SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Gillespie, 2013 NSSC 317

Date: 20130826
Docket: CRP 362340
Registry: Pictou

Between:

Her Majesty the Queen

v.

John Arthur Gillespie

Judge: The Honourable Justice Glen G. McDougall

Heard/Appearances: March 8 and 9, April 2 and 4, April 10 (recorded telephone conference), June 14 (ruling), June 22, July 31 (status report), August 29(adjourned) and 31, November 19(adjourned), December 5, 2012 (recorded telephone conference), January 8 (ruling), March 7 (recorded telephone conference), March 11 (adjourned), March 15, April 18 (ruling), August 1 and 2, 2013

Oral Decision: August 26, 2013

Written Decision: October 7, 2013

Counsel: T.W. Gorman, for the Crown
H . Edward Patterson, for Mr. Gillespie

By the Court:

[1] John Arthur Gillespie stands charged :

> THAT he on or about the 7th day of February, A.D. 2011, at or near, Little Harbour, County of Pictou, Province of Nova Scotia, did while his ability to operate a motor vehicle was impaired by alcohol did have the care or control of a motor vehicle contrary to Section 253(1)(a) of the Criminal Code;
>
> AND FURTHER
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> THAT he on or about the 7th day of February A.D., 2011, at or near, Little Harbour, County of Pictou, Province of Nova Scotia, did without reasonable excuse fail to comply with a demand made to him by Cst. Shane Foster, a peace officer, to provide forthwith a sample of his breath as in the opinion of Cst. Shane Foster, a qualified technician, were necessary to enable a proper analysis to be made in order to determine the concentration, if any, of alcohol in his blood, contrary to Section 254(5) of the Criminal Code.

[2] I shall henceforth refer to the accused person as either "Mr. Gillespie" or "the accused".

[3] After "Not Guilty" pleas were entered, the trial of these two charges got underway before me, sitting as a judge alone, on Thursday, March 8, 2012.

[4] Although only scheduled for two days, the trial lasted for a total of six full days, three half days and varying amounts of time on 10 other days. All of this was spread over close to 17 months from the first day of trial on the 8th day of March 2012.

[5] It took a long time but the Court is finally in a position to render a decision.

[6] Before getting to this point, the Court was called upon to make a series of rulings which dealt with:

(i) the area of expertise in which the defence's expert toxicologist could offer opinion evidence;

(ii) A Crown motion to exclude the entirety of the opinion evidence offered by the defence's expert arising from the Supreme Court of Canada case of **R. v. Gibson** which was an appeal from the decision of the Nova Scotia Court of Appeal; and finally

(iii) a Defence **Charter** motion to determine if the accused's s.10(b) right to counsel had been breached, and if so, should the evidence obtained as a result of the alleged breach be excluded under s. 24(2) of the **Canadian Charter of Rights and Freedoms**.

[7] I do not propose to revisit these rulings in any detail but any factual findings made by me in the course of making those rulings help to form the foundation on which my final decision is based. I should add that any subsequent evidence heard from the final Defence witness, Mr. MacIntosh, did not alter any of the initial factual findings that I made in order to make those rulings.

[8] It should be noted that all the evidence offered through both Crown and Defence witnesses during the *voir dire* to allow the Court to decide the **Charter** issue was adopted for use, not only for that purpose but, in the case of the Defence, was subsequently adopted for trial purposes as well.

[9] The Crown's evidence was, from the outset, offered for both *voir dire* and trial purposes in what is commonly referred to as a "blended *voir dire*".

[10] In addition to adopting the evidence of the five (5) witnesses called by the Defence during the *voir dire*, one additional witness was called to testify on behalf of the Defence at trial.

[11] That witness was, Michael MacIntosh, who testified that he recalled being flagged down on the Egypt Road by an individual whom he did not know at the time but who he later came to know as Gus Bezanson. Although Mr. MacIntosh could not remember the exact date this occurred, he did recall that it was sometime in February, 2011.

[12] According to Mr. MacIntosh, the man who flagged him down approached his Chev Silverado truck and asked him for a lift to a house on the Lewis Road. Mr. MacIntosh was familiar with the area from doing snow plowing during the winter

season. He knew the property where he drove Mr. Bezanson belonged to Art Gillespie, the accused.

[13] Mr. MacIntosh only learned of this passenger's name when he was recommended by a friend as someone who could do some plumbing work for him. When he approached the man to ask him if he would consider doing some work for him it was then that Mr. MacIntosh recognized Gus Bezanson as the man who had flagged him down a year or so earlier.

[14] Mr. MacIntosh also testified that although he knew where Mr. Gillespie lived and knew him to see him, he really did not now him very well personally.

[15] On cross-examination, Mr. MacIntosh indicated that his Chev Silverado truck was gun metal gray in colour. He also indicated that he was about 6'3" in height and weighed between 240 and 250 pounds and I recall him saying "In the winter you put 'er on, and in the summer you take 'er off", or something to that effect.

[16] He also testified that Mr. Bezanson only asked for a ride over to the Lewis Road. He did not inquire as to whether he had a tow rope to try to pull the stricken Honda CRV out of the snow bank in which it was embedded.

[17] Mr. MacIntosh also testified that when he pointed it out to Gus Bezanson that he owed him a favour for giving him a ride, it was Mr. Bezanson who said he had a friend who might like to talk to him. Mr. Bezanson was referring to Mr. Gillespie. Mr. Gillespie contacted Mr. MacIntosh and told him about the charges he was facing and eventually Mr. MacIntosh spoke to Mr. Gillespie's legal counsel.

[18] Mr. MacIntosh also testified that he was unaware of the existence of anyone else in the Honda CRV when he stopped to offer assistance to Mr. Bezanson.

[19] Previously, both Gus Bezanson and the accused mentioned the passerby who came along in a truck and gave Mr. Bezanson a lift to the Gillespie residence.

[20] Mr. Gillespie described the truck as a Ford Ranger. Mr. Bezanson, who presumably was in the better position of the two to describe the truck and its driver, testified that it was "a little dark truck", either a Ford or a Mazda. He also said that the truck was not large enough for three people to fit in the cab. That is why he

decided to leave Mr. Gillespie in the Honda CRV while he went with Mr. MacIntosh to get a tow rope and Mr. Gillespie's half-ton Ford, F-150 with the intention of coming back to tow the Honda out of the snow bank.

[21] Mr. Bezanson, in his testimony, described the driver of the little truck as a man about his own size. From my observation of Mr. Bezanson and Mr. MacIntosh from where they sat in the witness box, I would estimate that Mr. MacIntosh was close to 8 to 9 inches taller and a good 80-90 pounds heavier than Mr. Bezanson.

[22] Mr. MacIntosh's testimony tends to corroborate at least some of Mr. Bezanson's testimony. I will return to it again later in my reasons for judgment.

[23] During the course of this trial I have had to make factual findings in order to give the rulings I earlier mentioned.

[24] My findings of facts could not have been made without some weighing of the evidence that had been presented up to that point in the trial. This is particularly so in regard to the alleged **Charter** breach advanced by the Defence and to a lesser extent the issue pertaining to the Defence expert's area of expertise.

[25] The Crown motion to exclude all of Dr. Peter Mullen's evidence focussed primarily on the decisions of the Nova Scotia Court of Appeal in the companion cases of **R. v. Cave**, 2006 NSCA 52 and **R. v. Gibson**, 2006 NSCA 51 and the subsequent decision of the Supreme Court of Canada on the appeal of **Gibson** found at [2008] SCC 16. The submissions and arguments of counsel focussed primarily on the law. There really was not any disagreement on the established facts that their arguments were based upon.

[26] Turning once more to the issues that are now before me, I will look at the evidence first of the Crown witnesses. I will then look to the Defence witnesses.

[27] In doing so I am mindful of the burden that rests upon the prosecution to prove each and every element of the offences of which Mr. Gillespie has been charged. That burden remains on the Crown throughout. It is a burden that requires the Crown to prove each and every element of each offence beyond a reasonable doubt.

[28] The Defence does not have to prove that the accused is innocent. The alleged **Charter** breach, which I earlier disposed of, stands in contrast to this. The onus was then on the accused to prove, on a balance of probabilities, that his s.10(b) right to counsel had been denied.

[29] A favourable ruling on this issue was inextricably linked to the accused's answer to the second count in the Indictment - the refusal charge. Having said this the Crown must still prove the constituent parts of the offence in order to get a conviction.

[30] The central issues in order to gain a conviction on the first count in the Indictment are care and control and impairment by alcohol. There can be no doubt that Mr. Gillespie was found behind the steering wheel in the seat normally occupied by the driver.

[31] First, RCMP Constable Shane Foster then David MacDonald and finally Brian MacLeod all testified that when they first arrived at the scene where the red Honda CRV was found embedded in a snow bank, they found the vehicle's sole occupant in the driver's seat. The keys were in the ignition and the vehicle's running lights were illuminated. The vehicle's engine, however, was not running.

[32] Mr. Gillespie, in his testimony, admitted that he was in the driver's seat. He indicated that he moved to that position after the vehicle had left the travelled portion of the road. He managed to crawl over the centre console after he urinated in his pants while sitting in the passenger seat. Since the vehicle's passenger door was firmly wedged into the snow bank, the accused had no recourse but to answer mother nature's call where he sat, awaiting, accordingly to Mr. Gillespie''s testimony, the return of Mr. Bezanson with a tow rope and another of Mr. Gillespie's vehicles to pull the Honda CRV out of its temporary grasp.

[33] I accept and find as a fact that when the accused was found behind the wheel of his motor vehicle it was indeed stuck in the snow bank. It could not be put in motion.

[34] If I were to accept the testimony of the accused and Mr. Bezanson, even if I were to find that Mr. Gillespie's ability to operate a motor vehicle was impaired by alcohol, I would have to acquit him since he would not have had the care and control

of a motor vehicle that was capable of being put in motion even if Mr. Gillespie had wanted to move it. This, even though Mr. Gillespie admitted to consuming Canadian Club Rye Whiskey both before the vehicle skidded or was driven off the road and after while Mr. Gillespie says he was awaiting Mr. Bezanson's return.

[35] Since Mr. Gillespie gave testimony first for purposes of the *voir dire* and later adopted it for trial purposes, I am reminded that the approach mandated by the Supreme Court of Canad in **R. v. W.(D.)** must be applied. If I was to believe the evidence of the accused or even if I did not but am left with a reasonable doubt then I must acquit him.

[36] It does not end there, however. I can only convict if, based on the evidence I do accept, I am satisfied that the Crown has proved its case against the accused beyond a reasonable doubt.

[37] The story, and I use the word "story" purposely, spun by Mr. Gillespie and corroborated by some of the Defence witnesses, particularly Gus Bezanson and Mr. Gillespie's son Paul, in my view, stretches credulity to the breaking point.

[38] In my earlier ruling on the **Charter** motion, I suggested that Mr. Gillespie's recovery after spending the night in the police lock-up was miraculous. Despite not eating and despite having gone another 8 to 10 hours without the medication he said he needed to control his diabetes suddenly his ability to recall events came back. There was no medical explanation given for this. Indeed, there is a complete lack of any evidence of a medical professional, physician or otherwise, to support Mr. Gillespie's claims of being a diabetic and, if he truly is a diabetic which I am prepared to accept as a fact, there is nothing that would allow me to determine the severity of his condition or to tie his observed condition to his lack of food consumption and his failure to take his diabetes medication in the hours leading up to his arrest by Constable Foster. And neither does Gus Bezanson's or Paul Gillespie's confirmation of Mr. Gillespie's diabetic condition do much, if anything, to fill in this gap.

[39] Even Dr. Mullen in his testimony could only say that based on the hypothetical factual scenario presented to him by Defence Counsel, Mr. Gillespie, a seasoned drinker, should not have exhibited the rather exaggerated symptoms of impairment that others, in particular Constable Foster, observed.

[40] I am not persuaded that Mr. Gillespie's condition was the result of the exacerbating effects of diabetes compounded by his failure to adequately address his dietary needs coupled with the added failure to properly follow a drug or medication regime that one must assume was prescribed by his attending physician - A physician, by the way, who was not called to testify.

[41] I give no weight to Dr. Mullen's opinion. It is based on a hypothetical fact situation that has not been established by credible evidence and is therefore without foundation.

[42] Furthermore, Dr. Mullen is not an endocrinologist. Nor, for that matter, did he specifically perform any tests on the accused himself to determine possible ranges of alcohol level based on the accused's stated alcohol consumption on the day he was arrested and charged.

[43] Looking at the testimony of Gus Bezanson I have this to say. Mr. Bezanson is obviously a close personal friend of the accused. He relies primarily on Mr. Gillespie to earn a living. It is not surprising that he would try to help his friend.

[44] Mr. Bezanson is also in a position to feel his friend's pain at being charged. He is no stranger to the criminal justice system having been convicted in the past of 25 separate criminal offences including three convictions for drinking and driving. He has done time in jail. He has also been convicted in the past for driving while prohibited from doing so as part of an overall sentence for driving while impaired and exceeding the allowed alcohol limit of 80 milligrams of alcohol in 100 millilitres of blood.

[45] There is also the issue of the timing of Mr. Bezanson's revelation of having been the driver of the Honda CRV at the time it left the travelled portion of the Egypt Road in Pictou County and ended up in the snow bank where it was later found by some passers by.

[46] The Crown suggests this revelation, since it was only first made known when Mr. Bezanson took the witness stand, amounts to an alibi. As such the Crown argues that the Court should approach such evidence cautiously and based on the Supreme Court of Canada case of **R. v. Cleghorn**, [1995] 3 S.C.R. 175, it is open to me to draw a negative inference.

[47] The Defence argues that Mr. Bezanson's evidence does not amount to an alibi and hence no negative inference should be drawn.

[48] In the case of **R. v. Taylor**, [2012] N.J. No. 202 also found at 2012 NLCA, the decision, which was later overturned by the Supreme Court of Canada which adopted the dissenting reasons of Hoegg, J.A. in upholding the conviction of the accused by the Trial Judge, Justice Hoegg, in her reasons, agreed with the majority decision respecting alibi evidence. At paragraph 32 of the Newfoundland and Labrador Court of Appeal decision, and again these reasons were adopted in their entirety by the Supreme Court of Canada, which I am sure Justice Hoegg, a native of Pictou County, must have been very pleased to read:

> I agree with my colleagues that this is not a case involving alibi evidence.

[49] At paragraphs 12-14 of the Newfoundland and Labrador Court of Appeal's majority decision, Welsh, J.A. (concurred in by Rowe, J.A. and, as mentioned previously, adopted by Hoegg, J.A.) the Court said this:

> In this case, the Crown has submitted that Stephen Taylor's evidence amounted to an alibi which should have been disclosed in a timely manner to avoid the inference of recent concoction. Alibi is defined in Black's Law Dictionary, 8th edition, to mean:
>
> 1. A defense based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time. ...
>
> 2. The fact or state of having been elsewhere when an offense was committed.
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> 13 Similarly, in the Dictionary of Canadian Law, 3rd edition:
>
> "... [P]roof of the absence of the accused at the time a crime is supposed to be committed, satisfactory proof that he is in some place else at the time." ...
>
> 14 This definition of alibi evidence is applied in R. v. Cleghorn, [1995] 3 S.C.R. 175, where Iacobucci J., for the majority, described one element of the defence of alibi to be "an assertion that the accused was not present at the location of the crime, when it was committed" (paragraph 6, underlining in original). While this is the

> definition of alibi that generally applies, it may include other evidence that establishes impossibility that the accused committed the crime. For example, the accused may have been engaged with another person in an activity that would preclude commission of the offence by the accused.

[50] The evidence of Mr. Bezanson was not offered to establish that Mr. Gillespie was not present when the vehicle he says they were both in went off the road. What Mr. Bezanson says is that he was the driver and Mr. Gillespie was the passenger. If believed this would preclude "the commission of the offence by the accused".

[51] Based on **R. v. Taylor**, in my opinion, this amounts to an alibi.

[52] Even if it is not an alibi, I simply do not believe Mr. Bezanson. His testimony is simply not credible. He is not credible. He is perhaps the singular most unreliable witness I have ever had testify before me during my almost 12-year tenure on the bench.

[53] Although he testified to being a friend to Mr. Gillespie, he, despite the fact that he claims to have been the driver of the vehicle when it left the road, did absolutely nothing to help his friend until he appeared in court. He stood by while his friend spent a night in a police lock-up. He stood by while his friend went through a preliminary inquiry. It was not until the trial in this Court got underway that he finally came forward to share his story with those who were attempting to convict his friend of two very serious criminal offences.

[54] I realize there was no obligation on Mr. Bezanson to admit that he was the driver. He, like every Canadian citizen, has the right to remain silent and if suspected of committing an offence, he has the right to be presumed innocent.

[55] He does not have a right, however, to appear in court and, after taking an oath to tell the truth, concoct a story to deflect the blame from someone else no matter how close a friend that other person might be. I also find it hard to believe that Mr. Gillespie, as he said on cross-examination, did not raise this rather important matter with Mr. Bezanson at any time until just prior to trial. This is simply not believable.

[56] I also find it difficult to believe that Mr. Bezanson could be so confused regarding the colour and make and model of Mr. MacIntosh's Chev Silverado truck and Mr. MacIntosh's size and stature relative to his own. The trip to Mr. Gillespie's

residence, if it ever happened, was only short in distance and time but nonetheless it would have afforded Mr. Bezanson plenty of time to observe his surroundings.

[57] I am not saying that Mr. MacIntosh lied, but if he did give Mr. Bezanson a drive it was either not on the evening that the accused was found behind the wheel of his disabled vehicle, or, if it was that evening, then Mr. Bezanson was not the driver but rather a passenger in that vehicle.

[58] As to Paul Gillespie's testimony I accept that when he drove his father's impounded vehicle home he likely did encounter urine on the seat. I am also prepared to accept that he shared this with his common law partner, Ms. Margaret Harris. I do not accept Mr. Gillespie's testimony that the urine he first encountered was on the passenger seat.

[59] When one looks at photograph 2 of Exhibit No. 1, there is no evidence of wetness or staining on the passenger seat. What one sees is the discarded Nova Scotia Liquor bag. A bag that is composed of light brown paper with some obvious white lettering on the outside. If the seat had been as wet with urine as Paul Gillespie says it was, there should be some evidence of this on the outside of the paper bag. There is none visible in the photograph.

[60] In addition to this, several witnesses, including the accused himself, testified that the evening of February 7, 2011 was extremely cold. Some witnesses testified that it was perhaps as much as minus 10 to minus 15 degrees Celsius that night. Given these temperatures one would expect to see some residual evidence of urine saturation on the passenger seat. One might even expect to see some evidence of ice crystal formation yet there is none visible in the photograph earlier referred to.

[61] I find that Paul Gillespie's evidence that he first encountered wetness, smelling of urine on the passenger seat to be at best a mistake and perhaps more likely a lie.

[62] I have no doubt, and I find as a fact, that it was the driver's seat that was wet and emitting the odour of urine when he first entered the vehicle to drive it home to his parents' residence on the evening of February 8th, 2011. It was the same seat that his father, the accused, had been occupying the evening before when he drove the Honda CRV into a snow bank.

[63] I do not propose to delve into the evidence of each and every witness called by the Crown and Defence in any further detail other than what I have already referred to.

[64] The Crown has satisfied me beyond a reasonable doubt that on the evening of the 7th day of February 2011 the accused, John Arthur Gillespie, had the care and control of a motor vehicle while his ability to operate it was impaired by alcohol contrary to Section 253(1)(a) of the **Criminal Code**.

[65] I am also convinced beyond a reasonable doubt that the accused, John Arthur Gillespie, did without reasonable excuse fail to comply with the demand made to him by Constable Shane Foster, a peace officer and a qualified technician, to provide forthwith a sample of his breath as in the opinion of Constable Foster was necessary to enable a proper analysis to be made in order to determine the concentration, if any, of alcohol in his blood, contrary to Section 254(5) of the **Criminal Code**.

[66] In arriving at this decision I have considered all the evidence including that of the accused himself. While I do not reject the entirety of the accused's evidence, that which I do accept does not create a reasonable doubt in my mind.

[67] Mr. Gillespie, at this point in time I am going to ask you to stand sir. Mr Gillespie, the Crown, in my view, has met its burden and I therefore find you, John Arthur Gillespie, guilty on both counts of the indictment.

Justice Glen G. McDougall