IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R v. Kidson, 2007 NSPC 68

Date:20071128
Docket: 1686187 & 1686188
Registry: Bridgewater

Between:

Her Majesty the Queen

v.

Kidson

Judge:	The Honourable Judge Anne E. Crawford
Heard:	September 25, 2007, in Bridgewater, Nova Scotia
Charge:	s. 253(a) of the Criminal Code of Canada s. 253(b) of the Criminal Code of Canada
Counsel:	Paul Scovil, for the Crown Alan Ferrier, for the defence

By the Court:

[1] Matthew Stephen Kidson is charged that on August 12, 2006 in Lunenburg, Nova Scotia he:

> did while his ability to operate a motor vehicle was impaired by alcohol have care and control of a motor vehicle contrary to section 253(a) of the *Criminal Code*;
>
> And furthermore did having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded eighty milligrams in one hundred milliliters of blood have the care and control of a motor vehicle contrary to section 253(b) of the *Criminal Code.*

Facts

[2] The relevant facts are as set out in the Crown brief:

> The accused himself testified that on the date in question he was parked near the Knot Pub in Lunenburg, Nova Scotia. Prior to that he had left home at about 8:30 in the evening to meet some friends. On the way he stopped and picked up eight cans of beer, then drove to the Car Bright car wash, where he parked. He then walked to afriend's home where he began to consume alcohol. He and his friends then went to the Knot Pub where he continued to drink. As the Pub was about to close he and his friend went to his vehicle. He turned on the accessories to the vehicle. He and his friends were listening to the car stereo. He testified that he went to the vehicle to decide if he was "going to a party or walk to his girlfriend's home". His vehicle was in first gear with the emergency parking brake on. He testified that he was quite intoxicated and was too impaired to be driving. He was found by the investigating officer . . . behind the wheel of the vehicle in the driver's seat. He also testified that he did not intend to drive the vehicle.

[3] The arresting police officer testified that his attention was drawn to the defendant when he got out of his vehicle and staggered slightly, then got back in. When he was read the breath demand, his reply was, "I'm drunk." He also told the officer he didn't understand anything that had been read to him. When the police officer then re-read the demand and caution a second time, he told the officer, "I'm too drunk to drive." However, he did agree to give breath samples, which showed a blood alcohol level of 190 at 2:59 a.m. and 170 at 3:19 a.m.

Issue

[4] The defence took no issue with the readings or the proceedings leading to them, and stated that the only issue was whether or not the Crown had established beyond reasonable doubt that the defendant was in care or control of his motor vehicle at the relevant time.

Care or control

Section 258(1)(a) Presumption

[5] Section 258(1)(a) of the *Criminal Code* gives the Crown the benefit of a presumption of care and control where the accused is found occupying the driver's seat of a vehicle "unless the accused establishes that the accused did not occupy that seat or position for the purpose of setting the vehicle. . . in motion".

[6] The burden on the defendant to rebut the presumption on a balance of probabilities has been held to be a reasonable limit on the guarantee to the presumption of innocence under s. 11(d) of the *Charter* (*R. v. Whyte*, [1988] 2 S.C.R. 3).

[7] In the present case the defendant testified that he did not enter the driver's seat to put the vehicle in motion, but simply to listen to music while he and his friends discussed plans for the rest of the evening. Both of the options he was considering: another party, or spending the night at his girlfriend's house, were within walking distance of his car, and he said he planned to walk to either location. His testimony is corroborated in part by the testimony of Cst. Rioux that he noticed the defendant in his vehicle when he arrived at that location and by the testimony of Cst. Lewis who said that the defendant told him, "I'm too drunk to drive" when he first spoke to him.

[8] From the whole course of conduct of the defendant on that evening, including the fact that he drove the vehicle to the location where it was found before consuming any alcohol and walked to his friend's house and from his friend's house back to the pub, as well as his stated intention to leave the vehicle where it was and walk either to the next party or to his girlfriend's home, I am satisfied that the defendant has rebutted the presumption under s. 258(1)(a).

Risk of Danger to Public

[9] The defendant having rebutted the presumption, the burden shifts back to the Crown to establish beyond reasonable doubt that he had care and control without benefit of the presumption. As an intent to drive is not part of the care and control offence, the defendant may be convicted if he performs some act or series of acts involving the use of a car, its fittings or equipment, whereby the vehicle may intentionally or unintentionally be set in motion**,** thereby creating a danger (*R. v. Ford,* [1982] 1 S.C.R. 231; *R. v. Toews*, [1985] 2 S.C.R. 119).

[10] In this case, the defendant's acts involved the use of the car's equipment to turn the key in the ignition to the accessories position and to play music on the stereo. The defendant's car was parked on a level parking lot with its nose two feet or less from a building; the parking brake was engaged; the vehicle was in first gear and the engine was not running. In order for it to go anywhere but into the wall of the adjacent building, the engine would have to be started, the parking brake released and the transmission put into reverse gear. From these facts I conclude that there was little, if any, danger of the vehicle being set in motion unintentionally, or of its thereby becoming a danger to the public.

[11] The only remaining issue – and the one on which I requested briefs from Crown and Defence – is whether or not I can or should consider the risk of the defendant changing his mind and deciding to drive while still impaired.

[12] This is an issue on which Courts of Appeal across Canada appear to differ. Not surprisingly, the Crown relied on cases such as *R. v. Lockerby*, [1999] N.S.J. No. 349 (C.A.) and *R. v. Legrow*, [2007] N.S.J. No. 11 (S.C.) in which it was held that risk of a change of mind was a relevant consideration in deciding whether or not an accused who had rebutted the presumption was nevertheless in care or control of his motor vehicle for purposes of s. 253. Equally unsurprisingly, the Defence relied on cases such as *R. v. Martindale*, 1995 CarswellBC 1100 (S.C.) and *R. v. Decker*, 2002 CarswellNfld 40 (C.A.) which held that, to quote *Decker* at paragraph 31:

> To speculate risk of danger on the basis that an impaired driver might change his mind and for no other reason is to find liability for being intoxicated in a vehicle, a conclusion which has been rejected by the Supreme Court of Canada.

[13] In *R. v. Smith*, [2005] N.S.J. No. 307 (S.C.) Warner, J. conducted a thorough review of the case law relating to this issue and concluded:

> 26 The dictionary defines conjecture and speculation as "guesswork" or "an opinion or theory based on insufficient evidence". Risk assessment should not involve conjecture (Shuparski) or speculation (Decker). It may be speculation or conjecture to conclude that every driver whose BAC exceeds 80, might change his or her mind; however, it would be wrong to preclude a trial court from assessing the risk of a change of intention, on the facts of the individual case, especially where it is accepted that one effect of the consumption of alcohol is the impairment of judgment. In both Shuparski and Decker, the courts did make an assessment of whether there existed a risk that the accused might change his mind, ...
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> 27 To the extent that the courts in Shuparski and Decker imply that it is not permissible for trial judges to consider, based on the facts in their cases, whether the accused may change his or her mind when assessing the risk of the vehicle being put in motion, the views of most other Courts of Appeal appear to differ. Decisions, in which courts have recognized that the assessment of risk is properly an assessment, based on past and present acts, of future (as yet "unacted") acts, include:
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> > Sleeping, or intending to sleep, drivers: R. v. Diotte, supra, (NBCA); R. v. Rousseau, supra, (Que. C.A.); R. v. Pilon, supra, (Ont. C.A.); and R. v. Pelletier [2000] O.J. No. 848 (Ont. C.A.).
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> > In the vehicle without present intent to drive: R. v. Lockerby, [1999] N.S.J. No. 349, 1999 NSCA 122; R. v. Hein, [1999] N.S.J. No. 421, 1999 CarswellNS 391 (NSSC); R. v. Rioux (2002) 148 C.C.C. (3d) 160 (Que. C.A.).
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> > Disabled and/or awaiting a tow: R. v. MacMillan [2005] [2005] O.J. No. 1905 (Ont. C.A.); R. v. Wilford, [2004] O.J. No. 258, 2004 CarswellOnt 311 (Ont. C.A.); R. v. Burbella, [2002] M.J. No. 355, 2002 MBCA 106; R. v. Wren [2000] O.J. No. 756 (Ont. C.A.).
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> > Outside vehicle: R. v. Pike, [2004] O.J. No. 4269, 2004 CarswellOnt 4222 (Ont. C.A.); R. v. Cadieux, [2004] O.J. No. 197, 2004 CarswellOnt 315 (Ont. C.A.).

[14] From the cases cited, I conclude that the risk assessment, as an element of care and control, should include an assessment of the risk of the accused changing his

mind; in other words, it is a relevant, although not necessarily a sufficient, consideration.

[15] In reaching this conclusion I note that in *Lockerby*, the defendant was in the passenger seat and crossed to the driver's seat of an idling vehicle to engage the emergency brake and turn off the engine. In *Hein*, the defendant's engine was running and she was "waiting for a taxi to come by," but had not called one or made other arrangements for transportation home; so that, in each case, there were other considerations that added to the public risk or increased the likelihood of the defendant changing his/her mind.

[16] In the present case I find that there are no elements of risk to the public other than the possibility of the defendant changing his mind about driving; and I find that on the facts here that possibility was sufficiently remote to lead me to conclude that the Crown has not established beyond reasonable doubt that the defendant was in care or control of his motor vehicle for the purposes of s. 253 of the *Criminal Code*.

Conclusion

[17] The Crown having failed to establish beyond reasonable doubt that the defendant was in care or control of his motor vehicle at the time in question, I find that the defendant is not guilty of either offence charged.