IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Crouse, 2006 NSPC 41

Date: 20060926
Docket: 1601062 & 1601063
Registry: Bridgewater

Between:

R.

v.

Ryan Paul Crouse

Judge: The Honourable Judge Anne E. Crawford

Heard: August 14, 2006 in Lunenburg & August 23, 2006 in Bridgewater, Nova Scotia

Charge: s. 255 of the *Criminal Code of Canada* x 2

Counsel: Lloyd Tancock, for the Crown
Alan Ferrier, for the defence

By the Court:

[1] Ryan Paul Crouse has been charged:

> on or about the 6th day of November, 2005 at or near Bridgewater, Lunenburg County, Nova Scotia he did unlawfully operate a motor vehicle while his ability to operate a motor vehicle was impaired by alcohol or a drug and did cause bodily harm to Lynn Boyard Hogenson, contrary to Section 255(2) of the Criminal Code of Canada;
>
> and did
>
> unlawfully operate a motor vehicle while his ability to operate a motor vehicle was impaired by alcohol or a drug and did cause bodily harm to Michael Jeffrey Hubley, contrary to Section 255(2) of the Criminal Code of Canada.

Facts

1. The accident

[2] Just after midnight on November 6, 2005 the defendant, aged 23, was the driver of a motor vehicle involved in a single motor vehicle accident on King Street in the town of Bridgewater, Nova Scotia. Lynn Boyard Hogenson and Michael Jeffrey Hubley were passengers in his vehicle. As a result of the accident Mr. Hubley suffered a fractured rib. Mr. Hogenson's injuries were more serious; he sustained three fractures of the pelvis, a fractured femur and brain damage. He was in hospital until mid-January, 2006 and is still under doctor's care, with no ultimate prognosis.

[3] The defendant and his passengers were returning from an evening spent with other friends at the home of Lars Hagen, age 21, in Pleasantville, just down the Lahave River from Bridgewater. In a car behind them were Mr. Hagen, Garrett Robar and Nick Colpitts.

[4] Hogenson, Hubley, Hagen and Robar were called as Crown witnesses. Hogenson remembers nothing about the evening before or the accident itself.

[5] Although Hubley, Hagen and Robar disagree on details, all are in accord that the six young men in the two motor vehicles spent at least several hours on the evening of November 5, 2005 at Mr. Hagen's father's residence, drinking, playing

pool and watching a hockey game. Because the pool table was in a barn behind the Hagen residence and the television was in the home itself, there was a good deal of movement between the two locations. This, plus the amount of liquor that was being consumed, made it difficult for anyone to know exactly or even approximately how much anyone else was drinking.

[6] Hubley testified that the defendant picked him up at his residence sometime after supper and that he himself consumed the 12 pack of Keith's beer he took with him, but that the defendant took no alcohol with him and he did not see him drink that night. Hubley also testified that the defendant spent a lot of the evening behind the wheel. He took Hubley back home to get a change of clothing, went back to Hagen's, then returned to Bridgewater to close up the gas bar where he worked, and went back to Hagen's again.

[7] Lars Hagen testified that he picked Hubley up and that the defendant arrived later with Garrett Robar. He said that he himself consumed an entire quart of rum between 6 p.m. and 10:30 or 11 p.m. He said he "believed" the defendant brought beer with him and "thought" he had one beer.

[8] Garrett Robar testified that when the defendant picked him up, Hogenson was in the car with him. He said that he took liquor with him, probably 12 Labatt Blue beer; and that on the way to Hagen's they stopped at the liquor store. He said that Hogenson and the defendant went in and came out with liquor which was put in the trunk of the car, but he did not see who brought what out. He did not see the defendant drinking because the defendant was in and out and had to close up the gas bar. He said that they were all going back to Bridgewater so that the drivers (the defendant and Nick Colpitts) could have some drinks before they all went to the bar.

[9] As to the accident itself, Hagen and Robar were in the vehicle behind the defendant and neither saw what happened. Each said that the first thing they recall is the lights of the defendant's vehicle shining back at them. Hubley, who was in the front passenger seat of the defendant's vehicle said that all he could recall was the vehicle hitting the gravel shoulder of the road to the right and the defendant's hands on the wheel bringing the car back onto the road.

[10] Because of their conflicting testimony due to their own consumption of alcohol, I conclude that I cannot rely on the evidence of these witnesses either as to the defendant's consumption of alcohol or as to the cause of the accident, and that the best

evidence of what occurred that night is the testimony of the police officers and others who attended at the accident scene and dealt with the defendant that night.

[11] The first person to arrive on the scene appears to have been Dr. Anne Sprechlin, a radiologist, who was travelling south on King Street (toward Pleasantville), saw that the defendant's car had collided with a telephone pole and stopped to assist. She described the defendant's car as facing south in the south bound lane, partially tipped on the sidewalk. She said the driver, the defendant, was trapped underneath the car and was unconscious. Another passenger had been thrown out of the vehicle and was also unconscious. There was another vehicle parked on the other side of the road heading north toward Bridgewater.

[12] Cst Brekker of the Bridgewater Police Department was on patrol with Cst. Richard that night and early morning. At 12:08 a.m. they were dispatched to this scene. Cst. Brekker said that the vehicle was extremely damaged, with a lot of debris and steam coming from it. He found the driver, the defendant, trapped under the vehicle but with his torso and legs still under the console. His seatbelt was circling his neck and he was not breathing. Cst. Brekker cut the seatbelt and cleared his airway to restore his breathing. He noted a "large odour" of alcohol from the defendant's airway when he cleared it. The defendant was unconscious, but Cst. Brekker remained with him until the ambulance and fire department arrived to extract him from the vehicle. He stayed with him in the ambulance to the South Shore Regional Hospital. Throughout this period he was securing the defendant's head and continued to smell alcohol on his breath. He formed the opinion that the defendant was impaired.

[13] David Wynn, senior operations paramedic with Emergency Health Services, was dispatched to the scene at 12:10 a.m. He and his partner found three patients; his partner dealt with Lynn Hogenson, who had been ejected from the vehicle; and he dealt with the defendant and Michael Hubley, whom he found sitting on a rock. The defendant was pinned under the vehicle, unconscious, with the weight of the vehicle resting on his chest. He was grey and blue from lack of oxygen and his breathing was increasingly laboured. He and his clothing were soaked in gasoline; and Mr. Wynn could not distinguish whether the alcohol he smelt was coming from the defendant's breath or just from the beer in the area.

[14] When a second ambulance arrived, care of the defendant was turned over to paramedic Harold Zwanepol. As soon as the Fire Department removed the weight of

the car from the defendant's chest he was placed on a back board and Zwanepol inserted an intravenous catheter in his arm. Zwanepol stated that there was a strong odour of alcohol pervasive in the area near the defendant, although he did not remember specifically smelling his breath. He concluded, from what he called "pattern recognition" – a motor vehicle accident involving a person the age of the defendant, the hour, and the smell of alcohol – that the defendant was intoxicated.

[15] Dr. Christian Pugh was the emergency room physician on duty when the defendant arrived at the South Shore Regional Hospital just before 1:00 a.m. He described the defendant as being conscious, but not completely lucid. He said the defendant had multiple rib fractures and was breathing abnormally, so a tube was inserted into the side of his chest to expand his lung. When his breathing was stabilized, blood work and CT scans were done to determine the cause of his altered level of consciousness.

2. The blood test

[16] Dr. Pugh ordered the blood tests, which were entered into the computer by the nurses. In response the on-call laboratory technician Eileen Barkhouse attended at the emergency room with her collection kit. She testified that after confirming with Dr. Pugh and the police officer the identity of the patient – the defendant – she handed the required 4 tubes to the doctor, who filled them from a vein in the patient's arm which h e had opened for the insertion of a second IV tube.

[17] Both Dr. Pugh and Ms. Barkhouse were closely questioned as to the number of samples drawn, the reasons for drawing each sample, and the possibility of contamination from isopropyl alcohol or other chemicals used to cleanse the area.

[18] There was a discrepancy between the testimony of Dr. Pugh and Ms. Barkhouse as to the number of samples drawn and the colour coding of the tubes into which the samples were received. Dr. Pugh testified that he drew 3 samples; whereas Ms. Barkhouse said that she handed 4 tubes to Dr. Pugh. After listening again to the testimony of both witnesses, I am satisfied that Ms. Barkhouse's testimony is more accurate than Dr. Pugh's in this regard. Although Dr. Pugh ordered the tests, it was Ms. Barkhouse who was responsible for the physical process involved in obtaining and analyzing the samples. Ordinarily, she herself would have drawn the blood; however, as Dr. Pugh had already opened the defendant's vein for other purposes, he actually drew the blood and filled the vials handed to him by Ms. Barkhouse. She was

therefore in a better position than the doctor to know how many samples were taken and the colour and purpose of the vial into which each was received. Relying on her testimony, I am satisfied beyond reasonable doubt that of the four samples taken, the sample used to test the alcohol level in the defendant's blood was received into an empty tube with a brown stopper.

[19] As to the purpose for the blood alcohol (ethanol) test, although Dr. Pugh testified that the result, when it was received, did not affect his management of the patient, I am satisfied that it was ordered for a therapeutic, not a forensic purpose. Dr. Pugh testified that he ordered it, with other chemical tests to help determine the cause of the defendant's altered "sensorium" or level of consciousness. Dr. Pugh also testified that, although he knew that Cst. Brekker was present in the room, it was later, after the drawing of the blood for medical purposes, that Cst. Brekker asked him to draw blood for him, pursuant to a warrant, which apparently was done shortly before the defendant left by ambulance for hospital in Halifax. The results of that later test were not produced before the court.

[20] Dr. Pugh testified that there was a theoretical possibility of cross contamination from the isopropyl alcohol swab used to cleanse the skin before insertion of the IV needle if the skin was not allowed to air-dry before the needle was inserted. But in this case, he said, the area did air-dry. He also testified that the lab equipment at the South Shore Regional Hospital cannot produce a reading for isopropyl alcohol, which has a different "assay" than the ethanol alcohol contained in alcoholic beverages. I am satisfied beyond reasonable doubt that in this case the isopropyl alcohol swab did not affect the reading obtained from the analysis of alcohol in the defendant's blood.

[21] Ms. Barkhouse was questioned as to the accuracy of the laboratory instrument used to analyze the blood samples taken from the defendant. She testified that the instrument was an RXL Dimension and that she has been trained to operate the machine and to run the daily tests which ensure its accuracy. The machine is capable of running hundreds of such samples at a time and there is no possibility of cross-contamination of samples. When each analysis is completed a ticker tape printout is generated and the results are automatically sent to the computer at the same time. The ticker tape printout alerts the staff to any problems with the sample or analysis. In this case no such problems were indicated. In addition the manufacturer's recommendations require three levels of control tests to be run every twenty-four hours to ensure the accuracy of test results. These tests had been run at 11:43 a.m. on

November 5, 2005 and were not due to be run again until the same time on the 6th. As a result of these control tests and the printout from the ticker tape, Ms. Barkhouse stated that she could testify that the machine was working properly at 1:32 a.m. and that the test results it produced were accurate. Accordingly, I am satisfied that the test result reported here accurately states the defendant's blood alcohol level at 1:10 a.m.

3. The investigation

[22] Cst. Scott Feener of the Bridgewater Police Department, a Level II accident scene investigator was qualified as an expert in the calculation of speed of motor vehicles based on measurements of marks left by the vehicles on the road. He examined the scene both at the time and on November 7, 2005, taking measurements and photographs. He stated that from his calculations and the position of the defendant's vehicle he determined that the vehicle had been travelling north, went off the pavement, corrected, rotated clockwise in a yaw, jumped the curb, slid into a fence around a fire hydrant, hit the hydrant and came to rest against a telephone pole, snapping the pole.

[23] After taking the required measurements and determining the road conditions at the time and the drag factor of the pavement, he used a standard set of mathematical equations to determine that the defendant's minimum speed as he began to rotate in the yaw was 85.65 kilometers per hour. The speed limit at that location was 50 kilometers per hour.

[24] I find that the defendant's speed was at least 85.65 kilometers per hour as he lost control of the vehicle.

[25] Cst. Brekker testified as to the procedure he followed to obtain a copy of the results of the blood alcohol analysis from the hospital. On January 17, 2006 he successfully applied for a warrant to search the defendant's hospital records. He then called the medical records department at the South Shore Regional Hospital, to inform them of the warrant. The next day he served the warrant on staff person Cynthia Hatt. She handed him an envelope containing copies of the relevant documents, including the blood alcohol report entered as Exhibit 1 in these proceedings. On cross-examination Cst. Brekker admitted that he had not personally compared the copies he was given with the originals in the defendant's hospital file.

[26] Cst. Brekker forwarded Exhibit 1, together with the defendant's height, weight and age, which he had obtained in December, 2005 when the defendant attended for fingerprinting and photographing, to the RCMP forensic lab for an opinion as to the defendant's degree of impairment by alcohol at the time of the accident.

[27] Laurie Anne Campbell, a forensic alcohol specialist employed with the RCMP forensic laboratory in Halifax was qualified as an expert in the effects of alcohol on the human body and in absorption and elimination rates of alcohol from the human body. She was able to convert the results of the hospital analysis, 47.2 millimoles of alcohol per litre of blood to the legally required format of 218 milligrams of alcohol per 100 millilitres of blood at 1:10 a.m., the time the sample was taken. She then extrapolated back to 12:10 a.m., the time of the accident, assuming a 23 year old male individual weighing 170 pounds, no alcohol consumption in the 30 minutes before the accident, and an elimination rate of 10-20 milligrams % per hour, to arrive at a blood alcohol level at the time of the accident of 184 to 227 milligrams per 100 millilitres.

[28] As to impairment in ability to drive, the witness stated that all individuals are impaired in the ability to drive at 100 milligrams of alcohol in 100 millilitres of blood, and inexperienced drinkers may be impaired at lesser levels down to 50 milligrams per cent. Anyone with a level of blood alcohol of 184 to 227 milligrams per cent would definitely be impaired in ability to drive. At such a level, an individual would be intoxicated and most would be showing advanced indicia of impairment; although some individuals are able to mask such indicia, even they would nonetheless be impaired.

[29] If the assumption that the defendant had nothing to drink in the last 30 minutes before the accident was incorrect, and all of his drinking was done within the last 30 minutes, he would have had to consume 9 to 11 bottles of beer or 13 to 16 ounces of hard liquor within that time to result in the reading obtained at the hospital at 1:10 a.m.

[30] On cross-examination the witness admitted that she did not know the time of the defendant's last drink or his pattern of drinking that evening. If he had been drinking throughout the evening and had also continued to consume in the last half-hour before the accident, it would take less consumption in that last half-hour to reach the hospital reading.

[31] On cross-examination Ms. Campbell stated that, although she did not know the defendant's exact elimination rate, she was confident in saying that it would have been no lower than 10mg. per cent per hour. Only a very sick individual would have a rate less than that. If the defendant in fact had a rate of elimination higher than 20 mg. percent, as do some alcoholics, then his blood alcohol level at the time of the accident would have been even higher than what she calculated based on the normal range of elimination rates of 10-20% per hour.

[32] The defence called no evidence.

Issues

[33] The defence agrees that the two individuals named in the charges were injured in the accident which occurred on November 6, 2005 in Bridgewater, Nova Scotia and that the defendant was the operator of the motor vehicle. Factual issues raised by the defence have been resolved in the course of fact-finding above. The main issue which remains is whether or not the Crown has established beyond reasonable doubt that the defendant was impaired by alcohol in his ability to operate a motor vehicle at the time of the accident.

[34] Two subsidiary issues are:

> 1. Has the Crown established the accuracy of the copy of the blood analysis report tendered as Exhibit 1?
>
> 2. If so, can the Crown rely on the expert testimony of Ms. Campbell to establish impairment, given the recent case law in *Gibson* and *Cave*?

1. Exhibit One

[35] Exhibit 1, the copy of the hospital computer printout of results of the defendant's blood alcohol analysis, was handed to Cst. Brekker as part of a package of documents prepared for him by hospital staff in response to his service on them of the search warrant. He did not see the original documents or compare the copies to them. He was therefore unable to state that Exhibit 1 is or is not a true copy of the original printout.

[36] No one from the hospitals records department was called to testify to the accuracy of the copy. However, both Dr. Pugh, who originally ordered the test, and the lab technician, who conducted the test and produced the report, were shown the Exhibit. Ms. Barkhouse, stated that it was the end report which had been printed out in the emergency room for the use of the emergency doctor; and Dr. Pugh stated that he had seen and noted the ethanol level from the report, which was then attached to the defendant's chart by the emergency room nurse.

[37] I find that the Crown has established, through the testimony of Dr. Pugh and Ms. Barkhouse that Exhibit 1 is a true copy of the computer printout report on the defendant's blood alcohol level and therefore that the defendant's blood alcohol level at 1:10 a.m. on November 6, 2005 was 47.2 millimoles per litre of ethanol in serum. Relying on the expert evidence of Ms. Campbell, this converts, as stated above, to 218 milligrams per 100 millilitres of whole blood.

2. Expert evidence of impairment

[38] The recent judgments from the Nova Scotia Court of Appeal in *R. v. Gibson*, 2006 NSCA 51 and *R.v. Cave*, 2006 NSCA 521 have, according to defence counsel, resulted in some consternation in the defence bar. Both were cases where the defence sought to rebut the presumption of accuracy in s. 258 (1) (g) of the *Criminal Code*, available to the Crown in cases where breath or blood samples have been taken in accordance with the prerequisites outlined in s. 258 (1). That presumption allows the Crown to prove the defendant's blood alcohol level by introducing a Certificate of Qualified Technician, rather than calling the technician or another expert. As no such certificate is available in this case, that presumption is not in issue here.

[39] Indeed, this is not a case under s. 253(b) of the *Code*, at all. The Crown's task here is not to prove beyond reasonable doubt that the defendant's blood alcohol exceeded 80 milligrams of alcohol in 100 millilitres of blood. Rather the Crown here has the simpler, but sometimes more difficult, task to establish beyond reasonable doubt that the defendant's ability to operate a motor vehicle was impaired by alcohol or a drug. To assist in that task, the Crown called expert evidence as to the defendant's blood alcohol level.

[40] I must bear in mind the different purpose for which expert evidence is called in this case in assessing the applicability to this case of *Gibson* and *Cave*, as well as *R. v. Boucher*, 2005 SCC 72, on which both *Gibson* and *Cave* rely.

[41] In all three cases the defence called an expert to raise a reasonable doubt that, based on the defendant's evidence of his drinking, the results of the Crown's blood alcohol analysis was correct. In *Boucher* the trial judge disbelieved the defendant's evidence as to the amount and timing of alcohol consumed; there was thus no factual basis for the expert opinion, and no "evidence to the contrary" and the accused was convicted. The Superior Court reversed the conviction, finding that the evidence as a whole, including the expert evidence, raised a reasonable doubt; and the Court of Appeal upheld the acquittal. The majority of the Supreme Court of Canada reinstated the conviction, holding that the trial judge made no error in law in simply stating that she disbelieved the accused, and that in so doing she was implicitly addressing the first two steps in *R. v. W.(D.)*.

[42] Deschamps, J., for the majority, then went on to consider whether, as the Court of Appeal held, a reasonable doubt was raised by the evidence as a whole, including the lack of symptoms other than the smell of alcohol and the expert evidence, deprived of its factual basis. She stated at para 33:

> The absence of symptoms of impairment is generally not sufficient to constitute evidence to the contrary that can be used to rebut the presumption of accuracy. This is because a lack of evidence of the usual symptoms of impairment, such as staggering and slurred speech, does not provide information about the actual blood alcohol level.

and then noted at paragraph 34 that the expert had not enlightened the Court as to the defendant's alcohol tolerance and it was not a matter for judicial notice, concluding at paragraph 35 that neither the lack of symptoms nor the expert evidence could therefore be evidence to the contrary.

[43] In *Gibson*, although the trial judge had believed the defendant's testimony as to his consumption, Fichaud, J. for the Nova Scotia Court of Appeal nevertheless relied on this passage from the judgment of Deschamps, J. and concluded at para 19:

> ¶ 19 In Boucher the trial judge, whose decision was restored by the Supreme Court of Canada, disbelieved the accused's testimony of his drinking pattern. So that factual assumption of the expert was not proven. This differs from the present case, where the trial judge accepted Mr. Boucher's testimony. But Justice Deschamps' comments, which I have italicized, support another principle that does apply to Mr. Gibson's case. An expert opinion, based only on average tendencies of the population

> instead of the accused's rates of alcohol absorption or elimination, is without foundation. As stated in Boucher, it is not "evidence to the contrary" under s. 258(1)(c). Neither, in my view, can it be "evidence tending to show" the accused's lower blood alcohol concentration under s. 258(1)(d.1).

[44] Although the defence in the present case argued that this conclusion applies equally to the Crown when it presents similar expert opinion, I note the following differences between this case and the cases cited above, which lead me to distinguish them:

> 1. This is not a breathalyzer case; i.e., as stated above, the Crown is not required to prove any specific blood alcohol level for the defendant, but merely that his level was such as to impair his ability to drive.
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> 2. Unlike the defence in s. 258 cases, the Crown does not have the ability to produce evidence of a defendant's specific alcohol tolerance or absorption and elimination rates and has no choice but to rely on a range, provided that the Crown must establish that the range would include the defendant;
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> 3. This opinion is based, not on a problematic drinking pattern, but on a scientifically reliable blood alcohol test;
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> 4. The expert is not calculating forward from a drinking pattern over a period of time, but backward from a fixed, reliable figure at a given moment in time;
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> 5. The range produced by the expert's calculations in this case at its lowest puts the defendant at more than twice the legal blood alcohol limit and approaching twice the level where all drinkers are impaired in their ability to drive, i.e. this is not a case where, even if the expert opinion is accepted, the defendant might or might not have been impaired.

[45] It is of course trite law that an expert opinion is of no value unless the party proffering it proves each of the elements of the hypothetical on which it is based. In considering the reliability of the expert opinion as to the defendant's blood alcohol level at time of driving, I must decide whether or not the Crown has established the following elements:

> male
> age 23
> 5'10" in height

170 lb in weight
operating a motor vehicle at 12:05-12:10 a.m.
Sample taken at 1:10 a.m. showing 47.2 mmol/litre ethanol in serum
no consumption in last ½ hour before 12:05 a.m.
Rate of elimination of 10-20 mg.% per hour

[46] I am satisfied that gender, age, height, time of driving, and accuracy of the blood sample have been established beyond reasonable doubt.

[47] As to weight, the Crown offered the evidence of the defendant's weight in December, 2005, which seemed in accord with the defendant's appearance in court. There is no evidence that the defendant either gained or lost weight in the interval between the accident and his appearance for fingerprinting a month later; although it is not inconceivable that he may have lost weight, given the severity of his injuries and the length of his stay in hospital. On cross-examination Ms Campbell indicated that a variance of 20 pounds in either direction – either heavier or lighter – would affect the reading by 3 milligrams per cent per beer consumed.

[48] Similarly there is no evidence as to time of last drink. For purposes of her calculations Ms. Campbell assumed no consumption in the last half hour before the accident. She stated that if, on the other hand, all of the alcohol was consumed within that half-hour period, the defendant would have had to consume 9 to 11 beers or 13 to 16 ounces of hard liquor to have the blood alcohol reading obtained by the hospital at 1:10 a.m.

[49] As to the rate of elimination, although there is no evidence to establish the defendant's exact rate, I am satisfied from Ms. Campbell's testimony that his rate was not lower than 10mg.% per hour.

[50] Although the Crown has not established the defendant's exact weight or time of last drink beyond reasonable doubt, I find that there is sufficient evidence on those elements to allow me to rely on the conclusion of the expert, not to establish the exact range to which she testified, 184 to 227 mg%, but to conclude that, even if the defendant's blood alcohol level was lower, due to variation in either his weight or time and amount of last drinking, it was still more than sufficient to render him impaired in his ability to operate a motor vehicle at the time in question.

Conclusion

[51] On all of the evidence before the court, including the evidence of the expert witness, the evidence of speed, time of night, activities and drinking pattern of the defendant's companions, smell of alcohol from the defendant's breath and lack of other explanation for the accident, I find that the Crown has established beyond reasonable doubt that the defendant was impaired in his ability to operate a motor vehicle at the time of the accident.

[52] All other elements of the offences having been admitted by the defence, I find the defendant guilty as charged.