

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** R. v. Bonang, 2016 NSPC 73

**Date:** May 11, 2016

**Docket:** 2852480-81

**Registry:** Dartmouth

**Between:**

**Her Majesty the Queen**

v.

**Derek Bonang**

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**Decision**

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**Judge:** The Honourable Frank P. Hoskins

**Decision:** May 11, 2016

**Charges:** CC 253(1)(a)  
CC 254(5)

**Counsel:** Roland Levesque, for the Crown  
David S. Green, for the Defence

**By The Court (Orally):**

**Introduction**

[1] This is the decision in the matter of *The Queen & Derek Bonang*, who is charge with impaired driving and refusal, contrary to ss. 253(1)(a) and 254, respectively, of the *Criminal Code*.

[2] The central issues in this case are whether the Crown has proved beyond a reasonable doubt that Mr. Bonang *intentionally* or *wilfully* refused to provide a breath sample and committed the offence of impaired operation.

[3] I reserved my decision until today, so that I would have time to carefully consider and thoroughly reflect upon the evidence.

[4] Accordingly, I have had the opportunity to listen intently to the submissions that have been made by the Counsel and have considered all of the evidence that was proffered in this case.

[5] I will briefly summarize the surrounding circumstances which have emerged from the evidence presented, touch upon the law, and then provide my analysis, which has led me to the result in respect to the issue of whether or not the Crown has proven beyond a reasonable doubt the two alleged offences.

## **Summary of the Evidence**

### **The Evidence of Tregre Wilson**

[6] On February 15, 2015, at approximately 3:00 a.m., while driving home from Hammonds Plains along Victoria Road in Dartmouth, Mr. Wilson came upon a single motor vehicle accident. Having observed a car located on the median in the highway, he immediately asked his wife to call 911, which she did.

[7] Mr. Wilson also observed debris from the car on the highway, and that the car's lights were on. The car was a black Honda Civic. It seemed to him that the car was involved in an accident. He also noticed that there were two other vehicles present on scene: a taxi, and a SUV. He exited his vehicle and approached the car on the median. As he approached he observed two men near the Honda. He noticed that Mr. Bonang was outside of the Honda and the door of the car was open. He asked Mr. Bonang if he was okay, to which Mr. Bonang responded "yeah", and added that he was worried about his car. He also stated that he "he lost it."

[8] Mr. Wilson described the road conditions as "winter conditions with snow on the ground; it was not the greatest conditions." He also described the debris from the accident as "the back bumper from the car, which was removed from the highway." Mr. Wilson also observed one of the two men on the scene turn off the lights of the Honda Civic, after the two men repeatedly asked Mr. Bonang to turn off the lights. He overheard one of the men asked Mr. Bonang if he wanted some gum. Following that, the two men eventually left the scene, and he remained.

[9] Mr. Wilson left the scene when the Bridge Commission police arrived. He initially thought that the Bridge Commission Vehicle was a police vehicle, but realized later that it was a Bridge Commission vehicle. The Commissioner told him that he could leave the scene. He returned to his vehicle, where his spouse and child were waiting, and then departed the scene.

[10] Mr. Wilson described Mr. Bonang's demeanour as: "looking intoxicated; he had blood shot eyes, and he could smell alcohol emanating from him. Mr. Bonang was also "stumbling," and kept repeating himself. Mr. Wilson also observed that the cold weather did not seem to bother Mr. Bonang.

[11] On Cross-examination, Mr. Wilson stated that he smelled alcohol from Mr. Bonang's breath, and he was "incoherent," "dazed."

[12] He described the road conditions as being slippery, with packed snow and ice. Mr. Wilson thought it snowed earlier that evening.

[13] Mr. Wilson also described Mr. Bonang as being very relaxed. He was not giving anyone a hard time, and he seemed fixated on the condition of his car; as he kept asking about it.

[14] Mr. Wilson also stated that Mr. Bonang stayed on scene until the Bridge Commission officer arrived.

## **The Evidence of David Wog**

[15] Mr. Wog testified that on February 15, 2015, he was employed and working as a Bridge Commissioner. He explained that as a Bridge Commissioner, his duties and/or responsibilities include enforcement of the Nova Scotia *Motor Vehicle Act* and Bridge regulations.

[16] He also explained that he is sworn in as a peace officer, wears a uniform and operates a marked vehicle which is equipped with emergency lights.

[17] On February 15, at approximately 3:30 am, while on patrol, he noticed a vehicle on the median, and debris from the vehicle on the roadway. He exited his vehicle and approached the car. As he approached he observed that there were several people on scene. The driver of the vehicle was identified to him by individuals on scene. He then spoke to the driver, Mr. Bonang.

[18] He asked Mr. Bonang if he was okay, to which Mr. Bonang stated that he had made a mistake, he was going too fast, and that he screwed up. Mr. Wog described how Mr. Bonang walked in circles as he made those utterances or declarations.

[19] Mr. Wog asked Mr. Bonang to provide his registration papers. Mr. Bonang initially responded by repeatedly pointing to the glove compartment of the vehicle.

[20] During his interaction with Mr. Bonang, Mr. Wog smelled an odor of alcohol on Mr. Bonang's breath, so he alerted the Halifax Regional Police, as he believed that Mr. Bonang may have been impaired by alcohol. He also noted that Mr. Bonang

appeared to be confused, which he thought may have been caused from the accident.

[21] While inside the vehicle, Mr. Wog noted a smell of alcohol on Mr. Bonang's breath and that Mr. Bonang appeared confused and disoriented.

[22] Mr. Wog identified the vehicle shown in Exhibit 1 (photographs) as a 2010 black Honda Civic, the vehicle that Mr. Bonang was driving on the date and time in question.

[23] With the assistance of Exhibit 1, Mr. Wog described the damage to the vehicle; the damage to the traffic signs on the highway, and pointed out where the debris from the vehicle was located on the highway. Mr. Wog also drew a diagram of the highway which depicts the location of the traffic signs and the location of Mr. Bonang's vehicle when he first observed it.

[24] Mr. Wog estimated that he spent ten minutes in the vehicle with Mr. Bonang before the police arrived on scene. Mr. Wog provided the police with all of the information that he had gathered in relation to the accident, including what he observed and heard at the scene. Following that, the police took over the scene, and he left the area.

[25] On Cross-examination, Mr. Wog's attention was drawn to Exhibit 1, the photographs, and he confirmed that the vehicle had a "donut wheel," a "spear wheel", on it, which was flat. He added that the "spear wheel" did not appear to be a winter tire.

[26] Mr. Wog was also agreed that there was snow on the ground and that the road conditions could have been slippery.

[27] Mr. Wog described Mr. Bonang's demeanour when he spoke to him on the highway. He appeared confused and had a "weird look in his eyes: like a far- away look, not quite right; he wasn't quite with you".

[28] He agreed that Mr. Bonang looked "weird as oppose to being intoxicated".

[29] Mr. Wog recalled that while initially speaking with Mr. Bonang, he suggested that they sit in the vehicle. Once in the vehicle, Mr. Wog could smell the alcohol emanating from Mr. Bonang. He was within three feet of Mr. Bonang when detected the odor of alcohol.

[30] With the assistance of Exhibit 2, Mr. Wog described the locations of the traffic signs, and where the car was located in relation to the signs. He observed that the car was located on a snow bank, which was approximately one to two feet high from the pavement.

[31] Mr. Wog also described Mr. Bonang as being cooperative.

### **The Evidence of Cst. Clint Rhodenizer**

[32] Cst. Rhodenizer testified that he was on patrol with his partner, Cst. Smith, when they arrived on scene of the accident near the ramp to the Bridge.

[33] Upon arriving at the accident scene, he could see a car located “up by the sign”. He observed debris from the car on the highway. The identification of the driver of the vehicle was provided to him. He then spoke to Mr. Bonang, who stated that, “I fucked up, this is my fault”. Cst. Rhodenizer stated that when he asked Mr. Bonang where the car keys were, Mr. Bonang seemed, “confused and unsteady on his feet.”

[34] Mr. Bonang retrieved the documents from his vehicle.

[35] While in the vehicle Cst. Rhodenizer could smell a strong odor of alcohol emanating from Mr. Bonang’s breath.

[36] Cst. Rhodenizer stressed that Mr. Bonang was unsteady on his feet, his speech was slurred and he could smell alcohol on his breath. He also observed that Mr. Bonang was not wearing a jacket and that it was snowing. He added that the driving was slippery.

[37] Cst. Rhodenizer described the debris on the roadway, the damage to the vehicle, and the locations of the traffic signs on or near the ramp to the Bridge.

[38] With the assistance of Exhibit 1, the photographs, Cst. Rhodenizer identified the vehicle depicted in the photographs as the same vehicle involved in the accident on the date and time in question.

[39] Cst. Rhodenizer stated that he and Cst. Smith transported Mr. Bonang to the



police station after he was arrested. He was held in custody until he became sober.

[40] Cst. Rhodenizer stated that the officers contacted Duty Counsel because when Mr. Bonang was asked whether he would like to speak to legal counsel, he did not respond: he did not answer the question of whether he wanted to speak to duty counsel.

[41] Mr. Bonang spoke to Duty Counsel, legal aid lawyer, Mr. Nick Finch. After speaking to Mr. Finch, the officer asked him whether he was okay with the call, to which Mr. Bonang responded that he was.

[42] Mr. Bonang was on the phone with Mr. Finch for approximately eight minutes.

[43] On Cross-Examination, Cst. Rhodenizer confirmed the time that he arrived on scene, the time he came into contact with Mr. Finch and the time that he concluded his conversation with Mr. Finch.

[44] Cst. Rhodenizer confirmed that he noted the smell of alcohol on Mr. Bonang's breath while they were contained in a small space in the vehicle, and that he did not observe any apparent physical injuries on Mr. Bonang.

[45] Cst. Rhodenizer did not recall asking Mr. Bonang whether he struck his head. He also agreed that Mr. Bonang was cooperative, and was not combative; he was compliant.

[46] Cst. Rhodenizer agreed that he asked Mr. Bonang whether he was satisfied with his call to Duty Counsel. He also agreed that he did not ask Mr. Bonang whether he wanted to take the breath test.

[47] Cst. Rhodenizer stated that he believed Cst. Smith provided Mr. Bonang with the demand for a sample of his breath.

### **The Evidence of Cst. Craig Smith**

[48] Cst. Smith testified that on February 15, 2015, while on patrol he was dispatched to a single motor vehicle accident at or near the bridge off-ramp. At approximately 3:25 am he arrived on scene. He noticed that the Bridge Commissioner was on scene, and that a car was “perched on a snow bank.” He also observed that the front bumper was off of the car, and a man was in the driver’s seat. Having made these observations, Cst. Smith approached the vehicle. As he approached the vehicle, Mr. Bonang exited the driver’s seat and uttered, “I fucked up, it’s my fault”. He gestured with his arms as he stated that and commented that he had “spun out.”

[49] Cst. Smith observed that Mr. Bonang was intoxicated. He described him as being very confused, his speech was slurred, he had poor balance and his eyes were glossy.

[50] Cst. Smith asked Mr. Bonang for his license. Mr. Bonang provided his car keys, so he was asked again, for his driver’s license, and then Mr. Bonang provided his driver’s license to Cst. Rhodenizer.

[51] Following that Cst. Smith placed Mr. Bonang under arrest for impaired driving.

[52] Cst. Smith stated that he and Cst. Rhodenizer were both in uniform and were operating a marked police cruiser. He also stated that it was snowing at the time and it was cold. He added that the Mr. Bonang was not wearing a coat.

[53] Cst. Smith stated that he arrested Mr. Bonang because he felt Mr. Bonang was impaired, based on his observations of him, and from his conversation with Mr. Bonang.

[54] Cst. Smith testified that Mr. Bonang was sitting in the vehicle with the door open when he provided Mr. Bonang his *Charter of Rights* and the Police Caution. He read verbatim from his notebook the *Charter of Rights* and Police Caution. When he asked Mr. Bonang whether he understood, Mr. Bonang said that he did, but stared straight ahead and would not answer whether he wanted to contact a lawyer. Cst. Smith stated that Mr. Bonang nodded his head after he was provided his *Charter Rights*.

[55] Cst. Smith made the breath sample demand at 3:31 am by reading it verbatim from his note book. Following that, Cst. Smith asked Mr. Bonang whether he understood, to which Mr. Bonang said, “no, I don’t.” Mr. Bonang then said, “yes.” Cst. Smith then asked him whether he wanted to take the test, to which Mr. Bonang responded, “No, I don’t.”

[56] Following that exchange, Mr. Bonang was transported to the Halifax Regional Police Station. Cst. Smith did not believe that there was any conversation between the officers and Mr. Bonang while in transport to the police station.

[57] At the police station, Mr. Bonang was provided with the opportunity to speak to Duty Counsel.

[58] Mr. Bonang was placed in cells because he was intoxicated. He was to be released upon becoming sober.

[59] With the assistance of Exhibit 1, the photographs, Cst. Smith identified the vehicle depicted in the photographs as the vehicle he observed perched up on a snow bank. He also identified the path that the vehicle travelled from looking at the snow, as it clearly showed the path that the vehicle travelled.

[60] Cst. Smith stated that the spare tire was located on the rear passenger side of the vehicle. He also noticed that upon arrival at the accident scene that the engine bonnet (hood) was up on the car and that the bumper was off of the car.

[61] On Cross-Examination, Cst. Smith agreed that Mr. Bonang appeared to be dazed, confused and was cooperative; he was not resistant.

[62] Cst. Smith stated that Mr. Bonang was placed in hand-cuffs upon being arrested.

[63] Cst. Smith testified that he noted the smell of alcohol coming from Mr. Bonang while he leaned into the vehicle to retrieve the driving documents.

[64] He agreed that Mr. Bonang did not make any effort to be evasive or hide his breath from the officers.

[65] Cst. Smith reaffirmed that Mr. Bonang did not respond when he was asked whether he wanted to speak to a lawyer. And because he was unresponsive, the officers decided to put Mr. Bonang in contact with Duty Counsel.

[66] Cst. Smith recalled that Cst. Rhodenizer made the arrangements for Mr. Bonang to speak to Duty Counsel.

[67] After Mr. Bonang stated that he was satisfied with the telephone call, he was placed in cells.

[68] Cst. Smith agreed that after Mr. Bonang spoke to Duty Counsel, he was never asked again whether he wanted to take the breath test. He explained that he was not asked again because he had already been asked.

[69] Cst. Smith testified that at 3: 35 am, they were on route to the police station, and at 3:49 am they arrived at booking. He stated that there was no conversation between the officers and Mr. Bonang during that time period.

[70] Mr. Bonang was arrested for impaired driving and then was read his *Charter*

*of Rights*. Cst. Smith provided the *Charter of Rights*, police caution and breath demand from reading verbatim from his notebook, which were all read into the court record. Mr. Bonang stated that he understood.

[71] Cst. Smith disagreed with the suggestion that he may not have heard Mr. Bonang say he wanted to speak to counsel.

[72] With respect to the breath demand, Cst. Smith stated that after he read the demand to Mr. Bonang, Mr. Bonang stated, “No, I don’t,” which Cst. Smith interpreted as a refusal. Cst. Smith disagreed with the suggestion that the words, “no, I don’t”, meant that Mr. Bonang did not understand.

[73] Cst. Smith described his training in first aid and noted that he is not aware of the symptoms of a concussion.

[74] Cst. Smith testified that he was not in possession of an ALERT machine and commented that he would not have relied on it in any event. He stressed that notwithstanding the smell of alcohol coming from Mr. Bonang, he would have demanded a breath sample from Mr. Bonang given what he learned from his investigation. In other words, he would have still arrested Mr. Bonang for impaired driving even if there was an absence of a smell of alcohol.

[75] On re-direct examination, Cst. Smith stressed that he had no doubt about Mr. Bonang’s impairment, based on his observations

[76] Cst. Smith stated that Mr. Bonang's response to the breath demand, "no, I don't", meant to him that he was refusing the breath test. He added, that had Mr. Bonang indicated that he did not understand, he would have noted that.

### **The Evidence of Derek Bonang**

[77] Mr. Bonang testified that he is 23 years of age and is employed as a personal trainer with Goodlife. He resides in Dartmouth and enjoys playing hockey, paddling and working out.

[78] Mr. Bonang stated that on October 14, 2015, he left his girlfriend's house at approximately 7:30 pm to meet up with friends at Bubba Rays in Halifax; to watch hockey. He picked up his friend, Shawn Hoyt, on his way to Bubba Rays. He recalled that he watched the Toronto Maple Leafs play the Montreal Canadiens, which ended around 11:00 pm: the game was decided by a shoot-out. Following that game, he watched another NHL game and played pool.

[79] He recalled having consumed his first beer during the first period of Toronto game, his second beer during the second period, and his third beer at the beginning of the shoot-out. In total, he stated that he drank three Keith's beers.

[80] While at Bubba Ray's he met more friends, including Shawn and Brian.

[81] Mr. Bonang explained that on February 13, 2015, he received his first unemployment benefit so he could not afford to purchase a new tire for his car. For that reason he drove it with the spare tire. He added that because of his financial

situation he could not purchase winter tires.

[82] After spending an evening at Bubba Rays, Mr. Bonang drove to Cheers, another bar, to meet friends. He estimated that it took him 10 to 15 minutes to drive there from Bubba Rays.

[83] Mr. Bonang stated that he did not consume any drugs and paid cash for his drinks at Bubba Rays.

[84] He stated that he visited his friends Christine and Conner at Cheers. He stayed there for a while and then left to go home. On his way home he decided to visit his girlfriend at 88 Nadi Drive in the Shannon Park area by the MacKay Bridge in Dartmouth.

[85] Mr. Bonang described his route that he travelled from Cheers to the on-ramp of the MacKay Bridge where the accident occurred. In doing so, he stated that he drove to the McDonald's restaurant located on Windmill Road to pick up some food for his girlfriend but discovered that he did not have enough money. He left McDonald's and drove towards the Bridge off-ramp, which was off of Victoria Road or Windmill Road. As he turned onto the off-ramp he lost control of his vehicle. He conceded that he was driving too fast for the slippery road conditions. As a result, the vehicle struck a black and yellow traffic sign. He stated that he hit his head inside the vehicle after he lost control of it. He added that he was thrown around in the vehicle because he was not wearing his seat belt because he unbuckled it while at McDonald's.



[86] Mr. Bonang described how he felt after he struck his head. He stressed that he recalls talking to people but was “out of it.” He stated that everything was blurry. He recalled the presence of witnesses at the scene, including the two police officers. He stated that his head physically hurt, but mentally he did not know what happened, as he felt “out of it.” He recalled the police asked him for his driver’s license, registration and insurance, but does not recall getting them. He also stated that he does not recall having his *Charter of Rights*, police caution and breathe sample demand read to him. He emphasized that he does not recall what was actually stated to him by the officer, nor did he fully understand what was being said to him. He stated that he thought he had asked to speak to a lawyer. He did, however, recall speaking to Mr. Finch, who advised him that if the officers ask him to take the breathalyzer test, then to take it, but the officers never asked him after he spoke to Mr. Finch.

[87] Mr. Bonang also stated that Cst. Smith spoke very fast when he spoke to him, and consequently everything was confusing, as he did not understand nor appreciate what the officer was telling him.

[88] Mr. Bonang stated that it took him almost a week before he started to feel better. He stated that there were decreasing effects of having sustained a concussion. He labored with the effects of a concussion, which included being light headed, dizzy, and sick. He explained that he is very familiar with these symptoms as a result of sustaining several serious head traumas or injuries to the head in the past, which required extensive medical treatment.

[89] Mr. Bonang stated that he was not wearing his sweater when he exited the vehicle; it was inside the vehicle.

[90] He also stated that he does not recall being asked to take a breathalyzer test, or that a breathalyzer demand was made to him.

[91] Mr. Bonang could not specifically recall saying “no, I don’t”, in response to Cst. Smith’s reading of the breath demand, because he was confused and Cst. Smith talked fast. He recalls, however, the advice of Duty Counsel to take the breathalyzer test, if the police demand that he take it.

[92] On Cross-Examination Mr. Bonang testified that he does recall details of what he did before he went to the bar, and the score of the hockey game. He agreed that he recalls these specific details.

[93] He also agreed that he has a good recollection of the details of what occurred on the dates and times in question.

[94] He reaffirmed that he consumed three beers from 8:00 p.m. to 2:00 am. In fact, he was adamant that he only consumed three beers during that period of time. He added that he did not have anything to drink while he was at Cheers. He stated that he left Cheers at approximately 2:40 am, and travelled along Barrington Street to the Bridge. He travelled across the bridge to McDonalds on Windmill Road. He stated that he realized that he did not have enough money to purchase the food after he went in the drive through as he only had two dollars. He thought he had more

money.

[95] From McDonald's he drove towards the bridge off-ramp along Windmill Road towards Victoria Road, which is the exit to Shannon Park where his girlfriend residence is located.

[96] Mr. Bonang described what happen as he approached the off-ramp. He stated that as he was approaching the off ramp, he lost control of his car because he was driving too fast for the road conditions. Consequently, the car struck the traffic sign, which caused him to hit his head as he was thrown inside the vehicle. He believes he was thrown inside the vehicle because he was not wearing his seat belt. He took off his seat belt while he was at McDonald's searching for money.

[97] Mr. Bonang believes that he struck his head on either the dashboard or the windshield. While he was not sure of that, he is certain that he struck his head hard on something. He does not recall losing consciousness, but remembered a "big flash."

[98] He recalled Mr. Wilson speaking to him, but does not recall what he said.

[99] Mr. Bonang agreed that he was concerned about the damages to his vehicle, but does not remember expressing that concern to anyone.

[100] He also recalled speaking to the police, but agreed that he did not tell the police that he struck his head.

[101] Mr. Bonang recalled being in the police car when the officer read his *Charter Rights* to him, but does not recall what was said to him because he was “out of it.” He added, that he thought that he had asked to speak to a lawyer.

[102] He remembered asking to speak to a lawyer, but does not recall the officer asking him for a sample of his breath. And he does not recall asking the officer to repeat or clarify what he had stated to him.

[103] Mr. Bonang agreed that he understood that the police had arrested him for impaired driving, but he is unsure who initiated the consultation with legal counsel: he was unsure who asked for a lawyer. However, he does recall being satisfied with the legal advice that he received.

[104] He recalled that he was advised to take the breathalyzer test if the police ask him to take, and that he was “clear headed” enough to follow the advice of legal counsel.

[105] Mr. Bonang agreed that he did not go to see a doctor. He explained that he felt that he could deal with the symptoms of a concussion himself as had experience dealing with them in the past.

[106] It was suggested to Mr. Bonang that the police officers were polite to him, but he could not remember if they were.

## **The Evidence of Mr. Kevin Bonang**

[107] Mr. Bonang , Derek Bonang's father, testified that on February 15, 2015, at approximately 2:30 pm, he attended the Halifax police station to pick up his 23 year old son, who was arrested for impaired driving.

[108] Mr. Bonang described his son's behavior as being quiet during the days following the accident, which was consistent with how his son had responded in the past when he was enduring the effects of a concussion. He described his son's extensive experience with concussions and the medical treatment that his son has received, including two serious concussions sustained from playing hockey. He described the symptoms as displayed by his son when he was enduring the effects of being concussed, such as, watching his son spend an inordinate amount of time in a darkened room, seemingly confused a lot, and struggling with his thought process.

[109] Mr. Bonang identified the vehicle shown in Exhibit 1, as his son's, Derek's vehicle. He also identified the spare tire on the vehicle and noted that there were no winter tires it.

[110] Mr. Bonang testified that when he picked up his son at the police station, he noticed that Derek was uncharacteristically quiet, and spent the following days in his room with the blinds down. He stated that it seemed to him that his son was experiencing the symptoms of being concussed.

[111] On Cross-Examination Mr. Bonang agreed that he had picked his son up at the police station at approximately 2:30 p.m.; after the police had called him and

explained why Derek was at the police station. His wife was present when he picked up his son.

[112] Mr. Bonang explained why he did not take Derek to the hospital notwithstanding that his son appeared to have sustained a concussion in the accident. He explained that they had extensive experience dealing with concussions, and felt capable of taking the appropriate steps to ensure he was okay. He added that they decided not to seek medical attention.

[113] Mr. Bonang described Derek's history with concussions, including treatment he received by several doctors.

[114] Mr. Bonang confirmed that Derek is the registered owner of the Honda, and that the car has not been repaired since the accident.

[115] He also confirmed that the spare tire on the car at the time of the accident was a "donut tire, a spare temporary tire."

[116] Mr. Bonang stated that he did not discuss the accident with his son until a few days after the accident because his son was not feeling well. He added, that they actually did not talk a great deal about the accident.

### **The Evidence of Shawn Hoyt**

[117] Mr. Hoyt testified that he is a friend of Derek Bonang's and that he was with

Derek on February 14, and 15, 2015. He has been a friend of Derek's for approximately 6 to 7 years.

[118] He stated that on February 14, 2015, Derek picked him up at approximately 6:30 to 7:00 pm, and they went to Bubba Rays to socialize and watch hockey: Toronto was playing Montreal.

[119] Mr. Hoyt stated that they stayed at Bubba Rays until approximately 2:00 am, and then they left with a friend to attend Cheers. He recalled that Derek drove them to Cheers, and stated that Derek's driving was fine; there were no problems. He also added that he would not drive with an impaired driver, as he himself had been convicted of impaired driving.

[120] Mr. Hoyt estimated that Derek had consumed approximately three beers during the entire time that he was with him. He also stated that he was advised about the impaired driving charges the following day after Derek was released from custody.

[121] On Cross-Examination – Mr. Hoyt confirmed that Derek picked him up and drove him to Bubba Rays. They arrived at Bubba Rays at about 8:00 pm. They were at Bubba Rays from 8:00 pm until 2:00 am. While there they watched two NHL hockey games.

[122] He recalled that their friend Brian Naugle joined them at Bubba Rays, and went to Cheers with them afterwards.

[123] He agreed that Derek had approximately three beers; that it was only an estimate.

[124] Mr. Hoyt testified that he consumed approximately 6 to 7 beers. He felt that he was intoxicated. He recalled that he sat in the front passenger seat and Brian sat in the back passenger seat of Derek's car when they drove from Bubba Rays to Cheers.

[125] He described the weather conditions. He stated that it was snowing and the driving was slippery. He estimated that it only took five minutes to drive from Bubba Rays to Cheers, as there was not much traffic at that time of the day.

[126] Mr. Hoyt stated that Derek was not at Cheers very long. After he briefly spoke to a few a few people, he then left to go see his girlfriend. He and Brian stayed at Cheers.

[127] That is a brief summary of the evidence.

### **Burden of Proof**

[128] The Burden is upon the Crown to prove these allegations beyond a reasonable doubt.

[129] This legal or persuasive burden never shifts to the accused, Mr. Bonang, it remains with the Crown throughout the trial.

[130] As stated, issues in the present case are whether, on the whole of the evidence,



the Crown has proven beyond a reasonable doubt that Mr. Bonang committed the two alleged offences: impaired operation and refusal.

[131] In *R. v. Starr*, (2000) SCC 40, at paras. 87-88, the Supreme Court of Canada held that this burden of proof lies much closer to absolute certainty than to a balance of probabilities.

[132] In *R. v. Lifchus* (1997) 118 C.C.C. (3d) 1, at para. 32, the Supreme Court of Canada held that it is not sufficient to conclude that an accused person is - probably or likely guilty for a conviction to be registered.

[133] As stated in *Lifchus*, at para. 32, a reasonable doubt is not an imaginary or frivolous doubt. It must not be based on sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

[134] In the present case, credibility is an issue, and accordingly, I have considered the special instruction contained in the decision of the Supreme Court of Canada in *R. v. W.D.*, [1991] 1 S.C.R. 742, wherein Justice Cory formulated a concise and uniform set of instructions which posed three questions for consideration.

[135] *W.(D.)* is concerned with how a trier of fact should apply the burden of proof in a criminal case where the accused testifies. In brief, I must remember that the issue is not whether I believe Mr. Bonang, but whether the evidence as a whole convinces me of his guilt beyond a reasonable doubt. If I believe the exculpatory

evidence of the accused, Mr. Bonang, an acquittal must follow. However, even if I do not believe that evidence, I must ask myself, if it, nonetheless gives rise to a reasonable doubt. Finally, as the trier of fact, if I do not believe Mr. Bonang and I am not left in doubt on the basis of his evidence, I must still address and resolve the most critical, in fact, the only question in every criminal case: Does the evidence as a whole convince me of guilt beyond a reasonable doubt?

[136] The ultimate issue, as noted by Justice Binnie in *R. v. Sheppard*, 2002 SCC 26, at para. 65, is not credibility but reasonable doubt.

[137] In *R. v. Mah*, 2002 NSCA 99, at para. 41, Justice Cromwell, in delivering the judgment of the Nova Scotia Court reminds us that the judge at a criminal trial is not attempting to resolve the broad factual question of what happened. The judge's function is the more limited one of deciding whether the essential elements of the charge have been proved beyond a reasonable doubt.

[138] With respect to the demeanour of a witness, I am mindful of the cautious approach that I have to be taking in considering demeanour of witnesses as there are a multitude of variables that would explain or contribute to a witness' demeanour while testifying.

[139] I am mindful of Justice Saunderson's instructive comments he made in the case of *R. v. D.D.S.*, 2006 NSCA 34, at para. 77, wherein he emphasized that demeanour evidence, standing alone is hardly determinative, and the best tool in determining credibility and reliability is the painstaking, careful and repeated testing of the

evidence as to how it stacks up. How does the witness's account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard of proof in a civil or a criminal trial?

[140] Lastly, as the trier of fact, I may believe all, none or some of a witness' evidence, and I am entitled to accept parts of witness' evidence or reject other parts, and, similarly, I can afford different weight to different parts of the evidence that I have accepted.

[141] In this context, I have to consider the issues, mindful that the presumption of innocence is displaced only by proof beyond a reasonable doubt.

[142] It is trite to say that most criminal trials involve an assessment of the reliability and credibility of witnesses; this case is no exception. Therefore, it is essential that the credibility and reliability of the each witness be considered in light of all of the other evidence presented.

[143] This imposes an important and special obligation upon the court, as it requires a thorough, painstaking and careful examination of all of the evidence; mindful that in assessing credibility and reliability, the central question is not whether the offences occurred but whether the evidence establishes the accused's guilt beyond a reasonable doubt.

[144] I am also mindful that the proper approach to the burden of proof is to consider all of the evidence together and not to assess individual items of evidence in

isolation. To put it another way, I must consider the totality of the evidence in determining whether the Crown discharged its burden of proving the offences beyond a reasonable doubt.

[145] Before embarking upon my analysis in this case, let me stress that I am mindful of the distinction between credibility and reliability, which has been addressed by Justice Watt in *R. v. H.C.*, 2009 ONCA 56, in delivering the judgment of the Ontario Court of Appeal. He wrote, at para. 41:

Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately: observe, recalled, and recount events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence.

[146] Moreover, as Rowels J.A., in *R. v. R.W.B.*, [1993] B.J.No. 758, at para. 28, observed:

It does not logically follow that because there is no apparent reason for a witness to lie, the witness must be telling the truth. Whether a witness has a motive to lie is one factor which may be considered in assessing the credibility of a witness, but it is not the only factor to be considered.

[147] As this Court has commented many times in relation to the issue of credibility specifically, there is no category of witness who comes to court with an inherent degree of credibility built into their profession or position.

[148] Although it is true that police officers have, as part of their professional responsibilities, the obligation to observe and record information that comes their way in the course of their duties, each witness, including police officers, necessarily are required to be assessed on the strengths and weaknesses of their own specific testimony and how it stacks up to the evidence that is accepted by the court.

[149] There are witnesses too who may have a bias or prejudice either for or against an accused, which must be factored into what weight can be given to a witness' testimony. There are witnesses who have very little interest in the outcome of the matter. That can contribute to the weight the witness' evidence is given. Each witness brings with them a multitude of factors which a court must look at in assessing evidence. Reliability and accuracy of witnesses' testimony is also something which, similarly, needs to be assessed on a witness by witness basis. Each witness has factors which may impact their reliability and accuracy of their testimony, which is something that can be considered independent of credibility. A witness who is not credible will never be reliable or accurate, but a person who is well meaning and attempting to be truthful can lack reliability and accuracy.

## **The Law**

[150] With respect to the issue of whether the Crown has proved beyond a reasonable doubt the requisite *mens rea* for the offence of refusal, I should note that I am aware that there is a dichotomy in the case law with respect to the *mens rea* component for the offence of refusal. The two competing authorities are found in the decisions of *R. v. Lewko*, [2002] S.L. No. 622 (C.A.) and in *R. v. Porter*, [2012] O.J. No. 2841 (S.C.J.).

[151] As stated by Justice Kenkel in his text, *Impaired Driving in Canada*, 4<sup>th</sup> Edition. LexisNexis Canada Inc. 2015, at p. 17:

In *Lewko*, the Court held the Crown must prove the accused *intended* to refuse or fail to comply with the demand. If the accused did not intend to fail then the act was not voluntary, as there was no intention to commit the offence. Another line of authority takes the view that refusal is a general intent offence where knowledge or awareness of the prohibited act is sufficient to prove *mens rea*. If the accused did not refuse and did not intend to fail to provide a sufficient sample, that is a matter the accused must prove by way of reasonable excuse.

[152] A comprehensive analysis of this dichotomy is contained in the decision of *R. v. Soucy*, [2014] O.J. No. 4518 (C.J.), wherein Justice Paciocco carefully and thoughtfully explains these competing approaches to the requisite *mens rea* for the offence of refusal. He clearly endorsed the approach in *Lewko*; finding that it was keeping with basic criminal law principles. He concluded that the approach in *Porter* is incorrect and should not be followed. I agree and fully endorse Justice Paciocco's reasoning in *Soucy*, including his observations contained in paras. 53 to 55, wherein he wrote:

53 I am mindful that the application of this mens rea obscures the distinction between a "refusal" and a "failure" given that an intentional failure is, in substance, a form of refusal: *R. v. Weave* [2005] O.J. No. 2411 (C.A.). This is not, however, problematic. By including both terms Parliament has made it clear that the obstruction of an officer's efforts to secure information relevant to alcohol and impaired driving offences need not be openly defiant.

54 I am also mindful that applying an "intention" *mens rea* removes all claims of "inability to produce a sample" from the reasonable excuse category, meaning that the "reasonable excuse" category has relatively little application in the case of "failures." It still has an important function to perform in cases of refusal, however,

which explains its inclusion: see for example, *R. v. Greenshields*, *supra*, and the many cases digested in Joseph P. Kenkel, *Impaired Driving in Canada* [2012/2013 Edition], (Toronto: Lexis/Nexis, 2012).

55 Finally, I am aware that the effect of recognizing a *mens rea* of intention increases the burden of proof on the Crown, leaving it to disprove beyond a reasonable doubt that a failure was intentional, rather than calling on the subject to establish an inability to comply on the balance of probabilities, or at least discharge an evidential burden. This, in turn, makes it easier for individuals who have been driving under the influence to avoid detection by feigning inability. These concerns should not be exaggerated, however. The first is nothing more than a mundane application of the presumption of innocence. Nor is the corollary concern - the prospect that feigning inability might be encouraged - a reason that a court can use for deviating from established interpretive principles relating to moral fault. The way that courts address feigning is to evaluate the credibility- of such claims when they are made, in light of all of the evidence, not by convicting individuals even in the face of reasonable doubt because of fear that applying ordinary principles of law will enable others to avoid detection.

## **Impaired Operation**

[153] With respect to the law of impaired operation, it is noteworthy that while the Supreme Court's decision in *R. v. Stellato*, [1993] 12 O.R. (3d) 90 (C.A.), affirmed [1994] 2 S.C.R. 478 resolved a divergence of opinion in the authorities regarding the definition for impairment, it raised concern regarding the lowering of the evidentiary standard of proof required of the Crown in establishing the accused's guilt on the basis of only slight impairment. In other words, the new definition of impairment could make it much easier for the Crown to justify a conviction for an offence under section 253.

[154] There was also confusion in the aftermath of *Stellato* regarding the difference between evidence that shows a slight departure from the normal, and the need to establish beyond a reasonable doubt slight impairment of a person's ability to operate a motor vehicle.

[155] However, it would appear that the Alberta Court of Appeal's decision in *R. v. Andrews* 1996 ABCA 23, leave to appeal refused [1996] S.C.C.A. No. 115, has lessened both the concern and confusion in the authorities by having reconciled the reasoning of the decisions in *Stellatio* and in *MacKenzie*. Conrad J.A., writing for the Court, observed:

In my view, *Stellato* and *McKenzie* are compatible cases. *Stellato* speaks to the degree of impairment of the ability to drive necessary to sustain a conviction; *McKenzie* speaks to the manner of proof of that impairment. *Stellato* supports the proposition that a marked degree of impairment of ability to drive is not required, whereas *McKenzie* says that an inference of any impairment of the ability to drive can reasonably be drawn from conduct that exhibits a marked departure from the norm. It does not say that it ought not to be drawn if it is not a marked degree. It only proscribes that inference if there is a slight variation from the normal. It speaks to degree of proof. In other words, as framed in *Stellato*, the conduct must be of such a nature that an impairment of the ability to operate a vehicle (be it slight or marked impairment) is proven beyond a reasonable doubt. *Stellato* does not overrule *McKenzie*, it says that there is no rule of law requiring that in addition to finding the existence of an impairment of ability to drive, there must also be a marked departure of conduct.

[156] In *Andrews*, the Court identified a fine but crucial distinction between slight impairment generally, and slight impairment of one's ability to operate a motor vehicle. As stated in *Andrews*, every time a person has a drink, his or her ability to



drive is not necessarily impaired.

[157] The question is not whether the individual functional ability is impaired to any degree. Rather, as stated in *Andrews*, the question is whether the person's ability to drive is impaired to any degree by alcohol or a drug. In considering this question one must be careful not to assume that, where a person's functional ability is affected in some respects by consumption of alcohol or a drug, his or her ability to drive is also automatically impaired.

[158] One drink may impair a person's ability to do brain surgery, or a person's ability to thread a needle, but the question is whether the person's ability to operate a motor vehicle is impaired to any degree by alcohol or a drug.

[159] The general principles which emerge in an impaired driving offence are set out in *Andrews*, at para. 29, as follows:

- (1) the onus of proof that the ability to drive is impaired to some degree by alcohol or a drug is proof beyond a reasonable doubt;
- (2) there must be impairment of the ability to drive of the individual;
- (3) that the impairment of the ability to drive must be caused by the consumption of alcohol or a drug;
- (4) that the impairment of the ability to drive by alcohol or drugs need not

be to a marked degree; and

(5) proof can take many forms. Where it is necessary to prove impairment of ability to drive by observation of the accused and his conduct, those observations must indicate behaviour that deviates from the normal behaviour to a degree that the required onus of proof be met. To that extent the degree of deviation from the normal conduct is a useful tool in the appropriate circumstances to utilize in assessing the evidence and arriving at the required standard of proof that the ability to drive is actually impaired.

[160] The difficulty with deciding impaired driving cases is not so much with the legal test or definition for impairment of one's ability to operate a motor vehicle, but rather whether the required proof is present, which is often based on circumstantial evidence.

[161] It is worthy to note that evidence of a bald statement from a witness that the accused was unsteady or uneasy on his feet is not very helpful to the trier of fact in determining the degree of impairment.

[162] In fact, a detailed description of how the accused moved, his manner of movement, would be more of assistance to the trier of fact in determining the degree of unsteadiness or uneasiness of the accused.

[163] The collection of common words often used by the police, including:

unsteady, relatively unsteady, uneasy, or wavering, are more conclusive than descriptive, and thus it is more helpful to the trier of fact to have a detailed description of what is meant by those words; such as, an exact description of the actual movement.

[164] It is trite law that the Court must look at the totality of the evidence to determine if an inference can be made that the defendant's ability to operate is impaired by alcohol or a drug beyond a reasonable doubt

### **The Essential Elements of Impaired Operation**

[165] While the essential elements of the offence of having care or control of a motor vehicle while the person's ability is impaired are easily identifiable, the methods of proving them are not.

[166] The essential elements for the offence of impaired operation are as follows:

- a) the accused operated a motor vehicle;
- b) while his or her ability was impaired by alcohol or a drug.

[167] Obviously, section 253 requires proof that the impairment was caused by alcohol or a drug or by a combination of both.

[168] As stated, any degree of impairment from slight to great is sufficient to make out this element of the offence.

## **Determining Impairment**

[169] As stated, the Crown must establish that accused's ability to operate a motor vehicle was impaired by alcohol. There is no specific or singular indicia of impairment that is sufficiently conclusive by itself to justify a conviction, but rather, it is a combination of factors, or observations of various manifestations of impairment, which are often considered by the trier of fact in determining whether a person's ability to operate a motor vehicle is impaired by alcohol, including the following:

- Voluntary admission of consumption of alcohol or drugs;
- Smell of alcoholic beverage or drugs from breath;
- Physical Symptoms: bloodshot and/or glossy eyes, flushed face, slurred speech, unsteady on feet, demeanor;
- Nature of driving (aberrant driving);
- Physical sobriety tests;
- Drug Recognition tests;
- Opinion evidence;
- Breath test results;
- Blood test results; and
- Section 258(3) - an adverse inference.

## **Analysis**

[170] I have had an opportunity to assess and consider the evidence in relation to

this matter. I have had the opportunity to watch carefully and listen intently to the witnesses as they testified, particularly Derek Bonang, who elected to testify.

[171] It is trite to say that most criminal trials involve an assessment of the reliability and credibility of witnesses testimony; this case is no exception.

[172] There is no magic formula for deciding how much or how little to believe to believe a witnesses testimony or how much to rely on it in deciding a case.

[173] As previously mentioned, what is required is a careful, thorough and thoughtful examination of all aspects of the evidence called in the case.

### **Circumstantial Evidence**

[174] This case has both elements of circumstantial and direct evidence. With respect to circumstantial evidence, I am mindful that the circumstantial evidence must be assessed in the context of the entire evidence. A finding of guilt can only be made where it has been demonstrated beyond a reasonable doubt that the only reasonable or rational inference drawn from the proven facts is the guilt of the accused.

[175] The circumstantial evidence must be consistent with guilt and inconsistent with innocence. It is not necessary to show that any "equally consistent" reasonable inference can be drawn. If other reasonable inferences can be drawn from the proven facts which are not consistent with guilt then a reasonable doubt exists. Of course, inferences which are not reasonable or rational cannot raise a reasonable doubt.

[176] The accused does not have to prove anything. If there is a possibility the evidence is consistent with a conclusion other than guilt a reasonable doubt may exist.

[177] However, at the same time the trier of fact cannot speculate about mere possibilities. Certainty is not required.

[178] The Crown must therefore establish that no reasonable inference consistent with innocence can be drawn or made from the proven facts. However, individual pieces of evidence or facts need not be established beyond a reasonable doubt. The circumstantial "facts" need not be established beyond a reasonable doubt. It is only the ultimate issue of guilt to which the criminal burden applies although weaknesses in the establishment of any piece of evidence or fact may make it impossible to conclude beyond a reasonable doubt that the only reasonable or rational inference is the guilt of the accused.

[179] Drawing or making reasonable inferences must be distinguished from speculating or making conjectures. An inference is a deduction of fact that may logically or reasonable be drawn from another fact or group of facts which have been established.

[180] As previously mentioned, this burden of proof lies much closer to absolute certainty than to a balance of probabilities, as it is not sufficient to conclude that an accused person is - probably or likely guilty for a conviction to be registered.

[181] In the present case, there is no issue in respect to whether or not the Crown proved the essential elements of date, jurisdiction, care or control and identification as the evidence clearly establishes these essential elements beyond a reasonable doubt.

[182] Indeed, in this case there are no significant factual disputes as to what occurred on the date and time in question.

[183] As earlier stated, the principal issues are whether the Crown proved beyond a reasonable doubt that Mr. Bonang's ability was impaired by alcohol when he operated his motor vehicle on the date and time in question, and whether he wilfully refused or failed to provide a sample of his breath.

[184] I have had an opportunity to assess and consider all of the evidence.

[185] I have had the opportunity to watch carefully and listen intently to the witnesses as they testified.

[186] There is no magic formula for deciding how much or how little to believe a witnesses testimony or how much to rely on it in deciding a case. What is required is a careful, thorough and thoughtful examination of all aspects of the evidence called in the case, which includes the *viva voce* evidence, the admissions, and the exhibits.

[187] I find that each of the Crown witnesses testified in a straightforward manner, seemed honest, sincere and were forthright in providing their testimony. I did not

have any credibility or reliability concerns with any of Crown witnesses’.

[188] It seemed to me that each Crown witness provided their evidence to the best of their abilities. Each witness provided a clear and concise recollection of their observations and interactions with Mr. Bonang.

[189] Messrs. Wilson, Wog and Csts. Rhodenizer and Smith all strike me as being conscientious, and attentive persons, whom testified in a careful and thoughtful manner. I have no issues with their credibility or reliability.

[190] In fact, I find that Mr. Wilson’s evidence is entirely consistent with Mr. Wog’s observations of Mr. Bonang’s demeanor at the accident scene, particularly with respect to Mr. Bonang’s state of mind. They both described him as being confused, incoherent, and dazed; as did Cst. Smith. He agreed in cross-examination that Mr. Bonang appeared dazed and confused.

[191] I find that Mr. Derek Bonang testified in a straightforward manner, seemed honest, sincere and was forthright in providing his testimony. He was not argumentative or evasive, and answered all of the questions in a matter of fact manner. I recognize his recollection of the specific facts at the scene of the accident was poorer, then perhaps at the police station; as he candidly conceded what he could not recall. This may be symptomatic with having suffered a head injury. Having intently listened to and observe him while he testified, however, I have no concerns with his credibility. Derek Bonang seemed to have provided his evidence to the best of his abilities. He seemed sincere and honest in providing his evidence.



He did not strike me as trying to “gild the lily”, to borrow a phrase attributed to Shakespeare. For example, he did not attempt to minimize his evidence, by suggesting he only consumed one beer. He struck me as being forthright when he stated when he drank the three beers during the course of the evening. Also, while maintaining that he did not understand or appreciate what the officer said to him when he was read the breath demand, he did readily concede that he understood that he was under arrest for impaired driving as he was being transported to the police station. He also conceded that he did not ask the officer for clarification or to repeat what he had said to him.

[192] It should be noted that while I am mindful that Derek’s father, Kevin Bonang, and his friend Mr. Hoyt are not disinterested witness, they, nonetheless, strike me as being a truthful and reliable witnesses.

[193] Having carefully considered the evidence in its totality, I am not satisfied beyond a reasonable doubt that the Crown proved that Mr. Bonang possessed the requisite *mens rea* for the offence of refusal. In other words, I am not satisfied beyond a reasonable doubt that Mr. Bonang intentionally or voluntarily made a conscious decision to refuse to provide a sample of his breath. I am not satisfied that Mr. Bonang understood and/or appreciated what was being requested of him when the officer read him the demand for a sample of his breath. Therefore, in my view, he was not aware of what he was refusing, as I accept his evidence, which is in essence, is that he did not voluntary refuse or fail to provide a sample of his breath. In other words, I am not satisfied beyond a reasonable doubt that Mr. Bonang made a clear and unequivocal refusal; notwithstanding the officer’s evidence that he believed that

Mr. Bonang did. Let me explain.

[194] It is indisputable that Mr. Bonang was involved in a single motor vehicle accident which involved his car striking a traffic sign, and coming to rest on the median, which was 1 to 2 feet off of the pavement. The bumper of the car was located on the highway. Thus, it is reasonable to infer that the car struck the traffic sign with a significant degree of force.

[195] I also accept Mr. Bonang's evidence that he struck his head while in the car after he lost control of it, which is consistent with the evidence of Mr. Wilson who described Mr. Bonang as being incoherent and dazed. Mr. Wog also described Mr. Bonang as being confused and disoriented. He describe Mr. Bonang's demeanour in these terms, "weird look in his eyes: like a far away, not quite right". He agreed that Mr. Bonang looked, "weird as oppose to being intoxicated." Cst. Smith agreed that Mr. Bonang appeared to be "dazed" and "confused." He also reaffirmed that Mr. Bonang did not respond when he was asked whether he wanted to speak to a lawyer. Indeed, for that reason, the officers decided to put Mr. Bonang in contact with Duty Counsel.

[196] Mr. Bonang testified that after he struck his head he felt "out of it." He recalled talking to people but was "out of it: everything was blurry". He recalled the witnesses at the scene and the two police officers. He stated that his head physically hurt, but mentally he did not know what happened; he felt out of it. He recalled the police asked him for his driver's license, registration and insurance, but does not recall getting them. He also stated that he does not recall having his *Charter of*

*Rights*, police caution and breathe sample demand read to him. He stressed that he does not recall what was actually stated to him, and he did not fully understand what was being said to him. On cross-examination, he stated that he recalled speaking to Mr. Wilson but does not recall what he said. He recalled being in the police car when the officer read his *Charter Rights* to him, but does not recall what was said because he was, “out of it.” He added, that he thought that he had asked to speak to a lawyer.

[197] Mr. Bonang remembered asking to speak to a lawyer, but does not recall the officer asking him for a sample of his breath. And he conceded that he does not recall asking the officer to repeat or clarify what he had stated to him.

[198] Mr. Bonang agreed that he understood that the police had arrested him for impaired driving, but he is unsure who initiated the consultation with legal counsel: he was unsure who asked for a lawyer. However, he does remember being satisfied with the legal advice he received.

[199] I accept Mr. Bonang’s evidence, which is essentially that he did not understand nor appreciate what was being asked of him in relation to the breath demand. For that reason I have a real doubt, a reasonable doubt, that he willfully or intentionally refused or failed to provide a suitable sample of his breath. In fact, his evidence is supported, in part, by the evidence of several witnesses’ whom expressed the view that Mr. Bonang appeared: disoriented, dazed, confused, and incoherent.

[200] I also find that his demeanour, as described by the witnesses’ at the scene of

the accident is also consistent with a confused or dazed state, including his reaction to the officer's reading of his *Charter of Rights* wherein when Mr. Bonang was asked whether he understood, he said that he did, but stared straight ahead and would not answer whether he wanted to contact a lawyer. Mr. Bonang's reactions, his unresponsiveness, sufficiently concerned the officers to the extent that they made sure he spoke to Duty Counsel.

[201] The *Charter*, police caution and breath demand were all read to Mr. Bonang, during one occurrence. Thus, it is reasonable to infer that the whole process of reading the *Charter*, police caution, and breath demand, was complete in a very short period of time; within minutes. Hence, this continuous conversation or transaction was one single incident which was rather contemporaneous. Moreover, the conversational exchange between the police and Mr. Bonang should not be compartmentalized. This is of significance because after the officer read Mr. Bonang his *Charter of Rights*, but before he read him the breath demand, Mr. Bonang was unresponsive, which ended in an ambiguous response to whether he wanted to contact a lawyer. Rather than clarify that ambiguity, the officer proceeded seamlessly in a rather perfunctory manner to read from his card the breath demand.

[202] Now, I recognize that the officer believed that Mr. Bonang had responded to the questions he asked him, and that Mr. Bonang did not mention that he had struck his head in the accident, but it seems to me, having regard to all of the circumstances, that it would have been prudent perhaps for the police to ascertain that Mr. Bonang clearly and unequivocally understood what was being stated to him, particularly in the circumstances where the accused had not fully responded in a meaningful way

[203] While there were no apparent physical injuries to Mr. Bonang, it is undisputable that he was involved in an accident, and concern was raised by the officers about Mr. Bonang's unresponsiveness to the question of whether he wanted to contact a lawyer. Despite this the breath demand followed.

[204] In my view, the officers exercised prudence in making sure that Mr. Bonang contacted legal counsel, particularly in the present circumstance where Mr. Bonang was unresponsive. It is surprising, however, that the officers did not make a further breath demand after Mr. Bonang received legal advice as it often the case; notwithstanding, that it is not required: s. 254(3) does not require multiple demands. As observed by Justice Tidman in *R.v. Hendsbee* (1995), 149 (2d) 236, at para. 9, where he stated:

It seems to me, if the *Charter* right is to mean anything to such a detained person, the police must advise of the right to counsel before making the demand or at least before receiving the answer to the demand because the answer is the incriminating evidence. It is vital under that situation to have legal advice because once the answer is "no" then the offence is virtually proved if that evidence goes before the court.

[205] I only mention this observation as a gratuitous comment because nothing turned on it in this specific case.

### **Driving while Impaired**

[206] With respect to the allegation that Mr. Bonang operated his vehicle while his ability was impaired by alcohol or drug, I am not satisfied that the Crown proved

beyond a reasonable doubt that Mr. Bonang's ability to operate his motor vehicle was impaired by alcohol.

[207] While suspicious, I am left in a state of reasonable doubt on the totality of the evidence, including Mr. Bonang's evidence, which I accept that his ability to drive was not impaired having consumed three beers over an extended period of time. He also stressed that he had not consumed any drugs on the date and time in question.

[208] His evidence was, in part, supported by Mr. Hoyt's evidence that his driving was fine, as there were no problems despite the slippery driving conditions. I am mindful that there is no expert evidence in this case to explain the effects of the consumption of three beers on Mr. Bonang's ability to operate a motor vehicle; given when and how much he actually consumed.

[209] The mere presence of the smell of alcohol does not necessarily indicate impairment. It may, however, strengthen other evidence, but by itself does little—particularly when explained.

[210] However, I accept Mr. Bonang's evidence that he was not impaired when he operated his vehicle, and that he lost control of it because he was driving too fast for the slippery road conditions.

[211] I also find that the road conditions were slippery, and that Mr. Bonang's car had a temporary or emergency tire, a donut tire, on it at the time and date in question, which may have attributed to losing control of the vehicle.

[212] There is evidence that Mr. Bonang's speech was slurred. Given that he had just been involved in an accident, where he struck his head, I cannot exclude the possibility that the slurring of the speech resulted from the accident, as opposed to from impairment.

[213] In reaching this conclusion I am mindful that the question is not whether there are other possible explanations for individual circumstances, but rather whether the evidence taken as a whole leads to only one reasonable conclusion.

[214] As emphasized earlier, the Court must not assess each circumstance piecemeal but must look at the totality of the evidence relating to Mr. Bonang's conduct and condition to determine whether the whole of the evidence proves impairment beyond a reasonable doubt. It would be an error for the Court to weigh each indicia of evidence separately and then conclude that the totality of the evidence does not overcome the equivocal nature of its parts, as explained by Chipman J.A., in *R. v. Andrea*, 2004 NSCA 130, at para. 19. And more recently, by Fichaud, J.A., in delivering the judgment of the Appeal Court in *Schofield*, at paras 34 and 35, wherein he wrote:

The judge should not segregate the officer's criteria for piecemeal analysis, then banish each factor might have a stand-alone explanation. From the officer's roadside perspective, the factors may have had corroborative weights that together formed a sounder platform for an inference of impairment. The reductive approach denies that corroborative potential. As this Court recently said, of reasonable and probable grounds for a search warrant, (*R. v. Liberatore*, 2014 NSCA 109, para. 27):

- The body of evidence isn't anatomized for a segregated analysis of each fragment. Viewed as a whole, its bits may be cross-confirmatory.

There is no minimum period of investigation, mandatory line of questioning or legally essential technique, such as a roadside screening. The judge should not focus on missing evidence. Rather, the judge should consider whether the adduced evidence of circumstances known to the officer reasonably supported the officer's view.

[221] Let me be clear, I am satisfied that the officer had the requisite grounds under s. 254(3) of the *Criminal Code* to make the breath sample demand.

[222] I carefully considered the police officers' evidence in respect to Mr. Bonang's degree of impairment. Cst. Rhodenizer described Mr. Bonang as confused and unsteady on his feet. He also smelled a strong smell of alcohol on his breath, and his speech was slurred. Similarly, Cst. Smith observed that Mr. Bonang was intoxicated. He described him as being very confused, his speech was slurred, he had poor balance, and his eyes were glossy. Also, Mr. Wilson described Mr. Bonang as looking intoxicated, as he had blood shot eyes, a smell of alcohol was emanating from him, and he was stumbling. He added that Mr. Bonang kept repeating himself, and the cold did not seem to bother him. Mr. Wog testified that Mr. Bonang appeared to be confused, and he thought that the confusion may have been caused by the accident. He also noted a smell of alcohol on Mr. Bonang's breath. He stressed that Mr. Bonang has a weird look on his eyes, like a faraway look, not quite right. He looked weird as opposed to being intoxicated.

[223] I have also considered that that these observations were made immediately after the accident, in which Mr. Bonang had struck his head and was feeling the effects of that trauma, as he said, "he felt out of it". In other words, this is not a situation where there has been an unexplained accident. I find that other than the



smell of alcohol, the other indices of impairment as observed by the witnesses are also consistent with the fact that Mr. Bonang had been in an accident.

[224] Also, I am not prepared to apply the permissive inference in s. 258(3) of the *Criminal Code*, in light of my earlier findings that Mr. Bonang did not voluntarily refuse or fail to comply with the demand made under s. 254 of the *Criminal Code*. Therefore, there is no adverse inference to be drawn because he failed or refused to provide a sample, because he has been acquitted of that allegation.

[225] Having considered the totality of the evidence, including Mr. Bonang's evidence, I am not satisfied beyond a reasonable doubt that Mr. Bonang's ability was impaired as that term has been defined in the jurisprudence.

[226] As previously stated, if other reasonable inferences can be drawn from the proven facts which are not consistent with guilt then a reasonable doubt exists. Of course, inferences which are not reasonable or rational cannot raise a reasonable doubt.

[227] In reaching this decision, I am not satisfied that there is only one rational or reasonable inference to draw from the proven facts, as an equally compelling inference that can be drawn from the facts was that a sober Mr. Bonang lost control of his car because he was driving too fast for winter slippery conditions, with worn-out tires, including a temporary tire, "a donut tire."

[228] As previously mentioned, a high degree of suspicion is not enough, I must be

satisfied beyond a reasonable doubt.

[229] This burden of proof lies - much closer to absolute certainty than to a balance of probabilities, - and - it is not sufficient to conclude that an accused is probably or likely guilty for a conviction to be registered.

[230] As stated, the ultimate issue is not credibility but reasonable doubt.

[231] As the judge at a criminal trial, is not attempting to resolve the broad factual question of what happened. My function is the more limited one of deciding whether the essential elements of the charge have been proven beyond a reasonable doubt. It is against this context, that I have considered the evidence, mindful that the presumption of innocence is displaced only by proof beyond a reasonable doubt.

[232] For all of the foregoing reasons, I am not satisfied that the Crown has proven beyond a reasonable doubt the allegations against Mr. Bonang, therefore, I find him not guilty of both charges as described in the Information.