IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Legrow, 2007 NSSC 4

Date: 20070110
Docket: CR SAT 266993
Registry: Antigonish

Between:

William J. Legrow

Appellant

v.

Her Majesty the Queen

Respondent

D E C I S I O N

Judge: The Honourable Justice Douglas L. MacLellan

Heard: October 10th, 2006

Counsel: Joel E. Pink, Q.C., for the appellant
Ronald J. MacDonald, Q.C., for the respondent

By the Court:

[1] The appellant, William Legrow, appeals his conviction in Provincial Court in Antigonish by Judge John Embree on a charge of having care or control of a motor vehicle having consumed alcohol in such a quantity that the concentration in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood, contrary to Section 253(b) of the ***Criminal Code of Canada***.

TRIAL EVIDENCE

[2] The evidence before the Provincial Court Judge consisted of testimony from one Crown witness, and in addition, a number of admissions made by the defence at the start of the trial.

[3] The admissions were put on the record by the Crown Prosecutor and were as follows:

1. That the appellant was found behind the wheel of his truck parked in a parking lot in the Town of Antigonish;

2. The appellant was asleep when the police officer approached the vehicle at 3:26 p.m. and the driver's seat was in an inclined position;
3. The police officer noted the following symptoms of impairment, namely, smell of alcohol on his breath, red and watery eyes and that the appellant was somewhat disoriented;
4. The engine of the appellant's vehicle was running when the police officer approached the vehicle and when asked to turn the engine off the appellant fumbled with the control;
5. The appellant was given the Roadside Screeding Device and registered a fail;
6. He was then given a breathalyzer demand and taken to the police station and registered two readings of 190 milligrams of alcohol in 100 millilitres of blood;
7. The appellant's vehicle was searched and an empty 50 millilitre vodka bottle was located inside the vehicle under the driver's seat.

[4] The Crown witness described that he had followed the appellant's vehicle as it approached the Town of Antigonish on the Trans Canada Highway. He was behind the vehicle for a number of kilometres and said that it was swerving on the

highway. He said it would cross over the yellow line and go back onto the shoulder of the highway. He said he could see the driver's face in the rearview mirror and every time he yawned he would swerve on the highway. He said that at one point as the appellant's car was beside a transport tractor trailer, which he was passing, he swerved close to the rear wheel of the transport truck.

[5] He said the swerving he noted was done three or four times and that he hit the gravel shoulder of the highway maybe two times as he followed the vehicle.

[6] He said that he called the police from his vehicle and reported what he had seen. He said the appellant's vehicle turned off the highway into Antigonish. He said that would be about noontime prior to the appellant being located by the police in the parking lot.

[7] The appellant testified that on the day in question he had travelled from the Halifax area on a business trip. He said he drove to Port Hawkesbury and that around 1:15 p.m. he left Port Hawkesbury heading back to Halifax. He said that he stopped in Antigonish to pick up a cheque he was expecting from a Mr. MacIsaac who was a contractor and that when he arrived at Mr. MacIsaac's office there was

no one there. He said he decided to wait in the parking lot of the office to see if Mr. MacIsaac would show up. He said he arrived in Antigonish around 2:15 p.m. and that on the way to Antigonish he had attempted to call Mr. MacIsaac but couldn't reach him on the phone. He said he became frustrated about that and said that the incident when he nearly hit the transport truck was because he was dialling Mr. MacIsaac's phone number. He said that he went to Mr. MacIsaac's office but it was closed and that he then called his office in Dartmouth and told a Mr. Blake, an employee, that he was going to be late because he was going to wait for Mr. MacIsaac to show up with the cheque.

[8] He said he had nothing to drink prior to driving to Antigonish and that after talking to Mr. Blake he drove to the liquor store in Antigonish and bought a pint and two small bottles of vodka. He said he drove back to Mr. MacIsaac's office, parked his truck and drank the pint of vodka and one of the small two ounce bottles.

[9] He said that he then fell asleep in the truck. He said he kept the motor running because he needed to keep his cell phone operating because the battery was low. He said that prior to falling asleep and after drinking the vodka he spoke

to Mr. Blake and told him he intended to wait for Mr. MacIsaac to show up. He said that Mr. Blake asked him if he was drinking and that he had acknowledged that he was but that he was not going to move the truck.

[10] He said he told Mr. Blake that if Mr. MacIsaac showed up before 5 p.m. that he would call him and get him to come to Antigonish to pick up the truck.

[11] He said he then fell asleep and was awakened by the police officer. He said he never intended to move the truck after he had consumed the vodka.

[12] Allan Blake testified for the defence. He said he worked for the appellant and that around 3 p.m. on the day in question, he called the appellant and told him to leave the truck where he was outside Mr. MacIsaac's office. He said he knew he had been drinking because of the way he was speaking. He said he agreed to come to Antigonish to pick him up if Mr. MacIsaac showed up with the cheque.

[13] The central issue before Judge Embree was whether the Crown had proven whether the appellant was in care or control of his vehicle when he was approached

by the police officer at 3:26 p.m. on the day in question. That was an essential element of the charge.

[14] Judge Embree concluded based on the appellant's evidence and the other defence evidence that the appellant had rebutted the presumption set out in Section 258(1)(a) of the ***Code***. That provides:

> 258(1)(a) In any proceedings under subsection 255(1) in respect of an offence committed under section 253 or in any proceedings under subsection 255(2) or (3),
>
> (a) where it is proved that the accused occupied the seat or position ordinarily occupied by a person who operates a motor vehicle, vessel or aircraft or any railway equipment or who assists in the operation of an aircraft or of railway equipment, the accused shall be deemed to have had the care or control of the vehicle, vessel, aircraft or railway equipment, as the case may be, unless the accused establishes that the accused did not occupy that seat or position for the purpose of setting the vehicle, vessel, aircraft or railway equipment in motion or assisting in the operation of the aircraft or railway equipment, as the case may be;

[15] The trial judge found that since the appellant had in fact rebutted the presumption it was up to the Crown to prove care or control without relying on the presumption.

[16] After reviewing a number of the leading cases on care and control the trial judge said:

> In my view, the evidence here establishes that the defendant demonstrated and exercised care or control over his vehicle from 2:30 up to and including 3:28 p.m. on September 23rd, 2003. A risk of setting the vehicle in motion was not present while the defendant was asleep.
>
> However, both before falling asleep and at any point that he could have awakened, the risk was present and real despite his express intentions to the contrary. I point out the judgements referred to in Hannaman which I have already referred to at paragraph 51 of Mr. Justice Hill's judgement.
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> Given the provisions of S. 258(1)(c), there is a period of time when the defendant was awake, in care or control of his vehicle, and with a blood-alcohol level in excess of 80 milligrams of alcohol in 100 milliliters of blood.
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> While the evidence does not establish when the defendant went to sleep, I do have his evidence of what he did after 2:30 p.m. and I do have the evidence of Mr. Blake that he talked to the defendant close to 3 p.m.
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> One of the Crown submissions before me was that the overlap period from 2:16 p.m. to 2:30 p.m. by virtue of the operation of S. 258(1)(c) would allow the Court to enter a conviction on the 253(b) charge during a time that, by the defendant's own admission, he was operating his vehicle driving to and/or from the liquor store.
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> I do not accept that that provides a basis for the Court to enter a conviction on the 253(b) charge here. The evidence on the basis of which I am dealing with this matter is that the defendant had not consumed any alcohol up until just after 2:30 p.m.; therefore, there would not have been any alcohol in his system between 2:16 and 3:30 p.m.

> I recognize that there is no expert evidence before me on the subject of evidence to the contrary or evidence tending to show that the concentration of alcohol in the blood of the accused at the time when the offence was alleged to have been committed did not exceed 80 milligrams of alcohol in 100 milliliters of blood.
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> However, I do not consider that I need expert evidence in these circumstances to conclude that there is evidence before me that constitutes evidence to the contrary or evidence tending to show the factors I have just recited. Where the issue is and where the evidence suggests there is no alcohol consumed, I do not consider that I need expert evidence to demonstrate that there is no alcohol in the system.
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> In my view, the Crown has established here and the evidence demonstrates beyond a reasonable doubt all of the elements of the offence charged here under S. 253(b) of the **Criminal Code**. The defendant was in care and control of the motor vehicle at the time and place in question, having consumed alcohol in such a quantity that an office was committed under S. 253(b), and I find him guilty of that offence.

[17] The test which this Court must apply to this summary conviction appeal is set out in the case of ***R v. Nickerson*** (2002) 178 N.S.R. 189 where Cromwell, J.A. said: [page 191]

> The scope of review of the trial court's findings of fact by the Summary Conviction Appeal Court is the same as on appeal against conviction to the Court of Appeal in indictable offences: see ss. 822(1) and 686(1)(a)(I) and **R v. Gillis** (1981), 45 N.S.R.(2d) 137; 86 A.P.R. 137; 60 C.C.C.(2d) 169 (C.A.), per Jones, J.A., at p. 176. Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in **R v. Burns (R.H.)**, [1994] 1 S.C.R. 656; 165 N.R. 374; 42 B.C.A.C. 161; 67 W.A.C. 161; 89 C.C.C. (3d) 193, at p. 657 [S.C.R.], the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is unreasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for

> that of the trial judge. In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was some evidence to support the trial judge's conclusions nor a new trial on the transcript.

APPELLANT'S POSITION

[18] Counsel for the appellant argues that Judge Embree erred in his interpretation of the law.

[19] The Notice of Appeal alleges one ground of appeal:

> **THAT** the Learned Trial Judge erred in law in his interpretation of the meaning of "care and control" as set out in section 253(b) of the Criminal Code.

[20] Appellant's counsel in his brief and in oral submissions before me relies heavily on the case of ***R v. Hannemann*** [2002] O.J. 1686 a decision of Justice Hill of the Ontario Supreme Court. In that case the Court allowed an appeal from a trial decision which found the accused guilty of care and control while over .08. The accused had decided to sleep in his car because he could not get a ride to a hotel after drinking at a club. He slept in the car for a while and after waking up turned the car engine on because he was cold. The park brake of the vehicle was on. He

was found by the police officer who noted symptoms of impairment and gave him a breathalyzer demand.

[21] The trial judge held that even if the car could not be unintentionally put in motion he was bound by the case authorities that the accused was still in care or control and found the accused guilty.

[22] On appeal Hill, J. allowed the appeal. Counsel for the appellant in this case summarizes the Court's finding in his brief.

> Justice Hill in allowing the appellant's appeal did a comprehensive review of the case law. He held that the trial judge based on her decision on a finding that there was a risk of the appellant unintentionally setting his vehicle into motion. Justice Hill reviewed the evidence at trial and held that the evidence at trial did not warrant the finding. While the keys were in the ignition and the engine was running, the evidence before the court was to the effect that the vehicle could only be put into gear by a deliberate act or a series of deliberate acts and that, in any event, the vehicle could not be set into motion with the parking brake engaged. Justice Hill held: "On these facts, there was affirmative evidence suggesting the absence of risk of the vehicle being accidentally or negligently set in motion."
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> It is our respectful submission that **Hannemann** stands for the proposition that even where the accused is found in a vehicle with the keys in the ignition and the engine running, the possibility of risk, which is required to establish care or control, may be negatived by "affirmative" evidence that the vehicle could not have been put into motion inadvertently.

[23] I have been given a number of other cases following the same approach as indicated by Justice Hill.

[24] The Crown here rely on the interpretation of the concept of care or control as explained by our Court of Appeal. In ***R v. Miller*** (1995) N.S.J. No. 28, Chipman, J.A. said:

> Although each case will depend on its own facts, the element of being in such control of the car as(sic) to be at risk of setting it in motion is the basis of the criminal liability. Here the respondent was in the driver's seat behind the steering wheel. The keys were in the ignition. The engine was running. The respondent said he "started to pull the emergency brake off" as the police arrived. In the face of this, the trial judge's finding of care and control was not unreasonable or unsupported by the evidence. It should not be disturbed. The legislation is aimed at the protection of the public. The respondent was, at the material time, at the controls of the vehicle and constituted an immediate danger to the public in the sense contemplated in the authorities.

[25] In ***R v. Lockerby*** [1999] N.S.J. No. 349 the same Court confirmed a conviction for care or control in circumstances where the trial judge found that the accused had no intention to put the car in motion. Cromwell, J.A. said:

> Mr. Lockerby's principal contention on appeal is that risk of setting the vehicle in motion is an essential element of the offence and that no such risk was present here. He argues that is not a crime to get behind the wheel of a car to turn it off and put it in gear while having more than the legal limit of alcohol in the blood. I do not accept this argument. Assuming without deciding that risk of setting the vehicle in motion is an essential element of the offence, the trial judge made a

> clear finding that such risk existed here. The factual finding was upheld on appeal to Davison, J. and it is supported by the evidence. Risk is not to be assessed with the benefit of hindsight or on the assumption that the appellant's actions would, in fact, accord with his intentions. The appellant's own testimony at trial is, in my view, conclusive on this issue. He agreed in his testimony (set out above) that he was sitting in the driver's seat, with the keys in the ignition and that he could have driven the car if he had wanted to. In my view, when a person with more than the legal limit of alcohol in his or her blood had the present ability to make the car respond to his or her wishes, there is a risk that the car may be placed in motion, even where the person's intentions are not to do so.
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> A person who has the present ability to operate the vehicle, who has its superintendence or management, is in control of it.

[26] The ***Lockerby*** case was followed by the Nova Scotia Provincial Court in ***R v. MacKay*** [2003] N.S.J. No. 407 where Judge Williams said:

> The leading authorities on "care and control" are R v. Toews (1985), 20 D.L.R. (4th) 758 (S.C.C.), R v. Ford (1982), 65 C.C.C. (2d) 392 (S.C.C.), R v. Hein, [1999] N.S.J. No. 421 (S.C.), R v. Lockerby, [1999] N.S.J. No. 349, 1999 NSCA 122 (C.A.). Put succinctly, our courts have decided that when a person whose blood alcohol concentration exceeds the legal limit has the present ability to make a vehicle respond to that person's wishes, there is always a risk that the vehicle may be placed in motion even though the person might not have entered it with the intention to do so.

[27] In this case the appellant could easily have changed his mind about not driving his vehicle and proceed to do so.

[28] The car was capable of being driven by simply putting it in gear and stepping on the gas. Therefore, as in ***R v. Lockerby,*** he was in control of the vehicle while having more than the legal limit of alcohol in his blood.

[29] Based on the Nova Scotia cases, I conclude that Judge Embree, here, has applied the proper legal test to determine if the appellant was in care or control of his vehicle at the time he was approached by the police. Judge Embree was bound by the case law from the Nova Scotia Court of Appeal on that issue and I find no error in how he applied that law to the facts before him.

[30] I would therefore dismiss the appeal and confirm the decision of the trial judge in which he found the appellant guilty.

J.