

**IN THE PROVINCIAL COURT OF NOVA SCOTIA**

**Citation: R. v. Wasson, 2012 NSPC 79**

**Date:** 20120918

**Docket:** 2352944

**Registry:** Amherst

**Between:** Her Majesty the Queen

v.

Norma Louise Wasson

**Judge:** The Honourable Judge Paul B. Scovil

**Heard:** 15 August 2012 in Amherst, Nova Scotia

**Written decision:** September 18, 2012

**Charge:** THAT SHE on or about the 5<sup>th</sup> day of August A.D. 2011 at, or near Parrsboro, Nova Scotia, did while her ability to operate a motor vehicle was impaired by alcohol did operate a motor vehicle contrary to section 253(1)(a) of the Criminal Code.

**Counsel:** Bruce Baxter, for the Crown

Robert Gregan, for the Defence

**By the Court:**

[1] Parrsboro is a great little town on the shore of the Bay of Fundy. It boasts the Ship's Company Theatre. It's not Stratford but more like a small Stratford on the Fundy. Each year, immediately after the opening production, the Theatre holds a big Gala. The Gala is put on by volunteers with homemade food and with the local Jost Winery providing an open bar handing out samples of wine. The mayor of Parrsboro as well as other attending politicians give speeches. Probably that's the price attendees have to pay for the open bar. The mayor was a witness in this matter and even advised the court of her intention to re-offer for the mayoralty in the fall. Norma Wasson was one of the volunteers. She also volunteered to partake in the open bar. What this case must decide is whether Ms. Wasson drove home from the Gala while her ability to drive a motor vehicle was impaired by alcohol.

[2] The 2011 Gala was held on the night of August 5<sup>th</sup>. Constables Brown and Wiley of the Parrsborro detachment of the Royal Canadian Mounted Police were in separate police vehicles but parked in the parking lot of the Bare Bones Bistro. The officers were parked there at about a quarter to midnight. The officers were talking and watching the parking lot of the Ship's Company Theatre empty out as the Gala ended. The officers noticed that one vehicle had a non-functioning headlight so Constable Brown proceeded out of the parking lot to pull the vehicle over. As he followed behind the vehicle the officer noted it go over the centre line of the highway by almost the full width of the car. At that point Constable Brown engaged his emergency lights on the police car to signal the vehicle to pull over. The vehicle did not stop but continued on its way. The vehicle then signalled to turn right onto King Street. The vehicle made a wide turn going to the far left of the road to a point where the following officer was concerned the vehicle might actually leave the road. By this time the officer had activated his sirens. On King Street the vehicle pulled into a driveway and came to a stop. Stopping behind the vehicle Constable Brown exited the police vehicle and approached the other car. He found the only occupant to be a female driver later identified as the accused.

[3] Upon speaking to the accused, while she was seated in her vehicle, the officer immediately noted a smell of alcohol. He advised Ms. Wasson of her burnt headlight and she indicated she knew and was going to have it fixed. She added that she had had a few drinks. When asked for her driver's licence Ms. Wasson

had to exit the vehicle and walk around to the passenger side of the vehicle, open the passenger door and retrieve her documentation. In addition to this being odd behaviour the officer noted she was unsteady in her walk. When the officer spoke to her he noted that her speech was slurred and the smell of alcohol was detected to be on her breath. Constable Brown formed the intention at that point to demand a sample of Ms. Wasson's breath pursuant to 254(3) as he believed that she was driving while her ability to do so was impaired by alcohol. He testified that the indicia of impairment was strong enough that he felt no need to use a roadside screening demand under 254(2) as he had more than a suspicion that Ms. Wasson had alcohol in her body.

[4] The second officer, Cst. Wiley, arrived on the scene as a result of a radio call from Cst. Brown. The officers discussed how to transport Ms. Wasson back to the police detachment for the taking of a breath test. It was decided that they felt Ms. Wasson would be more comfortable in the Tahoe truck that Cst. Wiley was operating. Cst. Wiley testified that when they assisted Ms. Wasson out of her car to be transported in the Tahoe he could smell alcohol on her breath. She appeared unsteady on her feet as well. Ms. Wasson had difficulty getting into the Tahoe so it was determined they would transport her in Cst. Brown's police cruiser. Cst. Wiley noted at that time that the smell of alcohol was coming from Ms. Wasson's breath.

[5] Once Ms. Wasson was in Cst. Brown's vehicle Constable Wiley then stayed behind to wait for a tow truck to take the accused's vehicle to an impound lot. He then attended back at the police detachment. At the detachment Cst. Wiley was able to observe Ms. Wasson in the interview room where she was in conversation with Cst. Brown and the Intoxilyzer technician Cst. Roswell. He noted once again the smell of alcohol from Ms. Wasson, slurred speech, inability to follow simple instructions as well as unsteadiness on her feet. All of this allowed him to conclude that Ms. Wasson was intoxicated. Cst. Wiley had the additional advantage of having phoned Ms. Wasson the next day at which time he noted she had no slurred speech.

[6] The Intoxilyzer technician, Cst. Roswell, testified as well. He indicated that he was called in to perform breath tests on Ms. Wasson. When Cst. Roswell encountered Ms. Wasson in the Intoxilizer room he was able to note glossy eyes and delayed and slurred speech exhibited by the accused. The officer testified that

he had no memory of the smell of alcohol. Cst. Roswell also had the advantage of prior contact with Ms. Wasson. He had observed her driving on a prior occasion when he stopped her and issued a seat belt warning. At that time he had no problem with her manner of driving. Equally on that occasion Cst. Roswell did not note glossy eyes nor slurred speech. After viewing Ms. Wasson then and at the police detachment on the night in question Cst. Roswell gave the opinion that he could tell she was intoxicated and under the influence of alcohol. Cst. Roswell also noted that Ms. Wasson had difficulty standing and needed a wall to assist herself in remaining upright. Cst. Roswell had made an audio recording of the interactions between Ms. Roswell and the officers during the course of an attempt to obtain breath samples at the detachment. The recording itself forms part of the evidence before the court.

[7] In the audio recording one can hear a noticeable slurring of speech by Ms. Wasson. During the course of that recording Ms. Wasson advised the police that she had “four only”. Cst. Roswell inquired as to, “four what?” To this Ms. Wasson said, “four white wine, in little glasses”. She confirmed later in the recording that she had consumed four drinks of wine. Ms. Wasson was confirmatory of her speech pattern that night saying that she was “stumbling over her words” due to her ill fitting false teeth. Later she was concerned that her false teeth were the problem in her inability to give a proper breath sample. She was able to remove her teeth at one point but it made no discernable change in her manner of speech. Ms. Wasson was unable to provide a breath sample.

[8] In her defence Ms. Wasson called her family physician to the stand. Dr. Dauphinee-Bentley was qualified a general medical practitioner. She testified that Ms. Wasson was in to see her on August 3, 2011 with severe hip and groin pain. The doctor was concerned with metastatic deposits in Ms. Wasson’s hip. Ms. Wasson presented with a “wobbly gait” and also suffered Chronic Obstructive Pulmonary Disease. Ms. Wasson also had lost one quarter of a lung due to cancer. The doctor did indicate that there would be no medical reason for any problematic driving on Ms. Wasson’s part. Doctor Dauphinee-Bentley had also attended the Gala on the night in question. She had spoken briefly to Ms. Wasson and also was able to confirm that there was an open bar with small glasses of wine being served. She estimated that the glasses held about five ounces. Dr. Dauphinee-Bentley agreed under cross-examination that the accused should not have been combining alcohol with the medication regime that she was under.

[9] The current mayor of Parrsboro was also at the Gala. She saw Ms. Wasson there. Mayor Lois Smith was able to identify Exhibit 2 as the type and size of glasses that were being served. The wine was being passed around by servers. Mayor Smith reported that she spoke to Ms. Wasson during the evening and that Mayor Smith noticed no discernable difference in Ms. Wasson's demeanour than that which she normally displayed. She did not see that Ms. Wasson had any problems with walking.

[10] Ms. Wasson also called her sister Harriet Burbine to the stand. She was acting with her sister the accused as volunteers at the Ships's Company production on the night of August 5<sup>th</sup>. Ms. Burbine and Ms. Wasson had met earlier in the evening at about 6:45 and had planned on driving in separate vehicles to the theatre. They had worked on some deserts for the evening and then drove to Parrsboro some distance away. Ms. Burbine indicated her sister showed no signs of having consumed alcohol, was not consuming alcohol at that time and further that her driving abilities on the way to the theatre were fine. Ms. Burbine described the Gala and said that she saw her sister with a glass of wine in her hand. Ms. Burbine left at 11:15 to 11:30 and thought her sister was fine at that point.

[11] Finally Ms. Wasson herself testified. She detailed her ailments including ambulatory difficulties, pain, cancer treatments, partial removal of a lung and being on twelve different types of medication. Ms. Wasson stated she cannot drink anymore due to her medication but went on to say she can take a drink occasionally. She confirmed not having any alcohol prior to arriving at the Ship's Company Theatre. Ms. Wasson very quickly told the court that she had to correct something. She had told Cst. Brown that night that she had four drinks but that she did not say to the officer what it was that she drank. She testified to this despite what the court clearly heard her say on the audio recording regarding consuming four glasses of wine. Ms. Wasson stated she had a beer when she first arrived at the Theatre and then had a second beer of which she only had two sips. She later on had two glasses of white wine. The first beer was at six o'clock in the evening and the remainder were over the rest of the night. She confirmed the size of the glasses of wine as being that as introduced as the exhibit before the court. She explained some of her driving evidence by saying that the turn onto King Street was a wide turn which was why the officer thought she was not

operating her vehicle normally. She had no recollection of ever being over the centre line and further that the turn was one which required you take a wide angle to get around it.

[12] It was interesting to note that Ms. Wasson felt she had been singled out for police interaction. She testified that the police stopped her to make an example to the community. In cross examination she said she does not count her drinks but she needed to clear up how much she did drink that night. In relation to her slurred speech Ms. Wasson stated the difference in her speech was due to her being upset on the night in question. She later said that she had no slurred speech.

[13] The law in relation to driving while your ability to do so is impaired by alcohol is well established. As a trial judge I must be convinced beyond any reasonable doubt that Ms. Wasson's ability to operate a motor vehicle was impaired by alcohol. If the evidence before me is so frail as to leave me in reasonable doubt I must acquit the accused. If the evidence of impairment establishes any degree of impairment from slight to great, the charge has been made out. (*R. v. Stellato* [1994] 2 S.C.R. 478.)

[14] Care must be taken as well to insure that a court considers that the impairment of an accused relates to their ability to operate a motor vehicle and not just impairment generally. One may be slightly impaired but with no affect on one's ability to operate a motor vehicle. It is only when such impairment crosses the line into impairment of operating a motor vehicle can a court convict. (*Graat v. The Queen* [1982] 2 S.C.R. 819, *R. v. Meek* [2008] N.S.J. No. 130 )

[15] Here the defence asked that inferences be made from the fact that the officers did not attempt to get a blood sample from the accused, utilizing their powers under section 254 of the *Criminal Code*. I find that Ms. Wasson's inability to provide a sample of her breath pursuant to a breath demand was due most likely to lung incapacity. Ms. Wasson argued that a blood test should have been demanded by the officers that night given her inability to provide a sample of her breath. It was not clear what inference the defence felt a court should make from this and defence was unable to refer to any case law to support this argument. Breath and blood demands pursuant to the relevant sections of the *Criminal Code* are discretionary decisions which are solely within the purview of the policing

agencies involved in impaired driving investigation. They are not required to make any demands for breath or bodily fluids during the course of an investigation. Police may choose to simply rely on evidence they have obtained to pursue a sole charge under 253(1)(a) should they wish to do so. A court cannot take an adverse inference in such situations should an officer not make any demands under 254 of the Code.

[16] In relation to impairment I must consider the accused's evidence in relation to her alcohol consumption pattern as well as evidence of her driving and any indicia of impairment before me in evidence. It must first be emphatically stated that evidence of Ms. Wasson's ability to walk and unsteadiness on her feet could not be utilized in any analysis of her impairment of ability to drive on the night in question. Her doctor's testimony as well as other background evidence raises a reasonable doubt as to whether her gait was caused by alcohol impairment or medical issues. As well her inability to provide a proper sample of breath again can be laid at the feet of medical disability and are not a factor that I consider in relation as to whether her ability to operate a motor vehicle was impaired by alcohol.

[17] In relation to Ms. Wasson's testimony as to her drinking pattern, I find her evidence unreliable in making any determination as to amounts of alcohol consumed. In the audio recording of Ms. Wasson in the room housing the Intoxilyzer the accused was very clear that she had only four glasses of wine that evening. She made no mention of beer and was adamant on more than one occasion that she had four glasses of wine. Despite that Ms. Wasson, when testifying, changed her consumption pattern to one full beer, two sips of a second beer and then only two glasses of wine. Given these inconsistencies in the evidence of the accused the Court cannot rely on the accused's testimony to determine how much or what type of drinks she consumed that night. This Court must still determine if on all of the evidence the crown has proven that Ms. Wasson's ability to drive a motor vehicle was impaired by alcohol. Likewise following the test in *R. v. W.(D)*, [1991] 1 S.C.C. 742 even though I find the evidence of the accused unreliable I have to find that none of the evidence raises a reasonable doubt. Any doubt that is reasonable on any of the elements of the offence should enure to the benefit of the accused.

[18] In relation to driving evidence we have an officer who testified that the accused was completely on the wrong side of the road and took a turn in a very wide manner again bringing her into the oncoming traffic lane. This must be compared to her sister's evidence who stated that the accused's driving earlier in the evening was without problem. Her doctor under cross examination testified that she had no reason medically to have Ms. Wasson's licence to drive called into question.

[19] Two of the officers who dealt with the accused noted a strong smell of alcohol emanating from Ms. Wasson's breath, while the breath technician had no recollection of any smell of alcohol on Ms. Wasson's breath. It is clear that she had been drinking alcohol prior to being stopped. The fact she consumed alcohol is confirmed by several witnesses including the accused. While I cannot rely on the accused's testimony regarding the amount she consumed that night I can rely on her evidence, as well as her comments in the breath room, to determine that she did indeed consume alcohol.

[20] The officers involved all noted that Ms. Wasson was slurring her words. Ms. Wasson indicated that any change in her speech was due to her fear of the situation. Again the audio evidence from the breath room does not bear this out. Her demeanour on the audio recording went from jovial to crying and anger as well. I was able to compare the audio evidence to Ms. Wasson's courtroom speech and could note that she indeed slurred her speech in the breath room.

[21] I have reviewed all the evidence including the accused's driving pattern, smell of alcohol on her breath, slurred speech and her reported consumption of alcohol, all of which leads me to conclude beyond a reasonable doubt that the accused's ability to operate a motor vehicle was impaired by alcohol on the night in question. Accordingly I must convict her of the offence under 253(1)(a).