PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Thomas, 2013 NSPC 76

Date:20130514
Docket: 2381166 / 2381167
Registry: Sydney

Between:

Her Majesty the Queen

v.

Scott Thomas

Judge:	The Honourable Judge Jean M. Whalen
Heard:	April 30, 2013 In Sydney, Nova Scotia
Oral Decision:	May 14, 2013
Written decision:	September 6, 2013
Charge:	Section 253(1)(b) of the Criminal Code of Canada Section 253(1)(a) of the Criminal Code of Canada
Counsel:	Steve Melnick, for the Crown Tony Mozvik, for the Defence

By the Court:

I INTRODUCTION

[1] Mr. Thomas drove his car from the Civic Centre (his place of employment) to a parking lot just off the Esplanade and across from the CIBC building where he attended a meeting on the afternoon of September 16, 2011.

[2] Rather than move his car he left it where he had parked and walked back because it would "make him late for his office".

[3] At the end of the business day his "friends from away" picked him up from work and they went to a restaurant for supper. After that they walked to the hockey game at Centre 200.

[4] Mr. Thomas readily admits to drinking before the game and during the intermissions. After the hockey game they went to a local bar and he had "quite a few" drinks. Then he and his friends left and went to another bar.

[5] Unfortunately, Mr. Thomas became ill and decided to leave his friends at the bar and get a cab to Mr. Stewart's home. On his second attempt to get a cab he told the cab company to pick him up at his car (that he had parked previously that afternoon). Mr. Thomas was subsequently found by police in the front seat of his car with the engine running. He was charged pursuant to s. 253(a) and (b) of the *Criminal Code*.

II **ISSUE: CARE AND CONTROL**

[6] 1. Did the crown establish that Mr. Thomas was in care or control of his motor vehicle by virtue of the statutory presumption found in s. 258(1)(a) of the *Criminal Code*?

2. If so, did the defence, on a balance of probabilities, rebut that statutory presumption of care and control of his motor vehicle?

3. If the Court concludes that the defence rebutted the statutory presumption, then did the Crown establish beyond a reasonable doubt that the defendant was in *defacto* or actual care and control of his vehicle.

III THE LAW

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

[8] While an intention to drive (to put the vehicle in motion) is not an essential element of the offence, if proven a conviction may follow. In that regard, the Crown has the option of invoking the presumption set out in s. 258(1)(a) of the Criminal Code. If it is established that the defendant occupied the driver's seat, the onus falls on the accused to show that, on a balance of probabilities, it was not for the purpose of setting the vehicle in motion.

[9] A defendant who fails to rebut the presumption will be deemed to have had care and control of the vehicle, and subject to any other defences, a conviction will

follow. The failure to rebut the presumption has the legal effect of dispensing with the need to conduct a danger inquiry.

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

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

[12] There are three attributes to care and control:

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

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

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

Credibility of Witnesses

[13] ***R. v. Jaura***, *[2006] O.J. No. 4157*, at para 12 and para 13 states:

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

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

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

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

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

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

IV REVIEW OF THE EVIDENCE:

[15] Constable J. Reynolds testified he was dispatched to the unpaved parking lot between the hotel and the government wharf [accessed from the Esplanade] regarding an "impaired driver" in the early morning hours of September 17, 2011.

[16] Upon arrival he observed a male, later identified as Scott Thomas passed out in the driver's seat of a vehicle. The driver's door was partially open and his head was leaning towards the window. The vehicle was running and the lights were on. The defendant's hands and feet were inside the vehicle.

[17] Constable Reynolds stated he asked the defendant to make sure the vehicle was in park because he was concerned the vehicle was in drive. As he made his way to the passenger side of the vehicle Constable Donovan instructed the defendant to put the vehicle in park. Constable Reynolds testified initially he could not see the gear shift as he was going around to the passenger's side. Then he observed the defendant moving the shift down, then up, then into park. He recalled that the emergency brake was not engaged and it was an automatic. Constable Reynolds described Mr. Thomas as being "very unaware of his surroundings". His eyes were glossy and he was unsteady on his feet. Based on his observation the police officer formed the grounds that the defendant's ability to operate a motor vehicle was impaired by alcohol. Mr. Thomas was arrested, chartered, cautioned and given a "breath demand" at 5:03 a.m.

[18] Mr. Thomas stated he understood and agreed to take the test. The results of the breathalyzer readings were 170%.

[19] Constable Reynolds does not recall exactly what Mr. Thomas said but he was satisfied he understood the caution and demand. He testified when the defendant awoke he was confused and disorientated, but co-operative.

On Cross Examination

[20] Constable Reynolds testified the lights to the vehicle were facing "up to the road". The place where the car was parked was flat. He did not make notes but remembers the vehicle was in line with the back of the hotel. It was one hundred and fifty feet from the road.

[21] The officer stated he checked the brake "after" and it was not engaged. The seat was back but not "declined". Constable Reynolds did not see a sweater on or around the defendant. He doesn't know if Mr. Thomas' shoes were on.

[22] Constable Reynolds stated the car didn't move even when the defendant woke. He confirmed the defendant was co-operative and did not deny "anything". The officer did not recall seeing a duffel bag or gym bag.

On Rebuttal

[23] Constable Reynolds testified at the time it was not raining or foggy, it was a little overcast. He stated it was cold, it was a "typical September". He did not have the heat on in his car.

[24] Mr. Scott Thomas testified that he went to work as usual that day but did not car pool as his co-worker was off. He had a meeting in the CIBC building that afternoon and he drove his car that short distance because he had a number of things to carry.

[25] He parked his car in the "parking lot" across from the CIBC building. After the meeting the defendant returned to his office at the Civic Centre. He did not drive his car back because he said it would have made him "late, he had no time to move it".

[26] After work his "friends from away" picked him up and they went to Boston Pizza for supper. He had beer and pizza. Then they walked over to the hockey game, which began at 7:00 - 7:30 p.m. He had one drink before the game and a drink during each intermission.

[27] When the hockey game was over at 10:00 p.m. the defendant and his friends went to the Crown and Moose. He drank “quite a few” vodka and water and one fireball. They left just before midnight and walked to the Capri Club.

[28] At approximately 12:45 a.m. the defendant was not feeling well so he told his friends he was leaving and going “home”, meaning Matt Stewart’s house as it was his plan to stay over and all were going to play golf together the next morning.

[29] He approached a cab outside the club but the driver refused to take him to Glace Bay. He then called Dynasty taxi service. Exhibit D-1 (defendant’s phone records) show a call was made at 01:13 a.m. from the defendant’s cell phone. The defendant was told it would be a “forty to forty-five minute wait”. So the defendant told dispatch to pick him up at his car because he had to go get his gym bag and his sweater (as it was cold). He walked to where he had parked his car earlier that afternoon.

[30] The defendant testified he unlocked his door and sat in the driver's seat because he was freezing. He turned on the ignition and turned the heat on. The next thing he was awakened by the police.

[31] He testified he pushed back the seat so he could get his sweater out of his bag and he took his shoes off, although he's not sure why he did that. He stated his hands were between his legs and his feet were up to get warm. He was leaning towards the driver's door in a "fetal position". He stated he could not touch the pedals because the seat was back.

[32] He fell asleep; when he first woke he was initially startled and not aware of his surroundings. He was somewhat confused "as to what they were asking him to do". He first noticed Constable Donovan. He is positive the shift was in park and not moved and if he had woken up he would have called a cab. It was never his intent to drive that evening as he "always makes arrangements".

[33] He testified he was asked to get out of the car and he put his shoes on "stumbling with (1) one". The defendant stated his seat belt was not on, the radio

was not on. The only thing on were the lights because “they come on automatically when the ignition is turned on”.

[34] The defendant testified “I believe the emergency brake was on”. The police officer took him to the police vehicle then to lockup. He remembered “blowing for the breathalyzer” but not the exact readings, “it was extremely high”. He testified he told the police officer he got in the car because it was cold.

[35] The defendant was released at 10:00 a.m. and made arrangements to pick up his car. It had no gas so he had to get some before he could drive it home.

On Cross Examination

[36] The defendant testified his plans for Friday night were made on Monday with his friends. The defendant did not move his car before going to Boston Pizza because he wasn’t concerned about the safety of the car in the parking lot where he had left it that afternoon.

[37] Initially the day and early evening weather was nice but by 10:00 p.m. the [air] was chilly. He agreed with crown counsel he was extremely intoxicated.

[38] The defendant said his plan was always to go to Matt Stewart's house because it was less of a distance and they were planning to play golf the next day. He testified when he "told his buddies he was going home he meant Matt's home".

[39] Even though he had a sister who lived "up town", "she has children and he would never show up unannounced at that hour".

[40] The defendant stated his sole purpose for returning to his car was to get his bag "with golf stuff". He agreed he passed out from alcohol and he doesn't know if the cab came or not. He also agreed that with the vehicle running it could be put in motion, stating: "Yes, I guess you're correct".

[41] He doesn't know how long he was awake in the car, "not long". He did not tell his friends to come to the car and get him. He says they left at 4:00 a.m. He did not receive any calls from his friends after he left them at the club.

Analysis

[42] The defendant testified in a straight forward manner. When he was unsure he said so and readily agreed with matters surrounding his drinking. The defendant was co-operative with the police; confirmed by Constable Reynolds. The defendant was emphatic that he has never driven after taking a drink and would not on the night in question, even going so far to say if he had awakened at 9:00 a.m. himself he would not have driven his car because he knew he would not "be legally able to drive, nor would I". Constable Reynolds acknowledged he did not make notes of certain things (eg. sweater or temperature). He testified based on his recollection of events on that date. Although there was another police officer with Constable Reynolds that evening, she was not called by the crown or defence.

[43] Based on the evidence I find that the defendant was in care and control of his vehicle by virtue of the statutory presumption. Also, based on the evidence I heard I do accept the defendant's evidence that his intention when he initially entered his vehicle was to use it to wait for the cab and get warm. In these circumstances the defendant has established on a balance of probabilities that he did not initially occupy the driver's seat with an intention of setting his motor vehicle in motion and has rebutted the statutory presumption found in s. 258(1)(a) of the Code.

[44] Has the crown proven beyond a reasonable doubt the defendant had *defacto* actual care and control of his motor vehicle on the date in question?

[45] As stated in ***R. V Boudreault*, [2012] S.C.J. No. 56**: Care or control within s. 253(1) signifies three elements:

i) *An intentional course of conduct associated with motor vehicles:*

The defendant unlocked the car, sat in driver's seat, put his seat back. He turned on the engine and the lights engaged. Upon arrival on the scene the police officer saw the driver's door open, and the defendant leaning towards the window. The emergency brake was not on. The defendant said his hands and feet could not touch the wheel and pedals although the police officer does not recall where defendant's hands and feet were located, but they were inside the vehicle.

ii) *By a person whose ability to drive is impaired, or whose blood alcohol level exceeds legal limit:*

The defendant admits he was drinking at supper, the hockey game and the clubs. Both of the breathalyzer readings were 170 mg %.

iii) *In circumstances that create a realistic risk, as opposed to a remote possibility, of danger to person or property:*

The defendant was very intoxicated; initially Mr. Thomas was incoherent and confused. When asked to put the car in park the police officer observed he fumbled with gear shift because he didn't initially understand what was being asked. He stumbled out of the car with one shoe on.

[46] The risk of danger is an essential element of care and control. Parliament's objective was "to prevent a risk of danger to public safety". Therefore, conduct that presents no such risk falls outside the intended reach of the offence. To require that the risk be "realistic" is to establish a low threshold consistent with Parliament's intention. An intention to set the vehicle in motion suffices in itself to create the risk of danger contemplated by the offence of care and custody.

[47] A realistic risk of danger may arise in at least three ways:

i) *Defendant who initially does not intend to drive may later change his or her mind:*

The defendant testified even in morning he would not have driven. His plan came up because he got ill and wanted to leave before his friends. The defendant was in his motor vehicle for at least three hours. There is no evidence the car moved during that time. There is no evidence the cab showed up.

ii) *Defendant may unintentionally set the vehicle in motion:*

The defendant had means readily available to set the vehicle in motion. There were no physical or other impediments and not much effort was required to raise seat, or put the car in gear. The driver's door was open. Upon police arriving, they asked the defendant to put the car in park.

iii) *Through negligence, bad judgment or otherwise, a stationary or inoperable vehicle may endanger persons or property:*

Were there any previous poor decisions that night? The defendant got in his car drunk and started the engine, then fell asleep.

[48] At paragraph 46 of ***R. v Boudreault***, ***supra***, the court states:

> "The care and control offence captures a wide ambit of dangerous conduct: Anyone who is intoxicated and in a position to immediately set the vehicle in motion faces conviction on those facts alone."

[Has the defendant] adduced credible and reliable evidence tending to prove that no realistic risk of danger existed in the particular circumstances. Was the defendant's alternate plan objectively concrete and reliable? He called a cab. Was it in fact implemented - no, the defendant passed out in the car. It is unknown if cab came for the defendant. The defendant's level of impairment was severe. This demonstrates that there was nevertheless a realistic risk the defendant might set the car in motion (the emergency brake was not on and the car was running).

[49] In the early morning hours of September 17th the defendant got in his car while drunk, sat behind the wheel, started the engine and fell asleep. When he was awakened by the police almost four hours later he was still very drunk (reading = 170%), he was incoherent and stumbled out of the car with one shoe on.

[50] In ***R. v Boudreault, supra,*** at paragraph 75 the court states:

> "The preventive function of the provision is not to encourage finely tuned legal debates about the characterization of a risk that could materialize: the provision seeks to prevent the risk from materializing by criminalizing a wider array of conduct in which that risk is likely to be, but may not in fact be present."

[51] When the police found the defendant he was sleeping in the driver's seat, the keys were in the ignition, the engine was running, the emergency brake was not engaged. By the defendant's presence in the driver's seat of a running vehicle that he had started, he had the ability to operate the vehicle and had its "superintendence or management".

[52] Therefore, I find the defendant is guilty of care and control (s. 253(a)). Not guilty s. 253(b) C.C.C.

Dated at Sydney, Nova Scotia, this day of September, 2013.

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Jean M. Whalen, J.P.C.