PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Mattinson, 2013 NSPC 36

Date: 20130514
Docket: 2513685
2513686
Registry: Amherst

Between:

Her Majesty the Queen

v.

Dwayne Stewart Mattinson

Judge:	The Honourable Judge Paul B. Scovil
Heard:	14 May 2014 in Amherst, Nova Scotia
Written decision:	22 May 2013
Charge:	THAT HE on or about the 11th day of September A.D. 2012 at, or near Riverview, Nova Scotia, did while his 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; AND FURTHERMORE that on or about the 11th day of September, A.D. 2012 at Riverview, Nova Scotia, having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded eighty milligrams of alcohol in one hundred millilitres of blood did operate a motor

vehicle contrary to section 253(1)(b) of the Criminal Code.

Counsel: Mr. Bruce Baxter, for the crown
Mr. Robert Hagell, for the defence

By the Court:

[1] This is the decision in relation to Mr. Dwayne Mattinson. Mr. Mattinson has been charged under section 253(1)(a) and 253(1)(b). In relation to the facts, Heather Allen, who resided in Westchester, Cumberland County, Nova Scotia, on the 11th day of September, and on that day she had left home, headed towards Northport to ride her horses. She was proceeding from Oxford, Nova Scotia on the 301 Highway to Port Howe. From Port Howe, she turned left on the Sunrise Trail. At approximately 6:00 o'clock in the evening, while it was still light out, she noticed a truck driving erratically. It was consistently going off the road. The speed of the truck was varied, and it caused Ms. Allen to have a great concern that an accident might occur. She felt the driver could be possibly intoxicated, or have other problems. She described the truck as being a black truck with a short wheelbase and silver metal toolbox on the back. There appeared to be one occupant of the vehicle, who she could not identify, but it appeared to her to be a male. She indicated she called 911 and felt she had been able to pass on to the operator at 911 the license plate number of the vehicle. She continued to follow the vehicle until it reached the intersection of Mount Pleasant and Casey Road, at which time the truck turned off to the Casey Road, which is a dead end. She noted the vehicle go into the driveway of a home, which was the only home on the road.

[2] In describing the driving of the vehicle, she indicated that it was continuously going off the shoulder. She saw it cross the centre line into the opposite traffic lane. The vehicle would slow down and then pick up speed for no apparent reason. Ms. Allen advised the 911 operator that she was going to continue along her route to her final destination.

[3] Constable Douglas Galbraith of the Pugwash R.C.M.P. received a call from his dispatch operator in Truro advising of the complaint forwarded by Ms. Allen. The individual who had called had provided a plate number which, when processed through the computer, it was determined that the owner had lived at 9 Casey Road. The officer indicated that the dispatch call came in at 6:56 p.m. Constable Galbraith was able to arrive at the Casey Road at 7:16 p.m. Parked in the driveway of the home was a vehicle which matched the description of that given by Ms. Allen. The officer checked the license plate and confirmed it was the same number as that phoned in by the complainant.

[4] Constable Galbraith went to the door of the residence and knocked. A female answered the door. There were also dogs who had attended at the door with her. The woman said that, "You can come in" and she said, "he's over there". The officer walked over and asked the accused if he was Dwayne Mattinson, to which the accused replied, "Yes". The constable asked the accused if he had been drinking. Mr. Mattinson said he had been driving, but that he had been home for a while. His eyes were watery, and Constable Galbraith indicated he smelled alcohol coming from the accused. The officer testified that the appearance of Mr. Mattinson caused him to believe that Mr. Mattinson was impaired by alcohol. He requested the accused to go outside with him, and once they were outside the officer arrested Mr. Mattinson for the impaired operation of a motor vehicle.

[5] At the time of the arrest, the constable read to the accused the breath demand, *Charter of Rights* advisory and the police caution, all from a card, or cards. The right to counsel was read from a standard card, as was the breath demand and the police caution. Constable Galbraith took the accused into custody and arrived with him at 7:41 at the Oxford detachment of the R.C.M.P. At that time, the accused was turned over to Constable Anger, who was the breath technician at the time. Constable Galbraith asked the accused if he wanted to contact a lawyer, to which the accused said, "No". The accused at that time had indicated that he had gotten home at 6:00 o'clock in the evening. At home, he claimed to have had six ounces of scotch and a half a glass of wine. He also had indicated that he had last eaten at noon.

[6] In relation to the initial comments of the accused, Constable Galbraith, prior to his being arrested and read his rights to *Charter*, I find that those comments were obtained in violation of the accused's rights under section 10(b) of the *Charter of Rights and Freedoms*. While the crown argues that the accused was not detained, I in fact find that he was under a psychological detention, as described in *R. v. Grant* [2009] 2 S.C.R. 353. Here the officer had prior information from his dispatch that suspected an impaired driver had turned onto a road where the accused lived. In furtherance, he had a clear description of both the vehicle involved and a license plate number. The officer ran that license plate and determined the registered owner as being the accused, and when he came to the door of the accused's home, he spoke to the wife, who pointed to the accused and said, "There he is". I find at that time, with the information that he had, the

officer was engaged in a focused investigation on the accused. In *R. v. Grant* (supra), the Supreme Court of Canada set up the following useful summary:

> In cases where there is no physical restraint or legal obligation, it may not be clear whether the person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors:
>
> (a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual; whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focused investigation.
>
> (b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
>
> (c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

[7] In considering these factors, trial judges must keep in mind all the circumstances of the case and engage in a realistic appraisal of the entire interaction as it develops.

[8] In this case, the entire attention of the officer in relation to his investigation was focused on the accused. The accused, in a sense, was cornered in his own home. While it could be argued that he could simply walk away, it would be unrealistic for someone to think that an officer in that situation, making those inquiries, would allow him to simply escape by going out the door and leaving.

[9] I also point out a similar case in *R. v. Startup* [2010] A.J. No. 1268.

[10] As a result, I find the accused was in fact detained, and therefore should have been provided his section 10(b) *Charter* rights. As a consequence, any part of the conversation that occurred prior to his being arrested are excluded from my consideration.

[11] We must then look back at all the factors to consider whether the crown has made out the essential elements of 253. That being that the accused was beyond any reasonable doubt the driver of the vehicle and that he was impaired by alcohol. Heather Allen indicated that the events occurred "around six-ish". She was unable to identify the driver. The accused indicated that after properly being advised of his rights and waiving his rights to counsel, that he arrived home at 6:00, and claims to have had six ounces of scotch and a half of glass of wine after arriving home. The accused at no time indicated that he was the driver of the vehicle in question, and there are a number of issues that would leave a reasonable doubt in relation to the intricacies of an investigation and a trial under section 253(1)(a) and (b). Most importantly is the question of bolus drinking. Here, the accused indicated that he drank a number of large drinks, and there is no evidence before me how that would or would not affect the breathalyzer readings. There is additionally the concern regarding proof beyond a reasonable doubt of who was driving the vehicle in question. The lack of nexus between the arrival on scene by Constable Galbraith and the driving of the vehicle itself creates a reasonable doubt in relation to both charges, and as a result of the above, I acquit the accused.

PCJ