IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Orr, 2011 NSPC 2

Date: January 19, 2011
Docket: 2064807, 2064808
Registry: Halifax

Between:

Her Majesty the Queen

v.

Brianna Orr

Judge:	The Honourable Judge Marc Chisholm
Heard:	January 20, 2010, September 22, 2010 and December 21, 2010, in Halifax, Nova Scotia
Written decision:	January 19, 2011
Charge:	CC. 253(1)(a) & CC. 253(1)(b)
Counsel:	Darrell Martin, for the Crown Warren Zimmer, for the Defense

By the Court:

[1] The accused, Brianna Irene Orr, is charged that she, on or about the 27th day of March, 2009, at or near Halifax, Nova Scotia, did, unlawfully, have the care or control of a motor vehicle while her ability to operate a motor vehicle was impaired by alcohol or a drug, thereby committing an offence contrary to section 253(1)(a) of the Criminal Code and further that she, at the same time and place did unlawfully have the care or control of a motor vehicle after having consumed alcohol in such an amount that the concentration of alcohol in her blood exceeded the legal limit of 80 milligrams of alcohol per 100 milliliters of blood, contrary to section 253(1)(b) of the Criminal Code.

[2] Prior to the date of the commencement of the trial the Defense gave notice of a possible Charter argument concerning the accused's section 10(b) right to counsel. By agreement, the matter proceeded by way of voir dire with the voir dire evidence to subsequently be admitted on the trial proper. On the voir dire the Court heard from three witnesses, namely, Cst. Michelle Dooks-Fahie, Cst. Robert Blaikie and Cst. Tara Bell. At the completion of the evidence on the voir dire the Defense chose not to advance a Charter argument. The evidence on the voir dire, including a Certificate of a Qualified Technician regarding breath samples obtained from the accused,

was admitted on the trial proper. The Crown called no further evidence. The Defense did not call evidence.

The Evidence:

[3] The evidence was that at 2:43am on March 27, 2009, the Halifax police service received a call regarding a possible impaired driver at the McDonald's restaurant on Quinpool Road, Halifax, Nova Scotia. The call included the make, color and license plate number of the vehicle. At 2:45 am Csts. Dooks-Fahie and Bell, who were working together in a police wagon, were dispatched to attend the scene. The officers arrived at the McDonald's restaurant at 2:47am. The officers pulled the police vehicle into the drive-through lane, where the accused's vehicle was located, thus preventing the accused's vehicle from leaving. Both officers approached the vehicle. The accused, Brianna Irene Orr, was seated in the driver's seat. The engine was running. There were two other persons in the vehicle.

[4] Cst. Dooks-Fahie went to the driver's window and asked the accused to produce her license, registration and insurance. After two minutes of conversation with the accused she determined that there was a strong smell of alcohol coming from the breath of the accused. Cst. Dooks-Fahie testified

that it took the accused ‘a little while’ to get her paperwork together and she observed that the accused had glassy eyes, bloodshot eyes, and slurred speech.

[5] At 2:50am Cst. Dooks-Fahie called for an SL2 unit to be brought to the scene. She said that she did so because she didn’t have any driving evidence and “wanted to formulate more grounds at that time to ensure her level of impairment,...”

[6] At 2:53am Cst. Blaikie arrived on scene with an SL2. Between 2:50 and 2:53 Cst. Dooks-Fahie continued her conversation with the accused. At the request of Cst. Dooks-Fahie the accused turned off her vehicle and stepped out of her car. She walked to the front of her vehicle at which time, 2:53am, Cst. Dooks-Fahie read her the approved screening device (ASD) demand. The wording of the demand was proper. The accused agreed to take the test.

[7] To this point the evidence of Cst. Bell mirrored the evidence of Cst. Dooks-Fahie, with the exception that Cst. Bell did not testify to observing the accused’s speech to have been slurred. Cst. Bell noted that the two passengers were both female. She observed a smell of alcohol on the accused’s breath, glassy bloodshot eyes and that the accused fumbled trying to get her papers. On cross Cst. Bell added that the accused had difficulty

locating her papers, looking in her purse and the glove box before eventually producing her driver's license. Cst. Bell testified that when the ASD was being read to the accused she recalled her being upset and crying. Cst. Dooks-Fahie noted that she became emotional after exiting her motor vehicle. She became upset and cried again while in the breathalyser room. I accept the officers' evidence that the accused began to weep/cry only after she was out of her vehicle.

[8] There were four attempts by the accused to provide a sample into the ASD. On the first three attempts, according to Cst. Dooks-Fahie "she was unable to finish". The fourth sample was completed and read "fail". Cst. Dooks-Fahie testified that she was trained and qualified to operate the ASD. She testified that the operation of the ASD that morning caused her no concern. At 2:58am, immediately after receiving the "fail" reading, Cst. Dooks-Fahie placed the accused under arrest. Cst. Dooks-Fahie read the Charter of Rights notice and police caution to the accused from the card in her notebook. The wording of each was proper. The accused was taken to the police wagon and escorted to the police station.

[9] Cst. Dooks-Fahie testified that when the accused was out of her vehicle, especially when walking back to the police wagon, she was unbalanced,

unsteady. She stated that for the distance of eight to ten feet to the police wagon her walk was unsteady.

[10] Cst. Dooks-Fahie also testified that, upon arrival at the police station, the accused was helped out of the police wagon. She was "very unsteady". She wasn't able to get up and get out of the police wagon herself. She stated that she basically slid and Cst. Dooks-Fahie held on to one of her arms and helped her step down out of the wagon and then up the steps to booking. Her walking was unsteady again going into the police station. Cst. Dooks-Fahie noted that there is a significant height to the step up into the police wagon and the accused was wearing a dress and high-heeled shoes.

[11] Cst. Dooks-Fahie noted that the accused was very talkative.

[12] Cst. Dooks-Fahie testified that, in her opinion, the accused was "definitely impaired by alcohol".

[13] On cross Cst. Dooks-Fahie acknowledged that her notes, made after the incident, the same morning, recorded the accused's balance as "sure" as opposed to fair, swaying, or sagging at the knees and for her walk chose "sure" as opposed to fair, swaying, staggering and falling. Nevertheless, Cst. Dooks-Fahie testified that her evidence reflected her recollection of the incident and her observations of Ms. Orr.

[14] Cst. Bell noted that, while outside of her vehicle, the accused was steady on her feet, not falling over. The officers had no difficulty communicating with her. She was very apologetic. She was wearing a dress and high heeled shoes. She got out of her car ok. When arrested she was handcuffed, her hands behind her back. She was assisted to the police van and up into the van, which is normal police practice.

[15] At the police station Cst. Bell assisted the accused out of the police van and led her into the station, to the booking area, and placed her in one of the cubicles across from the room used for breath testing. The accused was not assisted as she walked and Cst. Bell did not mention anything unusual regarding her manner of walk or balance. According to Cst. Bell it was 3:05 am when the accused was placed in the cubicle.

[16] Cst. Dooks-Fahie initially estimated the time of arrival at the police station at 3:04 or 3:05. She didn't record a time but estimated the driving time from the scene at four minutes. On cross she conceded it may have been a few minutes earlier. I fail to see how it could have been any earlier than 3:05. I accept that the arrest occurred at 2:58am. The arrest was followed by the reading of the rights and caution, escorting the accused to the police van and assisting her inside. I accept Cst. Bell's evidence that the officers and the

accused departed the scene at 3:00am. Based upon the evidence of the three officers I accept that the drive to the police station would have taken 3-4 minutes. It would've taken some time at the station to assist the accused out of the police wagon and escort her to the cubicle.

[17] Once in the cubicle the accused was asked, again, if she wanted to speak to a lawyer. The accused wanted to speak to her father. Cst. Dooks-Fahie explained to the accused that she was able to call a lawyer or her father. That she would be given privacy to use the telephone. Cst. Dooks-Fahie understood that she was going to call her father. Cst. Dooks-Fahie also explained to her why she was there, i.e. that she had agreed to take the breath test and it would be administered after she completed her telephone calls. The officers then left her alone.

[18] Cst. Dooks-Fahie testified that, some time later, the accused said that she'd phoned home and her sister had answered. She then made a couple of calls to try and reach her father. In the end, she was using Cst. Bell's cell phone to speak with her father. Cst. Bell noted that the accused's parents had arrived at the station. Cst. Dooks-Fahie testified that, at one point, the accused's father was using Cst. Bell's cell phone as his had died.

[19] Cst. Dooks-Fahie testified that the accused was in the cubicle making telephone calls for “approximately 15 to 20 minutes”. The transcript, at page 26, records the questions and answers that followed:

Q. What happened then after she completed that?

A. After she completed that, she had told us that she agreed to go ahead with the breath samples.

Q. And how was that – can you tell us approximately what time it was that she agreed to take breath samples?

A. Sure. At approximately - - it would have been approximately one to two minutes before 4:00. 4:00 Cst. Lee Cook administered the first breath test, which was invalid as...

Q. Okay. We don’t - - we don’t need you to discuss what Cst. Cook did, but...

A. Okay.

Q. So did you go into the breathalyser room with Ms. Orr ?

A Yes, I did.

Q. And that was one to two minutes to 4:00 ?

A. Correct.

[20] On cross, Cst. Dooks-Fahie testified, page 68 of the transcript:

Q. Do you know when she was taken from that room over to the breathalyser room? Do you know what time it was?

A. It would basically be - - after she spoke with - - after she finished speaking on the phone, she would have been able to - - it would basically be when Cst. Cook was ready, setting up the breathalyser.

Q. Okay.

A. The first test was around 4:00, so...

[21] Cst. Dooks-Fahie testified to being present while samples were obtained from Ms. Orr. Cst. Dooks-Fahie was advised by Cst. Cook that Ms. Orr had failed and she so advised Ms. Orr. Cst. Dooks-Fahie completed the necessary paperwork, giving documents to Ms. Orr and explaining them. Ms. Orr was then released to her parents.

[22] On the issue of the accused's walk and balance, given the notes of Cst. Dooks-Fahie, and the lack of observation of unsteadiness or unbalanced by Cst. Bell, while I found the evidence of Cst. Dooks-Fahie credible and reliable, I am not convinced that the accused's walk was unbalanced or unsteady at any point while observed by the police. I accept the other observations and evidence of the two officers including their evidence that the accused had to be assisted from the rear of the police wagon.

Position of Defence:

[23] On the impaired driving charge the Defense position is that the Crown has failed to establish beyond a reasonable doubt that the accused's ability to operate a motor vehicle was impaired by alcohol or a drug.

[24] On the section 253(1)(b) charge the Defense argument is that the Crown has failed to establish beyond a reasonable doubt that the breath tests were conducted "as soon as practicable".

The section 253(1)(a) Charge:

[25] The Crown must prove, beyond a reasonable doubt, that the accused's ability to operate a motor vehicle was impaired by alcohol or a drug. The offence is made out by proof, beyond a reasonable doubt, of any degree of impairment, even slight. (***R v Stellato*** (1993), 78 C.C.C.(3d) 380 (SCC)).

[26] Evidence that the accused's functional abilities are impaired to some extent by the prior consumption of alcohol does not automatically lead to a conclusion that their ability to operate a motor vehicle is impaired. It may be unsafe to rely on a slight departure from normal conduct, alone, to conclude beyond a reasonable doubt that a person's ability to operate a motor vehicle is impaired by alcohol or a drug. (***R v Andrews*** (1996), 104

C.C.C. (3d) 392 (Alb.C.A.), leave to appeal to S.C.C. refused 106 C.C.C. (3d) vi.).

[27] A person may be convicted under this section where their impairment is due partly to fatigue and partly to the consumption of alcohol (***R v Pelletier*** (1989), 51 C.C.C. (3d) 161 (Sask.C.A.).

[28] A layman or police officer may give their opinion based on their own observations, as to whether or not the accused's ability to drive was impaired. However, a police officer's opinion is entitled to no special regard. (***R v Graat***, [1982] 2 S.C.R. 819.).

[29] I find that the accused had care or control of a motor vehicle between 2:47 and 2:50am on March 27 2009.

[30] I find that there was a strong smell of alcohol on the breath of the accused and her eyes were glassy and bloodshot. These observations were made before the accused became emotional and began to weep/cry. The condition of her eyes was due, at least in part, to her prior consumption of alcohol.

[31] The accused had some difficulty locating her papers for the police and fumbled with her papers. I find any difficulty or fumbling to have been slight.

[32] I find that the accused's speech was slurred. Cst. Dooks-Fahie had close contact with the accused over an extended period of time, including before, during and after the breathalyser testing. She noted the observation of slurred speech in her report which she made that morning. I accept her evidence on that point.

[33] Cst. Bell, had contact with the accused over a shorter period than Cst. Dooks-Fahie. She did not describe the accused's speech. When dealing with a charge of impaired driving, the absence of an observation such as slurred speech, by an officer who has contact with the accused, particularly where another witness noted such, is relevant for the Court to consider, but, it is not of the same weight as if the witness testified that the accused's speech was not slurred.

[34] Cst. Blaikie was not in a position to observe the accused's speech. The breath technician was not called and the Court will not speculate on what evidence the technician would have given, nor what evidence the accused's parents or friends in her vehicle may have given.

[35] The fact that the accused's speech was slurred I find to be evidence of her motor functioning being impaired by alcohol. There was no evidence of the extent to which the accused slurred her words.

[36] The accused had no difficulty understanding the officers or communicating with them.

[37] The accused was talkative. There is no basis on the evidence before me to find that the accused's talkative behavior was, in any part, indicative of impairment by alcohol. There was no evidence that alcohol tends to make people more talkative. There was no evidence as to whether the accused is normally talkative.

[38] I place no weight on the statement that the accused was apologetic as that is a conclusion based upon a statement or statements made by the accused which were not in evidence.

[39] There was no evidence of unusual driving.

[40] The accused's emotional upset is not, in itself, indicative of impairment. Persons detained by the police, under suspicion of drinking and driving, are likely to become nervous and upset. There is no evidence before the Court that persons under the influence of alcohol are more likely to be emotional. Furthermore, there is no evidence regarding the accused's emotional tendencies.

[41] Cst. Dooks-Fahie believed that the accused was definitely impaired by alcohol.

[42] Cst. Dooks-Fahie's evidence of the accused's walk and balance being unsteady was contrary to her notes made contemporaneously to the event. All of her other notes regarding her observations of the accused, made on the morning of the alleged offence, mirrored her evidence on the stand. I do not accept her testimony on this point.

[43] Cst. Bell testified that the accused was steady on her feet, not falling down.

[44] On the totality of the evidence I am not persuaded that the accused's walk or balance was unsteady.

[45] The accused was assisted into and out of the police wagon. Cst. Dooks-Fahie attributed this to impairment of the accused. Cst. Bell testified that she assisted the accused in and out of the patrol wagon as her normal practice. Given the height of the step into the wagon, the fact that the accused's hands were cuffed behind her back and that she was in a dress and high heeled-shoes, I am not convinced that she required assistance because her motor functioning was impaired by alcohol.

[46] In summary, there is no doubt that the accused had consumed a quantity of alcohol prior to being stopped by the police and that there was a strong smell of alcohol on her breath at that time she was stopped. There is no doubt that the prior consumption of alcohol was, at least in part, the cause of her

bloodshot and glassy eyes. Her speech was slurred. However, there was no evidence of unusual driving and the Court was not satisfied that the accused's walk or balance was unsteady. In these circumstances, while there was some evidence of her physical functioning being impaired, the evidence did not persuade the Court beyond a reasonable doubt that her ability to operate a motor vehicle was impaired by alcohol to any degree.

[47] On the totality of the evidence I am not persuaded beyond a reasonable doubt that the accused's ability to operate a motor vehicle was impaired by alcohol or a drug. I enter an acquittal on that charge.

The Section 253(1)(b) Charge:

The Relevant Code Provision

[48] "Section 258 (1) In any proceeding under subsection 255(1) in respect of an offence committed under section 253 or subsection 254(5) or in any proceedings under any of subsections 255(2) to (3.2),

(c) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), if

> (ii) each sample was taken as soon as practicable after the time when the offence was alleged to have been committed and, in the case of the first sample, not later than two hours after that time, with an interval of at least fifteen minutes between the times when the samples were taken, evidence of the results of the analyses so made is conclusive proof that the concentration of alcohol in the accused's blood both at the time when the analyses were made and the time when the offence was alleged to have been committed was, if the results of the analyses were the same, the concentration determined by the analyses and, if the results of the analyses are different, the lowest of the concentrations determined by the analyses,..."

[49] The Criminal Code, in section 258(1)(g) provides for proof of the results of the analyses of the testing of the accused's breath by means of a certificate of the qualified technician.

Jurisprudence

[50] The phrase "as soon as practicable" has been judicially interpreted to mean "with reasonable promptness" "within a reasonably prompt time under the circumstances" and does not mean "as soon as possible". (See for example ***R v Pearce***, [1984] B.C.J. No. 1612 (BCCA); ***R v Coverly*** (1979), 50 C.C.C. (2d) 518 (Alb.C.A.); ***R v Carriere***, [2010] S.J. No.499).

[51] The prosecution does not have to account for every minute (***R v Cambrin***, [1982] B.C.J. No. 1989 (BCCA)).

[52] The Court must consider the totality of the evidence and one factor for the Court to consider is whether the police acted reasonably ***R v Van Der Veen***, [1988] A.J. No. 710 (Alb.C.A.)).

[53] The Court must consider the length of the delay, whether there is any explanation for the delay and whether the explanation is reasonable. In ***R v Lightfoot*** 4 M.V.R. 238 (Ont.C.A.) found that a delay of 30 minutes without evidence explaining the delay was a failure to conduct the tests as soon as practicable. In ***R v Russell***, [1990] N.S.J. No. 558, Freeman, J.C.C. found that an unexplained delay of 15 or more minutes was fatal to the Crown's case.

[54] The Court cannot take judicial notice of what procedures are usually followed at the police station or how long it may take to prepare the instrument, etc. however, the trial Judge must apply the standard of "as soon as practicable" "with reason and common sense derived from experience" (***R v Carter***, [1981] S.J. No. 1337 (SkCA) and ***R v Carriere***, *supra*).

[55] In the present case, I find that the time of the alleged offence was 2:47-2:50 am. At 2:53 the accused was given an ASD demand. On the fourth attempt she provided a suitable sample which resulted in a fail reading. At 2:58 she was arrested, read the breathalyser demand and her Charter right to counsel

and the police caution. She was placed in the police vehicle and transported directly to the police station, a trip of approximately four minutes duration. I find that the accused was brought to a cubicle, a small room across from the breath testing room, at 3:05 am. The accused was brought from that room to the breath testing room one or two minutes before 4:00am. The first attempt to obtain a sample of her breath occurred at 4:00am.

[56] It is the period from 3:05 am to 3:58 or 3:59 which is in issue. A period of 53-54 minutes.

[57] The evidence regarding what transpired during this period comes from Cst. Dooks-Fahie and Cst. Bell. I accept their evidence. I find that this period of time was occupied by three activities: first, a conversation between the accused and the police officers; second, the accused's use of the phone to exercise her right to counsel; and third, a period of waiting for the qualified technician to be ready to conduct the breath testing of the accused. Each of these activities I find to be reasonable. The time taken for each activity and the overall time must not be of such a length as to raise a reasonable doubt that the tests were conducted as soon as practicable. The Court need not know the exact amount of time for each activity.

[58] First, upon the accused being placed in the cubicle, a conversation occurred between the police and the accused regarding her right to use the telephone to call a lawyer or her father, if she chose to do so. The police informed the accused that she would be given privacy to make her call(s). The evidence was that the accused was talkative. There was no evidence as to the duration of this conversation between the accused and the police. Based on the description of the interaction between the accused and the police I conclude that this conversation would not have taken more than five minutes.

[59] I accept the evidence that the accused began using the telephone immediately after completing her conversation with the police officers. The accused's use of the telephone began at approximately 3:10 am.

[60] At page 68, the Cst. Dooks-Fahie stated:

> "...[A]fter she finished speaking on the phone, she would have been able to - - it would basically be when Cst. Cook was ready, setting up the breathalyser."

[61] The Defense argued that Cst. Dooks-Fahie's evidence about Cst. Cook getting ready, setting up the breathalyser was hearsay and inadmissable. I agree with this submission, in part. Cst. Dooks-Fahie was not in the breathalyser room prior to 3:59 am and did not observe the actions of Cst.

Cook during that time. Therefore, she cannot testify to his actions during that time. However, Cst. Dooks-Fahie's evidence was admissible to explain her actions in keeping the accused in the cubicle until such time as she understood that the qualified technician, Cst. Cook, was set up and ready for the accused in the breathalyser room.

[62] In this case, the first sample was taken from the accused within a minute of her entering the breathalyser room. I conclude that any/all preparation must have occurred before that time.

[63] Cst. Dooks-Fahie testified that the accused completed using the telephone and advised that she was willing to take the breath test at approximately one or two minutes to 4:00 am. (Transcript at page 26). The officer also stated that the accused was taken to the breathalyser room at one or two minutes to 4:00 am.

[64] At page 68 of the transcript Cst. Dooks-Fahie testified that the accused was taken to the breathalyser room:

> "..[A]fter she finished speaking on the phone, she would have been able to - - it would basically be when Cst. Cook was ready, setting up the breathalyser."

[65] I view this statement as a minor modification of the officer's evidence. In my view, it did not represent a material change in the officer's earlier evidence.

[66] I accept Cst. Dooks-Fahie's evidence and find that any period of waiting for the breath technician to be ready after the accused completed her telephone calls was brief, a matter of a few minutes, at most.

[67] I turn to the period of time wherein the accused used the telephone.

[68] There was evidence that the accused told the police that she called home and spoke with her sister. There was evidence of efforts being made by the accused to contact her father on his cell phone. There was no evidence of how much time it took for the accused to reach her father. There was evidence that she "eventually"reached her father on his cell phone. There was no evidence how long she and he spoke by phone while he was at the location where she reached him. There was evidence that the accused's parents came to the police station. There was no evidence where the accused's parents were that early morning when they received her call nor how long it took them to proceed from there to the police station. There was evidence that the accused's father's cell phone died. There was evidence that Cst. Bell provided her cell phone to the accused's father (at one point

she seemed to say she provided it to the accused) to enable him to continue his conversation with the accused, while he was at the police station, before the accused was taken to the breathalyser room. There was no evidence as to the interval of time between the accused's father's cell phone dying and he being provided Cst. Bell's cell phone. There was no evidence as to how long the accused's father spoke with the accused using Cst. Bell's cell phone. I accept that all of these events transpired. I also accept, as previously noted, that the accused was talkative.

[69] Cst. Dooks-Fahie estimated that the accused was using the phone for 15 to 20 minutes. Just seconds after giving that estimate she stated that the accused finished using the telephone at one to two minutes to 4:00am and was taken into the breath testing room (Transcript at page 26). Those two statements are quite different in that, if the former were so the accused would have finished using the telephone by no later than 3:30 am., while if the latter was so, she finished her calls by 3:59 am. The Court need not accept either of these statements. The Court must be satisfied beyond a reasonable doubt that the breath samples were taken as soon as practicable.

[70] I find that Cst. Dooks-Fahie's estimate of the length of time the accused was using the phone was an understatement. I do so for four reasons;

(1) Cst. Dooks-Fahie evidence regarding the accused's time of arrival at the cubicles I found not to be reliable, based upon the activities between the arrest at 2:58am and the arrival at the cubicles;

(2) There is credible evidence which I accept that the accused began using the telephone at approximately 3:10 am and finished using the telephone a few minutes before 4:00 am; and

(3) There is no evidence of any other activity occurring between 3:10 am and 3:55 am and I so find.

(4) I find it virtually impossible to believe that all of the activities involved in the accused's exercising her right to counsel occurred in a mere 15 to 20 minutes.

[71] I accept the evidence of Cst. Dooks-Fahie that the accused was using the telephone from 3:10 am until a few minutes before 4:00 am.

[72] I find that the evidence provides an explanation of what took place throughout the period of time in question.

[73] The overall time period, from the time of the alleged offence (2:50am) until the time of the first sample (invalid) at 4:00 was only 70 minutes, well within the two hour statutory limit.

[74] I find that officers Dooks-Fahie and Bell acted reasonably throughout in fulfilling their duties including providing assistance to the accused.

[75] On the totality of the evidence I am satisfied beyond a reasonable doubt that the samples of the accused's breath were taken as soon as practicable. I find that the Crown may rely on the information contained in Exhibit #1.

[76] I find that all of the elements of the charge under section 253(1)(b) of the Criminal Code have been proven beyond a reasonable doubt. I enter a conviction on that charge.