

PROVINCIAL COURT OF NOVA SCOTIA

Cite as: R. v. Pottie, 2009 NSPC 57

Date: October 22, 2009

Docket: 1834382, 1834383

Registry: Halifax

Between:

HER MAJESTY THE QUEEN

v.

JEANETTE MARIE POTTIE

DECISION

HEARD BEFORE: The Honourable Judge Marc C. Chisholm

PLACE HEARD: Halifax, Nova Scotia

DATE HEARD: October 22, 2009

CHARGE: On or about the 23rd day of September 2007, at or Halifax
Reginald Murphy, Nova Scotia, unlawfully had care or control of a motor vehicle while driving on a public highway
that the concentration thereof in his blood exceeded 80 milligrams of alcohol in 100 millilitres of
blood contrary to Section 253(b) of the Criminal Code.

AND FURTHER that she at the same time and place aforesaid, did
have care or control of a motor vehicle while her ability to operate a
motor vehicle was impaired by alcohol or drug, contrary to Section
253(a) of the Criminal Code.

CROWN ATTORNEY: Darrell MARTIN
DEFENSE ATTORNEY: David GREEN

R v. Jeanette Pottie

1 Ms. Pottie is charged with two offences:

1 That she, on or about the 23rd day of September 2007, at or Halifax Regional
2 Municipality, Nova Scotia, did:

3 Unlawfully have the car or control of a motor vehicle having consumed alcohol in
4 such a quantity that the concentration thereof in his blood exceeded 80 milligrams
5 of alcohol in 100 millilitres of blood contrary to Section 253(b) of the Criminal
6 Code.

7
8 AND FURTHER that she at the same time and place aforesaid, did have care or
9 control of a motor vehicle while her ability to operate a motor vehicle was
10 impaired by alcohol or drug, contrary to Section 253(a) of the Criminal Code.

11
12 In summary the evidence is that Ms. Pottie went to a private club on the evening of
13 September 22, 2007. During the evening she consumed alcohol. Shortly after midnight, Ms.
14 Pottie drove her vehicle from the private club in the south end of Halifax, to the McDonald's
15 restaurant on Lacewood Drive in the western part of Halifax. The drive took approximately 20
16 minutes. As she waited in the drive-thru line her head was bobbing as if she was having trouble
17 staying awake. She drove into the back of the vehicle in front of her. She acknowledged having
18 done so. Shortly thereafter she fell asleep. Within minutes the police attended the scene and had
19 contact with Ms. Pottie. She was given the breath demand to which she complied. Breath
20 testing conducted at 1:59 a.m. and 2:19 a.m. resulted in readings of 170 mg% and 160 mg%
21 respectively.

1 It is not in dispute that when she was in control of a motor vehicle Ms. Pottie's ability to
2 operate the motor vehicle was impaired by alcohol and/or drug.

3 **Defense Theory**

4 The defense theory is that Ms. Pottie drank a moderate amount of alcohol between 8:00
5 p.m. and 11:30 p.m. September 22, 2007. Sometime shortly before 11:30 p.m. someone put a
6 drug (most likely Rohypnol) in Ms. Pottie's beer without her knowledge or consent. If she
7 consumed additional alcohol thereafter, such consumption was not voluntary nor was her
8 operation of her motor vehicle. Based upon that theory the following arguments were advanced.

9 **On the 253(b) charge:**

10 The Defense argued:

- 11 1) That a doubt has been raised as to the accuracy of the breath test results/and a doubt that
12 her blood alcohol was in excess of the legal limit at the time she was in control of a motor
13 vehicle;
- 14 2) That because a portion of Ms. Pottie's alcohol consumption was not voluntary, a doubt
15 has been raised that her blood alcohol level exceeded the legal limit due to the voluntary
16 consumption of alcohol;
- 17 3) That Ms. Pottie's operation of the motor vehicle was not a voluntary/conscious act.

18 **On the 253(a) charge:**

19 The Defense position is:

- 20 1) That a reasonable doubt exists as to whether Ms. Pottie's condition of impairment was
21 the result of voluntary consumption by her of alcohol and/or drug; and

1 2) That the operation of a motor vehicle by Ms. Pottie was not a voluntary/conscious act.

2 I will review the evidence of each witness and provide on my assessment of their

3 evidence as I do so.

4 **The Crown Evidence:**

5 **Lisa Marr**

6 Ms. Marr has been an EHS paramedic for 9 ½ years. She gave evidence that she attended

7 the scene at the McDonald's restaurant on Lacewood Drive, Halifax, NS, at around 1:00 a.m.

8 September 23, 2007 at the request of the police.

9 She did a medical assessment of Ms. Pottie over a 15 minute period.

10 She stated that:

11 - Ms. Pottie's vitals were all normal

12 - Ms. Pottie was alert and oriented.

13 - Ms. Pottie was not groggy

14 - She had no difficulty talking to Ms. Pottie. Ms. Pottie fully understood her situation.

15 She stated that Ms. Pottie told her that she'd had five beers and she's been in the drive-

16 thru lane for 45 minutes and fell asleep.

17 She did not observe:

18 - That Ms. Pottie's pants were undone

19 - That Ms. Pottie urinated on herself

20 - Any smell of urine

21 - Any smell of alcohol on Ms. Pottie's breath

- 1 - Any signs of impairment
- 2 - Any indication that Ms. Pottie has lost consciousness.

3 During cross-examination Ms. Marr indicated that in her limited experience dealing with
4 persons under the influence of Rohypnol Ms. Pottie's presentation was not consistent with same
5 in that unlike these other persons Ms. Pottie was able to carry on conversation, was not
6 disoriented, and was not very lethargic.

7 I found Ms. Marr's evidence credible. Her observation of Ms. Pottie's condition was
8 consistent with that of other witnesses on some point and inconsistent on some other points. I
9 accept the evidence of Ms. Marr and find that when she dealt with Ms. Pottie, Ms. Pottie was not
10 disoriented and was aware of her circumstances and recent events. I accept her evidence that
11 Ms. Pottie told her that she'd consumed five beer.

12

13 **Fiona Comeau**

14 Mrs. Comeau testified that, on the early morning in question she was driving the car that
15 was immediately in front of Ms. Pottie's vehicle in the McDonald's drive-thru lane.

16 She stated that the line was moving very slow. They were in the line a long time.

17 She noted that Ms. Pottie's head was bobbing.

18 When the line moved, Ms. Pottie moved her car forward and her vehicle hit the rear of
19 Mrs. Comeau's vehicle.

20 Mrs. Comeau got out of her car and spoke to Ms. Pottie. She testified that Ms. Pottie said
21 "Yeah yeah, I know I hit you. How hard did I hit you?"

1 Mrs. Comeau stated that Ms. Pottie was leaning quite a bit out the car window.

2 Mrs. Comeau felt that there was something wrong with Ms. Pottie, possibly that she'd
3 been drinking (although she did not detect a smell of alcohol) and asked her husband to call the
4 police which he did.

5 When the line moved again Mrs. Comeau moved her vehicle forward. Ms. Pottie did not
6 move her car. Ms. Pottie appeared to be asleep.

7 Mrs. Comeau's evidence was credible and I accept it in its entirety. I find that Ms.
8 Pottie was driving her car in the McDonald's drive-thru lane at around 12:30 a.m. on September
9 23, 2007. I find that Ms. Pottie drove her car into the back of Ms. Comeau's car and was aware
10 of having done so. I find that her head was bobbing and she eventually fell asleep.

11 **Cst. Gerald Murney**

12 Cst. Gerald Murney testified to receiving a 12:48 a.m. dispatch call to McDonald's
13 Lacewood Drive, regarding a possible impaired driver. He arrived within 1 minute. He was
14 directed to Ms. Pottie. He observed Ms. Pottie seated in the driver's seat, asleep. He had some
15 difficulty awakening her. Upon waking she was disoriented. She didn't immediately recognize
16 him, by his uniform, as a police officer. She offered him \$20.00. She said she'd been in the line
17 for about 45 minutes. He noted that she appeared to have urinated on herself.

18 He stated that he observed a faint odour of alcohol coming from Ms. Pottie. Ms. Pottie
19 admitted to having had a couple of beers. He testified that he believed Ms. Pottie was
20 intoxicated. After talking to Mrs. Comeau he arrested Ms. Pottie for impaired driving, at 12:55
21 a.m.. He called EHS to check Ms. Pottie and asked a female officer, Cst. Lake, to give the

1 breath demand, rights and cautions to Ms. Pottie.

2 He noted that Ms. Pottie staggered, and was swaying as she exited her car.

3 Later, after Ms. Pottie was cleared by EHS personnel he transported her to the police
4 station.

5 En route she provided information about where she'd been coming from, what she'd been
6 doing, and her work. He stated that she was more alert and cognitive at that time. I considered
7 his evidence on this point only as it related to her apparent alertness and understanding.

8 At the police station arrangements were made for her to speak by telephone with duty
9 counsel which she did.

10 At 1:44 a.m. Cst. Murney re-read the breath demand to Ms. Pottie and she again agreed
11 to take the test.

12 She was immediately taken into the breath testing room and introduced to the breath
13 technician Cst. Marshall Williams.

14 Cst. Murney remained during the testing procedure.

15 He testified that, while at the police station, he observed nothing out of the ordinary. Ms.
16 Pottie appeared to understand, she was polite and talkative and upset.

17 Cst. Murney's evidence was straight-forward and credible. I accept his evidence.

18 **Cst. Jennifer Lake**

19 Cst. Jennifer Lake testified that she was the second officer on scene. She stated that she
20 heard Cst. Murney arrest Ms. Pottie for impaired driving. She observed Ms. Pottie exit her
21 vehicle. She observed:

- 1 1) That Ms. Pottie's pants were unzipped (zipper down - pants not down);
- 2 2) Ms. Pottie appeared to have urinated;
- 3 3) Ms. Pottie's movements were very slow and groggy, later modified to a
- 4 little groggy.

5 She observed a faint smell of alcohol from Ms. Pottie. Based upon her own observations
6 and the information obtained from others she, upon request, gave Ms. Pottie a breath demand.

7 She gave the demand at 12:55 a.m. followed by rights and Caution. She stated that Ms.
8 Pottie appeared to understand. Ms. Pottie agreed to take the test and indicated that she wished to
9 speak to a lawyer.

10 Cst. Lake's evidence was also straight-forward and credible. I accept her evidence.

11 **Cst. Matthew Luck**

12 Cst. Matthew Luck responded to the scene arriving at 12:45 a.m.. He observed Ms.
13 Pottie in the driver's seat, apparently asleep, eyes closed, head back, mouth open.

14 He observed Cst. Murney awaken her by speaking loudly and touching her shoulder.

15 He observed Ms. Pottie hold up a bill (currency).

16 He observed Ms. Pottie exit her car. He saw a wet spot in the groin area of her pants.

17 He heard Ms. Pottie tell EHS personnel that she'd had 5 beers at Resolute Club.

18 He observed Ms. Pottie to be slow to react, eyes bloodshot, head bobbing side to side,
19 unsteady on feet, speech slurred, calm, unconcerned until breath tests were completed.

20 At police station he observed a strong smell of alcohol from her, glossy eyes, slurred
21 speech, unsteady on her feet, slow, groggy reaction to directions.

1 After the tests, when Ms. Pottie was advised of the result, he observed her crying and
2 upset.

3 Cst. Luck's evidence regarding Ms. Pottie's condition regarding impairment was more
4 detailed as his observations indicated more severity in regard to signs of impairment he showed.
5 I accept his evidence regarding signs of impairment to the point it is consistent with the
6 observations of other officers.

7 **Cst. Marshall Williams**

8 Cst. Marshall Williams testified that he used an approved instrument to test Ms. Pottie
9 and that he is a qualified breath technician. His evidence was that tests were performed by him at
10 1:59 a.m. with a result of 170 mg% and at 2:19 a.m. with a result of 160 mg%.

11 He stated that the instrument operated properly during the testing.

12 He described Ms. Pottie as cooperative, upset, with a mild odour of alcohol on her breath,
13 and bloodshot eyes.

14 He stated that she appeared to understand his directions and had no difficulty complying.

15 **Summary of Crown Evidence and Finding of Facts**

16 The evidence of the four police witnesses varied somewhat in relation to their
17 observations of signs of impairment.

18 These differences did not affect their credibility.

19 I accept that Ms. Pottie fell asleep at the wheel. That upon being awakened she was
20 disoriented and confused. That when seen by EHS technician some 10 minutes after being
21 awakened she was not disoriented and was aware of her situation and recent events.

1 I accept that, after the initial period of disorientation upon being awakened, that Ms.
2 Pottie appeared to understand what was being said to her. I accept that there was a smell of
3 alcohol on Ms. Pottie's breath. I accept that her eyes were glossy. I accept that, when she exited
4 her motor vehicle she was unsteady on her feet. I find that her movements/reactions were slow
5 and at least a little groggy. Her speech may have been slurred.

6 I find that Ms. Pottie told Ms. Marr that she'd consumed five beers and told Cst. Murney
7 that she'd consumed couple of beer.

8 I am satisfied that Ms. Pottie was given a lawful demand pursuant to s.254 at 12:55 a.m.
9 by Cst. Lake. I find that Ms. Pottie was advised of her right to counsel and given the usual
10 police caution.

11 At the police station Ms. Pottie was provided an opportunity to speak with counsel, in
12 private, which she did.

13 I find that Ms. Pottie provided two samples of her breath at 1:59 a.m. and 2:19 a.m.
14 respectively with a resulting reading of 170 mg % on the first test and 160 mg% on the second.

15 **The Defense Evidence**

16 **Phyllis Robar**

17 Ms. Robar testified that she is a friend of Ms. Pottie's and at the time, Ms. Pottie was
18 living with her on Moss Court, in Halifax West (Clayton Park area).

19 She testified that Ms. Pottie left her residence around 7:30 p.m. on September 22, 2007 to
20 go to the Resolute Club. She did not see her consume alcohol before
21 she left. Ms. Robar suggested that Ms. Pottie not take her car but Ms. Pottie took her car.

1 She testified that it was common for Ms. Pottie to take her car when going out and to take
2 a taxi home.

3 The next contact Ms. Robar had with Ms. Pottie was a phone call at 2:22 a.m.

4 During the call she observed Ms. Pottie to be incoherent, rambling and not telling her
5 what had happen or where she was. Eventually Ms. Pottie communicated that she was at the
6 police station.

7 She received a second phone call 30-45 minutes later. Again she had difficulty
8 understanding Ms. Pottie. She said Ms. Pottie was unclear.

9 She received a third phone call around 4:00 a.m. from Ms. Pottie to advise that she was
10 on her way home.

11 When Ms. Pottie arrived home she observed Ms. Pottie to be definitely distraught, not
12 herself, behaving out of character.

13 When she spoke with Ms. Pottie she claimed she had no recall of most of the evening,
14 although she did provide some details of driving and being at police station. Ms. Robar stated
15 that Ms. Pottie was upset at being caught and was totally embarrassed.

16 I found Ms. Robar's evidence credible and reliable. Although a friend of Ms. Pottie she
17 did not appear to demonstrate bias in favour of Ms. Pottie in her evidence. Ms. Robar did not
18 comment on Ms. Pottie's state of sobriety.

19 As to the evidence that Ms. Pottie was upset at being caught the only logical
20 interpretation is that Ms. Pottie was referring to being caught by the police. That statement
21 could be interpreted as an admission of having knowingly driven while being over .08 and/or

1 impaired. That statement was made before any discussion of an involuntary ingestion of a drug.

2 I accept Ms. Robar's evidence.

3 **Nicole Pottie**

4 Nicole Pottie testified that she is the sister of Jeannette Pottie. She stated that at 10 or 5
5 to 2:00 on September 23, 2007 she received a telephone call from her sister Jeannette.

6 She stated that Jeannette was hysterical, crying and difficult to understand.

7 She had to ask several times where Jeannette was before being told that she was at the
8 police station.

9 The following morning, at 10:00 a.m. she saw her sister.

10 She described her sister as depressed, talking a little crazy and not making much sense.

11 She said that Ms. Pottie couldn't answer questions about what happened the night before.

12 Ms. Pottie's recall of the time of the phone call would appear at odds with the police
13 evidence. Her evidence is consistent with that of other witnesses who spoke to and later
14 observed Ms. Pottie on September 23, 2007. I found her evidence credible and reliable however,
15 no explanation was offered as to what "talking a little crazy" meant.

16 **Evelyn Coish**

17 Evelyn Coish testified that she has been a friend of Ms. Pottie for 18 years. She testified
18 that around 2:30 a.m. on September 23, 2007 she received a telephone call from Ms. Pottie. She
19 said she couldn't make out Ms. Pottie. She eventually understood that Ms. Pottie had been
20 picked up by the police. She described Ms. Pottie as extremely upset. At Ms. Pottie's request
21 she called Ms. Pottie's husband in Cape Breton.

1 On the Monday following she spoke in person with Ms. Pottie. She stated that Ms. Pottie
2 was unable to explain what happened to her on the previous Saturday night.

3 She said it was common for Ms. Pottie and friends to take her car out but taxi home.

4 As with Ms. Robar and Nicole Pottie I found Ms. Coish's evidence credible and reliable.
5 I find that Ms. Pottie called them from police station that morning and appeared very upset,
6 crying, and difficult to understand. None of the three women commented on clarity of Ms.
7 Pottie's speech, that is whether her speech was slurred, nor on her apparent state of sobriety.
8 Therefore, there is evidence does not address the cause of Ms. Pottie's condition.

9 Based upon the evidence of these three defense witnesses I find that the following day,
10 Ms. Pottie was upset and having difficulty recalling all of the events of the night before.

11 **Marjorie Keeping**

12 Marjorie Keeping testified that she is a friend of Jeannette Pottie. She and Ms. Pottie
13 made plans to go out to the Resolute Club on the evening of September 22, 2007. The Resolute
14 Club is a private social club where people go to socialize. Alcoholic drinks are available.

15 Ms. Keeping testified that Ms. Pottie picked her up at 7:45 p.m.. They arrived at the
16 Resolute Club on Inglis Street, Halifax at 8:00 p.m.. Ms. Keeping indicated that to the best of
17 her knowledge Ms. Pottie did not consume alcohol before going to the Resolute Club.

18 Ms. Keeping testified that she left the Resolute Club around 11:30 p.m.. She stated that
19 she drank 4 beer between 8:00 p.m. and 11:30 p.m.. She was able to state this because she only
20 had \$20.00 for drinks and each drink (beer) costs \$3.50 plus a tip.

21 She said their plan was to go from the Resolute Club to the Red Fox Tavern. She didn't

1 indicate whether she's brought money to spend at the Red Fox Tavern.

2 Ms. Keeping testified that Ms. Pottie drank 4 beer between 8:00 p.m. and 11:30 p.m..
3 Initially she said that it wasn't possible that Ms. Pottie had more than 4 beer during that time but
4 later conceded, on cross examination, that she didn't see Ms. Pottie at all times and could only
5 say she saw her drink 4 beers. Ms. Keeping indicated that she was a smoker and at least once
6 had gone outside to have a cigarette.

7 Ms. Keeping stated that during the evening Ms. Pottie talked with a number of different
8 people at the Club, she danced and she played a video lottery machine.

9 Ms. Keeping testified that at around 11:00 p.m. she suggested to Ms. Pottie that they
10 leave and go to the Red Fox Tavern as planned. Ms. Pottie agreed but wanted to play her video
11 game a little longer. Ms. Pottie asked Ms. Keeping to watch her machine while she went to the
12 washroom and Ms. Keeping agreed. Ms. Pottie seemed fine until then. Ms. Keeping said that
13 she continued to hit play on the machine while Ms. Pottie was gone to the washroom.

14 When Ms. Pottie returned Ms. Keeping stated that her demeanor changed. She went
15 crazy. She yelled and swore at me, apparently because the value of her winnings on the machine
16 had gone down by \$20.00 while she was in the bathroom.

17 Ms. Keeping said that Ms. Pottie had never acted or spoken to her like that before. She
18 felt embarrassed/stunned. She told Ms. Pottie that she was calling for a taxi.

19 She went outside and called for a taxi. When the taxi arrived she went in and told Ms.
20 Pottie that the cab arrived. According to her, Ms. Pottie said "He'll wait".

21 Ms. Keeping went back outside and found that the taxi had gone. She went in and told

1 Ms. Pottie the cab left and she'd call another. She stated that Ms. Pottie pounded on the video
2 game and said "Yeah yeah."

3 Ms. Keeping testified that she told Ms. Pottie that she was calling a cab and leaving. She
4 stated that when the second cab arrived she got in and went home leaving Ms. Pottie at the Club.
5 Ms. Keeping said she arrived home at 10 minutes to midnight.

6 Ms. Keeping stated she saw Ms. Pottie the next day. At the time Ms. Pottie was crying.
7 She stated that Ms. Pottie told her what happened with the police but couldn't give
8 details.

9 Ms. Keeping brought up the idea that she may have been drugged.

10 Ms. Keeping testified that there was a man behind them throughout the evening. That Ms.
11 Pottie's beer was, at times, left unattended so he - or someone else could've put something into
12 her drink without her knowledge or consent.

13 Ms. Keeping testified the change in Ms. Pottie's demeanor occurred while Ms. Pottie was
14 in the washroom. She said that she went for a smoke while Ms. Pottie was in washroom.

15

16 **Assessment of Ms. Keeping's Evidence**

17 Ms. Keeping appeared to give inconsistent evidence on what she was doing when Ms.
18 Pottie went to the washroom and returned with a markedly changed demeanor. First she stated
19 that she was watching Ms. Pottie's machine while she was in washroom but later stated that she
20 was out having a cigarette thus leaving Ms. Pottie's beer unattended. Perhaps, Ms. Keeping
21 intended to communicate that the trip to the washroom while she was out having a cigarette was

1 an earlier visit to the washroom by Ms. Pottie.

2 Ms. Keeping's initial refusal to agree with the suggestion that Ms. Pottie may have
3 consumed more than 4 beers suggested a bias in favour of Ms. Pottie. Clearly on her evidence
4 there were times when Ms. Pottie could've been consuming beer without Ms. Keeping seeing her
5 do so. Also, Ms. Keeping's explanation for why she could say that she consumed only 4 beer,
6 that she had only so much money, was not convincing. On her own evidence at \$3.50 plus tip
7 for a beer, she could've paid for and consumed five beers. Further, the suggestion that she had
8 no other money/except taxi fare home, which she kept separate, even though she and Ms. Pottie
9 planned to go to a Tavern after leaving the Resolute Club seems highly improbable.

10 In assessing the evidence of Ms. Keeping I am mindful of the fact that she herself
11 consumed at least 4 beers; she is a close friend of Ms. Pottie; her evidence regarding Ms. Pottie's
12 amount of alcohol consumption reflected a bias in favour of Ms. Pottie.

13 As such the reliability of some of her evidence, and in particular, of how much alcohol
14 Ms. Pottie had to drink I found unreliable.

15 **Ms. Jeannette Pottie**

16 Ms. Pottie testified that on September 22, 2007 she worked until 5:00 p.m. then went to
17 Ms. Robar's residence where she was temporarily staying, as a result of a recent, but not a
18 surprising, break-up with her husband.

19 She left Ms. Robar's residence around 7:30 p.m.. During the time at the residence she ate
20 dinner but did not consume any alcohol or drugs.

21 She drove her car to pick up her friend Marjorie Keeping and together they traveled to

1 the Resolute Club arriving around 8:00 p.m.. Shortly after they arrived, they ordered an alcohol
2 drink, beer.

3 During the course of the evening Ms. Pottie stood around talking with people,
4 occasionally dancing, and consuming beer. Later, she decided to play a video gaming machine.
5 While she played the machine people would come by and chat. She stated that Ms. Keeping was
6 there with her.

7 She recalled Marjorie Keeping talking to her about leaving and taking a cab to the Red
8 Fox Tavern where they'd planned to go. She stated that she recalled going to the washroom and
9 asking Marjorie to watch her machine. She'd won about three hundred dollars. She guessed this
10 was sometime after 11:00 p.m..

11 She testified that she didn't recall returning from the washroom.

12 She didn't recall cashing out on the machine or cashing the machine's ticket in for cash,
13 but apparently did as she had the money in her purse the next morning.

14 She stated that she didn't recall yelling at Marjorie regarding the gaming machine.

15 She stated she had no recall of driving from the Resolute Club to Clayton Park and the
16 McDonald's restaurant, about a 20 - 30 minute drive, only 4 blocks from Moss Court. She had
17 no recollection of speaking to paramedics.

18 She stated that she had no recall of running into the back of a car at the McDonald's
19 restaurant drive-thru lane, or speaking to the driver of the other car.

20 She stated that she couldn't say how many beers she drank. She recalled drinking 3 or 4
21 beers. She testified that she didn't recall drinking any more beers after returning from the

1 washroom. She stated:

2 "I didn't think I had that many." "I felt fine." "I know I didn't drink that much."

3 "I wasn't drunk." "I know when I've had enough"

4 Ms. Pottie testified to having recall of a warm sensation, which she thinks may have been
5 when she urinated, and of sitting somewhere cold, and being in a room talking on the phone, and
6 then to dealing with the police and trying to blow into a breath testing instrument. She recalled it
7 took 2 - 3 tries before the instrument worked. She recalls some of the conversation with the
8 breath technician.

9 She recalled becoming upset when she was told that she'd blown over the legal limit on
10 the breath testing instrument.

11 She doesn't recall talking on telephone from police station with Phyllis Robar or her
12 sister.

13 Ms. Pottie claims that the following day and to this time she has no other recall of the
14 events after 11:30 p.m. on September 22, 2007.

15 She testified that she's had trouble recalling events in the past due to alcohol
16 consumption but not a blackout like this occasion.

17 Ms. Pottie testified that her drink was left unattended at times throughout the night, while
18 she was dancing or when away from the gaming machine. However, later she indicated that, as
19 she had won money she would not have left her gaming machine unattended. She'd have
20 someone watch it for her. Given Ms. Keeping's evidence that on at least one occasion she was
21 outside having a cigarette when Ms. Pottie went to the washroom apparently someone else, at

1 least once, watched Ms. Potties machine. Although someone was always watching her machine
2 Ms. Pottie felt someone could've dropped something into her beer which was sitting near the
3 machine, without being observed doing so.

4 She said there was a man with black hair standing near her and Ms. Keeping in the area
5 of the gaming machines.

6 Ms. Pottie testified that she went back to the Resolute Club the following day to speak to
7 the bartender and she called the police station to get information about what had happened, since
8 she couldn't recall. She also went to her doctor to be tested for drugs in her system.

9 **Assessment of Ms. Pottie's Evidence**

10 In considering Ms. Pottie's evidence regarding the consumption of alcohol I am mindful:

11 1) She gave two other answers on the morning in question each different than the
12 other and different than her testimony; and

13 2) According to Ms. Keeping, Ms. Pottie consumed 4 beers, that she observed,
14 before Ms. Keeping left around 11:30 p.m.; and

15 3) Ms. Pottie was under the influence of alcohol on the evening in question,
16 having consumed at least 4 beers.

17 I place little weight on Ms. Pottie's evidence that she "felt fine", "knows when she's had
18 enough" and "didn't think I had that many" since I don't know what is "enough" for Ms. Pottie
19 and a person who is under the influence of alcohol is not the best judge of whether they are
20 impaired.

21 For these reasons I found Ms. Pottie's evidence regarding the number of beers she

1 consumed unreliable.

2 As to Ms. Pottie's evidence regarding a loss of memory. I noted: (a) that Ms. Pottie's
3 evidence was that she had no recall of events after going to the washroom around 11:30 p.m.,
4 until being at the police station; (b) that then she had some recall of events during the breath
5 testing; and (c) that, then no recall of making five phone calls to her friends.

6 The expert called by the Defense, Mr. Johnstone, who's evidence I'll discuss
7 momentarily, did not comment on Ms. Potties's evidence regarding her pattern of lack of recall
8 that is whether it would be consistent with impairment by a drug such as Rohypnol. Furthermore,
9 Mr. Johnstone did not offer an opinion regarding how an emotional upset (as in this case Ms.
10 Pottie being advised of her failure of the breath test), would impact on a person's ability to later
11 recall the events.

12 I have no doubt that when Ms. Pottie spoke by telephone with her friends, between 2:22
13 a.m. and 4:00 a.m., she was emotionally distraught and still under the influence of alcohol.

14 It is difficult to assess a person's claim of lack of ability to recall. In this case there is
15 evidence that during the events of Ms. Pottie's short-term memory was intact but that is not
16 conclusive of whether later, she can recall the events. While I am not certain of the extent of
17 lack of recall, I find that Ms. Pottie's evidence regarding an inability to recall parts of the
18 evenings events may be true.

19 **Dr. Diane D'Arcy**

20 Dr. Diane D'Arcy confirmed that Ms. Pottie attended at her office and at her request was
21 sent for a blood test.

1 **Greg Johnstone**

2 Mr. Johnstone was accepted by Court as an expert in field of toxicology, the effects of
3 alcohol and drugs on a human body, the absorption, distribution and elimination of alcohol in the
4 human body and calculations relating thereto.

5 Mr. Johnstone provided information on the drug Rohypnol (and similar drugs). He stated
6 that depending on the dosage Rohypnol takes affect within 15 - 30 minutes. The drugs's effects
7 can last for a few hours, then the person will be groggy for a period thereafter.

8 He stated that often person can function while under the influence.

9 Generally, the person won't recall what occurred while under the influence of the drug

10 He stated that Rohypnol is disinhibiting, causing the person to be more responsive
11 to emotions/moods. Depending on the dosage a person may experience a loss of
12 physical control and may
13 fall asleep.

14 Mr. Johnstone gave information regarding the absorption and elimination of alcohol,
15 stating that the average elimination rate of alcohol from body is 10 - 20 milligrams per hour and
16 the absorption rate of alcohol ranges from 10mg % per hour to 20 mg% per hour with 15% being
17 the average.

18 **Opinion:**

19 (1) Mr. Johnstone opined that the signs of "gross" impairment testified to regarding Ms.
20 Potties's condition at 12:30 a.m. - 12:45 a.m. on September 23, 2007 were more severe than he
21 would expect of a person with blood alcohol level of 160 mg%.

1 Mr. Johnstone acknowledged that he never tested Ms. Pottie, and consequently, he
2 doesn't know how severe her signs of impairment would be at 160mg%. He also acknowledged
3 that, depending on her pattern of consumption of alcohol her blood alcohol level at 12:30 a.m.-
4 12:45 a.m. may have been higher than 160 mg%. For these reasons this opinion is of little
5 assistance to the court.

6
7 (2) Mr. Johnstone stated that, in his opinion Ms. Pottie's rapid impairment, change
8 demeanor, wetting herself, unzipped pants, falling asleep at wheel, lack of memory of some
9 events, (some recall at police station), are all consistent with her having ingested Rohypnol. He
10 felt that these details were not all explained by Ms. Pottie's stated consumption of alcohol but
11 acknowledged they could be explained by an excessive consumption of alcohol.

12 (3) Mr. Johnstone stated that if a person starts to drink beer at 8:15 p.m. and at 2:19 a.m. the
13 following morning has a blood alcohol level of 160 mg% the person would have to had
14 consumed 7.4 to 9.4 beers. He acknowledged that this calculation assumes an average drinking
15 pattern including the time of the last drink, and an absorption rate within the range noted. Mr.
16 Johnstone acknowledged that Ms. Pottie's drinking pattern and time of last drink was not clearly
17 established. Ms. Pottie was not tested for her absorption and elimination of alcohol rates. Mr.
18 Johnstone did not indicate how the elimination of alcohol factored into his opinion, if at all. Due
19 to the lack of proper evidentiary foundation I find this opinion deserving of no weight.

20 Mr. Johnstone was not asked his opinion, as to what Ms. Pottie's blood alcohol reading
21 would've been between at 12:30 a.m. - 12:45 a.m., assuming the truth of Ms. Pottie's evidence of her

1 consumption of beer. This may not have been asked because of the weakness of the evidence
2 establishing the underlying facts.

3 I turn now to the defense arguments. First to count # 1 and the charge contrary to
4 s.253(b).

5 Evidence to the Contrary

6 1) The defense argued that evidence to the contrary had been presented to cause a reasonable
7 doubt in relation to the accuracy of the breath test results and that Ms. Pottie's blood alcohol
8 level was above the legal limit at the time of care or control. Consequently, the defense argued
9 that the crown could not rely on the presumption in s.258(1)(c) of the Criminal Code

10 The law is clear that to establish "evidence to the contrary" the Defense must raise a
11 reasonable that the accused's blood alcohol level at the time of the care or control of a motor
12 vehicle would not only be different than the breath test results but would be over .08. **R v.**
13 **Crosthwait**, [1980] 1 S.C.R. 1089.

14 The defense urged the court to find that the defense evidence of Ms. Pottie's alcohol
15 consumption may be true, and in conjunction with Mr. Johnstone's opinion, raised a reasonable
16 doubt that her blood alcohol was over .08 at the time of control of a motor vehicle.

17 There are two aspect to this argument.

18 First, the accuracy of the breath test results. Mr. Johnstone gave an opinion that for a
19 person to have a blood alcohol level at 2:19 a.m. of 160 mg% that person would have to
20 consume between 7.4 and 9.4 beers after 8:15 p.m. the previous evening. If the court accepted or
21 found that Ms. Pottie may have consumed only three or four beer during the time period in

1 question this would raise a doubt regarding the accuracy of the breath test results.

2 As previously indicated, in my view, the foundational facts have not been established to
3 support Mr. Johnstone's opinion regarding the number of beers an individual would have to
4 consume after 8:15 p.m. to have a blood alcohol reading of 160 mg% at 2:19 a.m. the following
5 morning and consequently this opinion warrants no evidentiary weight.

6 Even if I came to a different conclusion regarding the weight to be given to Mr.
7 Johnstone's opinion, the evidence of Ms. Johnstone, in concert with that of Ms. Pottie and Ms.
8 Keeping did not raise a doubt that her blood alcohol content would've been over the legal limit
9 at the time of care and control.

10 This argument does not succeed.

11 **Voluntariness of Consumption of Alcohol by Ms. Pottie**

12 The Defense argument is:

13 1) That Ms. Pottie, after voluntarily consuming some alcohol, may have ingested a drug
14 (possibly Rohypnol) without her knowledge or consent around 11:00 p.m., September 22, 2007.

15 2) That she may, thereafter, have consumed additional alcohol,

16 3) That such consumption was not voluntary, as she may not then have been capable of
17 appreciating the natural consequences of consuming alcohol, namely, that she would become
18 impaired or more impaired; and

19 4) That a doubt has been raised that her voluntary consumption of alcohol would have resulted in
20 a blood alcohol level over .08 at approximately 12:30 a.m September 23, 2007.

21 There is no direct evidence that Ms. Pottie consumed a drug. The evidence of a dark-

1 haired man and Ms. Pottie's drink, at times, left unattended speaks to the possibility of someone
2 spiking her drink. There is no direct evidence of that having occurred. The behavior of Ms.
3 Pottie, as observed by others, and her lack of recall is, according to defense expert, Greg
4 Johnstone, consistent with her having ingested a drug, such as Rohypnol but it is also consistent
5 with excessive consumption of alcohol.

6 There is no evidence that consumption of Rohypnol or similar drugs would affect a
7 person's blood alcohol content.

8 There is no evidence that Ms. Pottie consumed any additional alcohol after 11:30 p.m.,
9 September 22, 2007. By 11:30 p.m. Ms. Keeping left the club so she can't speak to this issue
10 and Ms. Pottie says she doesn't recall the events of that time period. No other witness was called
11 to give evidence on this point. The best that can be said is that Ms. Pottie would've had the time
12 and opportunity to consume additional beer, between 11:30 p.m. and midnight or shortly
13 thereafter.

14 If she consumed beer after ingesting a drug and feeling its affects, would it have been
15 involuntary consumption? To put it another way, has a reasonable doubt been raised regarding
16 Ms. Pottie's ability, at that time, to appreciate the natural consequences to her actions.

17 The evidence of the affects of a drug such as Rohypnol does not, in my view, necessarily
18 lead to the conclusion that a person under the influence of such drug could not, thereafter, make
19 a voluntary decision to consume alcohol. What evidence is there as to whether Ms. Pottie
20 would've appreciated the natural consequences of consuming additional alcohol? Ms. Pottie
21 testified that she has no memory of that time period. Ms. Keeping described a quick change in

1 Ms. Pottie's demeanor - becoming verbally abusive and loud shortly before 11:30 p.m..
2 However, according to Ms. Keeping Ms. Pottie's responses to her statements were logical, for
3 example to the statement "the taxi is outside". Ms. Pottie's responded "He'll wait." These
4 responses demonstrate an awareness of events, an understanding of Ms. Keeping's statement and
5 a choice being made by Ms. Pottie was clearly communicated. Mr. Johnstone was not qualified
6 to do so and did not offer an opinion on Ms. Pottie's mental functioning during this time. He
7 stated that the drug Rohypnol is disinhibiting, causes impairment and a loss of memory and
8 people under it's influence are more likely to respond to their emotions. The impact depends
9 largely on the dosage.

10 Assuming that Ms. Pottie unknowingly ingested a drug and after the drug took affect she
11 consumed more alcohol, based upon the evidence before me I am not convinced that any
12 additional consumption of alcohol was involuntary. Ms. Pottie's lack of recall, if true, does not
13 equate to a lack of capacity to act voluntarily at the time. The defense must, of course, merely
14 raise a reasonable doubt so let me continue with the defense argument and assume that 1) a drug
15 was ingested, and 2) after it took affect more alcohol was consumed, and 3) the additional
16 consumption of alcohol was involuntary. On those facts has the defence raised a doubt as to
17 whether Ms. Pottie's blood alcohol at 12:30 a.m. would've been over the legal limit of .08 due to
18 the voluntary consumption of alcohol.

19 In support of his position defense counsel submitted the **R. v. Fletcher**, [2005] B.C.J. No.
20 491, Arnold, Provincial Court Judge decision.

21 Mr. Fletcher was observed driving a motor vehicle in an erratic manner. He was

1 observed to be highly impaired by alcohol or drug. The accused was arrested and given the
2 breath demand which he refused. He was charged with a number of offences including impaired
3 and refusal.

4 The trial Judge accepted the defense evidence that Mr. Fletcher drank one beer before
5 consuming “some” beer from a pitcher of beer which, unbeknownst to him was laced with
6 ecstasy. There was direct evidence that the pitcher of beer was laced with ecstasy. On the
7 impaired charge Judge Arnold found that the accused’s ability to operate a motor vehicle was
8 impaired, however, he found that a doubt had been raised as to whether the accused’s impaired
9 ability to operate a motor vehicle was the result of voluntary consumption of alcohol. He found
10 that while Mr. Fletcher had voluntarily consumed some beer, it was a “modest” amount and did
11 not persuade him that Mr. Fletcher’s impaired condition was due, in any part, to the voluntary
12 consumption .

13 I agree with His Honour Judge Arnold’s statements on the law regarding the issue of
14 impairment due to voluntary consumption of alcohol or a drug as noted above. However,

15 At page 24 Judge Arnold stated:

16 “I am not satisfied when the accused took control of his vehicle and undertook to
17 drive that he was acting voluntarily.”

18
19 With respect, in my humble opinion, the question of voluntariness of driving is a distinct and
20 different issue than that of whether impairment was due to the voluntary consumption of alcohol
21 or drug. The latter in my view is an issue of automatism and the defense burden of proving
22 automatism is on a balance of probabilities, **R v. Talock**, [2003] S.J. No. 454 (Sask. C.A.); **R v.**

1 **White**, [2000] N.J. No. 343 (Nfld. C.A). I will address that issue momentarily.

2 On the issue of voluntary consumption of alcohol the decision in Fletcher is
3 distinguishable on two bases:

4 1) In Fletcher, the court was addressing a charge under s.253(a) not s.253(b). On
5 a 253(b) charge the defense must raise a doubt that the accused's blood alcohol,
6 due to voluntary consumption of alcohol, was not over the legal limit of .08.

7 2) In Fletcher there was evidence, accepted by the trial Judge, that the accused
8 consumed only one beer voluntarily, whereas in the present case there is no
9 reliable evidence as to how much alcohol Ms. Pottie voluntarily consumed. Other
10 than to say she consumed at least four beers, which in my view, is not a modest
11 amount.

12 In the present case, (a) if Ms. Pottie ingested a drug, such as Rohypnol, and if, thereafter,
13 Ms. Pottie consumed additional alcohol, and if the court was left in doubt as to the voluntariness
14 of such additional alcohol consumption and if the court found that a doubt had been raised that
15 the blood alcohol readings at 1:59 a.m. and 2:19 a.m. were entirely the result of voluntary
16 consumption of alcohol, there is still is no evidence, to raise a doubt that the blood alcohol level
17 of Ms. Pottie at 12:30 a.m. on September 23, 2007 was over .08 due to her voluntary
18 consumption of alcohol. In my view, even if I viewed the defense theory as not more than mere
19 speculation, the evidence does not constitute evidence to the contrary to preclude the crown from
20 relying on the presumption of s.258(1)(c). Therefore, this defense argument does not succeed.

21 **Voluntariness of the Driving**

1 The proper characterization of this defense submission is non-insane automatism. This
2 defense requires that the defense establish on a balance of probabilities that the accused's actions
3 were not voluntary/conscious. **R v. Talock**, [2003] S.J. No. 454 (Sask. C.A.)

4 The law presumes that an accused's actions are voluntary/conscious. **R v. White**, [2000]
5 N.J. No. 343 (Nfld. C.A.).

6 In this case the defense argument is that the accused unknowingly ingested a drug
7 (Rohypnol).

8 If the ingestion of a drug occurred, has it been established that it prevented the accused
9 from making a voluntary/conscious decision to drive a motor vehicle?

10 The defense called Greg Johnstone, toxicologist.

11 In my view the field of expertise of Mr. Johnstone as accepted by the Court, did not
12 extend to him offering an opinion on the accused's ability to make voluntary/conscious decisions
13 while under the influence of Rohypnol (or other such drug) alone or in conjunction with alcohol.
14 Mr. Johnstone did not offer an opinion on this issue.

15 The accused's lack of recall, if true, while a factor for the Court to consider, is not to be
16 equated within a lack of conscious/voluntary mental functioning at the time.

17 The observations of Ms. Pottie, by others at the McDonald's restaurant, does not
18 establish an absence of conscious/voluntary mental functioning, indeed, the evidence supports a
19 finding to the contrary. This argument does not succeed.

20 **Summary:**

21 In summary, in relation to the s.253(b) there is no evidence to the contrary which raises a

1 doubt as to whether Ms. Pottie's blood alcohol level at the time of her having control of a motor
2 vehicle was over the legal limit due to her prior voluntary consumption of alcohol.

3 The defense of non-insane automatism has not been established on a balance of
4 probabilities.

5 I accept that Ms. Pottie was in control of her motor vehicle between approximately 12:10
6 a.m. and 12:45 a.m. September 23, 2007. I accept the breath test results of 170 mg% and 160
7 mg% at 2:19 a.m. I find that the presumption in s.258(1)(c) of the Code is applicable. I find her
8 to have been proven guilty beyond a reasonable doubt on the s.253(b) count. A conviction is
9 entered.

10 Having found her guilty on the first count a stay of proceedings is entered on the second
11 count.