SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Zhyvora*, 2017 NSSC 64

Date: 20170309
Docket: HFX No. 456588A
Registry: Halifax

Between:

Olena Zhyvora

Appellant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice Patrick Duncan

Heard: February 1, 2017, in Halifax, Nova Scotia

Counsel: Pavel Boubnov, for Olena Zhyvora, Appellant

Cory Roberts, for Her Majesty the Queen, Respondent

By the Court:

Introduction

[1] Olena Zhyvora appeals from her conviction following trial in Provincial Court in relation to an offence of having control of a motor vehicle while impaired by alcohol contrary to section 253(1)(a) of the **Criminal Code**.

[2] The Crown called two civilian witnesses who testified that on the date and in the locations alleged they followed the appellant's vehicle, during which time they observed several incidents of poor driving. They were concerned that the driver could be impaired and placed a call to the 911 service providing particulars of the vehicle that included the licence plate number.

[3] Shortly thereafter, police arrived at the address associated with the vehicle and found the appellant in the driver's seat of the car, with the key in the ignition, but the car was not running. The windows were rolled up. Alcohol was found in the vehicle.

[4] The appellant was, in the opinion of the arresting police officer, grossly intoxicated. A demand to provide samples of her breath for the purposes of determining the quantity of alcohol in her body was administered. She was transported to the police station where she ultimately failed to provide a proper sample. The appellant was charged with impaired control of a motor vehicle and refusal or failure to comply with the breathalyzer demand.

[5] The appellant testified that she had not consumed alcohol before or during the time that she was operating the vehicle. She maintained that after arriving at her residence she entered her house, consumed 200 ml of fortified wine, then took the wine out to her car where she continued to consume wine until the police arrived on scene and detained her. Ms. Zhyvora said that she went to the car because it was a warm day and she intended to turn on the air conditioner in the car as it was uncomfortably warm in her house. She testified that her allegedly poor driving and her physical and emotional state as testified to by Crown witnesses was attributable to her extreme distress over the circumstances of family members caught in the unrest in eastern Ukraine.

[6] The trial judge accepted some of the appellant's evidence but rejected the appellant's excuse of subsequent consumption describing it as "implausible". She found that the appellant was impaired when operating the vehicle as described by the civilian witnesses.

Issues on appeal

[7] The issues in this appeal are:

(i) Whether the learned trial judge erred in law by failing to instruct herself on the principles set out in *R. v. W.(D.)* [1991] 1 S.C.R. 742 and so failed to properly apply the principle of reasonable doubt to the evidence;

(ii) Whether the learned trial judge erred in mixed fact and law by rejecting the evidence of the appellant.

(iii) Whether the verdict of the trial judge is unreasonable or cannot be supported by the evidence?

Powers of a Summary Conviction Appeal Court

[8] 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
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> (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,

> (ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (a),
>
> (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

[9] The issues raised by the appellant engage questions of law, fact and mixed law and fact. There are many judicial decisions that set out the appropriate standards of review.

[10] Fichaud J.A., writing for the court in R. v. C.J. 2011 NSCA77, stated:

> [19] Questions of law are reviewed for correctness. Factual issues are reviewed for palpable and overriding error. The judge's application of the law to the facts is reviewed as a question of fact unless there is an extricable legal error. *R. v. Vander Peet*, [1996] 2 S.C.R. 507, para 81; *R. v. Buhay*, [2003] 1 S.C.R. 631, para 45; *R. v. Mann*, [2004] 3 S.C.R. 59; *R. v. Couture*, [2007] 2 S.C.R. 517.

[11] If there is "extricable legal error" the standard of correctness applies to that question of law. *See, R. v. Timmons*, 2011 NSCA 39, at para. 17.

[12] To the extent that the appellant challenges the trial judge's findings of fact 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.

[13] 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.
>
> [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.
>
> [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..."

[14] Implicit in the appellant's argument is the suggestion that the trial judge misapprehended aspects of the evidence, in particular as it related to the amount of time available to the appellant to have engaged in consumption of alcohol after she stopped driving. In *R. v. Izzard*, 2013 NSCA 88, Beveridge, J.A. explained:

> [40] To obtain a remedy on appeal based on an allegation that a trial judge misapprehended the evidence, the appellant must show two things: first, that the trial judge, in fact, misapprehended the evidence -- that is, she failed to consider evidence relevant to a material issue, was mistaken as to the substance of the evidence, or failed to give proper effect to evidence; and second, that the judge's misapprehension was substantial, material and played an essential part in the decision to convict (see *R. v. Schrader*, 2001 NSCA 20; *R. v. Deviller*, 2005 NSCA 71; *R. v. D.D.S.*, 2006 NSCA 34).

The Evidence

[15] Josie Hartlin was, at the time of trial, 20 years old and the daughter of Jennifer Hartlin. She testified that on June 8, 2014, she was in a vehicle operated by Jennifer Hartlin and travelled a route along Cole Harbour Road to Portland Street in Halifax Regional Municipality, Nova Scotia.

[16] Beginning on Cole Harbour Road she observed the appellant's vehicle in front of them being operated in an erratic manner that included:

- the car drove over a curb, onto a sidewalk and then back onto the road;

- the car swerved into the oncoming lane of traffic and then back over and onto the sidewalk;

[17] While they were travelling on Portland Street she called 911 to report this to the police. During the call she observed the appellant's vehicle going up onto the sidewalk again and repeatedly braking, without any apparent reason to do so. All of this was reported to the 911 operator.

[18] The appellant's vehicle made a wide turn from Portland Street and into the oncoming lane of Bruce Street. At that point Ms. Hartlin ended her call with 911.

[19] Ms. Hartlin gave a description of the driver and indicated that there was no one else in the appellant's vehicle at the time. She also testified that this took place in the evening but it was still a "nice sunny day", and traffic was "medium" – enough that the appellant's driving caused her concern for the safety of others on the road.

[20] In cross examination, she testified that they followed the appellant's vehicle for between 5 and 10 minutes at a distance of a "car length and a half".

[21] Jennifer Hartlin confirmed her daughter's evidence with some slight variations. She described that the appellant's car "hit the curb", "was kind of bouncing off the curb" and that the driver "kept hitting her brakes". Because of this poor driving she stayed about two to three car lengths behind the appellant's vehicle. She also noted that the vehicle was speeding up and slowing down between approximately 40 kmh and 75 kmh. At one point, the other car "went up over the curb" and onto the sidewalk. In cross examination, she answered that she observed the other vehicle "hit the curb several times" and went over the curb

once. All of this made her very nervous and she urged her daughter to call 911, which she did.

[22] Mrs. Hartlin followed the appellant as she turned onto Bruce Street and then to Woodlawn Road. At that point Mrs. Hartlin discontinued following the appellant's vehicle.

[23] She testified that it was "7 ish" when this occurred, and that it was still light out. The weather was clear and driving conditions were good. Shortly after arriving at their destination at the Maplehurst Apartments in Woodside, they received a call from the police indicating that they were coming to meet with the Hartlins to take their statements about this incident.

[24] Cst. Al MacLennan of the Halifax Regional Police testified that he is a "certified drug evaluator" who by the time of trial had been involved in approximately 200 investigations that involved impairment. On the evening in question he was partnered with Cst. Scott Kuhn. At 7:24 p.m. he was dispatched in relation to a "driving complaint" that included details consistent with the testimony of the Hartlins. He proceeded to the address associated with the licence plate number provided by the Hartlins as it was near the last place the appellant's vehicle was said to have been observed by the caller. The plate was identified as belonging to the appellant at 55 Woodlawn Road.

[25] He arrived at the address at 7:28 p.m. and immediately observed the appellant sitting by herself in the driver's seat of her vehicle which was parked in the driveway. The windows were rolled up and the keys were in the ignition, although the vehicle was not running. He knocked on the window and the appellant rolled the window down. He described in detail various signs consistent with impairment including:

- "a moderate odor of liquor" on her breath
- "glossy eyes"
- "very confused and trouble moving around"
- poor motor skills and confusion when attempting to respond to a request for registration and insurance documents

- poor balance when exiting the vehicle and while standing outside the vehicle

[26] Based on his observations, he arrested Ms. Zhyvora for having the care or control of a motor vehicle while impaired by alcohol. He testified that in his opinion "she was very, very intoxicated" … " she looked to be drunk is what she looked like". He noted that she attempted to resist after being handcuffed.

[27] In cross-examination, the officer testified that the call came to him from his dispatcher and that it was his understanding that the complained of conduct was "in progress". He acknowledged that he did not know the time span that might have elapsed between the time of the call to 911 and the time that it was dispatched to him.

[28] At one point the appellant began to speak French and so he called for the assistance of a French speaking officer to provide her Charter Rights advisory in the French language.

[29] He confirmed that Ms. Zhyvora was "very up and down", "very emotional", "agitated" and sometimes "crying" during his interaction with her. At one point while in the breathalyzer testing room she slammed her fists on the desk, and called him an "asshole".

[30] Cst. Denine of the Halifax Regional Police searched the appellant's vehicle and located an empty wine bottle, an empty beer can, a can of cider with a "mouthful" left in it, and a bottle of wine that was about 1/3 full. Each bottle was separately bagged.

[31] Cst. Robert Oostveen of the Halifax Regional Police was the breathalyzer operator in this matter. He described the appellant as showing "signs of gross intoxication" and "extreme intoxication" during the time she was in the breathalyzer room. He also described her as being hysterical, crying, vulgar, loud and at one point slammed her hands on the table. She did not provide proper samples for analysis and so he charged her with "refusal of the breathalyzer."

[32] Cst. Isabelle Jacques of the RCMP testified that she attended at 55 Woodlawn in response to a request for a French language speaker, that she attempted to engage in conversation with the appellant in French but concluded that Ms. Zhyvora "was not very fluent in French". She described the appellant's speech as "slurred".

[33] Olena Zhyvora elected to testify. She said that she went to Lawrencetown Beach at around noon of June 8, 2014, that she had not consumed alcohol prior to going to the beach, and had not consumed alcohol while at the beach. She thought that she left the beach at around 4 or 5 o'clock in the afternoon but admitted to being unsure in view of testimony that she was driving at around 7 o'clock.

[34] Ms. Zhyvora was asked whether she could recollect hitting curbs while driving home from the beach. She testified that she had hit curbs "before a few times" so it was possible that she did so, but that:

> I did not do like anything wrong. I was observing intersections. I was observing lights. According to my experience, like I don't remember that. Like I cannot say, I don't remember at all.

[35] She says that she was crying while driving.

[36] The appellant then testified as to what happened when she arrived home:

> I went to the house. I was sitting in the room. I was drinking. It was hot in the room. I decided to go to the car.

[37] The appellant testified that she took the remainder of the wine to the car with her. She estimated that she drank 200 ml of fortified wine from a "big bottle" and that it did not take very long because she was "trying to get drunk". Her plan was to get into the car and turn on the air conditioner, so she put the key in the ignition and left the windows rolled up. This was not the first time that she had sat in the car, in the driveway, getting drunk which was her explanation for the presence of an empty beer can, empty bottles and an empty cider can in her car.

[38] The appellant testified that she was in the car "no more than five minutes" when the police arrived at the car door. Ms. Zhyvora denied speaking in French with the police and was surprised when the French speaking police officer arrived to give her the Charter Rights advisory in that language.

[39] When asked about her behaviour at the police station she explained that her foul language was not directed at the police officers and that it was related to her "personal circumstances".

[40] That was the evidence material to the judge's decision and to the issues in this appeal.

The Judge's decision

[41] The contested issues before the trial judge were narrow. The identity of the appellant as the operator of her motor vehicle on the date and in the locations alleged was not in issue. Neither was it in issue that she was "impaired by alcohol" at the point in time at which she was found in the vehicle by police. The questions to be resolved were:

1. Was she in care or control of the motor vehicle while it was parked in her driveway?

2. Was it proven beyond a reasonable doubt that she was impaired while operating her vehicle while travelling from Lawrencetown to her residence?

[42] After a review of the facts and law relevant to the issue of "care or control" the trial judge was not satisfied that the appellant intended to set her vehicle in motion while parked in her driveway and therefore concluded that the appellant was not in care or control of the motor vehicle while seated in the vehicle in her driveway. Implicit in this decision is that the trial judge accepted the appellant's testimony that she only intended to sit in the car, drinking, with the air conditioning on and did not intend to set the vehicle in motion. The Crown has not contested this finding.

[43] The trial judge concluded, as admitted by Ms. Zhyvora, that she was in care and control of the vehicle at the time that she was seen driving on the Cole Harbour Road, Portland Street, Bruce Street and turning on to Woodlawn Road. The issue then was whether the evidence proved, beyond a reasonable doubt that the appellant was impaired by alcohol at that time.

[44] The trial judge next reviewed the testimony heard in the trial, and made certain findings of fact.

[45] After reviewing the prosecution evidence the learned trial judge carried out an assessment of the appellant's testimony:

> So the question is, can I accept Ms. Zhyvora's evidence in light of a window of four minutes of the police receiving the call? Josie hung up from police when the car turned right onto Bruce Street. Within four minutes the police were at 55 Woodlawn Avenue. Ms. Zhyvora's in the car. Not a whole lot of time to go in the house, drink 200 millilitres of fortified wine and come back,

> I have other issues with her evidence. She said it was hot in the house, and that's why she went out to the car, to use the air conditioning, yet she's sitting there in the car with the windows rolled up. She's wearing jeans and a skirt on top of it, and hasn't engaged the vehicle. Not a very plausible explanation.
>
> I accept that Ms. Zhyvora was under a lot of stress concerning her family. I do not accept that while at the beach she was not drinking. The driving was unexplained. I don't believe that someone even upset about family circumstances and crying would be up over curbs, to the extent that she was, according to the civilian witnesses.
>
> She told us that she was sitting in the car no more than five minutes. I believe that. Because she never got out of the car.
>
> So there are portions of her evidence that I accept, but the portion that relates to her getting home, being in the house, consuming alcohol and then getting back out into the vehicle to turn on the air conditioning because it was too warm simply is not plausible, given the other evidence that she's provided.
>
> In short, I am satisfied based on the evidence of the civilians and the police, that Ms. Zhhvora was impaired and operating a motor vehicle on Cole Harbor Road and Portland Street, shortly after 7:00 p.m. on June 8, 2014, given the driving and the indicia of impairment and the timing of the reporting of the incident and locating Ms. Zhyvora in the vehicle. As a result, I convict her of count number one, impaired driving.

Analysis

[46] I am satisfied that the trial judge reviewed the prosecution evidence accurately. There is no indication that she failed to appreciate the evidence or that she misstated the evidence in her decision.

[47] The question, as the defence argues, is whether the trial judge applied proper legal principles in assessing the credibility and reliability of the appellant's testimony, in particular her assertion that she did not consume alcohol until after her care or control of the vehicle ended.

[48] The trial judge's decision did not cite the three-step process in *W.(D.).*

[49] The judge's decision did not respond to the defence submission that there was an insufficient evidentiary basis to conclude that the time of the Hartlins' 911 call and the time of the dispatch were proximate in time and therefore only four minutes elapsed from the time that the Hartlins' observed the appellant driving until Cst. MacLennan observed her in her driveway. The significance of this to the

defence is that if the gap in time between the two events was greater than that assumed by the trial judge then the testimony of the accused could be true.

[50] The issues presented by the appellant are inextricably linked to each other and so I will address them as one. To respond to these questions, I adopt the approach of Justice Saunders in *R. v. DDS*:

> 29 Because of the overlap among the appellant's first, second and last submissions [(i), (ii), and (vi)] both in terms of the evidence and the proper legal principles to be applied to that evidence, it is more convenient that I deal with these three arguments at the same time. For ease of reference I will repeat them. D.D.S. complains that the trial judge erred in law:
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> > (i) in his application of the test in *R. v. W.(D)*, [1991] 1 S.C.R. 742, 63 C.C.C. (3d) 397;
> >
> > (ii) by failing to direct himself or apply the proper legal principles when assessing the reliability and credibility of witnesses;…
> >
> > (vi) in misapprehending certain critical evidence bearing upon the substantive issues that arose in this case.
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> 30 In approaching the analysis in this manner I wish to emphasize several points. The organizational technique just described is for convenience only, given the nature of the record, and the issues on appeal. By combining a discussion of the test in *W.(D.)* with considerations of misapprehending the evidence I do not wish to be seen as supporting a submission or analysis that amounts to an amalgam of the two, or encourages their combination by counsel. On the contrary, the two are quite distinct. While admittedly, the *W.(D.)* inquiry as to reasonable doubt will, of necessity, invite an assessment of credibility, and a consideration of testimony and other evidence tied to that assessment, it should not be confused with the quite distinct inquiry into whether the trier has so gravely misunderstood the evidence as to compel overturning the verdict. Whereas the latter scrutiny entails a review of the body of evidence, the former demands a review of the judge's decision and reasoning.
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> 31 Neither would I wish to be seen as having simply substituted our view about credibility of the witnesses for that of the trial judge. That such an intervention would clearly be outside this court's authority is indisputable. …
>
> 34 Not surprisingly most criminal cases involve an assessment of the reliability and credibility of viva voce testimony. This imposes an important and special obligation upon the trier of fact. A fundamental requirement of a fair trial is the recognition and application of correct legal principles in assessing issues of credibility, as well as a proper understanding and application of the burden of proof.

[51] Turning more specifically to the *W.(D.)* formulation the court said:

> 36 In *R. v. W.(D), supra*, the Supreme Court of Canada held that a trial judge must instruct the jury that the rule of proof beyond a reasonable doubt applies to issues of credibility. Specifically, Cory, J. concluded that a trial judge is required to instruct the jury that they must acquit the accused in three situations: first, if they believed the accused; second, if they were left with a reasonable doubt on the basis of his evidence; and third, even if they did not believe the accused's evidence, but still had a reasonable doubt as to his guilt after considering the whole of the evidence.
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> 37 Mr. Justice Cory formulated a concise and uniform set of instructions on the issue of credibility as follows:
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> > First, if you believe the evidence of the accused, obviously you must acquit.
> >
> > Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
> >
> > Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.
>
> 38 In judge alone trials it is common place, and appropriately so, for trial judges to refer to this three-step process . It is not necessarily fatal if a trial judge fails to do so. *R. v. Minuskin*, [2003] O.J. No. 5253 (C.A.) at para. 22. What is important is that the judge correctly apply the burden of proof in a way that makes it clear the trial judge has analyzed the evidence properly. A failure to do so amounts to an error in law and will necessitate a new trial.
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> (emphasis added)

[52] In *R. v. Saulnier*, [2005] N.S.J. No. 115 (C.A.) Chipman, J.A. began by referring to the suggested approach articulated in *R. v. W.(D)* and then observed:

> [17] The principle is, of course, equally applicable to a trial by a judge without a jury. The judge in the reasons for judgment is not required to spell it out as carefully as must be done in a jury charge, but it must appear clear from the judge's reasons as a whole that the judge applied the proper test. That is, the judge must not only make the necessary credibility findings to underlie a conclusion of guilt, but must also apply the principle of reasonable doubt. *See R. v. Brown* (1994), 132 N.S.R. (2d) 224 (N.S.C.A.) per Matthews, J.A. at para. 19.

[53] Fichaud J.A., writing for the court in *R. v. Lake* 2005 NSCA 162, also addressed the degree to which a trial judge must adhere to the application of the *W.(D.)* steps:

> 15 *W.(D.)* dealt with a jury charge. A judge alone is presumed to know the basic principles of law governing reasonable doubt which need not be recited mechanically in every decision. Her decision may operate within a flexible ambit. She need not quote phraseology from *W.(D.)*, follow the *W.(D.)* chronology or even cite *W.(D.)*. The question for the appeal court is whether, at the end of the day and upon consideration of the whole of the trial judge's decision, it is apparent that she did not apply the essential principles underlying the *W.(D.)* instruction. *R. v. Boucher*, [2005] S.C.J. No. 73, 2005 SCC 72 at para. 29 and 59; *R. v. Minuskin* (2003), 181 C.C.C. (3d) 542 (O.C.A.), at para. 22; *R. v. Brown* (1994), 132 N.S.R. (2d) 224 (C.A.) at paras. 17 and 19; *R. v. Maharaj* (2004), 186 C.C.C. (3d) 247 (O.C.A.) at para. 33, leave to appeal denied [2004] SCCA No. 340; *R. v. Saulnier*, [2005] N.S.J. No. 115, 2005 NSCA 54 at paras. 17, 19, 35, 37; *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (O.C.A.) at p. 203; *R. v. Robicheau* (2001), 193 N.S.R. (2d) 42 (N.S.C.A.), at para. 27, per Roscoe J.A. dissenting, adopted by the Supreme Court of Canada [2002] 2 S.C.R. 643; *R. v. Mah*, [2002] N.S.J. No. 349, 2002 NSCA 99, at para. 41; *Chittick*, at para. 21; *R. v. Binnington*, [2005] N.S.J. No. 402, 2005 NSCA 133, at para. 10.
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> 16 ...
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> 17 An implied answer to one of *W.(D.)*'s questions clearly is acceptable. In *R. v. Boucher*, (SCC) at paras. 29 and 59, the majority and dissenting judges agreed that, when a trial judge clearly rejects an accused's credibility, this not only answers *W.(D.)*'s first question but also may imply a negative answer to *W.(D.)*'s second question. To similar effect: *R. v. Smaaslet*, [2004] B.C.J. No. 1926, 2004 BCCA 432 at paras. 8, 21; *R. v. Nelson*, [2004] O.J. No. 3103 (O.C.A.), at para. 19; *R. v. M.A.L*, [2005] B.C.J. No. 1706, 2005 BCCA 395 at paras. 47-48.

[54] In summary, it is not fatal to the result if the trial judge fails to recite the three-step process of *W.(D.)* however where that occurs then the reviewing court must review the judge's reasons as a whole, be satisfied that the judge applied the principle of reasonable doubt, and that she made the necessary credibility findings to underlie a conclusion of guilt.

[55] The trial judge in this case is very experienced and sits in a criminal trial court which hears these types of cases frequently. The court is taken to know and apply the principle of proof beyond a reasonable doubt. I find that the trial judge's failure to explicitly state the burden of proof is not a basis upon which to set aside the verdict.

[56] The judge's path of reasoning is easy to follow. The trial judge clearly stated her findings of credibility. Most of the prosecution evidence was unchallenged and the court accepted it. As a trier is entitled to do the trial judge accepted some of the appellant's evidence but not all of it. She disbelieved the accused's testimony of

bolus drinking after she parked the vehicle and instead concluded that Ms. Zhyvora was impaired when the Hartlins observed her driving the vehicle. In doing so she implicitly responded to the first two questions posed in the *W(D)* approach. i.e., She did not believe the appellant and the evidence of the appellant did not raise a reasonable doubt in the mind of the trial judge.

[57] The totality of the evidence, which the trial judge reviewed in her decision, did satisfy the court of the appellant's guilt, which responded to the third question posed in *W.(D.)*.

[58] The remaining question is whether the conclusion of the judge is reasonable and supported by the evidence.

[59] It could be argued that once the trial judge rejected the appellant's evidence of subsequent consumption the proximate timing of the 911 call to the time of dispatch and the arrival of the police on scene is not material to the judge's overall conclusion. However, the trial judge's determination as to the appellant's credibility was based in part on the assumption that the time between the 911 call and the arrival of the police was too short for the appellant to be telling the truth. As this finding was a factor in the credibility assessment the factual underpinning for that conclusion requires examination.

[60] The finding that the appellant's explanation was "implausible" was based on the following conclusions of the trial judge:

- The police arrived at 55 Woodlawn Avenue within four minutes of the end of Josie Hartlin's call to 911, made from Bruce Street;

- Four minutes was "Not a whole lot of time to go in the house, drink 200 millilitres of fortified wine and come back" [to the car];

- The appellant's circumstances in the car were inconsistent with her testimony that she was there because it was too warm in the house. The air conditioning in the car was not on, the car windows were rolled up and Ms. Zhyvora was wearing jeans and a skirt on top of it, which one can infer would be unusual for a person claiming to be too hot. Implicit in the judge's finding is the conclusion that there was sufficient time to turn on the car's air conditioning but that the appellant did not do so. The judge's assessment was that: "She told us

> that she was sitting in the car no more than five minutes. I believe that. Because she never got out of the car."

- The appellant's evidence did not explain her poor driving including driving "up over curbs";

- The trial judge did not accept the appellant's explanation that her poor driving was the result of crying and being upset.

[61] There is evidence that was available to the trial judge upon which she could conclude that "only four minutes" elapsed from the time of the Hartlin call to the time that the police arrived to find the appellant in her car.

[62] Josie Hartlin completed the phone call on Bruce Street just before her mother observed the appellant turn onto Woodlawn Road. The evidence of Ms. Zhyvora confirmed that she drove directly to her house on Woodlawn Road – there was no suggestion that she stopped or drove someplace else before pulling into her driveway. It is therefore reasonable to infer that the end of the 911 call ended only minutes before the appellant pulled into her driveway.

[63] The evidence that speaks to the gap between that time and the time of the police arrival on scene is not as complete as it might have been. If the Crown had led evidence as to the time that the 911 operator received the call and dispatched the call to the police, then this question would be answered. However, that was not done and so the question is what other evidence did the court have upon which to conclude that the dispatch was proximate to the end of the 911 call.

[64] Cst. MacLennan was cross-examined on the timing question:

> Q. And do you know how much time is needed to transfer a complaint from [a] concerned citizen to dispatch and then to you?
>
> A. Minutes, minutes.
>
> Q. Could it be five minutes, ten minutes, 20 minutes?
>
> A. In this specific circumstance, I don't know the exact time but...
>
> Q. Okay, fair enough. So, the concerned citizen could report the complaint ten minutes ago, and then you receive it through the dispatch. Correct?
>
> A. It could be that way, yes.

> Q. Okay, okay. And you did not, when you received the complaint, you did not receive a specific time when actually the, the concerned citizen saw the vehicle driving erratically. Correct?
>
> A. The way the call was received that it was like in progress, so it wasn't a call that we were going to investigate. It was happening now. So when we receive it, we're going to investigate it as an in progress, happening at this time. The transition of how long that took place from the call, the person that made the call, for us to get it, was as long as it took for the people that received the call to send it to us. But I don't know exactly the time span in that, that it would take. But it was in progress, is my understanding

[65] The officer was forthright in acknowledging that he could not speak for the 911 operator as to the time passed from taking the call to dispatch of the call, however the information he was provided that the matter was "in progress" was not qualified or otherwise refuted. The officer's expectation, presumably based on his experience, was that such a call would be dispatched promptly. It is also reasonable to infer that a 911 operator would dispatch such a call immediately unless there was an overriding and intervening event that delayed them. There was no evidence that there was such an event.

[66] Ms. Zhyvora had no idea what time she was driving the car thinking that it could have been 4 or 5 o'clock in the afternoon, a proposition which was clearly disproven. Her evidence is of no assistance in determining the time frame leading up to her arrest.

[67] Jennifer Hartlin testified that these events occurred around "7 ish", which while inexact puts the time of driving and the 911 call reasonably close in time to the time of dispatch to the officers. Also, the evidence of Jennifer Hartlin that the police called to get their witness statements shortly after they arrived at their destination in Woodside supports the conclusion that the timelines were tight.

[68] If the timing issue was the sole basis for the trial judge's rejection of the appellant's evidence it may very well have warranted more evidence to support her overall assessment of the appellant's credibility, but it was not. There was also the unexplained driving evidence, and the inconsistency in the explanation for her reasons to be in the car which brought the appellant's credibility into question. The evidence was present to support these conclusions.

[69] A trial judge does not have to recite every piece of evidence upon which they rely to reach their conclusions. In this matter, there was other evidence that

the trial judge did not refer to but which, in my assessment, further supports her determination of the appellant's credibility.

[70] Looking at the factors cited by the judge in the context of the totality of the evidence there was ample grounds to question the appellant's credibility and reliability.

[71] Even allowing that there may have been some delay in the transmission of the call to the officers, the timelines are very tight for the appellant to have done what she testified to. There would be some time in travelling to her house after the end of the 911 call, shutting down her car, exiting the vehicle and walking into the house, sitting down and consuming a significant quantity of wine, then electing to exit the house, and enter the car. All of this had to happen in less than a half hour. Further, the effects of absorbing the wine into her system would have to have been almost immediate for the officer to find her so significantly intoxicated so quickly after the consumption took place.

[72] The evidence showed Ms. Zhyvora's driving to represent an ongoing danger to the public, both pedestrian and vehicular traffic, over a considerable distance. Such driving was consistent with an impaired operator. The appellant could not remember this, only allowing that it had happened on other occasions so it was "possible" that it happened on the date of the offence. This explanation demonstrates either that she was not forthcoming about the reasons for her poor driving or had no recollection of her dangerous driving. Either way it is evidence that could be used to bring her credibility and reliability into question.

[73] She erred by two to three hours in her estimate of the time that she drove home. She could not remember speaking French to the police officers and testified that her conduct at the police station was not directed at the officers, notwithstanding that Cst. MacLennan testified that she called him an "asshole", a comment that clearly contradicts her account. Her purportedly poor recollection and/or minimization of evidence unfavorable to her position undermines her credibility and reliability as a witness.

[74] Finally, there is the ultimate advantage that a trial judge has in hearing and seeing the witness testify. Deference is owed to a trial judge's findings of fact. 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:
>
> 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.

Conclusion

[75] I am satisfied that while the trial judge did not refer to the principles set out in the case of *R. v. W.(D.)* she applied the appropriate underlying principles in reaching her conclusions.

[76] The trial judge’s rejection of the appellant’s testimony as it related to an assertion of subsequent consumption of alcohol after ending her care and control of her motor vehicle, and the judge’s review of the totality of the evidence demonstrated the application of the underlying principles of the *W(D)* approach to assessing credibility.

[77] The evidence supports the trial judge’s findings of fact and her assessment of credibility. A review of that evidence satisfies me that there was other evidence, not referred to by the judge, which could also support her conclusions.

[78] There was no “palpable and overriding error” in the trial judge’s assessment of the facts. The decision is reasonable and can be supported by the evidence.

[79] Appeal dismissed.

Duncan J.