IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Awad, 2012 NSPC 43

Date: 20120420
Docket: 2381903
Registry: Sydney

Between:

Her Majesty the Queen

Plaintiff

-and-

Yamen Awad

Defendant

DECISION

Judge: The Honourable Judge Jean M. Whalen, J.P.C.

Heard: April 20, 2012

Charges: Section 253(1)(a), 253(1)(b) *Criminal Code*

Counsel: Andre Arseneau, for the Crown
Daniel Burman, for the Defence

Introduction

[1.] The police were dispatched to "Big Ben's Convenience" parking lot at 12:15 A.M. in response to a 911 call reporting "4/5 people staggering and possibly impaired." Upon arrival, Constable MacIsaac saw a "green" Honda Civic with lights on, backing up. Mr. Awad was found to be in the driver's seat. He was arrested, chartered and cautioned, and complied with a breathalyser. Both readings were 110%. He was charged pursuant to Sections 253(1)(a) and 253(1)(b) of the *Criminal Code*.

ISSUE

- Did the defendant *operate* or *have care and control* of a motor vehicle while his ability to operate was impaired by alcohol?

Review of the Evidence

[2.] Constable MacIsaac was dispatched to "Big Ben's" parking log. The caller had said four or five "...people were staggering possibly impaired." Constable MacIsaac arrived at 12:15/12:16 A.M. and located a "green Honda Civic" in the parking lot. Upon turning into the parking lot, Constable MacIsaac saw the green Honda Civic with lights on in gear backing up. The Officer activated his emergency lights and did a vehicle stop. He was on the "backside of Big Ben's",

at Disco Street in Sydney. The Officer parked his police cruiser behind the rear bumper of the car.

[3.] When asked to explain further what he saw when he was pulling in, Constable MacIsaac stated “I saw the reverse lights and the car moved one to three inches. The vehicle jerked when the police lights were turned on. He explained that he meant the vehicle “stopped quickly in a front to back motion.”

[4.] Constable MacIsaac went to the driver’s side of the vehicle. He asked for a licence but the defendant did not have a wallet with him. The officer was given insurance papers which the defendant retrieved from the dash. Insurance was in the defendant’s name. There were three other people in the car, one in front passenger’s seat, one in the back passenger’s seat, and one in the back of the driver’s seat.

[5.] The Officer could smell a strong smell of alcohol coming out of the vehicle so he asked the defendant to get out of the car and come to the back [of same]. Constable MacIsaac observed that the defendant was unsteady on his feet. When speaking “up close he smelled what he believed to be an alcoholic beverage.” The defendant could speak but his speech was slurred.

[6.] The Officer observed what looked like “vomit” on the ground next to the driver’s side door. He then formed the opinion that the defendant was impaired by alcohol and he should not operate a vehicle.

[7.] At 12:30 A.M. the defendant was arrested, chartered and cautioned. Defence counsel took no issue with this sequence of events (thus the police officer did not refer to his card). Mr. Awad understood the “demand” and agreed to give a sample. He was transported to Central Division at 12:44 A.M. Mr. Awad was given the opportunity talk to Legal Aid duty counsel.

[8.] The defendant gave two samples. A certificate was prepared, entered as Exhibit #1 – both readings were 110%.

[9.] Constable MacIsaac also testified the photos taken by Constable Fraser were a fair and accurate depiction of the car/scene. Specifically, photo number 4, the police officer said the driver opened the door when the police officer approached. There were no individuals “around” the car.

[10.] When Constable MacIsaac first approached the engine was running. He directed the defendant to turn off the car. The officer was not sure what happened to the key. While dealing with the defendant, no one else approached him and he had no other discussion with the three other males. Jamael Ali testified he saw

police with the defendant and stayed in the store the whole time because he had did not want any trouble.

[11.] On cross-examination the police office was adamant he saw the vehicle move, albeit a small amount. He did agree that it was a small car containing four grown men and any movement by them could make it rock. (The court heard no evidence that some passenger did this.)

[12.] The officer stated he pulled up right behind the vehicle within approximately five feet. The police office says he is not mistaken, that he saw reverse lights; there was no reflection from his emergency lights or headlights.

[13.] The officer agreed once again "it could be possible it moved from people in the vehicle." He said he did not know if it was the defendant who vomited outside the car as he was not present when that happened.

[14.] Constable MacIsaac agreed that the defendant was coherent, not out of control, able to walk, although unsteady (which was supported by the dispatch call indicative of four or five persons staggering). The officer took no statements from the other three individuals in the car.

Yamen Awad

[15.] The defendant testified that after drinking with his roommate at Cape Breton University, they decided to go to the Steel City, a bar on Townsend Street. The cab did not arrive so they got a friend, Jamal Ali, who was sober, to drive. On the way they stopped at Big Ben's to get cigarettes and gum. Jamal remained in the vehicle. When the others returned to the car from the store they realized they had forgotten Jamal's "stuff" so Jamal go out of the car and went into the store himself, leaving the others in the car.

[16.] While waiting for Jamal the others were playing music on the defendant's Ipod attached to the stereo of the car. The defendant's friend, Faras, when trying to change songs grabbed the cord and as a result pulled the deck face from the stereo. The defendant testified Faras asked him "to walk over to the driver's side to fix it." The defendant had been seated in the middle of the back seat between two other people who were not called as witnesses.

[17.] The defendant got in the driver's seat and then became ill. He opened the driver's door and vomited. He did not get out of the car.

[18.] He testified he readjusted the deck face and re-calibrated the Ipod to get the music list. It was then he saw the lights of the police car. He was only in the car for three to four minutes.

[19.] The defendant admits to being intoxicated, but he said he was "able to remember fairly clearly" and he was "coherent". It was Jamal Ali who left the car running when he went into the store. He was the only sober person and he remained in the store during the 15 minutes the police were dealing with the defendant.

[20.] The defendant denies touching anything except the radio. He denies putting the vehicle in reverse and says he did not drive as he did not have the intention to drive. He stated Jamal was "definitely coming back to drive the car."

[21.] Mr. Awad also testified he "did not do it unintentionally because it takes two or three steps to move my car – press the lock button, press the brake pedal."

[22.] On cross-examination Mr. Awad agreed it was "pretty apparent he was drunk." He described the others as "pretty drunk" as well. Jason was the worst. They all went into the store except for Jamal and they were joking around. He stated he "went straight to the things he wanted to buy. He agreed the "guys

attracted some attention." So much so the police were called – dispatch 4/5 people staggering/impaired.

[23.] The defendant does not recall their specific behavior that might have attracted attention. He stated "Faras forgot Jamal's stuff. None of us cared much."

[24.] The defendant does not recall if Andrew moved or was not in the car as he was focussed on the music. He told the court he:

(i.) "He clipped the face plate back on because a bump would knock it off;

(ii.) He calibrated – recognize service from the Ipod;

(iii.) Then he put the cable to the Ipod; and

(iv.) Brought up the playlist."

[25.] The defendant testified "I remember exactly what I did – nothing to move the car." He could offer no explanation for the officer testifying he saw back lights on and the car lurching back and forth.

[26.] Mr. Awad stated during the whole [encounter and process] he never did tell the police office he was not driving. When asked why, he stated "because it was pointless to tell the police officer, it wouldn't do any good...." He has never asked the police officer to speak to Jamal. Why? "Because he was scared inside."

Jamal Ali

[27.] Jamal Ali testified that Yamin and the others asked him to drive to the Steel City because they were drinking and he was sober. They stopped at Big Ben's so they could buy cigarettes, etc. He waited in the car while the others went in, but they forgot to buy his "stuff" so he left them in the car and went in the store.

[28.] He saw the police take Yamin but he did not say anything because he did not "want to get in trouble; maybe they did something before (*meaning before they asked him to drive – he had not been drinking with them*) [and police] would take them all." (emphasis added)

[29.] Mr. Ali did not take the car keys. He left the car running as the heater was on in the car. He had plans to return to the car, but when he saw police taking Yamin he stayed in the store.

[30.] He looked at Exhibit #2, photos 2 and 3, and testified "it looks like where I parked the car; [it] doesn't look moved, I don't think so." Even though Yamin was drunk, "he had a conversation and could speak fairly good."

[31.] On cross examination Mr. Ali says he was not upset that they had forgotten his "stuff, they were drunk. He saw the police lights but he did not think they were coming for his friends. He says when he left the car no one was in the driver's

seat. When the police arrived he does not know who was in the driver's seat. He does not know who could have put the car in gear. Mr. Ali left the car before the "deck" incident and stayed in the store until police left with the defendant.

[32.] When police left he spoke to Faras and Rigby. He returned to the residence with Rigby, and Faras went to the Steel City. He did not offer to drive the car back to the residence. They took a cab.

Feras Alkhyyat

[33.] Feras Alkyhyyat testified that they had asked Jamal to drive because the cab was not coming and they all had been drinking. Ten to fifteen minutes later they were on their way and stopped at Big Ben's to get cigarettes and "stuff". Two to three minutes later they came back to the car but had forgotten Jamal's cigarettes, etc. Jamal told them to stay in the car while he went into the store. While Jamal was in the store, Faras was trying to change the "deck" but could not. He asked Yamin to fix it and he says the defendant came from the back seat to fix the deck.

[34.] He says the defendant threw up first, (opened the door), then took some deep breaths for ten to fifteen seconds. Mr. Alkyhyyat testified he "saw from mirror police flashing lights". Mr. Awad was in the car three or four minutes then the police came.

[35.] He testified that the car was running when Jamal was in the store. The defendant came from the back seat to the front when Mr. Alkhyyat asked him to fix the deck because they were trying to change songs. The defendant knew how because of problems in the past.

[36.] Mr. Alkhyyat testified the defendant was doing nothing to the other parts of the car. (no steering wheel, pedals, revs or gears). He was doing nothing to "concern me of putting car in motion". The witness is "one hundred percent sure the defendant did not drive or put in reverse."

[37.] On cross examination the witness was not sure of their position upon returning to the car from the store but said "I think we got in same way." The witness agrees the face plate came off but denies grabbing the cord attached to the phone. The defendant says Mr. Alkhyyat did grab the cord which resulted in the face plate coming off.

[38.] The witness testified the defendant threw up before he got the face plate on. He is not sure if the defendant recalibrated the Ipod etc. (not sure of sequence as outlined by the defendant). Mr. Alkhyyat stated he would notice the defendant "didn't touch wheels, pedals or gear shift." He says the defendant did not touch the steering wheel when he got in or leaned out of the car. (Later he says but

maybe he did and he did not see). The witness only saw the defendant handle the music deck. He did not see him handle the phone (which contains the music).

[39.] Mr. Alkhyyat did not tell police anything, "don't want to make trouble – quiet and left. I didn't think it would have helped Yamin."

[40.] Mr. Alkhyyat testified that Jamal came out of the store before the defendant left with police.

The Law

[41.] In care and control cases, the ultimate task of the trial judge is to decide whether the Crown has met the burden of establishing beyond a reasonable doubt that the defendant's interaction with his or her vehicle presented a danger or a risk of danger or a risk to public safety. If the facts establish beyond a reasonable doubt a risk of the accused putting the vehicle in motion, either intentionally or unintentionally, or if the facts otherwise support a finding of danger, then care or control will have been established.

[42.] While an intention to drive (to put the vehicle in motion) is not an essential element of the offence, if proven a conviction may follow. In that regard, the Crown has the option of invoking the presumption set out in s. 258(1)(a) of the *Criminal Code.* If it is established that the defendant occupied the driver's seat,

the onus falls on the accused to show that, on a balance of probabilities, it was not for the purpose of setting the vehicle in motion.

[43.] A defendant who fails to rebut the presumption will be deemed to have had care and control of the vehicle, and subject to any other defences, a conviction will follow. The failure to rebut the presumption has the legal effect of dispensing with the need to conduct a danger inquiry.

[44.] If, however, the accused rebuts the presumption, the Crown is still entitled to establish "active" care or control by proving that there was a risk of putting the vehicle in motion unintentionally or of posing in some other manner an immediate danger to public safety.

[45.] The trial judge must have regard to all of the surrounding circumstances leading up to the intervention by police.

[46.] There are three attributes to care and control:

(1.) Acts involving the use of the car, or its fittings and equipment, or course of conduct associated with the vehicle.

(2.) An element of risk of setting the vehicle in motion, whether intentionally or unintentionally.

(3.) An element of dangerousness arising from the risk of setting the vehicle in motion.

The Law

1. Credibility of Witnesses

[47.] *R. v. Jaura*, p. 4, paras. 12 and 13 state:

> The assessment of credibility is not a science (*R. v. Gagnon, [2006] 1 S.C.R. 621*) nor can it be reduced to legal rules or formulae: *R. v. White (1947), 89 C.C.C. 148 (S.C.C.).* However, proper credibility assessment is closely related to burden of proof. For this reason, an accused is to be given the benefit of reasonable doubt in credibility assessment: *R. v. W.D. [1991] 1 S.C.R. 742; (1991), 63 C.C.C. (3d) 397*. Credibility must not be assessed in a way that has the effect of ignoring, diluting, or worse, reversing the burden of proof. What must be avoided is an "either/or" approach where the trier of fact chooses between competing versions -- particularly on the basis of mere preference of one over the other: *R. v. Challice (1979), 45 C.C.C. (2d) 546 (Ont. C.A.)* cited with approval *R. v. Morin, [1988] 2 S.C.R. 345;* see also *R. v. Chan (1989), 52 C.C.C. (3d) 184 (Alta. C.A. and authorities cited therein).* Acceptance of a complainant's version does not resolve the case. The court must still consider and weigh the defendant's version and, if unable to reject it, must consider itself to be in a state of reasonable doubt: *R. v. Riley (1979), 42 C.C.C. (2d) 437 (Ont. C.A.).*
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> > The learned trial Judge then proceeded to consider each version in isolation and preferred the version of the complainant to that of the appellant. Having concluded that he preferred the complainant's testimony to that of the appellant, he found that the Crown's case had been proved beyond a reasonable doubt. With respect, we think that he erred in approaching the issue before him in that manner. The issue before him was not which version of the evidence was true, but rather, on the totality of the evidence viewed as a whole, whether the Crown's case had been proved beyond a reasonable doubt.

> It is not without significance that the trial Judge did not specifically reject the evidence of the appellant nor find his evidence to be incredible. Yet, in this case the appellant could not be convicted unless his evidence on the issue of consent was totally rejected.

In assessing the credibility of any witness, including the accused, the existence of evidence that contradicts the witness is obviously highly relevant. For my part I regard it as the single most important factor in most cases, though the relative weight given to this versus other factors -- such as demeanour, contradictions within the witness's evidence itself, potential bias, criminal record or other factors -- varies from case to case. No witness is entitled to an assessment of his credibility in isolation from the rest of the evidence. Rather, his evidence must be considered in the context of the evidence as a whole. In a "she said/he said" case, that necessarily means that the defendant's evidence must be assessed in the context of and be weighed against the evidence of the complainant (and vice versa): *R. v. Hull, [2006] O.J. No. 3177, (Ont. C.A. Aug 4 2006 at Para. 5):*

> W.(D.) and other authorities prohibit triers of fact from treating the standard of proof as a credibility contest. Put another way, they prohibit a trier of fact from concluding that the standard of proof has been met simply because the trier of fact prefers the evidence of Crown witnesses to that of defence witnesses. However, such authorities do not prohibit a trier of fact from assessing an accused's testimony in light of the whole evidence, including the testimony of the complainant, and in so doing comparing the evidence of the witnesses. On the contrary, triers of fact have a positive duty to carry out such an assessment recognizing that one possible outcome of the assessment is that the trier of fact may be left with a reasonable doubt concerning the guilt of the accused (underlining added)

[48.] I am also mindful of *R. v. W.D.* [1991] 1 S.C.R. 742; (1991), 63 C.C.C. (3d) 397 which states at para. 27:

> In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or

> disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole. See R. v. Challice (1979), 45 C.C.C. (2d) 546 (Ont. C.A.), approved in R. v. Morin, supra, at p. 357.

Analysis

[49.] At trial there were four witnesses called including the defendant. Constable MacIsaac, and Mr. Ali were the only sober individuals at the scene on the night in question. However, Mr. Ali was not in or near the car during the critical time when events are alleged to have occurred. He remained in the store until the police took the defendant because he did not want to become involved.

[50.] Mr. Awad and Mr. Alkhyyat both admit to drinking and being drunk. They described the other two friends that we did not hear from as drunk. Their actions and appearance in the store attracted attention to the extent that a call was made to dispatch stating four or five people staggering and possibly impaired.

[51.] Mr. Ali and Mr. Alkhyyat did not speak to police that night, nor at any time after the incident and leading up to the trial date. There were no statements given by Mr. Ali, Mr. Alkhyyat or the defendant. Their version of events was heard for the first time at trial. (I do acknowledge the defendant’s right to remain silent.)

[52.] All three civilian witnesses were trying their best to recollect and I do not see any embellishment. Mr. Alkhyyat, however, was not sure of the sequence of events and, although he says he did not see the defendant touch the steering wheel or pedals, on cross examination he was not sure.

[53.] I find that Mr. Alkhyyat's recollection was affected by alcohol and the passage of time.

[54.] The defendant says he did not touch any pedals or the steering wheel, yet the police officer saw the car "jerk" in a back and forth motion and brake lights engaged. Defence counsel suggested on cross examination that people in the car moving could make it rock, but there is absolutely no evidence from Mr. Ali, Mr. Alkhyyat or the defendant to suggest that took place.

[55.] Any movement by the defendant was leaning to the left and back to the right when he opened the car door to vomit, and this took place before the police officer arrived on scene. There is no evidence to refute the police officer's testimony that he saw brake lights or jerking motion of the car unless I accept the defendant's testimony that he did not touch the steering wheel, brake pedal or put the car in gear.

[56.] In ***Faryna v Chorney*** [1952] 2 D.L.R. (354) B.C.C.A. at para.11:

> The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions.

[57.] Although the police officer's notes may differ from his report, the report was made within hours of the alleged incident by a sober individual. The computer generated reports are more commonly used now by officers to complete their files.

[58.] I find the defendant, although adamant he did not touch the pedal or gear shift, made the car jerk and brake lights engage. There is no evidence that the police officer or the defendant had any enmity between one another to suggest that the police officer would make this up. It was, by both accounts, an amicable encounter.

[59.] Based on all of the evidence before me, I find the defendant by his own admission, was in the driver's seat adjusting the "equipment" of the car, and although he may not have had any intention of driving, based on the evidence the court heard, I find the defendant was in 'care and control' "by committing acts involving the use of the car or its fittings and equipment; embarking on a course of conduct associated with the vehicle."

[60.] There was an element of risk of setting the vehicle in motion, whether intentionally or unintentionally:

(a) He was drunk;

(b) He got in the front seat;

(c) The keys were in the ignition; and

(d) The vehicle was running.

And this car was observed by the police officer to have “jerked” in a back and forth motion and brake lights were engaged.

[61.] There was also an element of dangerousness arising from the risk of setting the vehicle in motion. This was a busy convenience store on a main street, the corner of Disco and Prince Streets). The store was crowded. Mr. Alkhyyat in his cross examination “saw a huge lineup in the store, just forgot....” (regarding Mr. Ali’s purchase).

[62.] Their behaviour in the store drew attention and police were dispatched with a report of four or five people staggering, possibly impaired.

[63.] The defendant was in “care and control” while his ability to operate a motor vehicle was impaired by alcohol and is guilty on Count #2, 253(1)(a), and I would enter a stay on Count #1, 253(1)(b).

The Honourable Judge Jean M. Whalen, J.P.C.