paramedics, who had close contact with her, testified that they smelled alcohol emanating from her breath or person. I also noted that other witnesses who were also in close proximity to her and who also spoke to her did not smell any alcohol emanating from her or detected anything that, in their opinion, would consider to be impaired by alcohol.
- [11] Thus, in my view, even though I accept that the smell or odour of alcohol was present, I conclude that its degree or potency was highly subjective and depended on the particular witness self-declared sense of smell. Therefore, in my opinion, these subjective impressions cannot, without more, be an accurate factual assessment of whether alcohol affected the accused ability to operate a motor.
- [12] Whether a person's ability to drive is impaired by alcohol is a question of fact, on which a lay person can give an opinion. *R. v. Graat*, [1982] 2 S.C.R. 819. Constable MacInnis the arresting officer, when she placed the accused under arrest, formed her opinion of intoxication not from the sense of smell, which is highly subjective, but from her observations of the eye condition, speech and gait of the accused. However, in my view, it is the indicia of impairment that was present at the time of arrest and the basis for and the opinion of the arresting officer that is critical.
- [13] Because impairment is a question of fact, I think that I must be careful not to conclude that because the police state that they smell alcohol that opinion must overwhelm the opinion of others. The smell of alcohol alone is not proof beyond a reasonable doubt that a presumed consumption of alcohol affects a person's ability to drive. Further, as the effect of the consumption of alcohol is subjective we must rely upon objective observations such as the accused general conduct, the manner of driving and the speed of the vehicle and passive emanations such as smell of alcohol on her breath, her manner of speech, her manner of walking and her eye condition. *R. v. Zinck*, [2003] N.S.J. No. 98, 2003 NSPC 6.
- [14] On the evidence, there was no testimony of the actual manner of driving of the accused. The only thing that I can consider is her reported statement to a witness that she swerved to avoid hitting a cat. All the reported observations of the accused were made when she was not operating a motor vehicle and after she had been in an accident that had affected her not only emotionally but also physically. Therefore, in my view, Constable MacInnis' observations when considered with the total evidence, were equivocal and overall does not without doubt confirm behaviour that deviated from the norm and, specially whether the accused ability to operate a motor vehicle was impaired by alcohol. *R. v. Stellato* (1993), 78 C.C.C. (3d)

380.

- [15] Although there is some evidence that the accident scene had physical elements that could have been useful to determine or to corroborate circumstantially the manner of driving and speed of the vehicle and which objectively could have been of some assistance on the issue of impairment it was apparent that no efforts were made to establish that linkage if at all it did exist. Also, on the evidence, the arresting officer formed an opinion that the accused had alcohol in her system and even though she had detained the accused for over three hours the officer did not demand from the accused a breath or blood sample to determine the concentration of alcohol, if any, in the accused blood.
- [16] Thus, on the total evidence I think that it would be unsafe to conclude beyond a reasonable doubt that the accused ability to operate her vehicle at the time of the accident was impaired by alcohol. Therefore, on the evidence before me, I am not satisfied beyond a reasonable doubt that the accused ability to operate her motor vehicle was impaired by alcohol.

Conclusion

- [17] On the analysis that I have made on the evidence before me, I find the accused **not guilty** as charged. An acquittal will be entered on the record.