

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R v. Sampson, 2008 NSPC 34

Date: 20080429

Docket: 1592988

Registry: Bridgewater

Between:

R.

v.

Gordon Sampson

Judge: The Honourable Judge James H. Burrill

Heard: April 29, 2008 in Bridgewater, Nova Scotia

Written decision: May 29, 2008

Charge: 253(a) CC

Counsel: Murray Judge, for the Crown
Philip J. Star, Q.C., for the Defence

By the Court:

[1] On the 253(a) charge before the court, the clear issue and only issue is whether or not the Crown has proven beyond a reasonable doubt that the accused's ability to operate a motor vehicle was impaired by alcohol on the night in question.

[2] On that point, I have the evidence of Fisheries Officer Roland Burgess, a fisheries officer with some 12 years experience who has known the accused since high school. On the night in question he was travelling in the Broad River area near Port Mouton, Nova Scotia when he noticed an all-terrain vehicle westbound on highway 103. The operator had a hunting vest on, the operator was leaning way to the side of the all-terrain vehicle like he was almost falling off. Because of observing this unusual position, he decided to go back and half-way up what he called the Broad River Hill, he still encountered the individual who turned out to be the accused, still leaned over on the all-terrain vehicle as he'd seen him before. At the top of the Broad River hill the accused turned into the River Head Road. The lights of the Fisheries truck were engaged and not seen by the accused. They were engaged just as he turned down the road. They followed him for approximately one kilometre down the road without stopping or apparently seeing the Fisheries truck, or being aware of it's presence. He then went to turn into a

driveway that turned out to be the accused's driveway, he looked over the shoulder, missed the entrance to the driveway to a degree, went up on two wheels to the side, on two wheels until the all-terrain vehicle settled down on the four wheels. He pulled in behind the accused, who by that time had taken his helmet off, that's at the point in his testimony where he indicated he had know the accused since high school. That he described this individual as having speech that was really slurred. He noted at that point in time that he was not injured. He described him as being very intoxicated and that after he came off the all-terrain vehicle, he staggered sideways.

[3] It was at that point time that he used the word "he suspected he was impaired" and then arrested him and detained him until the R,C,M,P, could come to the area. He stayed with him for a time, or he stayed with him until the R,C,M,P. came to the scene. On the highway, he said that the driving was only about 30 kilometres per hour, perhaps a little faster while he was going down the River Head Road, and that he never looked back until he was near, or until he was in the driveway, or at the entrance to the driveway.

[4] He said that Cst. Wilcox arrived approximately 20 minutes later and that the accused did not drink, I accept from his evidence, he did not drink anything after he was detained by the Fisheries officers, although the Fisheries officer indicated that he never saw him drink.

[5] Fisheries officer Burgess described the same encounter. He indicated that the driver of the all-terrain vehicle, the accused, was hanging off to the right side of the vehicle. That he turned down the River Head Road and he never looked before he made the turn. That the red and blue lights were on the Fisheries truck and that the accused looked when he was almost to the driveway and that's when the vehicle was on two wheels and he described it as almost rolling. When he got off the all-terrain vehicle he described the accused as staggering a little bit and that the accused had a strong odour of alcohol, strong smell of alcohol on his breath and that he was detained. He said he was red in the face, that he was staggering a little bit, and that he was slumped off to the side of the all-terrain vehicle as he was driving it. At one point in time, he had indicated that he was going home, at which time the Fisheries Officer placed both hands on his shoulders and told him that he was staying until the police showed up, and that he was never out of their sight until the R.C.M.P. arrived.

[6] He was cross-examined about whether or not he was familiar with individuals riding all-terrain vehicles side saddle, to which there was no positive response, but no indication that what he observed was someone riding in a side saddle fashion on the all-terrain vehicle.

[7] Cst. Duffney who arrived on the scene, described the accused. He detected an odour of alcohol on his breath, he described his speech as slurred although later confirmed that he had made notes of important observations and that he had used the term “slightly slurred speech” to which he agreed. That the eyes of the accused were glassy and that he observed him walk to the car and then to the police station and then within the police station. And that he only observed the signs of impairment as noted, which through inference would indicate that he never saw anything unusual about those walks that I’ve just described.

[8] Cst. Wilcox also gives testimony about his observations. He observed at the scene in the Broad River/Port Mouton area the accused walk to the police car. He observed the accused stagger slightly to the right as walking. In the police car he had the dome light on and the heat on, the silent patrolman open. He looked at the

accused. He observed a strong odour of alcohol. He observed his eyes to be glassy, his speech slightly deliberate and slurring. He believed his ability to drive was impaired so he gave him the breath demand.

[9] It's clear that back at the detachment he was able to deal coherently with Mr. Sampson. That there was no trouble with Mr. Sampson understanding what was being said to him, or making sense in conversation. And he confirmed that in the investigative guide that a description of his speech as being slightly slurred, his face being normal, his eyes being glassy, slightly bloodshot, his attitude being cooperative is what he observed. That he appeared to understand everything, and that they had small talk on the way back to the detachment about deer hunting and work, and that there was no difficulty at all understanding him.

[10] Cst. Young is the breath tech that testified. He had made no notes other than on the breathalyzer check sheet, and really gave little to no evidence about his particular condition at the time.

[11] As I've indicated, the question is whether or not the Crown has proven beyond a reasonable doubt that the accused's ability to operate the motor vehicle

was impaired by alcohol on that night and on that occasion when he was observed operating the all terrain vehicle by the two Fisheries officers. To quote from the decision of Judge Tufts in the Cynthia Meek case, 2008 N.S.P.C. 14, Judge Tufts says at paragraph seven:

“This section creates an offence to operate a motor vehicle when the “ability to operate” is impaired by alcohol. The Canadian Oxford Dictionary defines “ability” as, “capacity or power; cleverness; talent; mental or mental power,” and “impaired” as , “damaged or weakened.” It is of course not “impaired driving” which is the operative phrase; rather it is impairment of one’s ability to operate a motor vehicle that is the focus....”

[12] He quotes the **Power** case (2002) A.J. No. 178. In paragraph eight, he says”

“The manner of driving is not a requisite element of the offence although it is often circumstantial evidence of the condition of the operator....”

[13] Referring again to the **Power** case. The degree of impairment that must be proven may be from slight to great. That comes from the **Stellato** decision, 1993 78 CCC (3d) 380, and is cited by Judge Tufts at paragraph 11 of his decision:

“Accordingly, an degree of impairment from “slight to great: is sufficient to make out this element of the offence, se R. V. Stellato.....However, it is one’s ability to operate a motor vehicle which must be impaired, not some general deviation of the defendant’s conduct from the norm, see **R. v. Andrews** (1996) A.J. No. 8.”

[14] Within that context, it is very much a factual determination on the consideration of the whole of the testimony before the court as to whether or not the Crown’s evidence establishes beyond a reasonable doubt that the accused’s ability to operate a motor vehicle was impaired on this occasion. During the assessment of such evidence, it’s not simply a question of adding the debits and credits with regard to indicia of impairment. It is a consideration of the whole of the testimony to determine whether or not the Crown has met the requisite standard of proof. Paragraph 21 of the decision, Judge Tufts says this:

“Having said this, the case of **R. v. Ryan**, *supra*, is instructive. In that case the defendant was asleep but in care or control of a motor vehicle. His speech was slurred, he had red, watery eyes and smelled of alcohol. The arresting officer said he was very intoxicated, although the breath tech administrator indicated that the defendant spoke normally and saw nothing to suggest the defendant’s ability to drive was impaired. The trial judge convicted the defendant. The summary appeal court judge overturned the decision and entered an acquittal. The Nova Scotia Court of Appeal dismissed a further appeal noting that the evidence was not reasonably capable of supporting the trial judge’s conclusion as to, “criminal impairment.” Leave to appeal to the Supreme Court of Canada was refused.’

[15] In that case, Judge Tufts recognized that an experienced police officer opine about the defendant’s impairment although stronger language such as intoxicating, or other adjectives were not used. He says the only evidence of motor impairment was the staggered walk, which given the location on the edge of the roadway next to a high-speed highway is not particularly strong evidence and he goes on to consider all factors in entering an acquittal.

[16] In assessing the evidence before the court today, I will say that I accept without reservation the evidence of Fisheries Officers Burgess and Bowers as to what they observed. And it's clear that they observed most unusual driving in that the operator was slumped sideways on his vehicle like he was almost falling off. That that was so unusual that they felt that he might be injured, so they went back to check. They followed him, he made a turn travelling up the Broad River Hill, down the River Head Road, making that turn without looking, and then down the River Head Road at a reasonable speed, perhaps slightly over 30 kilometres per hour without observing flashing lights behind him at night in the dark. He looked back just before entering his driveway, missed the driveway slightly, went up on two wheels almost rolling the all-terrain vehicle before settling back on four. At that point in time he was observed by someone that had known him for years, since high school who described him as being not injured but very intoxicated. His speech really slurred and that he was staggering sideways as he went off the bike. The staggering was described in that way by Officer Burgess. Officer Bowers described it as staggering a little bit. There was a strong odour of alcohol present on his breath, it was observed. And officers dealing with him did see slight stagger, but also observed walking that was not staggered back at the detachment,

and also were able to converse sensibly, as were the fisheries officers, with the accused who appeared understanding of the situation.

[17] In this particular case we have all those factors, I have all those factors to consider as a whole in determining whether or not the Crown has met the case of proving beyond a reasonable doubt that his ability to operate a motor vehicle was impaired by alcohol. The post-driving observations coupled with the driving observations of the officers, the Fisheries officers, do lead me to conclude beyond a reasonable doubt that in fact the Crown has proven that the accused's ability to operate a motor vehicle was impaired when he was observed operating it by the Fisheries officers. One can isolate individual parts of testimony, one can point to Fishery Officer Burgess' use of the word "suspected" in deciding whether or not the Crown has proven its case beyond a reasonable doubt and in considering that fact. But it is the whole of the evidence that I must consider and despite the fact that officers back at the detachment did not see him stagger as he walked from the police car to the detachment, and despite the fact that Officer Burgess at one point said that he suspected he was impaired, therefore he arrested him and detained him for impaired driving, the whole of the evidence convinces me beyond a reasonable doubt that the Crown has met the **Stellato** test and that they have proven that the

accused's ability to operate a motor vehicle was impaired by alcohol on the night in question and I must find the accused guilty of the offence with which he is charged.