PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v Pelletier*, 2019 NSPC 83

Date: 20191220
Docket: 8268806
Registry: Truro

Between:

Her Majesty The Queen

v.

Phillip Andre Pelletier

Judge:	The Honourable Judge Alain Bégin,
Heard:	December 20, 2019, in Truro, Nova Scotia
Decision	December 20, 2019
Charge:	253(1)(a) Criminal Code of Canada
Counsel:	Alison Brown, for the Crown Attorney Carbo Kwan, for the Defendant

By the Court:

[1] This is a criminal trial. The Crown has the onus of establishing beyond a reasonable doubt that Mr. Pelletier committed the offense of operating a motor vehicle while impaired by a drug contrary to s. 253(1)(a) of the *Criminal Code of Canada*. The onus of proof never switches from the Crown to the accused.

[2] Proof beyond a reasonable doubt does not involve proof to an absolute certainty. It is not proof beyond any doubt. Nor is it an imaginary or frivolous doubt. In ***R. v. Starr*** (2000) 2SCR 144, the Supreme Court of Canada held that this burden of proof lies much closer to absolute certainty than to a balance of probabilities.

[3] The Supreme Court of Canada in ***R. v. Lifchus*** [1997] 3 SCR 320 noted at paragraph 39:

> "39. Instructions pertaining to the requisite standard of proof in a criminal trial of proof beyond a reasonable doubt might be given along these lines:
>
> The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty.
>
> What does the expression "beyond a reasonable doubt" mean?
>
> The term "beyond a reasonable doubt" has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think that it needs no explanation, yet something must be said regarding its meaning.
>
> 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.
>
> Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the

> accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.
>
> On the other hand, you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.
>
> In short, if based on the evidence before the Court, you are sure that the accused committed the offence, you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt."

[4] The fundamental protection in every criminal trial is the presumption of innocence. This principle is central to the entire analysis to be conducted by the trial judge.

[5] To be presumed innocent until proven guilty by the evidence presented in court is the fundamental right of every person accused of criminal conduct. Running together with this presumption of innocence is the standard of proof against which the Crown evidence must be measured. To secure a conviction in a criminal case, the Crown must establish each essential element of the offence to the point of proof beyond a reasonable doubt.

[6] It is settled law that an accused person bears no burden to explain why their accuser made the allegations against them. Reasonable doubt is based on reason and common sense. It is logically derived from the evidence or the absence of evidence.

[7] In ***R. v. W.D.*** the Supreme Court of Canada indicated the manner in which a trial court should assess the evidence of an accused who testifies. The accused's evidence is treated in a way different from other evidence. I must consider whether I believe the accused's evidence, and if so, then he is entitled to be acquitted on a charge where I believe his denial. Even where I do not believe the accused's evidence, if it serves to raise a reasonable doubt in relation to his guilt for any of the occurrences, then he is entitled to the benefit of the doubt and he is entitled to be acquitted of the charges relating to that occurrence.

[8] Even where I do not believe the accused, and his evidence fails to raise doubt, I must still consider whether on the evidence I do accept, if the Crown has proved the essential elements of each offense beyond a reasonable doubt. I may

only convict the accused of offences proven beyond a reasonable doubt. Proof beyond a reasonable doubt also applies to issues of credibility.

[9] Finally, if I am left in doubt where I don't know who or what to believe, then I am by definition in doubt and the accused is entitled to the benefit of the doubt. Having said that, however, the accused's evidence is not considered in isolation. It is part of the whole of the evidence that I have heard and must consider.

[10] A criminal trial is **not** a credibility contest.

[11] On the issue of credibility I am guided by the case of ***Faryna v. Chorny*** [1952] 2 DLR 34 where the Court held that the test for credibility is whether the witness's account is consistent with the probabilities that surrounded currently existing conditions. The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. **In short, the real test of the story of the witness in such a case must be how it relates and compares with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.**

[12] Or as stated by our Court of Appeal in ***R. v. D.D.S.*** [2006] NSJ No 103 (NSCA), **"Experience tells us that one of the best tools to determine credibility and reliability is the painstaking, careful and repeated testing of the evidence to see 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 …criminal trial?"**

[13] With respect to the demeanour of witnesses, I am mindful of the cautious approach that I must take in considering the demeanour of witnesses as they testify. There are a multitude of variables that could explain or contribute to a witness' demeanour while testifying. As noted in ***D.D.S.***, demeanour can be taken into account by a trier of fact when testing the evidence, but standing alone it is hardly determinative.

[14] Credibility and reliability are different. Credibility has to do with a witness's veracity, whereas reliability has to do with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately

observe, recall and recount events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point.

[15] Credibility, on the other hand, is not a proxy for reliability. A credible witness may give unreliable evidence. Reliability relates to the worth of the item of evidence, whereas credibility relates to the sincerity of the witness. A witness may be truthful in testifying, but may, however, be honestly mistaken.

[16] The Ontario Court of Appeal in ***R. v. G(M)*** [1994] 73 OAC 356 stated at paragraph 27:

> "Probably the most valuable means of assessing the credibility of a crucial witness is to examine the consistency between what the witness said in the witness box and what the witness has said on other occasions, whether on oath or not. Inconsistencies on minor matters or matters of detail are normal and are to be expected. They do not generally affect the credibility of the witness…**But where the inconsistency involves a material matter about which an honest witness is unlikely to be mistaken, the inconsistency can demonstrate a carelessness with the truth. The trier of fact is then placed in the dilemma of trying to decide whether or not it can rely on the testimony of a witness who has demonstrated carelessness with the truth.**"

And at paragraph 28,

> "…it is essential that the credibility and reliability of the complainant's evidence be tested in the light of all of the other evidence presented…….**While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness's evidence.** There is no rule as to when, in the face of inconsistency, such doubt may arise, but at least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness's evidence is reliable. This is particularly so when there is no supporting evidence on the central issue…"

[17] In the case of ***R. v. Reid*** (2003) 167 (OAC) the Ontario Court of Appeal stated that although the trial judge is at liberty to accept none, some, or all, of a witness' evidence, this must not be done arbitrarily. When a witness is found to have deliberately fabricated criminal allegations against the accused, the trial judge must have a clear and logical basis for choosing to accept one part of that witness' testimony while rejecting the rest of it.

[18] It is important to remind myself of my role, and duty, as the trial judge. The Nova Scotia Court of Appeal in ***R. v. Brown*** [1994] NSJ 269 (NSCA) confirmed at paragraph 17 that:

> "…There is a danger that the Court asked itself the wrong question: that is which story was correct, rather than whether the Crown proved its case beyond a reasonable doubt."

[19] In the case of ***R. v. Mah*** 2002 NSCA 99, the Court stated:

> "The W.D. principle is not a magic incantation which trial judges must mouth to avoid appellate intervention. Rather, W.D. describes how the assessment of credibility related to the issue of reasonable doubt. **What the judge must not do is simply choose between alternative versions and, having done so, convict if the complainant's version is preferred. W.D. 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 reasonable doubt**…the ultimate issue is not whether the judge believes the accused or the complainant or part or all of what they each had to say. The issue at the end of the day in a criminal trial is not credibility but reasonable doubt."

[20] The ***Mah*** case makes it clear that my function as a judge at a criminal trial is **not** to attempt to resolve the broad question of what happened. My function is limited to having to decide whether the essential elements of the charges against the accused have been proved beyond a reasonable doubt. The onus is always on the Crown to prove the elements of the offenses beyond a reasonable doubt. The onus is not on the Defence to disprove anything.

My Analysis of the Evidence

[21] I have reviewed all of the evidence that was presented at the trial, along with all of the Exhibits. It is not my function as a trial judge when rendering a decision to act as a court reporter and recite all of the evidence that I have heard and considered. It suffices for me to highlight the pertinent parts.

Cst. Melanson:

[22] Cst. Melanson testified that on June 20, 2018 the following occurred:

- He was heading north in an unmarked car on the 102 towards Truro when he encountered the vehicle belonging to Mr. Pelletier.

- Mr. Pelletier's vehicle was "jerking in traffic" in that it crossed the fog line, and it also crossed the dividing line between the two lanes of traffic.

- Cst. Melanson positions his vehicle behind Mr. Pelletier's red Corrolla and at one point in time he sees the vehicle drift towards a tractor trailer that was off to the side of the road, and Mr. Pelletier's vehicle narrowly missed the tractor trailer.

- Cst. Melanson follows Mr. Pelletier into Truro and noted that the driving manner by Mr. Pelletier remained consistent, with Cst. Melanson wondering if the driver was impaired. He could see Mr. Pelletier's head bobbing up and down.

- Cst. Melanson observes Mr. Pelletier drift onto Exit 13A as if he was going to pull off the highway and Mr. Pelletier pulls back onto the highway.

- Once off the highway Mr. Pelletier is in the left turning lane for Walmart and he then swerves back into the right lane and proceeds through the intersection.

- Cst. Melanson follows Mr. Pelletier into the Home Hardware parking lot off of Willow Street in Truro.

- Cst. Melanson parks behind Mr. Pelletier's car and proceeds to the driver's door where he sees Mr. Pelletier remove a pill from a tin foil wrapper and put the pill in his mouth.

- Cst. Melanson gets Mr. Pelletier to spit the pill out into his hand and he places the pill on the roof of the car.

- Mr. Pelletier advises Cst. Melanson that he was at the airport all night and that he was tired.

- Cst. Melanson notes Mr. Pelletier's eyes to be glossy, red, and with narrow pupils.

- Cpl. Wood and Cst. Foster arrive on scene and Cst. Melanson conveys to Cpl. Wood his observations regarding Mr. Pelletier's driving, his observations and about the pill.

- Cst. Melanson asks Cst. Foster for his DRE demand card so that the DRE demand could be made of Mr. Pelletier. The demand and arrest are made in Cpl. Wood's police car.

[23] On cross-examination Cst. Melanson stated that:

- "it really scared me when I saw the tractor trailer and he almost hit it".
- That Mr. Pelletier would have been a danger if a car was attempting to pass him.
- that Mr. Pelletier did not signal when he almost took Exit 13A.
- The tractor trailer was the only close call.
- Mr. Pelletier did exhibit some signs of safe and proper driving as he did successfully navigate through a construction zone without incident.
- Mr. Pelletier was cooperative with Cst. Melanson.
- Mr. Pelletier advised him that the pill was prescription medication.
- Cst. Melanson felt while following Mr. Pelletier that he was either an impaired or distracted driver because of the ongoing issues noted with Mr. Pelletier's driving.
- As Cst. Melanson did not smell any alcohol coming from Mr. Pelletier he ruled out impairment by alcohol, and the unwrapping of a pill from tin foil made him suspect that Mr. Pelletier was impaired by drugs when looking at the bigger picture.

Cpl. Wood:

[24] Cpl. Wood testified as follows regarding June 20, 2018:

- When he arrived at the Home Hardware Mr. Pelletier was still seated in his vehicle but his feet were outside of his vehicle.
- He found the pill on the roof of Mr. Pelletier's car.
- He did not detect an odour of alcohol from Mr. Pelletier but he did note that his pupils were pinpoint, so he arrested Mr. Pelletier for impaired operation of a motor vehicle by a drug based on his own observations and

from his discussions with Cst. Melanson, and a DRE demand was made of Mr. Pelletier.

- He transports Mr. Pelletier to the detachment and Mr. Pelletier is put in contact with a lawyer.

- Mr. Pelletier is then turned over to Cst. Burns after Cpl. Woods advises Cst. Burns of the grounds for Mr. Pelletier's arrest.

[25] On cross-examination Cpl. Wood stated:

- He noted Mr. Pelletier's "pupils were pinpoint" and "constricted".

- He confirmed that Mr. Pelletier was coherent.

- While there is no notation in his notebook about Mr. Pelletier being tired, there is a note of it in his typed report which was prepared within 24 hours.

- Cpl. Wood never saw Mr. Pelletier stumble or miss a step, and he did not note any difficulties with Mr. Pelletier getting out of his vehicle or walking.

Cst. Burns:

[26] Cst. Burns is a trained DRE and he testified as follows:

- He reviewed the information received from Cst. Foster as reported by Cst. Melanson, which included weaving in traffic, bobbing of the head, pinpoint pupils, slurred speech, glossy eyes, no odour of alcohol, and that a pill was seized.

- No breathalyzer test was administered on Mr. Pelletier.

- The DRE test was administered, and entered as Exhibit #2 at the trial, and the highlights from that according to Cst. Burns' testimony are as follows:

    1. With regards to the eye exam there was a noted 'lack of smoothness' in what was supposed to be a smooth pursuit.

    2. The horizontal nystagmus test provided indications of some sort of depressant in Mr. Pelletier's system.

> 3. No issues with the vertical nystagmus test was an indication of a lower dose in Mr. Pelletier's system.
>
> 4. There was a lack of convergence as the "left eye floated away".
>
> 5. For the divided attention test Mr. Pelletier thought that 20 seconds was 30 seconds which was an indication that Mr. Pelletier's internal clock was fast (the permitted leeway is 6 seconds).
>
> 6. Mr. Pelletier was swaying backwards 3 inches, and side-to-side 2 inches, whereas the normal expected sway is 1 inch.
>
> 7. During the walk and turn test Mr. Pelletier lost his balance on two occasions. This was considered a "performed poorly".
>
> 8. During the walk and turn test Mr. Pelletier committed 5 faults, whereas 2 or more faults is considered to be a "performed poorly".
>
> 9. During the one leg stand Mr. Pelletier put his foot down 3 times, swayed, and had to put his arms out for balance. 2 out of 4 is considered to be a performed poorly, Mr. Pelletier had 3 out of 4 faults so he "performed poorly".
>
> 10. During the finger to nose test Mr. Pelletier missed the tip of his nose on all 6 attempts, and he used the pad of his finger instead of the tip. This was considered to be a "performed poorly".

[27] The divided attention test results indicated that Mr. Pelletier was under the influence of a drug, and Cst. Burns believed it to be a depressant as Mr. Pelletier was very calm during the testing.

> 11. The clinical signs showed low blood pressure, a normal pulse rate, and a slow reaction to light.
> 12. Mr. Pelletier's muscle tone was flaccid.

[28] Based on all of the testing Cst. Burns determined that on the totality of his observations that Mr. Pelletier was under the influence of a CNS depressant and a

narcotic analgesic. A urine sample was taken from Mr. Pelletier which confirmed a CNS depressant but showed no signs of a narcotic.

[29] Cst. Burns testified that being tired would not be an innocent explanation for Mr. Pelletier's test results as fatigue would not explain all of the clinical signs that he observed in the DRE testing.

[30] Cst. Burns also noted that he has performed 38 DRE tests, and that in 19 of those cases he determined that the individual was not impaired.

[31] On cross-examination Cst. Burns stated that:

- He found 6 indicators of a CNS depressant in Mr. Pelletier being: horizontal gaze, lack of convergence, slow reaction to light, low blood pressure, low body temperature, and flaccid muscle tone.
- The divided attention test could be affected by fatigue.
- He was unsure if fatigue could affect the walk and turn test.
- He did not think that the torn meniscus was an issue as he assumed that Mr. Pelletier's right leg was fine, and Mr. Pelletier did not indicate otherwise. Further, the one leg test was just one part of the whole evaluation.
- Mr. Pelletier's speech was "slow" and "staggered" and he did not note any change during the testing.
- Mr. Pelletier never told Cst. Burns that he was fatigued.
- Cst. Burns acknowledged that if Mr. Pelletier was 'coming down' from a stimulant that it could mimic being on a depressant and Cst. Burns indicated that this could be a form of impairment.
- Cst. Burns stated "in this case he was showing that he was impaired and showing me that he had ingested."
- Mr. Pelletier never showed any signs of his nodding off while doing the testing.
- Cst. Burns said that with Mr. Pelletier being sluggish, slurred speech, slow speech, calm and easy going that this would be similar to someone being impaired by alcohol.
- When asked what his findings from the evaluation would indicate to him regarding Mr. Pelletier's ability to drive, Cst. Burns responded that if

Mr. Pelletier's eyes were not functioning properly, he couldn't drive, and if Mr. Pelletier's divided attention was not good, he would not be safe to drive.

Mr. Pelletier:

[32] Mr. Pelletier testified as follows:

- He had worked 6 out of the last 7 days leading up to June 20, 2018, and he had worked 4 days straight.
- He was only sleeping 3 to 5 hours per day that week.
- At the end of his shift on the day in question he was fatigued, and he had to ask to leave work early.
- After a brief nap in his car at the airport he headed home where he got just over 4 hours of sleep.
- He has prescriptions for Clonazepam and Adderall.
- He was headed to Truro to get some parts for a kayak project when he was spotted by Cst. Melanson.
- He does not recall seeing the tractor trailer on the side of the road that Cst. Melanson says that he almost hit, and he doesn't recall almost exiting at Exit 13A before turning back onto the highway.
- He never put the pill in his mouth, that the pill was 8 inches from his mouth when Cst. Melanson came to his car.
- The pill was placed on the dash, and not on the roof of the car.
- Cpl. Wood let him put his feet out of the car, and it was Cpl. Wood who told him about his erratic driving.
- When asked about his driving as described by Cst. Melanson he stated that it was caused by "sleep deprivation".
- During the testing with Cst. Burns he misunderstood what was required of him for some of the tests so his anxiety increased, and that his fatigue also started to kick in while doing the testing.

[33] In his cross-examination Mr. Pelletier stated that:

- The extreme fatigue hit him when he got to the Home Hardware parking lot and that he "did not feel it while driving".
- He split his pills in consultation with his doctor to avoid him running short, but he could not explain how if he took his medications as prescribed how he would run short.
- He was advised by his pharmacist of the issues/concerns regarding operating a vehicle while on his prescribed medications.
- On June 20, 2018 he was tired, not sleeping well, and he had not taken his medications as prescribed.

Summary/Decision

[34] I noted at the start that I was guided by the case of ***R. v. W.D.*** I must consider whether I believe Mr. Pelletier's evidence, and if so, then he is entitled to be acquitted on the charges where I believe his denial. I do not believe the evidence of Mr. Pelletier so I must turn to the second stage of ***R. v. W.D.***

[35] Even where I do not believe Mr. Pelletier's evidence, if it serves to raise a reasonable doubt in relation to his guilt for any of the occurrences, then he is entitled to the benefit of the doubt and he is entitled to be acquitted of the charges relating to that occurrence. The evidence by Mr. Pelletier did not raise a reasonable doubt so I must turn to the third stage of ***R. v. W.D.***

[36] Even where I do not believe Mr. Pelletier, and Mr. Pelletier's evidence fails to raise doubt, I must still consider whether on the evidence I do accept, if the Crown has proved the essential elements of each offence beyond a reasonable doubt. I may only convict Mr. Pelletier of the offences proven beyond a reasonable doubt.

[37] Here are the main difficulties that I have with Mr. Pelletier's evidence:

1. He was not taking his medications as prescribed, so I do not accept that the case of ***R. v. Domb*** 2011 ONCJ 756 submitted by his counsel is applicable to this case. That case refers to an individual who was under his doctor's care and actually following his prescription. Mr. Pelletier was splitting his medications, not taking them at the time

intervals prescribed, and on the date in question he was about to take his medication only 2 hours apart.

2. I also do not accept that the ***R. v. Mann*** 2010 ABPC 306 case is applicable as in that case the accused apparently did not know that the drugs in question could affect their ability to drive. Mr. Pelletier testified that his pharmacist had warned him about the possible dangers of driving while on his prescription medications.

3. I also reject the suggestion that perhaps Mr. Pelletier was coming down from a stimulant and that this would mimic him being on a depressant. This is speculative. It is clear from the DRE testing by Cst. Burns that Mr. Pelletier's ability to drive was impaired by drugs due to his eyes not functioning properly, and his divided attention not being good. Cst. Burns was clear in his evidence that Mr. Pelletier was impaired, and that Mr. Pelletier "performed poorly" on several parts of the test.

4. I have difficulties with Mr. Pelletier's evidence as to when he actually felt fatigued. His testimony varied from when he was on the highway and that is why Cst. Melanson saw his erratic driving, to when he first arrived at the Home Hardware parking lot, or perhaps it was during the testing with Cst. Burns. There was no consistency in this evidence, and this was a central part of Mr. Pelletier's defense.

5. Further recollection issues for Mr. Pelletier relate as to whether the pill was on the dash or on the roof of the car. Cst. Melanson and Cpl. Wood are clear that it was on the roof. Mr. Pelletier believes that it was on the dash.

6. Mr. Pelletier believes that it was Cpl. Wood that permitted him to put his feet outside of the car, whereas Cpl. Wood is clear that Mr. Pelletier already had his feet outside of the car when he arrived on scene. This is confirmed by Cst. Melanson.

7. Mr. Pelletier indicates that it was Cpl. Wood who told him about his erratic driving, whereas Cst. Melanson indicates that he had advised Mr. Pelletier about the erratic driving. I accept that it was Cst. Melanson who had told Mr. Pelletier.

[38] I accept the expert DRE evidence of Cst. Burns that Mr. Pelletier's ability to operate a motor vehicle was impaired by a drug on June 20, 2018. This is

confirmed by the DRE testing by Cst. Burns, the evidence of Cst. Melanson who followed Mr. Pelletier on the highway and observed the erratic driving, and the subsequent confirmation of drugs in Mr. Pelletier's system from the urinalysis entered as Exhibit #1.

[39] Cst. Burns testified that Mr. Pelletier being tired would not be an innocent explanation for Mr. Pelletier's DRE test results. I accept that evidence.

[40] As noted in the case of ***R. v. Bush*** 2010 ONCA 554 by the Ontario Court of Appeal, it is the accused's ability to operate a motor vehicle that must be impaired. And that "slight impairment to drive relates to a reduced ability in some measure to perform a complex motor function whether impacting on perception or field of vision, reaction or response time, judgment, and regard for the rules of the road."

[41] Based on all of the evidence before me, Mr. Pelletier's ability to drive on June 20, 2018 was impaired by a drug and Mr. Pelletier is guilty of the offence.

Judge Alain Bégin, JPC