IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Jessome, 2006 NSPC 65

Date: 20061215
Docket: 1482270
1482271
Registry: Sydney

Between:

Her Majesty the Queen

v.

John Perry Jessome

Judge:	The Honourable Judge A.P. Ross
Heard:	June 9, 2006 and October 18th, 2006, Baddeck, Nova Scotia
Charge:	s. 253(a) cc s. 253(b) cc
Counsel:	Mr. Kevin Patriquin, for the Crown Mr. William Burchell, for the Defence

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By the Court:

[1] These are reasons for decision in a case of impaired driving tried in Provincial Court at Baddeck, Victoria County, on June 9th and October 18th, 2006.

FACTUAL BASES

[2] The accused, John Perry Jessome, was charged under s. 253(a) of the Criminal Code with driving a motor vehicle while impaired by alcohol at Neil's Harbour, Victoria County, on October 30th, 2004. He was driving a small truck northward on the Cabot Trail when he came to the attention of Police. Two RCMP officers traveling behind him noted his vehicle veer into the opposite lane on three separate occasions over a distance of approximately 4 kilometers. They also observed "weaving" within his proper lane of travel. In the words of one officer, the driving made them "suspicious" of possible impairment.

[3] The police officers were not on highway patrol duty as such. They were in the area to bolster the local detachment on Hallowe'en, an occasion for considerable mischief in previous years. Although then assigned to a Customs and

Excise section, both had previous experience in regular police work which included highway patrol duty.

[4] On first observation of the Jessome vehicle, one officer estimated it was one-third over the center line going downhill on a straight stretch of road. He said he remarked on this to his companion. Thereafter, their attention piqued, they made the additional observations of driving noted above. Mr. Jessome's speed was proper and did not concern them. It was around 7 p.m., and dark.

[5] The observed driving occurred between Black Brook and Neil's Harbour. The Cabot Trail is not the shortest distance between those two points. Defence produced photos of curves in the road. At the same time, the surface was in good shape, the road had proper shoulders, and there was nothing remarkable about the weather.

[6] Police engaged the lights on their patrol car. Mr. Jessome pulled over as directed. The officer who approached the driver's side immediately noticed a "strong odour of alcohol" from the accused, and bloodshot eyes. He requested that Mr. Jessome come to the police car. He said that Mr. Jessome "staggered" as he

walked. Once he was inside the police car the odour of alcohol was again strong, and the accused's eyes appeared bloodshot and glossy. He said the accused's speech was "noticeably slurred". He then went on to compare this with the accused's speech in court on the date of a previous appearance and with the accused's speech the very day of trial, the witness having conversed with Mr. Jessome during the time they waited for his trial to commence.

[7] The officer who approached the passenger's side said that he noticed Mr. Jessome stagger upon exiting his vehicle. He also testified to a strong odour of alcohol inside the police car when he returned to it, attributable to Mr. Jessome, who had been placed in the rear seat. His description of the accused's speech was "somewhat slurred". A short time later, under the bright lights at the detachment, he noted red and watery eyes. Although the officer had never spoken to the accused before, he spoke to him subsequently, on scheduled court days, at which times the speech was not slurred as it had been the evening he was arrested.

[8] According to both police officers, Mr. Jessome's demeanour changed after he was given a breath demand. En route to the local detachment he went from being pleasant to aggressive, from calm to loud.

[9] Because there was no currently certified technician available available to take breath samples at the Ingonish detachment that evening, Mr. Jessome was taken to Baddeck detachment. Whatever was or was not done there forms no part of the evidence in this case.

[10] The officer who made the breath demand had once worked as a qualified technician, though not in the preceding six or seven years. He was asked to compare the degree of impairment of this accused with others he had encountered in the course of his police work. Specifically, he was asked to rate Mr. Jessome's level of impairment against others upon whom he had administered a breathalyzer test in the past. In preface, the officer said that he had tested over five hundred people arrested for impaired driving. In these cases he made observations of indicia of impairment and recorded such observations on a checksheet. He then opined that Mr. Jessome's level of impairment was "in the higher category".

[11] In cross-examination defence counsel elicited the following points, which I accept. Perfectly sober drivers are sometimes noted to weave within their lane of travel. Mr. Jessome was driving at a proper speed. It would not be so unusual for

a driver to briefly venture over the centre line on some of the corners encountered on this stretch of highway. Mr. Jessome's destination that evening was his place of work, in the oyster business.

[12] In argument, defence counsel pointed out that a strong smell of alcohol can be indicative of recent consumption as much as heavy consumption, and that such indicia as bloodshot eyes and uneven gait can be caused by fatigue, cold, uneven ground, and other things. These are proper points of argument. They do not stray too far from the evidence or what is known from experience or what might properly be learned from other cases. All in all, Mr. Jessome received vigorous and capable representation.

[13] The arresting officers were the only witnesses. Their testimony is the only evidence. The officer who made a breath sample demand said he believed that Mr. Jessome's ability to operate a vehicle was impaired by alcohol. The matter for decision is whether the evidence at trial suffices to prove beyond a reasonable doubt that Mr. Jessome was driving while impaired by alcohol within the meaning of s.253(a) of the Criminal Code as that has been considered and defined by the appellate courts.

THE LEGAL TEST FOR IMPAIRMENT

[14] I have read quite a number of cases dealing with proof of impaired driving including those cited by counsel in final argument,. I do not intend to refer to them all, but will make brief mention of a few.

[15] R. v. Stellato [1993] O.J. No. 18 is the starting point. The Supreme Court of Canada later endorsed this judgement of LaBrosse J.A. in the Ontario Court of Appeal. Like cases which precede and follow it, the issue which exercised the court was this : what degree of departure from some normal standard of behavior is required to be proven in order to convict for impaired driving under s.253(a)? The judgement notes that the Criminal Code does not prescribe any special test, that this is an issue of fact to be determined on the evidence in each case, and that the burden of proof is neither more nor less than for any other element of a criminal case. It goes on to hold that any degree of impairment ranging from slight to great, if proven, is sufficient to make out the offence. If, however, the evidence of impairment is so frail as to leave the trial judge with reasonable doubt, the accused must be acquitted. Implicit is the distinction between the meaning of “impaired” in s.253(a) and the kind of evidence from which an inference of impairment may be

drawn. This was taken up by the Alberta Court of Appeal in R. v. Andrews [1996] A.J. No.8.

[16] The importance of Andrews is its caution not to confuse what degree of impairment need be proven (slight) with the nature or degree of proof needed to establish it. Slight impairment is not made our on flimsy proof. It also posits a distinction between impairment by alcohol in a general sense and impairment of one's ability to drive a motor vehicle. I suspect, having listened to a number of expert witnesses in other cases, that some would say no such distinction should be made, i.e., that if a person's general faculties, motor control, speaking ability, level of awareness, reaction time, etc. are impaired by the presence of alcohol in the body, it would follow as night follows day that a person's ability to safely drive a motor vehicle is therefore impaired as well, and to the same degree. However it is not necessary to belabour that point here. In the sense that Andrews directs trial courts to relate evidence of impairment to the ability to drive, and to pay particular heed to evidence which directly connects impairment on the one hand with driving and driving ability on the other, it has application to Mr. Jessome's case.

[17] As additional comment I would say, concerning proof, that neither the existence of s.253(b) in law nor the availability (or non-availability) of a breathalyzer-type instrument in a given case ought to raise the bar for the Crown in 253(a) cases. Obviously a properly conducted scientific test of blood alcohol level, set against a fixed numerical standard, offers the possibility of clearer modes of proof than does a case where the evidence consists of eyewitness observations of the individual accused set against quasi-objective standards gleaned from general observation of others. Be that as it may, courts must not hold the Crown to a higher standard of proof, or require proof of more than slight impairment, simply because, for some reason, a breath sample was not procured.

[18] A further aside : some courts describe the effects of alcohol as “subjective”, supposedly in distinction to the “objective” measurements of blood alcohol levels. Because the term “subjective” is of such importance in law, using it in this way may cause confusion. While it is the effect of alcohol on the nervous system which concerns us in these cases, and the brain is the biggest part of that, a state of impairment is not like “intention”. There may be individual differences, but the analysis we are making is not of *mens rea*. Indeed, experts have testified in any number of cases before me, and in numerous cases elsewhere, that at given levels

of blood alcohol everyone is impaired in their ability to drive however well they may mask the symptoms or accommodate to their decreased motor skill. Calling the effects "subjective" may obscure recognition of this. A better term might be "individual" effects.

[19] I will later highlight evidence which is comparative in nature. By this I mean evidence pertaining to the accused's behavior which the same witness, in making an evaluation or choosing descriptors, can refer to a standard or baseline. Although not truly scientific in nature, such evidence ought to be accorded more weight than evidence which sits in isolation. In this sense, the instant case has more to do with Andrews than with Stellato. It also has to do with non-expert opinion, and hence with R. v. Graat [1982] 2 S.C.R. 819.

NON-EXPERT OPINION - VALUE OF EVIDENCE OF A QUALIFIED TECHNICIAN

[20] In Graat the Supreme Court of Canada discussed non-expert opinion evidence. Although of general application, the case has features in common with this one : the police exceeded the time frame within which they could obtain breath samples, the charge dealt with by the court was impaired driving, and the opinion

expressed was given by police officers about the degree of impairment by alcohol of the accused.

[21] Noting that the line between fact and opinion is not always clear, the Supreme Court hewed closely to the common law in affirming that non-expert opinion is admissible on a wide variety of subjects including age, emotional state, value, speed and distance. It also confirmed that persons may give an opinion about whether a person is intoxicated, and to what degree. In the words of Justice Dickson, “Intoxication is not such an exceptional condition as would require a medical expert to diagnose it.” As to the ability of the trier of fact to understand and evaluate evidence on an impaired driving charge, he said “Intoxication and impairment of driving ability are matters which the modern jury can intelligently resolve on the basis of common ordinary knowledge and experience.” The weight given the opinion evidence will depend upon the view taken of all the circumstances.

[22] The judgement concludes with two caveats, the second of which I wish to mention before complicating it. Justice Dickson states:

> I conclude with two caveats. First, in every case, in determining whether an opinion is admissible, the trial judge must necessarily exercise a large measure of discretion. Second, there may be a tendency for judges and juries to let the opinion of police witnesses overwhelm the opinion evidence of other witnesses. Since the opinion is admitted under the "compendious statement of facts" exception, rather than under the "expert witness" exception, there is no special reason for preferring the police evidence over the "opinion" of other witnesses. As always, the trier of fact must decide in each case what weight to give what evidence. The "opinion" of the police officer is entitled to no special regard. Ordinary people with ordinary experience are able to know as a matter of fact that someone is too drunk to perform certain tasks, such as driving a car. If the witness lacks the relevant experience, or is otherwise limited in his testimonial capacity, or if the witness is not sure whether the person was intoxicated to the point of impairment, that can be brought out in cross-examination. But the fact that a police witness has seen more impaired drivers than a non-police witness is not a reason in itself to prefer the evidence of the police officer. Constable McMullen and Sergeant Spoelstra were not testifying as experts based on their extensive experience as police officers. Mr. Wilson does not need any special qualifications. Nor were the police officers relying on any special qualifications when they gave their opinions. Both police and non-police witnesses are merely giving a compendious statement of facts that are too subtle and too complicated to be narrated separately and distinctly. Trial judges should bear in mind that this is non-expert opinion evidence, and that the opinion of police officers is not entitled to preference just because they may have extensive experience with impaired drivers. The credit and accuracy of the police must be viewed in the same manner as that of other witnesses and in the light of all the evidence in the case. If the police and traffic officers have been closely associated with the prosecution, such association may affect the weight to be given to such evidence.

[23] The police officers whose opinions were accepted in Graat were a patrol officer and a desk sergeant, both with a number of years experience. Justice Dickson wished to point out that Mr. Wilson, a civilian, was equally entitled to express his opinion in court and to receive the same consideration for it. In the case before me here one of the police officers who expressed his view of the degree

of impairment of Mr. Jessome was, at one time, and for a number of years, a qualified technician.

[24] A technician takes accurate and reliable measurements of a person's blood alcohol level using scientifically valid and legislatively approved methodology. He or she thus has an objective measurement of blood alcohol level, and thus of the degree of impairment by alcohol, for every such person he sees. While the technician will not always (indeed not usually) have seen any driving by the suspected impaired driver, he or she will have had an opportunity to observe the accused prior to the test, to converse with him, and generally to observe him at the time he is presented for testing and afterwards. In some cases the technician will also have made observations in the field. The results of the breath tests are instantaneous and thus give an objective measure against which the technician may compare his impression of impairment. Over time the technician will have seen, observed and simultaneously measured various degrees of impairment and various levels of blood alcohol. If one were to design a training program to teach someone how to reliably estimate level of impairment, one could hardly do better than this.

[25] Sergeant Peters stated that he had tested over 500 hundred people. In my view, his opinion is entitled to more weight than the opinion of a regular member of the police or public. This is not meant to diminish the potential value fo the latter.

[26] Obviously any additional weight given to the opinion of a technician will depend on the degree of experience. The weight assigned may depend upon any number of other possible factors. I do not wish to be seen as attempting to create a special category of evidence or of witness, nor to shortcut any fact-finding process. Certainly nobody's opinion should be accepted without the fullest scrutiny. But the accumulated experience of a qualified technician, and the unique opportunity such a person has to conduct both a subjective and objective assessment of impairment, in case after case, ought to cause a trier of fact to listen very carefully to what he or she has to say. Putting it within the framework of analysis endorsed in Graat, this is a circumstance which can affect the value of the opinion evidence; in this sense I do not think it offends either the ratio or the caveat contained in the judgement there.

INFERENCES - CONDUCT EVIDENCE - DRIVING AND NON-DRIVING EVIDENCE

[27] In some of the reported cases the accused has testified and "explained away" certain things which were relied upon by the police as indicia of impairment. R. v. Lozano [1997] N.S.J. No. 581is one such case. The accused provided explanations for certain things which otherwise might have caused the trial judge to infer impairment by alcohol. Mr. Jessome did not testify and thus I do not have anything by way of defence evidence to counter the accusatory evidence of the police. I fully realize that an accused has a constitutional right to silence and no onus upon him to prove his innocence. To note the foregoing is simply to say that I must reason within the evidence, such as it is.

[28] This being said, a trier of fact is entitled to consider matters of everyday experience when assessing evidence and applying the burden of proof. Where, as here, it is argued that a particular thing relied upon by police as an indicator of impairment may have a cause other than the ingestion of alcoholic beverage (e.g. uneven gait by uneven ground, or watery eyes by cold, or strong odour by recent consumption) a trier of fact may look at the evidence, in light of common experience, and conclude that an inference of impairment should not be drawn.

Indeed, it may result in error if the trier of fact, contemplating a possible inference, does *not* consider innocent explanations emerging from the circumstances in which the accused was found (see, for instance, R. V. Ryan [2002] N.S.J. No. 514 (Q.L.) at paragraphs 23 and 24). At the same time, the reasoning must be within the realm of common experience, and not outside the evidence. Speculation is not for juries.

[29] The terms "functional evidence" and "conduct evidence" appear in the caselaw on impaired driving. In Andrews, the Alberta Court of Appeal drew a distinction between "driving ability" and "functional ability". I have already expressed, and would share, the reservations some might have as to whether there is any real distinction between the two. Certainly the legal element requiring proof is impairment of driving ability, but it is difficult to see how a person who is impaired in such common, well-practised functions as walking and talking is not also, and almost ipso facto, impaired in his or her ability to operate a motor vehicle safely on a highway. However, it is wise not to automatically jump to conclusions. The ultimate issue must always be borne in mind. It is impossible to envisage all possible circumstances. But I would not read Andrews as authority to automatically discount the value of evidence related only to "functional ability".

[30] I think a more functional distinction may be drawn: between driving and non-driving evidence. The former may well make a stronger impact on a trier of fact, simply because it is so direct. Both would be conduct evidence in the broad sense. Some judges have lumped non-driving evidence into the potentially broader category of circumstantial evidence.

[31] Both types of conduct evidence (driving and non-driving) may be distinguished from mere physical appearance, such as red eyes or flushed face. Defence counsel has argued, citing the author Alan Gold, that a "standard litany" of indicia should receive short shrift from the court. If certain features are commonly found in persons impaired by alcohol, and persons impaired by alcohol are routinely arrested and charged, it is hard to see how a standard litany can be avoided.

[32] Be that as it may, the court must always attempt to ascertain whether a witness, police or otherwise, is annunciating features of the particular case from actual memory rather than merely making assumptions from other cases, or filling in gaps of memory. Testimony should not be gilded with assumptions from other

cases. The stuff of common experience is not meant to fill gaps in memory of the individual accused. In admitting non-expert opinion, a court should not dispense with proof of particular circumstances.

[33] I would therefore add that things such as “red eyes” have little significance on their own. It is conduct evidence which one would expect to see in impaired driving prosecutions; non-conduct evidence may fit in and support, but make for a flimsy foundation.

THE VALUE OF COMPARISONS

[34] Evidence which is comparative in nature is usually more valuable than evidence, particularly opinion evidence, for which no baseline or standard or reference point is given. If one says something is “fast”, the listener needs to know “compared to what”. In the instant case, much of the evidence inculpating Mr. Jessome is worthy of considerable weight because it consists of observations which could be related to a known or normal condition of some sort. In this regard I have already spoken of the evidence of the technician. Two other aspects bear mention here.

[35] First, both police officers interacted with Mr. Jessome on the dates of his subsequent court appearances - occasions when he was presumably sober - providing a point of comparison for their observations of his speech and gait and demeanor the night he was arrested.

[36] Second, the initial concerns about Mr. Jessome's driving which formed from seeing him cross the center line and weave in his lane, were developed in the minds of the police officers as they traversed the very same highway, in the same direction of travel. The road was curvy, but the police, traveling right behind, had to negotiate the same road at the same time. The observations were not made from a helicopter, or a parking lot, or even from a different vantage point on the highway. The police did not read about the windings of the road in a tourist brochure. These were not fleeting or peripheral observations. The police had an opportunity, over a considerable stretch or road, to make a genuine assessment of his driving relative to their own.

CONCLUSION

[37] While there well might be innocent explanations for some of the things put forward as symptoms of impairment the sum total of the evidence leads to only one reasonable conclusion - that Mr. Jessome was impaired by alcohol as he drove his vehicle on the Cabot Trail that night. I have no doubt of this, having heard the evidence I did and assessed it in the way I have described.

[38] Mr. Jessome is therefore found guilty, as charged.

Dated at Sydney, Nova Scotia, this 15th day of December, 2006.

A. Peter Ross, Provincial Court Judge