IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Burton, 2006 NSSC 275

Date: 20060907
Docket: CR.AM.264285
Registry: Amherst

Between:

William Ronald Burton

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice David W. Gruchy
Heard:	September 7th, 2006, in Amherst, Nova Scotia
Decision:	September 7th, 2006 (Orally)
Written Decision:	September 19th, 2006
Counsel:	Jim M. O'Neil, for the Appellant Mary Ellen Nurse, for the Respondent

By the Court: (Orally)

[1] On February 28, 2006, the learned Provincial Court Judge, Carole A. Beaton, tried the appellant on the charges that:

> On or about the 3rd day of July, 2005, at or near Mapleton, Cumberland County, Nova Scotia, he did while his ability to operate a motor vehicle was impaired by alcohol or a drug, did have the care and control of a motor vehicle contrary to section 253(a) of the *Criminal Code of Canada*;
> AND FURTHERMORE on the same date and place aforesaid 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 have the care and control of a motor vehicle contrary to section 253(b) of the *Criminal Code of Canada***.**

[2] Upon hearing the evidence, the learned trial judge convicted the appellant on the second count and, having applied the Kienapple principle, stayed count number one.

[3] The appellant's position, briefly, is that while he admits he was intoxicated at the time of the alleged offences, he was not the driver of the vehicle and was not in care and control of it.

The Evidence

[4] On the morning of July 3, 2005, Constable Andrew Clark of the Royal Canadian Mounted Police attended at the scene of a collision between two vehicles at the Lynn Mountain Road, at Mapleton, Cumberland County. He found a Toyota Echo motor vehicle had apparently been struck from the rear by a GM Blazer. He determined the Echo had been operated by Vicki Porter, who was present at the scene. She informed the officer there were two male occupants of the other vehicle and, after he identified himself to her as the owner of the Blazer, she and the appellant, had gone to a neighbouring house to call the police.

[5] The officer said when he arrived at the scene the appellant was "... seated in the driver's seat with the door open, keys were in the ignition, and he was leaned over toward the centre of the vehicle...". He smelled of liquor.

[6] Upon being questioned, the appellant told the officer he was not the driver of the vehicle and he gave the officer different names of the driver. He told the officer, "... he was trying to get paperwork from the vehicle that he owned".

[7] It is clear the appellant lied to the officer about the identity of the driver and about his own activity prior to the accident.

[8] The officer then arrested the appellant for having the care and control of a motor vehicle while impaired. The appellant was taken to Parrsboro for a Breathalyzer test, which resulted in readings of .150 and .140.

[9] Specifically with respect to the charge of care and control, the officer testified:

> Q. Okay. And you have charged him with care and control of a vehicle while impaired.
>
> A. Yes
>
> Q. How did you come to that conclusion?
>
> A. Well, when I approached the vehicle he was seated in the driver's seat and the keys were in the ignition and he also indicated to me under caution that he had driven immediately prior ... a few minutes prior to this having happened and picking up this hitchhiker. And to me he certainly would have no reason not to drive again if he had driven prior to.

[10] The officer was cross-examined about his observations of the appellant's position in the vehicle:

> Mr. O'Neil: Thank you, Your Honour. I just have a few question, officer. Now when you ... when you approached the scene you saw the Blazer, I guess, by the side of the road or on the road or ...
>
> A. Yeah, both vehicles were on the side of the road. The Toyota was first and the Blazer was in behind.
>
> Q. Okay. Now Mr. Burton was seated with his feet out of the door.
>
> A. Yeah, the door was open.
>
> Q. Okay.
>
> A. And one or both feet was out the door. I can't distinguish. Certainly, one was for sure and I can't say for sure if two or one were.

Q. Okay. Is it kind of like when someone leans in to get something? You said his hand was going to the console or he was ...

A. He was ... he was seated in the ... in his ... he was seated in the driver's seat as far as his lower end was.

Q. Yes.

A. Door was open. A foot was out the door. One, possibly two. I'm not sure which.

Q. Yeah.

A. And he was leaned over towards the center of the vehicle.

Q. Okay. Now you indicated he said he was one point looking for his papers, I guess, maybe insurance.

A. Yeah, that's correct.

Q. Okay. And what you describe is physically consistent with someone reaching for papers.

A. If you were to do it from the driver's side.

Q. Yeah.

A. Yes.

Q. When you approached the scene, when did you first notice Mr. Burton's feet or that somebody was in the ... in the ... in the area of the Blazer?

A. Well, I had to drive down by the two cars and turn the police vehicle around and pull in behind, turn the lights on.

Q. Okay.

A. So when I drove by I believe is when I noticed. I believe Ms. Porter was stood up outside.

Q. Ms. Porter was near the vehicle?

A. Yeah, she ... I believe she was or she was over towards the ditch. She was in the area anyways. Stood up outside.

Q. Yeah.

A. And I believe Mr. Burton at that point was seated in the Blazer.

Q. Okay. When you say "seated," (sic) would it be more ... I don't want to put words in your mouth, but is it more like leaning in the seat? Like, you know, with your feet out. You're, like, leaning in the seat to the console rather than actually being fully seated in the vehicle?

A. Well, no, his rearend (sic) was seated in the seat.

Q. Sideways.

A. No, not sideways.
Q. No.
A. No, forward. And there was a leg out the open door and he was leaned over towards the center. He wasn't sitting, like, sideways to it.

[11] Ms. Vicki Porter testified she had driven on the Lynn Mountain Road and the appellant's vehicle caught up to her. She said as that vehicle appeared to be in a hurry, she put on her signal light and pulled over to allow it to go by. The driver of the other vehicle "tried to go around, but he didn't succeed" and the collision occurred. After the collision the appellant got out of the passenger side of his vehicle and spoke to Ms. Porter. She and the appellant then went to a nearby residence to phone the police. While they were placing the call, the driver of the vehicle, Tony Gilbert, left the scene.

[12] Ms. Porter was asked if after they returned from making the phone call the appellant had gone back to his vehicle. She testified:

Q. Okay. Do you recall ever seeing Mr. Burton any ... in the vicinity of his vehicle?
A. Around his vehicle?
Q. Uh-huh.
A. When he came back out?
Q. Yes.
A. Well, they ... I think he had ... I thought he had got something for the police officer, but I'm not sure. I ... because once he appeared on the scene I was just kind of letting him deal with him.

[13] On cross-examination Ms. Porter was reminded of a statement she had given to the police and she then testified:

A. Well, it was a long time ago when I give this statement, but I ... he was ... I got here that he was sitting in the driver's seat with his feet out the door turned sideways.
Q. Okay. And now just getting you to think back ... and that would have been a true statement when you gave it to the police, would it?
A. I would have thought so because it was shortly thereafter.
Q. Okay. Now do you recall any discussion with Mr. Burton about insurance papers, that sort of thing, exchanging papers?

A. No, I just remember getting my insurance card out or my insurance or whatever out the glove compartment to the police officer.

Q. Do you recall him saying things to the effect that he was going to get his papers out of the truck?

A. Yeah, he was ... he was in the glove compartment at one point.

Q. Okay.

A. Yeah, getting papers or something out.

Q. Okay. And would that be the point where he's ... he was leaning in with a ... on the seat with his feet hanging out? Would that describe that time?

A. Well, it could have been. I couldn't say for sure because he was in the glove compartment before the police arrived, too.

Q. Okay.

A. At one point. But on the passenger side.

Q. Okay. And when he went on the driver's side the police had already arrived at that point.

A. Uh-huh. Yes.

Q. So they were present when he was doing that.

A. They would have been, yes.

[14] On re-direct examination with respect to how the appellant was seated in his vehicle before and after the officer arrived, Ms. Porter testified:

Ms. Nurse: Yes. You mentioned that he was on the passenger side of the vehicle in his glove compartment before you went to the house?

A. I'm sure he ... I'm sure he was.

Q. Okay. All right. So the next time was a totally different incident where he was sitting in the ...

A. Uh-huh. Because he was looking for something in the glove compartment and I'm not sure if he said license, insurance. I'm not sure what he said.

Q. And this was before?

A. Before because it was the other man that was doing most of the talking.

Q. Okay. And you said "turned sideways", in this ... when you "sideways", do you mean the body being sideways or ...

A. Yeah.

Q. ... or him sideways this way? I'm directing ...

A. I don't think he was like sitting right in the vehicle. Like, had the door open and ... but had his feet out.

Q. Okay.

A. And sitting like this. Like, out of the vehicle.

Q. Okay. Do you know how long he was in that position?

A. I couldn't say.

Q. In terms of being in the passenger side looking, how long was he in the passenger side looking?

A. Not that long.

[15] The appellant gave evidence. He acknowledged he lied to the police officer about the identity of the driver and about his activities prior to the accident. He said as he had been intoxicated his friend, Tony Gilbert, drove his vehicle. Mr. Gilbert had informed the appellant, while they were driving, that he did not have a driver's license. He described his activities of the night before the accident and that morning and acknowledged he was too intoxicated to drive. He said at the time of the collision he was asleep and woke up when the accident occurred. He got out of his vehicle, which was "real close to the ditch" and then, having spoken to Ms. Porter, went back to his vehicle to get a cell phone. As the cell phone did not work in that area, he and Ms. Porter went to a nearby house to call the police.

[16] Upon returning to their vehicles the appellant and Ms. Porter discussed the damages and eventually he agreed a claim would be made against his insurance. He testified when he started to go to his vehicle to get the insurance papers, he saw the police vehicle coming. He testified he sat in the driver's seat with his feet out of the door and reached over to the glove compartment to obtain the papers. He said the officer then arrested him for care and control of the vehicle, to which he protested, as he said the vehicle was not operable because of the damage incurred in the collision.

[17] He described the arrest as follows:

Q. The ... now can you describe to use how your body was physically located as you were trying to get your insurance papers? Where was your feet and where ... tell us ... describe ... use a picture of how you were.

A. My feet might have left the ground for maybe a second, a matter of reaching over across the vehicle to get my insurance papers

out the glove box. Once I got them out I was sitting around with my feet outside the door going through them. Like, I had a large envelope there, you know, I had it folded up with all my papers in it. And I was going through it and he come up to the car ... the Mountie did, and he said, Do you mind stepping out the vehicle? I said, yes. I said, I'm just getting the insurance papers for you and for her. Like, that's the first thing you're going to ask me for is that and my license, right, you know, that I own the vehicle and everything. He said, yeah. He said, well, we'll deal with that in a minute. He said, you know ... he said, I'm placing you under arrest right now. And, like, okay ...

Q. Okay.

A. You know ...

Q. In terms of ... did you ever put your feet inside the vehicle.

A. My feet never ...

Q. ... to the house.

A. ... entered the vehicle at all after that.

[18] On cross-examination, the appellant said his car was inoperable after the accident and pointed to a photo tendered in evidence showing the vehicle being towed with a fender apparently against the right front tire. He also testified he went to the driver's door of his car to get the insurance papers as the car was so close to the ditch it was awkward to go to the passenger side. He testified:

Q. Why didn't you go next time you were in the vehicle around the passenger side of the car?

A. Because it was so close to the ditch and plus the Mountie was just coming down the road. I could see him when I was going back to the vehicle.

Q. Did he ask you ... there's no ... you didn't state. He never asked you to go into the car to get the insurance, did he?

A. No, but she needed the insurance papers and she was starting to get agitated and I didn't want to stay there to make a conflict with her, like, about it. Like, she was getting a little excited about it. And I said, well, okay. I'll just give you the insurance papers, right, because the Mountie is coming down the road. I went over to the car and I leaned over and the Mountie even testified in his report there a little earlier that he seen me leaning over when I was getting the papers.

[19] Mr. Kelly Mooney testified he had seen the appellant in his vehicle earlier that morning at a campground. At that time, the appellant was in the passenger side of the vehicle.

[20] Tony Gilbert testified he had been the driver of the appellant's vehicle at the time of the accident. He had offered to drive the appellant as the appellant had been drinking. After the collision, he said he did not identify himself to Ms. Porter and, as he was not a licensed operator, he panicked and left the scene. He said he threw the car keys on the floor of the vehicle.

Decision of the Trial Judge

[21] The trial judge began her decision by stating that the burden of proof is on the Crown to establish the elements of the offence to the standard of proof beyond a reasonable doubt. She found the following facts had been established to the requisite standard of proof:

> (a) The accident in question occurred on July 3, 2005 when the appellant's vehicle was being driven by Tony Gilbert and the appellant was a passenger in the vehicle.
> (b) The appellant and Vicki Porter went to a nearby residence and called the police and upon their return to the vehicle they found that Tony Gilbert had left the scene.
> (c) When Cst. Clark arrived Mr. Burton was located inside the vehicle registered to him, in the position of the vehicle reserved for the driver.
> (d) The appellant provided Breathalyzer samples following demand made pursuant to the Criminal Code and his readings were as set forth above.

[22] The learned judge then said:

> The question remains as to whether the Crown has established that Mr. Burton had care and control of his vehicle and is the crux of the submissions made by defence and Crown at the completion of the trial.

[23] She continued:

> The two issues are: whether Mr. Burton was driving the vehicle at the time of the accident such that he could be said to be in care and control and secondly, whether Mr. Burton's location and conduct inside the vehicle at the time that the officer first observed him amounted to care and control of the vehicle.

[24] The first of the two issues identified by the trial judge is not relevant to my consideration in this matter as the trial judge correctly, in my view, stayed the first count.

[25] The decision then went on to summarize certain of the testimony given at trial. She noted, in particular, that the constable found the appellant in the driver's seat of the vehicle with his feet or foot out the door "leaned over towards the centre of the vehicle", in a manner consistent with someone reaching for papers.

[26] Somewhat similarly, the trial judge noted that Vicki Porter saw Mr. Burton in his vehicle with his foot or feet outside the door, turned sideways. She also noted that Ms. Porter confirmed the appellant was in the driver's seat of the vehicle when the police were there, "with his feet out and he remained in that position not that long".

[27] The learned trial judge then reviewed certain of the evidence of the appellant and his witnesses. In particular, she addressed the conflict of evidence concerning the keys of the appellant's vehicle and made a finding of credibility as follows:

> I don't accept the evidence of Mr. Gilbert on that point and where the evidence of Mr. Gilbert differs from that or departs from that of Mrs. Porter or Mr. Burton, I reject the evidence of Mr. Gilbert. I do accept portions of what Mr. Burton has to say but where there are discrepancies between the evidence of Mr. Burton and Mrs. Porter or Mr. Burton and the officer, for the reasons I have outlined previously, I accept the evidence of Mrs. Porter and Constable Clark.

[28] The learned trial judge then addressed the law concerning the care and control of a motor vehicle and concluded as follows:

> And so clearly the presumption which is contained in section 258 allows, once the crown establishes that the defendant was in the driver's position, that the defendant is presumed to be in care and control unless the defendant establishes on a balance of probabilities

that he was not in that position to set the vehicle in motion. Mr. Burton said he had no intent. When I look at the evidence of Mr. Burton and the whole of the evidence before the court I note the three following points which have been weighing on the court in assessing Mr. Burton's role:

1. Mr. Burton gave evidence that he had previously been to the passenger side of the vehicle to access his phone which was located beyond the glove box. Clearly access to the vehicle through the passenger side could be accomplished and indeed was accomplished by him. This begs the question, relative to his intent, why Mr. Burton would choose to go to the driver's side, where the glove box would be even further away than it would have been if he had entered from the passenger side, in order to access his insurance papers?

2. The second issue is with respect to the matter of the keys. Mr. Gilbert said that he left the keys on the floor and it is clear that at some point in the process those keys ended up in the ignition where they were viewed by Cst. Clarke. So there are two possibilities: either Mr. Gilbert is not being truthful on the point, thinking that maintaining that the keys were on the floor would somehow be of assistance to his friend Mr. Burton, and the keys were therefore always in the ignition, or Mr. Gilbert is being truthful about the keys having been on the floor and if he is being truthful about that, it begs the question as to how those keys got back into the ignition. There is absolutely no suggestion and no evidence before the court that Ms. Porter was ever inside the Burton vehicle and the only appropriate conclusion to come to would be that Mr. Burton was responsible for the keys being in the ignition.

3. Finally, Mr. Burton maintained in his evidence that his sole reason or purpose for being in the driver's seat of the vehicle was so that he could access the glove box and retrieve his insurance papers and he also testified that he could see the police approaching as he did that. I note however that the evidence of Ms. Porter establishes that she had no recollection of any discussion with Mr. Burton about the notion of an exchange of insurance particulars. So in my view the actions of Mr. Burton strongly suggest that the possibility he intended to engage the vehicle or to do something with the vehicle, given the location of the keys and given his location in the driver's seat. Even if

> it would be improper or inaccurate, on the weight of the evidence, to ascribe that motive to Mr. Burton, it begs the question as to whether Mr. Burton remained in control of the vehicle under the circumstances as they existed.

[29] The learned trial judge concluded as follows:

> In the instant case I am satisfied that Mr. Burton was in the vehicle, in the seat occupied by the driver, facing forward, with at least one foot outside the vehicle and the keys in the ignition. On the evidence Mr. Burton was a person who had the function or power of directing, dominating or commanding the vehicle within his possession. I am satisfied that the crown has established to the requisite standard of proof that Mr. Burton was in care and control of the vehicle. I am not convinced on the evidence of Mr. Burton that he was not in a position to take command of the vehicle or to direct or govern it if he decided to do so. Accordingly a conviction will enter on the second count. Owing to the application of the **Kienapple** principle it is not necessary for me to adjudicate on count number one which should be stayed.
>
> I am satisfied that the crown has established the requisite standard of proof that Mr. Burton was in care and control of the vehicle.

Grounds of Appeal

[30] The appellant's ground of appeal set forth in his notice of appeal was as follows:

> That the Learned Trial Judge erred in law by applying the incorrect legal test to determine "care and control" of a motor vehicle.

[31] At the appeal, the appellant set forth the issue to be addressed as follows:

> "Did the Learned Trial Judge err in law in assessing the evidence and thus rendered an unreasonable decision?"

Standard of Review

[32] Section 686 (1)(a)(i) of the *Criminal Code* sets forth the authority of this Court to set aside a verdict on the ground that it is unreasonable or cannot be

supported by the evidence. Mr. Justice McIntyre of the Supreme Court of Canada in *R. v. Yebes*, [1987] 2 S.C.R. 168; 36 C.C.C. (3d) 417, stated at p. 430:

> In my view, the majority of the Court of Appeal did not fail to apply the current principles relating to the treatment of circumstantial evidence. The function of the Court of Appeal, under s. 613(1)(a)(I) of the *Criminal Code*, goes beyond merely finding that there is evidence to support a conviction. The court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judicially, could reasonable have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the court must re-examine and to some extent reweigh and consider the effect of the evidence. This process will be the same whether the case is based on circumstantial or direct evidence. In the Court of Appeal, the majority clearly found that there was sufficient evidence to justify the verdict and both Macdonald and Craig, JJ.A. rejected all rational inferences offering an alternative to the conclusion of guilt. It is therefore clear that the law was correctly understood and applied.

[33] The instruction by Mr. Justice McIntyre has been followed in *R. v. W.R.* [1992] 2 S.C.R. 122: *R. v. Diniaris*, [2000] S.C.J. No. 16: *R. v. Molodowic*, [2000] S.C.J. No. 17: R. v. A.G. [2000] S.C.J. No.18.

[34] I have, therefore, engaged in a thorough re-examination of the evidence, paying due deference to the trial judge's finding of credibility, examined the decision for possible defects and analysis, errors of legal principle or legal inconsistencies.

Analysis

Misapprehension of the evidence

[35] The appellant has submitted the trial judge misapprehended material evidence in assessing it with respect to whether the presumption of "care and control" as found in section 258(1)(a) of the *Criminal Code* was rebutted.

[36] The critical aspect of the learned trial judge's decision to be addressed is whether the appellant occupied the seat or position ordinarily occupied by a person who operates a motor vehicle as contemplated in s. 258(1)(a) of the *Criminal Code*.

[37] The question is to be addressed:

(a) On the basis of the Crown evidence only, and

(b) Considering some of the defence evidence.

[38] The relevant portion of s. 258(1)(a) is as follows:

> (1) 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...the accused shall be deemed to have had the care or control of the vehicle...unless the accused establishes that the accused did not occupy that seat or position for the purpose of setting the vehicle...in motion.

[39] Justice Ritchie of the Supreme Court of Canada in *David Benjamin Ford v. Her Majesty the Queen*, [1982] 1 S.C.R. 231 said:

> In my opinion, at the very least the Crown must establish by inference or otherwise that the accused had the intention to use the motor vehicle as a motor vehicle – that is, to have the care or control of the motor vehicle as a motor vehicle.

[40] Mr. Justice McIntyre of the Supreme Court of Canada in *R. v. Toews*, [1985] 2 S.C.R. 119 referred to the opinion of Mr. Justice Ritchie and said:

> I am of the view that the intention of an accused charged under s.234(1) is relevant in so far as it may contribute to the presence of the required mens rea for the offence or tend to exclude it. The [page 124] mens rea for driving while impaired is the intent to drive a motor vehicle after the voluntary consumption of alcohol or a drug. The actus reus is the act of driving where the voluntary consumption of alcohol or a drug has impaired the ability to drive. Similarly, the

> mens rea for having care or control of a motor vehicle is the intent to assume care or control after the voluntary consumption of alcohol or a drug. The actus reus is the act of assumption of care or control when the voluntary consumption of alcohol or a drug has impaired the ability to drive. In proving its case, the Crown must establish the presence of impairment by evidence in the usual way and the element of care or control may be established either by reliance upon the presumption in s.237(1), where it is applicable, or by showing actual care or control without reliance upon the presumption: see R. v. Donald, supra, per Tysoe J.A., at p.149.
>
> To turn to the case at bar, as I have indicated above, I am in agreement with Hutcheon J.A. that the absence of an intent to drive the truck on the part of the respondent does not by itself afford him any defence. I am also of the view that the Crown cannot rely, in the facts of this case, on the presumption of s. 237(1). I would agree that to occupy the seat ordinarily occupied by the driver within the meaning of s. 237(1), one need not be sitting up straight with hands on the steering wheel and in all respects be ready to drive. The fact that some movement or adjustment of position might be required to enable a person to take the steering wheel and drive the car will not necessarily be such a departure from the occupation of the driver's seat that it will deprive the Crown of the right to rely on the presumption. However, in my view, by no extension or liberal interpretation of the words "occupying the driver's seat" can the section apply here. The respondent was lying across the front seat, his head on the passenger side, his legs encased in a sleeping bag under the steering wheel. The Crown can take no comfort from the presumption in this case. The Crown is left then to [page 125] rely on the evidence to show acts of care or control.

[41] Mr. Justice McIntyre then posed the question, "What will constitute having care or control short of driving the vehicle? It is, I suggest, impossible to set down an exhaustive list of acts which could qualify as acts of care or control, but courts have provided illustrations which are of assistance." He then referred to *R. v. Thomson* (1940), 75 C.C.C. 141; *R. v. Henley (*1963), 3 C.C.C. 360 and *R. v. Price* (1978), 40 C.C.C. (2d) 378. Mr. Justice McIntyre concluded in that particular case as follows:

> ... Strangely enough, however, there is no direct evidence that the respondent put the key in the ignition or turned on the stereo, and the evidence is that the last driver of the vehicle was his friend, who drove him to the party and who was to drive him home. I consider that in view of all the circumstances described above no adverse inference should be drawn I this case on the basis of the ignition key evidence alone. It has not been shown then that the respondent performed any acts of care or control and he has therefore not performed the actus reus.

[42] The Supreme Court of Canada, again considered the matter of care or control of a motor vehicle in *R. v. Ford*, [1982] 1 S.C.R. 231 and, in particular, Mr. Justice Ritchie addressed the matter of whether a lack or absence of intention to drive a motor vehicle may constitute a valid defence to a charge of care and control of a motor vehicle. He concluded such an absence does not constitute a valid defence, but he did set forth certain matters to be considered. He said:

> ... Care or control may be exercised without such intent where an accused performs some act or series of acts involving the use of the car, its fittings or equipment, such as occurred in this case, whereby the vehicle may unintentionally be set in motion creating the danger the section is designed to prevent.

[43] It is of interest to note Mr. Justice Dickson in *Ford*, while dissenting, referred to the opinion of Ritchie, J. in *R. v. Appleby*, [1972] S.C.R. 303 when he held that s. 237 (the section in question herein) required the accused to prove, <u>on a balance of probabilities</u> that he did not have an intention to set the vehicle in motion. Ritchie, J. also commented, however, if an accused could succeed in disproving this intention, he should be acquitted.

[44] The appellant herein has, as an example of facts resulting in a conviction of care and control, cited the case of *R. v. Miller*, [1995] N.S.J. No. 28 in which the Appeal Court of Nova Scotia reversed an acquittal on appeal in the following terms:

> Although each case will depend on its own facts, the element of being in such control of the car as 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, a the material time, at the controls of the vehicle and constituted an immediate danger to the public in the sense contemplated in the authorities.

[45] The Manitoba Court of Appeal in *R. v. Burbella* (2002), 167 C.C.C. (3d) 495 considered the matter of an inoperable vehicle and the care and control of same. In particular, it discussed the case of *R. v. Saunders*, [1967] 3 C.C.C. 278, a Supreme Court of Canada decision, which held the inoperability of a motor vehicle is irrelevant to the question of care or control. The Manitoba Court of Appeal, however, said:

> In my opinion, the Supreme Court in its decisions has been consistent that danger is an essential element of care or control. Only in the case where the presumption applies and care or control is conclusively deemed will be the absence of danger not afford a defence. In many instances the circumstances themselves will establish the danger. However, even where the accused establishes that he did not have the intention to set the vehicle in motion, evidence of acts involving some use of the vehicle which could accidentally cause it to become dangerous, whether by setting the vehicle in motion accidentally or causing some other for of danger, will establish care or control.

[46] On the basis of the Crown evidence alone, it is clear the accused exited his vehicle, which was parked close to the ditch, and had a conversation with Mrs. Porter about the damage which had been caused to her vehicle. They discussed the matter of insurance and I conclude from her evidence he returned to his vehicle on the passenger side, apparently in an attempt to use a cell phone to call the police. He and Ms. Porter then went together to a neighbouring house and called the police. On their return there was further discussion about the damages and the possibility of an insurance claim. Ms. Porter's evidence was to the effect that when the police officer arrived, the appellant went to the driver's side of the vehicle, apparently looking for insurance papers to exhibit to the police officer. Her evidence was clear that his feet were outside the vehicle and he leaned over towards the centre or glove compartment. It was then that he was arrested.

[47] The police officer's evidence was to similar effect. He agreed the appellant's feet or foot was outside the vehicle and he was "leaned over towards the centre of the vehicle". The police officer agreed that "he was one point looking for his papers, I guess, maybe insurance".

[48] There was no evidence the appellant had performed any act involving the use of the vehicle which could have accidentally caused it to become dangerous.

[49] I conclude, on the basis of the Crown evidence, the appellant had not "occupied the seat or position ordinarily occupied by a person who operates a motor vehicle". A person who operates a motor vehicle would not have his feet or foot outside the vehicle and would not be leaning towards the centre of the vehicle.

[50] The Crown evidence further does not establish that the appellant's actions did not "involve some use of the car or its fittings and equipment" and, in addition, shows no course of conduct associated with the vehicle which, in those circumstances, would involve a risk of putting the vehicle in motion. In these circumstances, and on the basis of the Crown evidence alone, I conclude the appellant had not performed any acts of care or control and, accordingly, had not performed the *actus reus* of the offence. Similarly, the evidence of the Crown alone clearly shows his intention was to obtain papers, but not to obtain the care or control of the vehicle. He, accordingly, did not have the *mens rea* necessary for care or control of the vehicle.

[51] The learned trial judge's finding of credibility is not entirely clear with respect to the appellant. The learned trial judge apparently only disbelieved the appellant when his evidence was at variance from that of the Crown witnesses. She said, "I do accept portions of what Mr. Burton has to say, but where there are discrepancies between the evidence of Mr. Burton and Mrs. Porter or Mr. Burton and the officer, for the reasons I have outlined previously, I accept the evidence of Ms. Porter and Constable Clark." The appellant said he had obtained his insurance papers out of the glove box and then was sitting with his feet outside the door going through them. That statement is not at variance with the evidence of either the Constable or Mrs. Porter. In those circumstances, the appellant was not in care or control of the vehicle.

[52] In the learned trial judge's decision, the learned trial judge said:

> Finally, Mr. Burton maintained in his evidence that his sole reason or purpose for being in the driver's seat of the vehicle was so that he could access the glove box and retrieve his insurance papers and he also testified that he could see the police approaching as he did that. I note however that the evidence of Mrs. Porter establishes that she had no recollection of any discussion with Mr. Burton about the notion of an exchange of insurance particulars. So in my view the actions of Mr. Burton strongly suggest that the possibility he intended to engage the vehicle or to do something with the vehicle, given the location of the keys and given his location in the driver's seat. Even if it would improper or inaccurate, on the weight of the evidence, to ascribe that motive to Mr. Burton, it begs the question as to whether Mr. Burton remained in control of the vehicle under the circumstances as they existed....

[53] The learned trial judge was clearly in error in this regard. Ms. Porter testified quite clearly that she had a discussion with the appellant about insurance and she recalled he had gone to his vehicle to obtain insurance papers. Indeed, the police officer agreed the appellant had said he was looking for insurance papers. With this error in mind, I conclude the learned trial judge misdirected herself as to the intention of the appellant in entering his vehicle.

[54] The evidence of the appellant was that his vehicle was immobilized as a result of the damages incurred in the accident. The fact it was immobilized is not a defence. (See *Saunders*). The accused testified it was immobilized and there is no evidence to counter that position. Indeed, a photograph shows the appellant's vehicle being towed with a fender apparently against the right front tire. While the fact the vehicle was immobilized is not a defence to care and control, it is a factor relevant to the appellant's state of mind, or *mens rea*.

[55] In all the circumstances outlined above, I conclude the learned trial judge erred in her conclusion that the appellant had the care and control of his vehicle at the time of his arrest. The appeal will be allowed and an acquittal will be entered.

Gruchy, J.