IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Polley 2013 NSPC 38

Date: 20130530
Docket: 2290137
2290138/2290139
2290140
Registry: Amherst

Between:

Her Majesty the Queen

v.

Stephen Daniel Polley

Judge:	The Honourable Judge Paul B. Scovil
Heard:	17 & 18 January 2012; 3 April 2012; 10 January 2013, in Amherst, Nova Scotia
Written decision:	30 May 2013
Charge:	THAT HE on or about the 29th day of May A.D. 2010 at, or near Oxford, Nova Scotia, did having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded eighty milligrams of alcohol in one hundred millilitres of blood did operate a motor vehicle, to wit, a 2003 Chevrolet van, contrary to section 253(1)(b) of the Criminal Code; AND FURTHERMORE ON THE SAME DATE AND PLACE AFORESAID did while his ability to operate a motor vehicle was impaired by

alcohol did operate a motor vehicle contrary to section 253(1)(a) of the Criminal Code;

AND FURTHERMORE ON THE SAME DATE AND PLACE AFORESAID did operate a motor vehicle while disqualified from doing so by reason of an order pursuant to section 259(1) of the Criminal Code contrary to section 259(4) of the Criminal Code;

AND FURTHERMORE ON THE SAME DATE AND PLACE AFORESAID did operate a motor vehicle on the 104 highway in a manner that was dangerous to the public contrary to section 249(1)(a) of the Criminal Code.

Counsel: Mr. Bruce Baxter, for the crown
Mr. H. Edward Patterson, for the defence

By the Court:

[1] If anything can be said about the facts in the matter before this court it would be that it is totally unexplainable how no one was killed or seriously injured when the vehicle of the accused travelled and left the 104 highway in the course of the events that were described by the witnesses. The driving of the vehicle in question was horrendous and eventually caused the vehicle to leave the highway and roll several times. The debris field was impressive and the accused was ejected through the front windshield some 40 feet away.

[2] The facts disclose that on the morning of the incident the accused and his brother-in-law Brian Purdy had left the accused's residence in Pugwash Junction to attend a dry walling job they had secured in Moncton, New Brunswick. Purdy lived close to the accused so he drove his vehicle there, where it was left for the day. The two drove to Moncton in the accused's grey van, leaving at 5:00 a.m. Purdy was driving the van as the accused was prohibited from driving a motor vehicle. The prohibition order prohibiting the accused from driving on the date in question was entered into evidence by the crown at trial. That Purdy was driving when the two left that morning was confirmed by the accused's common law wife. The two travelled to their work site in Moncton, where they worked until noon.

[3] After the work ended at noon, Purdy testified that they went "to some guy's place" where they proceeded to do a great deal of drinking of alcoholic beverages. After that Purdy testified that the next thing he recalled was standing in the ditch after the vehicle had left the road. He did not recall how long they were at "the guy's" house, when they left, who was driving, or any of the events leading up to the vehicle leaving the road. Pictures taken of Purdy showed what was described as a seat belt rash on his right shoulder and cuts to his right forearm. Mr. Purdy could not explain how the injury was obtained.

[4] The crown produced a number of witnesses who observed the van from the time it reached the Nova Scotia border until when it left the 104 highway just prior to the Oxford exit. Those witnesses described extremely erratic driving at high rates of speed. Several felt compelled to call 911 to report the driving of the van. None could give any positive evidence as to who was driving the van. The question that lies at the forefront of these charges was, can the crown prove to the

extent necessary in a criminal trial who was driving the vehicle and that it was the accused.

[5] The crown relies on circumstantial evidence to prove beyond a reasonable doubt that the accused, Polley, was in fact the driver of the van. The crown also argues that even if it cannot prove that Polley was the driver, he can nonetheless be convicted as a party to the offence. Since this court will be finding the accused was the driver of the van, it will not be necessary to consider the crown's argument that the accused was a party to the offence.

[6] Circumstantial evidence is defined as any item of evidence, testimonial or real, other than the testimony given by an eyewitness to the material fact. It is any fact from which the existence of which the trier of fact may infer the existence of the fact in issue. The determination as to whether that circumstantial evidence is that of a relevant nature is one that is left entirely with the trier of fact.

[7] Circumstantial evidence must ground itself in the proper inference of facts. Such proper inferences involved a deduction of facts that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the trial. Such an inference can only be made with objective facts from which one can infer the facts that are required to establish the proposition for which they put forward for. The trier of fact here must caution himself that in order to find guilt on the basis of circumstantial evidence, the court must be satisfied beyond a reasonable doubt that Polley drove the van during the period in question is the only reasonable inference that can be drawn from that evidence. (See *R. v. Griffin*, [2009] 2 S.C.R. 42)

[8] What evidence is there then that can be used to circumstantially prove that the accused was the driver of the van? They are as follows:

> i. Brian Purdy was shown in exhibit number two, photographs one, two, three and four as having a linear rash on his right shoulder. Purdy could not explain how that rash was received. As explained later, this was described by a police officer as being consistent with a seat belt rash resulting from an occupant of a vehicle being held back by a seat belt in an automobile collision.

ii. Photograph five of exhibit number two shows Brian Purdy at the hospital shortly after the accident with a number of small lacerations on his right arm which he appears to be wiping from. He is shown wearing a white t-shirt which has blood on its right side.

iii. Esther Kennedy was travelling on the 104 highway towards Dartmouth. She stopped at the accident scene after the van went off the road. She saw one person standing and speaking to the RCMP. She described the person as a Caucasian male with blood on his right arm from the elbow down. She further testified that the individual was dressed like the person in photo five of exhibit number two. That person was Brian Purdy.

iv. Pat Hallihan was a passenger in a vehicle that was driven by his wife as they drove from New Brunswick to go visit relatives in Halifax. Mr. Hallihan had just been passed by the van when it went off the road in a cloud of dust. He then stopped at the accident scene. He noted that there was a passenger in the vehicle which had the accident. That person was located in the passenger side of the vehicle. By the time Mr. Hallihan walked down to where the vehicle was located, the individual on the passenger side had gotten out of the vehicle. That passenger did not appear badly hurt but was bleeding from the right arm. Mr. Hallihan was able to describe that person as wearing a white t-shirt. Mr. Hallihan was clear that when he first saw the individual in the passenger seat of the vehicle involved in the accident, that person was not moving.

v. Michelle MacArthur is a 30 year old mother of twin boys. She and her mother were travelling back to her home in Oxford from Springhill, Nova Scotia. She saw the van in question swerve out in front of a transfer truck and then go back in, at which time she saw dust flying from where the van left the 104 highway. She was able to say there were only two occupants of the van. As she had first aid experience, she stopped to render assistance. She saw the passenger getting out of the passenger side front of the van. She had a short conversation with him which I will discuss later. She noted another individual that had apparently been thrown from the van some

distance off. That individual was lying there in an unconscious state. In relation to the passenger, as he was getting out she noted that he was taking his seat belt off. She could tell that by the way his hands were moving over the belt. She described the passenger as wearing a white t-shirt with jeans. On the date in question his right forearm was bleeding. She noted the passenger had blood all over his arm. She had no difficulty seeing the passenger as he was getting out of the van. She was able to say that when she had the van pass her vehicle, she noted there were only two individuals in the van. She was able to identify the passenger as the person shown in exhibit number two, photograph one. The person she identified was Brian Purdy.

vi. Jeffery Bezanson gave evidence that he is a paramedic employed with Emergency Health Services with 19 years experience. On the date in question he was stationed in Springhill, Nova Scotia and received a call to go to the accident scene. He was able to attend the accused, Mr. Polley, who had been ejected from the van. Mr. Bezanson was able to testify that the injuries that he found on the accused were consistent with that of having been ejected from an automobile as a result of an accident. Mr. Bezanson was able to say that he had never seen anyone with injuries such as he saw on the accused have those injuries occur when they were a passenger. He also indicated that he'd never seen someone who had been using a seat belt ejected from a vehicle in the manner in which the accused had.

vii. Constable Dale Banks testified in relation to what he found at the accident scene. Constable Banks is currently a retired RCMP member. At the time of this incident, he was an active member with 32 years of experience. In his investigation of the accident scene he noted the blood covering portions of the front passenger seat door. These are represented in photograph 12 of exhibit number one. In addition, Constable Banks was able to examine the seat belts within the vehicle that is in issue. He noted that the passenger side front seat belt was fully extended and showed friction marks that were consistent with that seat belt being worn during the accident. The officer went back later to the impound area where the van was being

held and cut that portion of the seat belt with the friction marks out. Constable Banks brought it to court and it was introduced as evidence. Constable Banks also examined the driver's side seat belt, which had no marks similar to the passenger side and did not appear to him to exhibit any signs of having been worn during the accident. Constable Banks also advised that seat belts cause marks when worn in an accident. Those marks are consistent with the marks shown on Mr. Brian Purdy's shoulder, which were photographed.

viii. Constable Edward Drennan attended at the hospital where he took photographs of the injuries of Mr. Purdy, including his arm and shoulder. He identified those pictures, which were introduced as an exhibit. They showed Mr. Purdy's arm and his white t-shirt with blood on it.

ix. Richard Prevost is an armed security officer who is 33 years of age. He had left New Brunswick on his way to Nova Scotia to attend in the Dartmouth area. He had just come past the Amherst area when he saw the van in question breaking in and out of traffic while swerving at high rates of speed. Mr. Prevost indicated he was travelling at between 100 and 115 kilometres per hour and that the vehicle had gone past him at a high rate of speed. Prevost noted that there were two male occupants. He very shortly came on the scene where he saw a cloud of dust and debris. He noted that the van was the one he had just seen and that it was the one in the accident. As he had paramedic training he stopped to render assistance. He noted that there were women walking around and he also noted a gentleman come out of the vehicle on the passenger side. That individual was somewhat disoriented. The women who were there advised that another person from the accident was in the tree line. He then observed a man in the tree line in an unconscious state. That man was not moving and was unresponsive. Prevost was able to identify the individual who he saw coming out of the passenger side as the one who was wearing a t-shirt on the date in question. Based on his training as a paramedic, in his experience he felt that the accused had obviously been ejected from that vehicle.

[9] Prior to completing my consideration of that inferential evidence that can be taken into account in making a determination as to whether circumstantially the crown has proven that the accused is the driver, I should also give consideration to some evidence which has been argued by the crown as evidence which should be considered in determining who was driving the vehicle on the date in question.

[10] One witness had a conversation with Brian Purdy which dealt with who was driving the vehicle on the day on question. Michelle MacArthur testified that when Mr. Purdy exited the van he stated that he did not know where the driver was. He further referred to the driver as being "Stephen". The crown submits that this evidence should be admitted as "classic *res gestae*" and though hearsay should be admitted for the truth of it. The crown provided no case law supporting this theory, nor was it explained what "classic *res gestae*" is.

[11] The accused indicates that the comments were indeed hearsay and further that when Ms. MacArthur gave the evidence in question, the accused objected and was advised that it was only being introduced as part of the narrative. In actuality, when the accused objected, the court indicated that in its opinion, the evidence was being given as part of the narrative and not evidence of the truth of Purdy's statement. At no time did the crown interject to say that in fact the hearsay evidence was being introduced for the truth of it. It was surprising that at the end of the matter the crown has changed its course, seeking to have Purdy's comments to MacArthur introduced to prove that Purdy was not driving and that the accused was.

[12] This court will not allow the admission of this evidence in for two reasons. Primarily, if the crown had wanted this evidence in as truth of the contents of the statement either as *res gestae* or some other exception to the hearsay rule, the crown should have been very clear at the time what the basis was for the evidence. Secondly, even if it were sought under any of several exceptions to the hearsay rule it would not be admitted. The exceptions to the hearsay rule are varied and to a great extent there exists in the history of such exception very little certainty to guide trial judges. There could be argument for the utterances of Purdy to be accepted on several fronts. It could be argued as a declaration to prove identity. It could be put forward as a spontaneous exclamation or as *res gestae*. In all those exceptions there is a root concern that the utterances be contemporaneous. The rationale being that such contemporaneity is a safeguard against concoction. Here,

while relatively contemporaneous, there still exists a real concern that any such statement would be given to direct suspicion away from Purdy himself. I therefore exclude those statements.

[13] An analysis of the above facts renders the following, which leads inexorably to the conclusion that the accused was the driver of the van. We know that there were only two occupants of the van. This is obvious from several witnesses independent of each other reporting that they observed two occupants as the vehicle travelled the road. We can add that only two injured people were found at the scene, the accused and Purdy. One of these two had to be the driver.

[14] Of the two, one was seen exiting from the passenger side of the vehicle. He wore clothes that matched those worn by Purdy. The individual had a bloody right forearm. Purdy had injuries to his right forearm and was described by several witnesses as bleeding from the forearm. The accused had no such injuries. The bloody forearm matched the bloody right passenger door armrest. Purdy had a seat belt rash consistent with being seated in the right hand passenger seat at the time of the accident. The accused had injuries consistent with being ejected from the vehicle and was found 40 feet or more from the vehicle after it came to rest. There is no other rational conclusion than it was the accused who was driving the van at the time of the accident.

DRIVING WHILE PROHIBITED

[15] Given that the accused was driving the van from at least the border of Nova Scotia to the accident scene and further that he was under a driving prohibition at the time, I accordingly convict him of the charge under 259(4).

IMPAIRED DRIVING

[16] It should first be noted that the crown presented no evidence in relation to the blood alcohol level that would have been in the accused's body at the time of the offence. Accordingly the charge under 253(1)(b) is dismissed.

[17] Until the decision in *R. v. Stellato*, 1993 Carswell Ont 74, 18 C.R. (4th) 127, 43 M.V.R. (2d) 120, 78 C.C.C. (3d) 380 (Ont. C.A.); affirmed 1994 Carswell Ont 84, 1994 Carswell Ont 1159, [1994] 2 S.C.R. 478, 3 M.V.R. (3d) 1, 31 C.R. (4th)

60, 90 C.C.C. (3d) 160 (S.C.C.), courts disagreed whether "impairment" required a marked departure from a normal person, or whether slight impairment sufficed for liability. The Supreme Court in *Stellato* (supra) unanimously adopted the reasoning of Labrosse J.A. in the Court of Appeal (para. 14):

> In all criminal cases the trial judge must be satisfied as to the accused's guilt beyond a reasonable doubt before a conviction can be registered. Accordingly, before convicting an accused of impaired driving, the trial judge must be satisfied that the accused's ability to operate a motor vehicle was impaired by alcohol or a drug. If the evidence of impairment is so frail as to leave the trial judge with a reasonable doubt as to impairment, the accused must be acquitted. If the evidence of impairment establishes any degree of impairment ranging from slight to great, the offence has been made out.

[18] In the case before this court there is significant evidence of a high degree of impairment by the accused. Purdy testified that he and the accused had been consuming a large quantity of alcohol in the afternoon preceding this incident. The driving evidence supplied by numerous witnesses is evidence of the inability to operate a motor vehicle. Michelle MacArthur indicated she smelled alcohol emanating from the accused. Jeffery Bezanson, the paramedic on scene, indicated that he could smell alcohol coming from the accused when he was checking on him. He asked the accused if he had been drinking, to which Mr. Polley replied that he had "a lot to drink". Another paramedic on scene, Ken Leavitt, noticed alcohol mouth odour coming from the accused. He described the accused as being confused and that he presented as an intoxicated man. The accused as well told Leavitt that he had not been using drugs, that he had been drinking all day. A number of other witnesses described the degree of alcohol impairment they noted in relation to the accused. There is absolutely no doubt whatsoever that the accused was highly impaired by alcohol during the course of his driving. Accordingly I convict him of the offence under section 253(1)(a).

DANGEROUS DRIVING

[19] The law in relation to the essential elements of the offence of dangerous driving were recently reviewed in *R. v. Thomas* [2012] N.S.J. No. 711 (N.S.P.C.) where Judge Tax of our Provincial Court stated:

> The law in relation to this charge has recently been reviewed by the Supreme Court of Canada in *R. v. Roy,* 2012 SCC 26 (CanLII). In that case, decided in June 2012, the court confirmed and clarified their earlier decisions in *R. v. Beatty*, 2008 SCC 5 (CanLII) and *R. v. Hundal*, [1993] 1 S.C.R. 867 with respect to the analysis to be conducted by the trier of fact to determine if the *actus reus* and *mens rea* of this offence have been established beyond a reasonable doubt.
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> In *Roy*, supra, Justice Cromwell delivered the decision for the court and stated at para. 34 that:
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> > In considering whether the *actus reus* has been established, the question is whether the driving, viewed objectively, was dangerous to the public in all of the circumstances. The focus of this inquiry must be on the risks created by the accused's manner of driving, not the consequences, such as an accident in which he or she was involved.
>
> As a result, there must be an objective inquiry into the risks created by the manner of driving in all of the circumstances of the case, without simply focusing on the consequences of the accused's driving.
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> With respect to the *mens rea* analysis, the court stated in *Roy*, supra, at para. 36, that the analysis will depend on whether the dangerous manner of driving was the result of a "marked departure from the standard of care which a

> reasonable person would have exercised in the same circumstances". Cromwell, J. pointed out in para. 37, that simple carelessness does not represent a "marked departure" from the standard of care expected of a reasonable person in the same circumstances and that "the marked departure" standard is a "modified objective standard", which is the minimum fault requirement for a criminal offence. Mr. Justice Cromwell added that if there was proof of subjective *mens rea*, that is, "deliberately dangerous driving", that would support a conviction for dangerous driving, but proof of that subjective *mens rea* is not necessarily required (at para. 38).
>
> Based upon those comments of the Supreme Court of Canada and the plain meaning of section 249(1)(a) of the *Criminal Code*, the court must have regard to all of the circumstances of the risks created by the manner in which the white BMW was operated, including the nature, condition and use of the place at which the motor vehicle was being operated and the amount of traffic that might reasonably expected to be at that place.

[20] Here the traffic conditions on the 104 were medium to heavy. Esther Kennedy, a civilian witness, reported that the accused had passed at a high rate of speed. She noted the van driven by the accused to be swerving and driving erratically to the point where it almost lost control which caused her to feel that an accident was imminent. She called 911 as a result. Deborah Vaters noted the accused's van swerving in and out of traffic and at one point was very close to colliding with the back of their car. The van was, according to Ms. Vaters, all over the road, at times striking the gravelled portion of the highway. The driving was such that her husband called 911. Annie Crowe reported the van coming along really fast. She was concerned as the van was swaying. She pulled over with the intention to call 911. Witnesses all described a grey van with mud on it, leading to no other conclusion than it was the van driven by the accused which was the subject of their attention. There is no question that the driving of the accused, given all the conditions, including the evidence of his intoxication, was

dangerous in the extreme and clearly met the test for the *actus reus* of dangerous driving.

[21] The driving by the accused was beyond careless and no one could help but realize the dangers associated with driving in that manner. The accused chose to drive in such a manner that he put everyone on that highway that afternoon in imminent risk of great harm. There is nothing before this court to suggest that the driving by the accused was anything but intentional. The *mens rea* of this offence is made out. Accordingly I convict the accused of the offence under 249(1)(a).

PCJ