IN THE SUPREME COURT OF NOVA SCOTIA
Citation: [R. v. MacLellan, 2004 NSSC 5]

Date: 20040109
Docket: S. AT. 203539
Registry: Antigonish

Between:

Robert Anthony MacLellan

Appellant

v.

Her Majesty the Queen

Respondent

D E C I S I O N

Judge: The Honourable Justice Douglas L. MacLellan

Heard: December 9, 2003 in Antigonish, Nova Scotia

Counsel: Coline Morrow, for the appellant
Allen Murray, Esq., for the respondent

[1] The appellant Robert Anthony MacLellan appeals his conviction by Judge John MacDougall of the Provincial Court on a charge of impaired driving.

FACTS

[2] The appellant was tried in Provincial Court on four charges, namely, a charge of impaired driving, a charge of operating a vehicle while over the legal alcohol limit and two charges under the ***Fisheries Act*** involving unlawfully fishing smelt and a charge of obstruction of a Fisheries officer in the performance of his duties under the ***Fisheries Act***.

[3] These charges arose as a result of the appellant being observed by two Fisheries officers driving his truck in an area where they felt he might be involved in the unlawful fishing of smelts.

[4] When the Fisheries officers observed the appellant's vehicle they engaged their emergency equipment indicating that he should stop. They testified that he did slow down as they followed him and that he drove along the shoulder of the highway for

about one kilometer at about 20 kilometers per hour. They said that he then turned off the highway onto a secondary gravel road and at that point he increased his speed to 60 kilometers per hour. They testified that they pursued him and that he then left that road into a clear-cut area and circled backed to the main paved highway. Once again he then turned off that highway onto the same gravel road and this time continued until he could go no further and his vehicle stopped. They testified that the appellant then jumped out of the driver's vehicle and was chased on foot. Two passengers also left the vehicle from the passenger side.

[5] The Fisheries officer caught up with the appellant after a chase of about 500 feet. He was arrested for obstruction of a Fisheries officer and handcuffed. He was then escorted back to the officer's vehicle. He was given his charter rights and caution about giving a statement. The Fisheries officer said that he smelled of liquor and that they later found some beer bottles in his truck. They also found some fishing rods and some fish.

[6] The Fisheries officers said the appellant was polite to them and that the was not irrate or abusive during their contact with him.

[7] The officers testified that while they drove behind his vehicle that the appellant's vehicle fish-tailed a number of times while it was in the clear-cut area. Both officers' testified that the appellant appeared to be unsteady on his feet and they both described his speech as being a little bit slurred.

[8] During the chase, the Fisheries officers had called for assistance from the R.C.M.P. and once they had the appellant in custody they waited for the R.C.M.P. officers to arrive. At that point, the appellant was given a breathalyzer demand by the police officer and taken in the police vehicle to the Antigonish Detachment where the breathalyzer test was to be administered.

[9] The R.C.M.P. officer described the appellant has having glassy eyes and his face being flushed. She said he had a smell of liquor coming from his breath and that his speech was a bit slurred. She described him as appearing to be under the influence of alcohol. Along with that and what she learned from the Fisheries officer, the R.C.M.P. officer felt that she had grounds to give the appellant a breathalyzer demand and did so.

[10] The trial judge after hearing the evidence on a voir dire decided that the appellant's charter rights had been violated when he was initially stopped by the Fisheries officers, and therefore, dismissed the obstruction charge and the charge of illegal fishing. He also concluded that the appellant's charter rights had been violated by the R.C.M.P. officer because the appellant was not advised of his right to contact counsel when he was brought back to the police station. He therefore excluded the certificate of the breathalyzer technician and the charge of failing the breathalyzer was dismissed.

[11] The trial judge did, however, find that the Crown had proven the charge of impaired driving and convicted the appellant. In his decision the trial judge noted that there was before him evidence that the appellant smelled of liquor and that his eyes were glassy and that his speech was a bit slurred. He also noted that there was some evidence that he was unsteady on his feet.

[12] In finding the appellant guilty of the impaired driving, the trial judge said:

> Given the indecision, then the driving through the clearing, back up the Campbell MacQuarrie Road, the speed, getting stuck up at the top, the running away, all of which would suggest that Mr. MacLellan is operating under some degree of disability with respect to rational behaviour, reasonable behaviour.

The explanation for this, I have to look at we know that he's drinking, he's got alcohol emanating from his breath. There are other signs which in and of themselves may not be enough to suggest that his ability to drive is impaired.

I know that here is a person who, by description, is quite calm or, understated, he is not an aggressive individual, an obnoxious individual, but he has chosen to drive in such an irrational and erratic fashion.

If anything, there is an emotional or an unreasonable aspect to what he is doing given the demeanour that he displayed after he was stopped and after he was caught.

What are the explanations for that aggressive behaviour in terms of the driving? The only conclusion that I can come to is that he wasn't thinking straight. Why wasn't he thinking straight? The reasonable conclusion that I have to draw is that he was impaired, and the impairment was by alcohol.

I am satisfied that the Stiletto decision and the test in that decision is that, beyond a reasonable doubt, the Crown has been able to satisfy me that alcohol had an impact on Mr. MacLellan's ability to operate the motor vehicle, and that he was impaired by alcohol based on the criteria set out in Landes.

That criteria is quite broad. The standard, once I am satisfied that a person's judgment is impaired, that his reasoning is impaired, is not to a significant or a marked degree, but only that it has an impact on his ability to drive. I conclude that the Crown has met the burden with respect to impairment.

ISSUE

[13] The issue on this appeal is whether the trial judge was justified in finding the appellant guilty of impaired driving based on the evidence before him.

[14] The test to be applied by this Court on this appeal is set out in ***R v. Nickerson*** [1999], NSJ 210 where Cromwell, J.A. of our Court of Appeal said:

> 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 sections 822(1) and 686(1)(a)(i) and R. v. Gillis (1981), 60 C.C.C. (2d) 169 (N.S.S.C.A.D.) 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, [1994] 1 S.C.R. 656 at 657, 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 reasonably 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.

[15] I have been provided with a number of the leading cases on the issue of impaired driving and in particular where the Courts have dealt with the issue on appeal.

[16] In ***Regina v. Stellato*** (1973), 78 C.C.C. (3d) 380, the Ontario Court of Appeal dealt with an appeal from a conviction for impaired driving. There the evidence

indicated that there was erratic driving on the part of the accused, a strong smell of alcohol, glassy and bloodshot eyes, slurred speech and unsteadiness on his feet. The Court approved of the test outlined by the Prince Edward Island Court of Appeal in ***R v. Campbell*** (1991), 26 M.V.R. (2d) 319 where Mitchell, J.A. said:

> The Criminal Code does not prescribe any special test for determining impairment. It is an issue of fact which the trial Judge must decide on the evidence. The standard of proof is neither more nor less than that required for any other element of a criminal offence. Before he can convict, a trial Judge must receive sufficient evidence to satisfy himself beyond a reasonable doubt that the accused's ability to operate a motor vehicle was impaired by alcohol.
>
> It is not an offence to drive a motor vehicle after having consumed some alcohol as long as it has not impaired the ability to drive. However, a person who drives while his or her ability to do so is impaired by alcohol is guilty of an offence regardless of whether his ability to drive is greatly or only slightly impaired. Courts must therefore take care when determining the issue not to apply tests which assume or imply a tolerance that does not exist in law. Trial judges constantly have to keep in mind that it is an offence to operate a motor vehicle while the ability to do so is impaired by alcohol. If there is sufficient evidence before the Court to prove that the accused's ability to drive was even slightly impaired by alcohol, the Judge must find him guilty.

[17] In ***Stellato***, *supra,* the Court held that:

> 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 ***R v. Ryan***, (February 9th, 2002) Edwards, J. of this Court dealt with an appeal from a conviction of impaired driving. There the accused was found sleeping in his vehicle. The police officer knocked on the car window and when the accused opened the door she described a very strong smell of alcohol. She also said that the accused's speech was very slurred and that he had watery eyes. In her opinion the accused was "very intoxicated". In that case, the accused was given a breathalyzer demand but the test could not be done because the instrument was not working. The accused was therefore tried on the charge of impaired driving. Justice Edwards in his decision in which he quashed the conviction said:

> The main difficulty with the Crown's case is the lack of conduct or function evidence. Evidence of impaired driving must be extrapolated from evidence of impaired function generally. While ***Stellato*** confirms that evidence of a "marked departure from normal behaviour" is not necessary to prove impairment it also makes clear the need for some evidence of deviation from the norm sufficient to show impaired ability to drive. In addressing this requirement, the Alberta Court of Appeal in ***Andrews,*** supra, identifies some general principles applicable to impaired driving/care and control cases at page 405:
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> 1. the onus of proof that the ability to drive is impaired to some degree by alcohol or a drug is proof beyond a reasonable doubt;
>
> 2. there must be impairment of the ability to drive of the accused;

> 3. the impairment of the ability to drive must be caused by alcohol or a drug and not some other source;
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> 4. the impairment of the ability to drive may not be to a marked degree; and
>
> 5. where it is necessary to prove impairment of ability to drive by observation of the accused and his conduct, those observations must indicate behaviour that deviates from normal behaviour to a degree that the required onus of proof be met. To that extent the degree of deviation from normal conduct is a useful tool in the appropriate circumstances to utilize in assessing the evidence and arriving at the required standard of proof that the ability to drive is actually impaired.
>
> There was no evidence that Mr. Ryan's coordination or balance were impaired. There was no evidence that he stumbled or was unsteady on his feet. There was no evidence of his being clumsy, dropping or spilling. There was no evidence of any "roadside" performance tests; because apparently none were conducted..

[19] The ***Ryan*** case, *supra*, was appealed and our Court of Appeal upheld the decision of Edwards, J. (R v. Ryan (2002), 210 N.S.R. (2d) 194). In that decision Oland, J. speaking for the Court said:

> The summary conviction appeal court judge identified several possible inferences other than impairment. He was of the opinion that the evidence was reasonably susceptible to more than one meaning. The other possible causes he recounted are not, in my view, so far-fetched or beyond the realm of common knowledge as to be speculative. Some, such as fatigue and sleep deprivation as a possible explanation for red, watery eyes could relate directly to the circumstances in which the respondent was found. No other indicia, such as a lack of physical co-ordination, appeared in the evidence.

> The summary conviction appeal court judge did not reject Constable Clarke's opinion that the respondent was heavily intoxicated out of hand or because she is not an expert. Rather he did so because, after reviewing her evidence, he was of the view that her factual observations could not reasonably support the opinion she had reached.
>
> It is my view that, having regard to particular circumstances of this case, the summary conviction appeal court judge did not err in his consideration of whether the findings of the trial judge were unreasonable or cannot be supported by the evidence. He was conscious that at trial the onus was always on the Crown to prove not that the respondent may have been drinking, but that the respondent's ability to drive was impaired. He did not disregard any of the observations of experienced police officers but considered the totality of their evidence at trial. As he is entitled on appeal, the summary conviction appeal court judge re-examined, and to some extent re-weighed that evidence to ascertain whether it is reasonably capable of supporting the trial judge's conclusion as to criminal impairment. For the reasons set out in his decision, his determination was that it was not. In coming to this conclusion, the summary conviction appeal court judge did not simply substitute his view of the evidence for that of the experienced trial judge.

[20] The trial judge here found that the symptoms of impairment described by the Fisheries officers "in and of themselves may not be enough to suggest that his ability to drive is impaired". However, he based his conclusions of impaired driving on what he termed "aggressive behaviour in terms of driving". He concluded that the appellant was not thinking straight and that he was not thinking straight because he was impaired by alcohol.

[21] Having reviewed the evidence before the trial judge, I conclude that the appellant's driving behaviour is not capable of supporting the trial judge's conclusion.

[22] The trial judge here concluded that because the appellant attempted to evade the Fisheries officers therefore his judgment must be impaired by alcohol and used that to conclude that he was guilty of impaired driving.

[23] I conclude that the appellant's decision to run from the Fisheries officers is equally consistent with a desire to avoid being charged under the ***Fisheries Act*** or under the ***Liquor Control Act*** as well as because he was impaired. It is obvious that there are many cases where accused persons attempt to run from police because they simply want to evade ***Motor Vehicle Act*** offences.

[24] I conclude that the trial judge did not apply the appropriate standard of proof here because after he found that the other symptoms of impairment did not convince him of the offence beyond a reasonable doubt he should not have used the appellant's reaction to being stopped as only consistent with impairment by alcohol. That reaction, namely, that he attempted to run from the Fisheries officers can be explained otherwise and therefore the trial judge's conclusion is not reasonable.

[25] I would allow the appeal and quash the conviction and sentence imposed on the appellant.

J.