SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Prosser*, 2017 NSSC 63

Date: 20170307
Docket: Hfx, No. 457766
Registry: Halifax

Between:

Matthew Bruce Prosser

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Patrick J. Duncan
Heard:	February 15, 2017, in Halifax, Nova Scotia
Final Written Submissions:	February 9, 2017
Counsel:	Nicholas Fitch, for Matthew Bruce Prosser, Appellant
	Glenn Hubbard, for Her Majesty the Queen, Respondent

By the Court:

Introduction

[1] Following a trial in Provincial Court the appellant was found guilty:

1. Of having the care or control of a motor vehicle while he was impaired by alcohol or drug contrary to s. 253 (1)(a) of the **Criminal Code**; and

2. Of having care or control of a motor vehicle having consumed alcohol in such a quantity that the concentration in his blood exceeded eighty milligrams of alcohol in one hundred milliliters of blood, contrary to s. 253 (1)(b) of the **Criminal Code**.

[2] The trial judge entered a Stay of Proceedings in relation to the impaired charge and the appellant was sentenced in relation to the "over 80" charge.

[3] Mr. Prosser appeals his convictions on the basis that the learned trial judge erred in accepting the conclusions of a forensic specialist's report that purported to calculate the appellant's blood alcohol level at the time of control of the vehicle from breath samples taken between 3 and 4 hours after the appellant was in control of the vehicle.

[4] The parties agree that if the trial judge erred in relying upon the expert's opinion then both charges should be dismissed.

Facts

[5] At approximately 9:00 a.m. on July 2, 2015, Joyce Griffin was driving on Highway 207 near West Chezzetcook, Nova Scotia. She observed the appellant's oncoming vehicle travelling at what she felt was a high rate of speed, and on the wrong side of the road, just moments before the vehicle went airborne and crashed, eventually coming to a rest on the driver's side door.

[6] The appellant crawled out of the vehicle and approached Ms. Griffin who by that time had parked her vehicle and was approaching the appellant's car. Mr. Prosser identified himself as "Matthew" and asked her for a drive, but she refused feeling that he should receive medical assistance. Other vehicles stopped and an

unidentified woman called the 911 police emergency line. When Mr. Prosser was advised that the police had been called, he left the scene on foot.

[7] The police were dispatched at 9:22 a.m. and Cst. James Misner arrived on scene at 9:30 a.m. The officer examined the vehicle and located Mr. Prosser's photo identification. Two empty Moosehead Dry Ice beer cans were seized but the officer could not recall if they were found inside or outside the vehicle. He interviewed potential witnesses and then followed the path that witnesses pointed to as the direction in which the appellant fled. He was unable to locate the appellant on his own. A K-9 unit was dispatched and at 11:24 a.m. the appellant was located hiding under a tree about 700 meters from the scene of the accident.

[8] When found, the appellant was dirty, disheveled, and dressed only in his underwear. He had cuts and bruises. Mr. Prosser's demeanour was described as relaxed, cooperative and quiet. He had a bracelet on his wrist from a downtown Halifax bar. Mr. Prosser was in bare feet and he smelled of alcohol. His eyes were bloodshot and watery. He exhibited no other signs of impairment.

[9] The appellant was initially arrested for leaving the scene of an accident and shortly after he was given a demand to provide samples for breath analysis, which he agreed to. There was a delay to permit a medical examination. Ultimately the tests were administered and the appellant's blood alcohol readings were150 mg of alcohol in 100 millilitres of blood at 12:54 p.m. and another reading of 150 mg of alcohol in 100 millilitres of blood at 1:17 p.m.

[10] Kerry Lynne Blake, a forensic alcohol specialist, prepared a report that the prosecution submitted into evidence pursuant to section 657.3 **Criminal Code**. The report assumed that Mr. Prosser was driving "at approximately 0920 hours." The specialist concluded that the range of Mr. Prosser's BAC "for several minutes" on either side of 9:20 a.m. would be between 186 and 221 mg%, meaning that he was not only over the legally prescribed limit of 80 mg% but also that he would have been impaired at that time.

Position of the appellant

[11] Counsel submits that the evidentiary basis necessary to support Ms. Blake's conclusions is absent and that the trial judge erred in concluding otherwise. In particular, the appellant argues that the evidence of the time of driving did not match the time of driving used by Ms. Blake to form her conclusion as to the blood alcohol content of the appellant.

[12] It is submitted that the term "several minutes", used in the report, is too imprecise to conclude what the appellant's BAC would have been at approximately 9:00 a.m., being the time that Ms. Griffin testified to as the approximate time of the appellant's accident.

[13] The appellant says that reliance on the expert report, without calling the specialist, provides the Crown with an exception to the usual rule that a witness gives their evidence in person. For this reason, the threshold of reliability and relevance, where the Crown relies upon the Certificate, must be high. Any unexplained deviation of the facts from those assumed by the expert, should result in rejection of the conclusions.

Position of the Respondent

[14] The Crown agrees that the trial judge's decision did not address the basis upon which she concluded that the specialist's conclusions were valid although the evidence suggested the accident was approximately 20 minutes before the time that the report assumed the appellant to be in care or control of his vehicle.

[15] Nevertheless, says the respondent, the judge's conclusions were reasonable and supported by the evidence. A 20-minute difference should be accepted as reasonably within the time referenced by the expert when she asserted that the BAC estimate was valid for "several minutes" on either side of 9:20 a.m.

Powers of a Summary Conviction Appeal Court

[16] This appeal has been brought pursuant to section 813(a)(i) of the **Criminal Code**. The powers of a summary conviction appeal court are, in accordance with the provisions of section 822(1) of the **Criminal Code**, as found in section 686(1) of the **Criminal Code**, which reads:

> **Powers**
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> 686(1) On the hearing of an appeal against a conviction …, the court of appeal
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> (a) may allow the appeal where it is of the opinion that
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> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
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> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

> (iii) on any ground there was a miscarriage of justice;
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> (b) may dismiss the appeal where
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> (i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,
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> (ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (a),
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> (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred; or
>
> (iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;

Standard of Review

[17] The applicable standard of review is as set out in the case of *R. v. Nickerson*, [1999] N.S.J. 210 (N.S.C.A.), where it is stated:

> 6 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.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. B. (R.H.)*, [1994] 1. S.C.R. 656 (S.C.C.) 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.

[18] Cromwell J.A., as he then was, in *R. v. Barrett*, 2004 NSCA 38, outlined the scope of appellate review of evidence relied upon to support a verdict as follows:

> [15] This Court may allow an appeal in indictable offences like these if of the opinion that "... the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence.": s. 686(1)(a)(i). In applying this section, the Court is to answer the question of whether the verdict is one that a properly instructed jury (or trial judge), acting judicially, could reasonably have rendered: *Corbett v. The Queen*, [1975] 2 S.C.R. 275 at 282; *R. v. Yebes*, [1987] 2 S.C.R. 168 at 185; *R. v. Biniaris*, [2000] 1 S.C.R. 381 at para. 36.
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> [16] The appellate court must recognize and give effect to the advantages which the trier of fact has in assessing and weighing the evidence at trial. Recognizing this appellate disadvantage, the reviewing court must not act as if it were the "thirteenth juror" or give effect to its own feelings of unease about the conviction absent an articulable basis for a finding of unreasonableness. The question is not what the Court of Appeal would have done had it been the trial court, but what a jury or judge, properly directed and acting judicially, could reasonably do: *Biniaris* at paras. 38 - 40.
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> [17] However, the reviewing Court must go beyond merely satisfying itself that there is at least some evidence in the record, however scant, to support a conviction. While not substituting its opinion for that of the trial court, the court of appeal must "... re-examine and to some extent reweigh and consider the effect of the evidence.": *Yebes* at 186. As Arbour, J. put it in *Biniaris* at para. 36, this requires the appellate court "... to review, analyse and, within the limits of appellate disadvantage, weigh the evidence..."

[19] The appellant submits that the learned trial judge misapprehended the evidence. Oland J.A., writing on behalf of the court in *R. v. Delorey*, 2010 NSCA 65 addressed that question in the following terms:

> [27] The third issue asserts a misapprehension of evidence in regard to credibility and as provided by expert evidence. The standard of review is that summarized in *R. v. Peters*, 2008 BCCA 446:
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> > Material misapprehension of the evidence can justify appellate intervention. The standard is a stringent one: the misapprehension of the evidence must go to the substance rather than to the detail; it must be material to the reasoning of the judge and not peripheral; and the errors must play an essential part not only in the narrative of the judgment but in the reasoning process itself. If this standard is met, appellate intervention is justified, even if the evidence actually does support the conclusion reached: see *R. v. C.L.Y.*, [2008] 1 S.C.R. 5 at para. 19 and *R. v. Lohrer*, [2004] 3 S.C.R. 732 at paras. 1-2, both citing *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.) at 221. *See* also, *R. v. Miller*, [1999] N.S.J. No. 17 (N.S.S.C.).

[20] Deference is owed to a trial judge's findings of fact, including those based on expert opinion evidence. The Supreme Court of Canada stated in R. *v. Van der Peet* [1996] 2 S.C.R. 507 that:

> 81 It is a well-settled principle of law that when an appellate court reviews the decision of a trial judge that court must give considerable deference to the trial judge's findings of fact, particularly where those findings of fact are based on the trial judge's assessment of the testimony and credibility of witnesses. In *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, Ritchie J., speaking for the Court, held at p. 808 that absent a "palpable and overriding error" affecting the trial judge's assessment of the facts, an appellate court should not substitute its own findings of fact for those of the trial judge:
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> > These authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that they are not to be reversed unless it can be established that the learned trial judge made some palpable and overriding error which affected his assessment of the facts.

Analysis

[21] The learned trial judge correctly reviewed the evidence, that is, she noted Ms. Griffin's evidence that the time of the appellant's control of his vehicle was at approximately 9:00 a.m. and that the conclusions of the forensic alcohol expert were based upon the assumption that the time of the appellant's control of the vehicle was "at approximately 0920 hours". Counsel for the appellant is correct in saying that the trial judge's decision does not address the basis upon which she concluded that she could rely upon Ms. Blake's opinion, notwithstanding this discrepancy. The question then is whether, upon a review of all the evidence the trial judge's conclusion is supportable, even though she did not provide her reasons.

[22] Ms. Blake's report is three pages, single spaced and contains the scientific and factual basis upon which she reached her conclusions. It describes the impairing effects of what she concluded was the appellant's range of BAC at the time of the accident. No issue was taken with any other aspect of her report than the timing question. The material part of the report, to the issue in this appeal, states:

> For the estimate that follows, it will be considered that the absorption of alcohol from the gastrointestinal tract was complete at the time of driving and that the peak BAC was attained prior to, or at, the time of driving. It will also be considered that there was no alcohol consumed between the time of driving and

> the time of breath testing and that alcohol was eliminated from the body at a rate of 10 to 20 mg% per hour. This range of elimination rates applies to the vast majority of the population and is generally accepted in the scientific community. Under these conditions and using the first breath test result, the BAC at the time of driving is estimated to be between 186 and 221 mg%. Note that several minutes on either side of this time frame will make no appreciable difference to my estimate. This estimate has not required the gender, weight, height or age of the person.
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> The estimated BAC would be affected if there was unabsorbed alcohol in the gastrointestinal tract at the time of driving or if alcohol was consumed between the time of driving and the time of breath testing. In order to be at 80 mg% at the time of driving and at 150 mg% at 1254 hours, for a male of this weight, height and age, a minimum of 6.5 ounces of hard liquor (40% by volume) or 4.3 bottles of beer (5% alcohol by volume, 341 millilitres) or 3.4 cans of beer (6% by alcohol by volume, 355 milliliters) would have to be absorbed after the time of driving and prior to the time of breath testing, the alcohol would have to be consumed after the time of driving or in a bolus manner within minutes immediately prior to the time of driving. This estimate is conservative in that it considers that the maximum BAC is attained for the alcohol consumed and that the subject eliminated alcohol at the low end of the elimination rate rage of 10 mg% per hour.

[23] There is no direct evidence and no evidence that would lead to the inference that the appellant had "unabsorbed alcohol in the gastrointestinal tract at the time of driving or [that] alcohol was consumed between the time of driving and the time of breath testing". Neither is there evidence upon which to conclude that the appellant consumed alcohol after the time of driving or in a bolus manner "within minutes immediately prior to the time of driving". There is no evidence that brings into question the accepted elimination rate range of 10 – 20 mg% per hour.

[24] Assuming the expert's most favorable calculation of the appellant's BAC at 9:20 a.m. as 186 mg%, and reducing that by an elimination rate of 20 mg% per hour, the appellant's BAC at 8:20 a.m. would have been 166 mg%, more than double the legal limit of 80 mg%, and still a level that is consistent with impairment. Therefore, whether the time of care or control of the vehicle was at 9:00 a.m. as estimated by Ms. Griffin, or 9:20 a.m., the time used by the expert, the evidence supports the trial judge's conclusion that the appellant was impaired by the consumption of alcohol in excess of the legal limit at the time that he had the control of his motor vehicle.

[25] I conclude that the decision of the trial judge was reasonable and supported by the evidence.

[26] The appeal is dismissed.

Duncan, J.