IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Morris, 2006 NSPC 50

Date: 2006 Nov. 08
Docket: 1655779, 1655780
Registry: Halifax

Her Majesty the Queen

v.

James Robert Morris

Judge:	The Honourable Judge Jamie S. Campbell
Heard:	September 27, 2006, in Halifax, Nova Scotia
Oral decision:	November 8, 2006.
Charges:	Refusing a demand to provide a breath sample contrary to section 254(5) of the *Criminal Code* and with driving while his ability to operate a vehicle was impaired by drugs and alcohol contrary to section 253 (a) of the *Criminal Code*.
Counsel:	Alex Keaveney, Crown Michael Taylor, Defence

By the Court:

[1] The two large stone lions that stand separating the Granville Mall from Duke Street in Halifax were saved by the Nova Scotia College of Art and Design from the demolition of Halifax's Old Customs House in 1958. They were placed in that location, removed from street traffic yet in the heart of the city's downtown within the last few years. In the early morning hours of May 13, 2006 James Robert Morris found himself in his car, with the air-bag deployed, facing down the two lions and not entirely sure how he had landed in that predicament. Mr. Morris' situation got worse.

[2] He was charged with failing to comply with a breathalyzer demand contrary to s. 254(5) of the Criminal Code and with operating a motor vehicle while impaired, contrary to s. 253(a) of the Criminal Code.

Issues:

[3] There are two issues. The first, which was the subject of a voir dire, is whether Mr. Morris' right to counsel under s. 10(b) of the Canadian Charter of Rights and Freedoms has been infringed and whether as a result his refusal of the breath demand cannot be admitted in evidence against him.

[4] The second issue is whether there is sufficient evidence of impairment to prove the charge under s.253(a).

Facts:

[5] Mr. Morris is a 22 year old third year accounting student at Mount St. Vincent University in Halifax. He also works full time for a national grocery chain in one of its local stores.

[6] On May12, 2006 he left work at about 6:30 pm. He went, with a friend, to another friend's home in Fall River. They were attending a graduation party. Mr. Morris acknowledged having had two glasses of wine at the party. He and his friend left Fall River at approximately 11:00 pm. The friend drove Mr. Morris' car back to Halifax from the party. In his direct evidence he said that the friend had driven "just in case". When asked about that on cross examination he gave a more nuanced response. He said that his friend had not been drinking and was fully awake, while he, Mr. Morris wanted to relax.

[7] Mr. Morris said he arrived home at about 11:20pm. After changing his clothes he headed to Reflections Cabaret arriving shortly before midnight. At the cabaret he had two single mixed drinks of Vodka and Seven Up. He left, alone, at 1:40am intending to drive to his home on Veith St. in Halifax.

[8] Mr. Morris' evidence was that he did not feel intoxicated at that time. He did not feel that his ability to drive had been impaired by alcohol.

[9] He got in his car and headed down Granville St, and recalled driving between 40 and 50 kilometers an hour.

[10] Mr. Morris remembered hearing a crash as his car hit the curb and as the air bag in his car deployed. Rather than stopping at the corner of Duke and Granville Streets, Mr. Morris drove straight into the pedestrian mall across the street, shearing off some metal posts in the process. The car came to a rest entirely off the street with it's rear bumper resting about four feet from the street.

[11] Mr. Morris had no recollection of the moments leading up to the accident itself. His narrative goes silent. It stops with him driving down Granville St. and picks up again as he senses the impact.

[12] Mr. Morris' evidence was that he did not know what had happened.

[13] After getting out of the car he saw a small group of people and walked toward them.

[14] Joshua Kennedy and Donald Pritchard are private security guards employed by a nearby mall. Upon hearing the crash they ran toward the vehicle, to see if anyone, either on the street or in the vehicle, had been injured. They both saw Mr. Morris walking along with the group of strangers. As they approached, Mr. Pritchard called out to Mr. Morris "Are you ok?".

[15] Both Mr. Kennedy and Mr. Pritchard were dressed in dark uniforms but their uniform jackets did not specifically identify them as security officers.

[16] As Mr. Kennedy came to within about 20 feet of Mr. Morris, Mr. Morris began to flee. Mr. Kennedy recalled that this happened just he was getting ready to start talking to Mr. Morris. He had been on the radio informing his dispatcher of what had happened.

[17] Mr. Morris ran up Duke St. to the intersection with Barrington Street, then ran along Barrington Street northward until he reached the bus stop at the end of Barrington Place Mall. Mr. Kennedy and Mr. Pritchard pursued him, on foot. They noted that while he was wearing beach sandals or flip flops he was able to run at considerable speed. Mr. Morris recalled having lost one sandal on Duke St. and the next at the entrance to the Delta Barrington Hotel.

[18] Mr. Morris eventually stumbled and was taken down and detained by a cab driver and another person on the street. When Mr. Pritchard arrived his handcuffs were placed on Mr. Morris by one of the people who had stopped him. Mr. Morris recalled being held with his face to the ground.

[19] Constable Chris Delong of the Halifax Regional Police was dispatched to the scene and at 2:11 am found Mr. Morris being detained. Mr. Morris was on the ground, laying on his side, in handcuffs.

[20] Constable Delong was told of the motor vehicle accident and took Mr. Morris to the police vehicle. Constable Delong testified that he noticed a strong alcohol odor from Mr. Morris, and noted as well that Mr. Morris had bloodshot glossy eyes and was staggering to the left. He said that he had to hold Mr. Morris up to stop him from falling over.

[21] When they reached the police vehicle, Mr. Morris began crying and said that he had broken up with his girlfriend.

[22] Constable Delong read Mr. Morris the demand for a breath sample. Mr. Morris refused that demand and indicated clearly to Constable Delong that he would not provide a sample. Constable Delong placed Mr. Morris under arrest and at that time read him the Charter caution, including advising him of the right to consult legal counsel.

[23] At that point, Mr. Morris did ask to speak with his own lawyer. He was brought to the holding room of the Halifax Regional Police headquarters on Gottingen Street at 2:40am. He remained in that room until 3:10am. While he had spoken on the phone he had not been successful in reaching his lawyer.

[24] Constable Delong called the Nova Scotia Legal Aid on-call duty counsel number. He left a message indicating the nature of the call and the time. No response was received and by 3:35 am Mr. Morris was released. He was told that he could consult counsel at his leisure.

[25] He was given the opportunity to call a taxi but decided instead to walk home. Constable Delong testified that he did not believe that Mr. Morris was a danger to himself or others. On that basis he concluded that Mr. Morris need not be held for public intoxication.

[26] Mr. Morris went to work the next day, but returned home early. He stayed at home the following day, Sunday, until he was persuaded to seek medical attention. He was diagnosed as having a concussion and a number of contusions.

Right to Counsel:

[27] The right to legal counsel is not a formality or a mere technicality. It is a constitutional right.

[28] Section 10(b) of the Canadian Charter of Rights and Freedoms provides that:

> *10. Everyone has the right on arrest or detention,*
>
> *(b) to retain and instruct counsel without delay and to be informed of that right.....*

[29] When a person is detained by state authorities, he or she is put at a disadvantage. The

person has been deprived of his liberty and is at risk of incriminating himself. A person who has been detained is in need of immediate legal advice to assist him in regaining his liberty and to protect against self incrimination. R. v. Bartle [1994] S.C.J. No.74.

[30] The Charter imposes a number of duties on the police who detain a person. First, the person must be informed of his right to retain and instruct counsel. If he has indicated a desire to exercise the right, he must be given a reasonable opportunity to do so and the police must refrain from eliciting evidence from the detained person until he has had that reasonable opportunity.

[31] The purpose of the informational component of the s. 10(b) right is to provide people who

are detained with meaningful choices. A person can neither exercise nor effectively waive a right of which they have not been informed. The authorities cannot presume that the person is aware of the right to counsel.

[32] Here, Mr. Morris was not informed of the right to counsel prior to being given the breathalyzer demand and his refusing that demand.

[33] Only after the refusal was Mr. Morris was advised of the right to consult counsel. He was left in a holding room, with a telephone book and was seen using the telephone. He did indicate to the police that he was not able to contact his lawyer. This took 30 minutes.

[34] Constable Delong then called legal aid duty counsel and left a message, stating the time and the nature of the call. When no response was received from legal aid, Mr. Morris was released about 25 minutes later.

[35] There is no suggestion that Mr. Morris was given another breathalyzer demand after he had been given an opportunity to exercise the right to consult counsel. No evidence was obtained from him after his refusal of the breathalyzer demand. It is clear however that evidence was obtained from Mr. Morris after he was detained and before he was advised of his right to consult counsel.

[36] Mr. Morris' right to counsel was breached.

[37] The question then is whether Mr. Morris' refusal, given as it was, before he was made aware of his right to retain counsel, should be excluded under section 24(2) of the Charter.

[38] Section 24(2) of the Charter provides that:

> *24(2)Where... a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the*

> *evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute*.

[39] First there must be a Charter violation in the gathering of evidence. There is no requirement for a strict causal link between the Charter infringement and the discovery of the evidence, but there must be some connection or relationship. Evidence which is obtained as part of the ‘chain of events” involving a Charter breach will fall within the scope of section 24(2).

[40] Clearly Mr. Morris’ refusal was given in the context of the infringement of his right to counsel under s. 10(b).

[41] The second stage of the inquiry under s. 24(2) involves a balancing of factors relating to the effect of admission on the fairness of the trial, the seriousness of the breach and the effect of exclusion on the administration of justice. The burden rests of the party seeking to exclude the evidence.

[42] In this case, the evidence obtained would adversely affect the right to a fair trial. Not only

is the evidence obtained inculpatory, the refusal is essentially the offence.

[43] While the burden is on the party seeking to exclude the evidence, that burden is not with respect to each and every aspect of the inquiry. If the Crown asserts that the accused person would not have acted differently had the right not been infringed, the crown bears the burden of establishing that on the evidence.

[44] There was no evidence to suggest that had Mr. Morris been advised of his right to counsel before the demand been made, that he would have still refused.

[45] The second factor involves an assessment of the seriousness of the breach. There is no assertion here that the police used bad faith in dealing with Mr. Morris, and Mr. Morris was indeed given at least some opportunity, albeit after the refusal, to contact counsel.

[46] The breach in one sense was not an ongoing one. Mr. Morris was advised of his right to consult counsel, and was advised immediately after the refusal of the breathalyzer demand, but by the time he was so advised, it was too late. The evidence had been obtained. While the court should not speculate on what advice he might have received, and while the scope of advice in breathalyzer cases has been acknowledged as being limited, once the demand has been refused and the offence essentially committed, the scope of advice is narrowed even further. The refusal however is not irrevocable.

[47] In any event however, the “seriousness of the violation” factor cannot save evidence that falls afoul of the “trial fairness” factor.

[48] The third factor, is whether admission of the evidence would bring the administration of justice into disrepute. Generally, the admission of conscriptive evidence is considered to do so, though that is not always the case. The rights guaranteed by the Charter are fundamental to the operation of a fair and impartial adversarial system. The admission of evidence obtained in the context of a breach of a right as fundamental as that set out in section 10(b), should be undertaken very carefully.

[49] Here, the admission of the evidence would so significantly disadvantage the accused that the state would have secured a very substantial advantage by breaching his rights. It may be considered by some as relying on a technical point, and giving more weight to legal technicalities that to the realities of the tragedies caused every day by impaired drivers. The reputation for impartiality of the system rests on maintaining the proper balance in the adversarial process. The individual in these circumstances is protected from the power of the state by the power of his constitutional rights. When those rights are perceived as technical points and are treated as such the power balance is shifted to favor the state authorities. The reputation of the system of justice is served by maintaining a properly balanced process and that can only be done by giving real meaning to rights guaranteed by the Charter. The admission of Mr. Morris’ refusal in these circumstances would bring the administration of justice into disrepute by failing to give effect to his constitutionally guaranteed rights.

[50] The Crown argued that R. v. Forsythe (N.S.C.A.) [1992] N.S.J. No.69, 35 M.V.R.(2d)161, 109 N.S.R.(2d) 179, 297 A.P.R.179 applied. In that case the police officer gave the accused person a breathalyzer demand, followed immediately by the reading of the right to counsel. The accused refused the demand and was then asked if he wished to obtain counsel. The court found that the accused understood both the demand and the reading of his rights.

[51] The Court of Appeal was satisfied that the offense was complete before the accused asked
for counsel. None of the evidence on which the conviction was based was obtained in violation of the Charter.

[52] That case involved a person who refused after being advised of his right to consult counsel. The demand was made first in time, as here, but the refusal was not made until the accused was advised of and understood the right to consult legal counsel. Having been advised of the right, he waived it by his actions. In this case, the demand was followed immediately by the refusal and the accused was not made aware of his right until after the evidence had been obtained. Mr. Morris could not waive the right without first being informed of it.

[53] With the determination that the evidence of the refusal is inadmissible, it follows that the accused must be found not guilty of the offense of refusing the breathalyzer demand.

Impairment:

[54] Mr. Morris is also charged with driving while impaired.

[55] For many of the indicia of impairment Mr. Morris is able to assert explanations, which in each case, may be more or less reasonable.

[56] Constable Delong observed a smell of alcohol from Mr. Morris. The smell of alcohol is indicative only that a person may have consumed alcohol. Mr. Morris readily conceded that he consumed alcohol that night.

[57] Constable Delong observed Mr. Morris falling to one side and stumbling. Mr. Morris does not deny that he was unsteady on his feet when he was with Constable Delong. Yet, Mr. Morris was able to run with considerable ease for some distance in the moments after the accident. He had been in a serious car accident. His hips had been bruised by the seatbelts. He was taken to the ground and restrained using handcuffs. When the police came to pick him up he was, not surprisingly, in considerable discomfort. It may be that he was indeed able to run in the moments after the accident but because of the circumstances surrounding his detention, he was later unsteady on his feet.

[58] Constable Delong testified that Mr. Morris was experiencing mood swings. He had begun crying about breaking up with his girlfriend. Crying is not, in itself, evidence of mood swings in the plural. His reaction my well have been a natural reaction to the shock of the accident.

[59] Constable Delong noted that Mr. Morris had bloodshot glossy eyes. It was argued that these could equally be symptoms of the concussion that Mr. Morris had just suffered in the accident. There is no evidence before the court as to the symptoms of a concussion but I am prepared to accept that this is a possible explanation.

[60] The indicia of impairment however are not the only evidence with respect to the matter. Furthermore, though there may be plausible explanations for each one, it is at least equally plausible that they provide some evidence of impairment. While there are plausible alternative that have been proposed for the indicia of impairment that have not been explained away to the point that they cannot be considered at all.

[61] Mr. Morris had gone to Fall River earlier in the evening and at that time had a friend drive his vehicle. He initially said that he had two glasses of wine, and this was a precaution, to be “safe”. He later added that he was feeling tired and wanted to relax while his friend drove. If he was in fact too tired to drive from Fall River, he apparently was not too tired to get dressed and go out into the bar. Mr. Morris was appropriately cautious in leaving Fall River. His sense of caution was not so acute when he left Reflections at 1:40 am.

[62] Mr. Morris testified that while at the cabaret he had two one ounce mixed drinks, over a period of about two hours. He recalled that he did not feel impaired at the time. He recalled driving down Granville St. at a rate of 40 to 50 kilometers an hour. He then has no recollection until after the impact with the curb having already crossed Duke St. at some speed. He could

give no explanation at all as to how his vehicle crossed over Duke St. and collided with the Granville Mall, coming to rest outside the Split Crow Pub. He did not say whether it was inattention or whether it was an effort to avoid a pedestrian or another car. It is essentially a black hole in an otherwise rather seamless narrative.

[63] His recollection returns when speaking about his flight from the vehicle. He was able to recall details, about the moments following the crash, including where along his path he lost each of his shoes.

[64] The accident and his injuries might account for some lack of recollection around the moments immediately after impact, but there is no evidence to suggest his recollection of the moments leading up to the accident would be affected. He could remember when he left the bar. He could remember the speed at which he drove down Granville St. He could remember hearing the impact of the crash. He could remember where he lost his beach sandal along Duke St.. He could not remember the critically important issue of what caused him to careen into the barrier protecting the pedestrian mall.

[65] Mr. Morris was questioned about his flight from the scene. He maintained that upon getting out of the car he was dazed and wandered toward a small group of passing strangers. This is consistent with the evidence of the other witnesses.

[66] When he saw the security guard, Mr. Kennedy, coming toward him he began to run away.

At this point it is not appropriate to measure Mr. Morris' actions against those of a reasonable person. He was reacting in a situation where his judgement was impaired at least by the circumstances in which he found himself. His actions were also consistent with those of a person whose judgement was impaired by alcohol.

[67] In his evidence at trial Mr. Morris contended that he intended to report the accident immediately, but did not have his cell phone and that he believed he had 24 hours in which to report it. While those considerations may well have entered his mind in retrospect, in light of what was happening at the time, the reporting of the accident appears to have been far from Mr. Morris mind in the immediate moments following the impact. Mr. Morris may well believe, now, that this was intent, but his actions suggest that he had other things on his mind.

[68] Mr. Morris said that he was intimidated by a person dressed in black coming toward him.

Mr. Kennedy's uniform jacket has no insignia that from a distance might be interpreted a police insignia.

[69] Either Mr. Morris believed Mr. Kennedy was a police officer or he did not. If he did, he

would have no reason to run other than if, in his addled state, he believed he had done something wrong. That may or may not have included driving while impaired. Mr. Morris however did not suggest that he believed Mr. Kennedy to be a police officer.

[70] Mr. Morris said that he believed that Mr. Kennedy was just a man dressed in dark clothes who was running toward him and may have been hostile. There is no reason to believe that Mr. Kennedy was particularly threatening or expressed himself in a hostile manner. There is no reason to believe that he appeared to be any more hostile than any of the other people at the scene. He stopped about 20 feet from Mr. Morris. That is not an act of open hostility. If Mr. Morris was indeed intimidated by Mr. Kennedy, his decision to run from an area of relative safety was not rational. As I have noted, Mr. Morris' reactions are consistent with those of a person reacting to trying immediate circumstances. They are also consistent with those of a person whose judgement was impaired by alcohol.

[71] Based on all of this information, is there sufficient evidence to infer beyond a reasonable doubt that Mr. Morris was driving while his ability to do so was impaired by alcohol?

[72] It is an offence to operate a motor vehicle when one's ability to do so is impaired by alcohol or drugs. Impairment may be anywhere from slight to great.

[73] The question is not whether Mr. Morris was "drunk" or intoxicated or whether his level

of impairment was greater or less that it would have been had his blood alcohol level exceeded the permissible amount.

[74] At the same time, courts must be cautious not to assume that any level of alcohol consumption results in impairment. The accused person's ability to drive must be impaired to some extent.

[75] All of the evidence must be considered in context. While each of the indicia of impairment may be explained, the fact that so many are present is a relevant factor. Mr. Morris had bloodshot glossy eyes, was unsteady on his feet, and was emotional about an issue that was not directly related to the accident.

[76] Those must be considered together with his admission that he had been drinking that night. He remembers having consumed two ounces of liquor while at Reflections.

[77] He had asked a friend to drive earlier that evening after having two glasses of wine within

a comparable period of time. His evidence suggests that he was at that time properly concerned about his level of impairment. He should equally have been concerned about his level of impairment upon leaving Reflections, unless his condition was such that his ability to recall the number of drinks he actually had was impaired as well as his judgement as to his own

impairment. Alcohol affects the ability to operate a vehicle, but also affects the ability to make the self assessment as to impairment.

[78] It is relevant that he left Reflections Cabaret and had an accident within moments of getting in the car. He had not driven any significant distance, only the matter of a few city blocks.

[79] He has no recollection of what caused the accident and has no possible explanation for it, and yet has maintains that he has clear recollection of the time before and after.

[80] Mr. Morris fled the scene, suggesting that it was his intention to report the accident some time later. It would be unlikely that he could have formed such an intention between impact and the arrival of the police, given what was taking place, yet he was confident in asserting that this had been the case.

[81] Mr. Morris, as the accused person has no obligation to provide any explanations, but when he does give evidence, the court can properly make inferences from inexplicable gaps in the narrative. If Mr. Morris cannot remember the critical moments leading up to the accident, his recollection as to his own perceived level of impairment is not dependable. When considered in light of the presence of so many indicia of impairment, the fact that he had in fact been drinking at the bar, the unexplained accident moments after leaving the bar, and the irrational behaviour in fleeing the scene one is lead inexorably to the conclusion that he was impaired.

[82] I am satisfied beyond a reasonable doubt, that Mr. Morris' ability to drive was impaired at

the time of accident when he was in care and control of a motor vehicle and he is guilty of the offence as charged under s. 253(a).

J.