PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Lamond*, 2021 NSPC 9

Date: 20210207
Case# 8316957, 58
Registry: Sydney

Between:

Her Majesty the Queen

v.

Jillian Lamond

Judge: The Honourable Judge A. Peter Ross,

Heard: January 13 and 14, 2021, in Sydney, Nova Scotia

Decision February 9, 2021

Charges: s.320.14(1)(a), s.320.15(1)

Counsel: Darcy MacPherson, for the Crown
David Ianetti, for the Accused

Summary

The accused was seen exiting the rear door of a vehicle which had recently crashed into a ditch. No one else was seen inside or around the vehicle. She made spontaneous statements at the scene, some indicating she was driving, others that she was not. Police noted some signs of possible impairment. Field sobriety tests were conducted, indicating an impairment by alcohol and/or drug. A drug recognition evaluation demand was made. A screen for the level of alcohol resulted in a reading of 180 mg/%. This led police to believe impairment by alcohol. A demand for breath samples led to one successful reading of 170 mg/%, but the accused failed to provide the required second sample. She gave as her excuse that her ribs had been injured in the accident making it too painful and difficult for her to blow into the instrument. The accused was charged with impaired operation of a conveyance, s.320.14(1)(a), and with failing or refusing to comply with a demand for breath samples to determine her blood alcohol concentration, s.320.15(1).

The evidence left a reasonable possibility that an ex-boyfriend was the driver, even though the accused was initially reluctant to disclose this person's name, and he was not called to testify at trial. On this basis she was found not guilty on the impaired operation charge; it was not necessary to consider whether the evidence proved impairment.

The blood alcohol concentrations were taken as evidence of her level of impairment. As such, although immaterial to the refusal offence *per se*, the stark contradiction between her degree of impairment and her evidence of having had only two glasses of wine in the hours preceding the crash undermined her overall

credibility, particularly the credence of her excuse. Her successful attempts also belied the claim that she was unable to continue with the breath test procedure. She was found guilty on the charge of refusal.

By the Court:

Facts

[1] Late on the evening of December 25, 2018 the accused, Jillian Lamond, left a Christmas gathering at a residence on Little Pond Road, Cape Breton County, in her red four-door Honda. Whether she was driving, or was in the back seat, is open to question. Whether she was impaired by alcohol is also in issue.

[2] At trial, Ms. Lamond says she left the house with her ex-boyfriend, one R.B., between 22:30 and 22:40 hours.

[3] Melinda Whitty and her sister were out for a drive that evening to view Christmas displays. On Little Pond Road they came across a single motor vehicle accident. They had noted a small white car pull out from a driveway about 200 meters ahead. They then saw a second vehicle – the accused's Honda – which had crashed on the side of the road. The small white car stopped alongside Whitty's. One of the two male occupants told her to call 911; the white car left and did not return.

[4] Ms. Whitty placed the 911 call at about 2300 hours and remained at the scene. In her testimony she says the vehicle "nose-dived into the ditch". Airbags had deployed and the windows had shattered. She saw a person get out from the rear passenger side door, identified in court as the accused. She appeared to be in shock but did not appear to be injured. Whitty saw nobody else in or outside the

vehicle. When she asked the accused if there was anyone else in the car the answer was no. Ms. Lamond did not want the police to be called, saying that she would get a tow truck on her own, but 911 had already been alerted.

[5] Ms. Whitty waited while fire, ambulance and police arrived, in turn. Ms. Lamond said to Whitty "I wasn't driving . . . I think I fell asleep." In the minutes that followed Whitty overheard the accused say that she had been at a gathering, that there had been an argument, that she had left with her boyfriend. She also heard the accused say that she "had a few drinks."

[6] At trial the accused denied that she was the driver. Her extemporaneous statements at the scene, some noted above and others noted below, were admitted in evidence, both consistent or inconsistent, both exculpatory and inculpatory. The recent fabrication exception and the need for context supported admission. Voluntariness was not in issue.

[7] Cst. Colin White of the regional police force found the accused standing next to her heavily damaged vehicle. They spoke about the accident. Initially she was not under suspicion for any wrongdoing. She said, in a series of statements, that

- She was the owner
- That she had been driving and checking Facebook when the accident occurred
- That she fell asleep at the wheel
- That she could not remember being in the car

[8] I find the foregoing utterances to Whitty and Cst. White were made, even though the accused claims to remember only the last. During the exchange, the officer noted glossy eyes and slurred speech. From this, and the circumstances of the accident, he suspected impairment (although all he could smell was perfume). He detained her and demanded she perform field sobriety tests. Thinking that the extreme cold was impairing the accused's ability to complete the exercise, he took her to North detachment where he "restarted the test". Ms. Lamond was searched at the detachment. A small bottle of Crown Royal whiskey, unopened, was found in her purse.

[9] The accumulation of clues on three sets of tests gave Cst. White grounds to arrest Ms. Lamond for impaired operation of a conveyance. At 0048 of the following morning, the 26th, thinking the impairment was likely by a combination of alcohol and drug, and being a certified drug recognition expert, he gave her a s.320.28(2) drug recognition evaluation (DRE) demand. He began with what he termed the "breath demand portion" of the evaluation (which I take to be a s.320.28(3) demand). This sample was taken by Cst. Matt Ratchford, a qualified technician, with an Intox EC/IR II. It registered 180 mg in 100 ml. of blood. I will refer to this as the "DRE sample".

[10] Believing then that the main cause of impairment was by alcohol, Cst. White read the accused a standard s.320.28(1) breath demand. She agreed to take the tests. After the usual observation period, Ms. Lamond provided a sample which measured 170 mg/%.

[11] Cst. Ratchford testified that the accused was first brought to him at 00:38 for the DRE sample. He did an initial observation period of 15 minutes. The first

attempt at 0059 was unsuccessful because she “sucked in”. He explained the error, demonstrated how to blow properly, and tried again to procure a sample from the accused. In two subsequent attempts the accused stopped blowing. Ratchford persisted. Another insufficient sample was given, but at 01:05 the accused provided a sample sufficient for analysis. As noted above the result of this DRE sample was 180 mg/%.

[12] Cst. White then made the demand for further samples under s.320.28(1). Cst. Ratchford observed another 15 minute waiting period. At 01:23 the accused provided an insufficient sample. At 01:26 she blew successfully. As noted above this registered at 170 mg/%. After yet another 15 minute observation period, she declined to provide any more samples. In Cst. Ratchford’s words “she chose to refuse the second test.” He did not record the exact words but indicates that she “expressed disinterest” in continuing. He does not recall that any reason or excuse was given.

Issues

[13] There is no issue concerning

- The grounds for arrest
- The grounds for the DRE or breath demands
- The form of the demands
- The accused’s understanding of the demands
- The accused’s s.10(b) rights

The issues in the case, which arise from the testimony of the accused, are:

- With respect to the impaired driving charge, whether the evidence proves (i) she was operating the vehicle and if so, (ii) she was impaired in her ability to do so
- With respect to the refusal charge, whether her physical condition provides an excuse for failure to provide a proper sample.

[14] Findings of credibility are important to the determination of these issues.

The impaired operation charge – s.320.14(1)(a)

[15] Ms. Lamond testified that she suffers from lupus, and from depression. She provided a list of the medications she was taking on the date in question. This evidence has little relevance to the outcome of the case. However, it appears that she was going through a difficult period – she termed it "trauma" – concerning her choice of partners. She had evidently broken up with R.B, yet met up with him again that night for reasons she did not elaborate upon. She says the relationship ended very badly, that she "did not want anyone to know that she had been with him that night." She denied driving the vehicle, but at the same time "did not want to bring him (R.B.) into it." She said "he literally tortured me . . . I didn't tell the police the truth . . . I did not want him to be involved." She said that R.B. "got dropped off and grabbed my car – I got in the back seat – I didn't want the family to know". She says that she lay down in the back seat because she wasn't feeling well. She says she was dozing off when the accident happened.

[16] There is no evidence one way or the other on whether it was possible to open the driver's door. While the condition of the vehicle might account for a driver

exiting through a rear door, this fact is more consistent with her being in the back seat when it crashed.

[17] Crown challenged Ms. Lamond on her claims. It asked why R.B. had not been subpoenaed to support this version of events. It argued that her evidence on this point - that R.B. was driving - should be disbelieved. It is possible that R.B. was in the small white car and that both vehicles left the Christmas gathering at the same time. Speculation aside, Ms. Lamond appeared to have genuine concern about involving her ex-boyfriend in the matter. This might have motivated her to cast blame on herself when police arrived to investigate. In such a circumstance I attach little importance to the fact that R.B. was not sought out and subpoenaed for trial.

[18] It is more likely than not that Ms. Lamond was driving the red Honda. As noted, the extemporaneous statements made at the scene are both inculpatory and exculpatory on this point - she told Ms. Whitty that she was not driving, she told police she was. In these situations people often attempt to deflect blame, but upon a consideration of all the evidence I think it is within the realm of reasonable possibility that the accused attempted to take blame, and that R.B. was driving the car.

[19] I have significant concerns about the accused’s credibility, which I will discuss below. These pertain primarily to her level of intoxication but affect the whole of her evidence, including her denial that she was driving. However, I do not discount her evidence entirely – it does leave me with some reasonable doubt about whether she was operating the vehicle at the material time. She is entitled to an

acquittal on the s.320.14(1) charge on that basis alone, regardless of her level of impairment.

The refusal charge – s.320.15

[20] With respect to her attempts to provide samples, the accused claims that she was unable to blow properly because her chest was injured in the accident. On the face of it, even without medical evidence, this is a reasonable assertion. The vehicle had come to a crashing halt and suffered considerable damage. It is plausible that a person might emerge from this with bruised ribs.

[21] Ms. Lamond claims that she told both police officers several times that she was in pain. She testified that "every time I couldn't blow I'd say 'I'm sorry, my chest is sore'." Neither officer had notes of any such statements. In cross-examination, and again in their rebuttal evidence, both officers insist they have no memory of this. They do not remember that she her hand on her chest, as counsel suggested. Given that both knew the accused had been in an accident, and given the training and duties of each, it is highly likely that they *would* have remembered and noted any such complaint if one had been made.

[22] Both police officers appear to have acted fairly towards the accused and explained things clearly to her, including the consequences of refusal. They appear to be truthful and accurate in their recitation of events.

[23] Of even greater significance for the accused's credibility is how her testimony measures up against the results of the two breath tests. She claims to have had one glass of wine earlier in the day, and one small glass of wine between

18:30 and 19:00 that evening. This cannot possibly be true, given the blood alcohol concentrations measured later.

[24] In a previous case in this court, R. v. Kelly, 2019 NSPC 73 at par. 56 et seq, I considered the potential evidentiary significance of a properly measured BAC where no presumption is in play. There the evidence was proffered by way of a certificate. Here I have the *vive voce* evidence of the QT who says he obtained two reliable samples of the accused's breath measuring 180 and 170 mg/%. These readings are quite consistent across a 21 minute time frame. Nothing about the sampling or analysis was called into question in cross-examination. Here, a qualified technician obtained proper samples into an approved instrument which disclosed very high blood alcohol concentrations some 2 to 2.5 hours after the incident. There were ample grounds to make the demand, based on an unexplained accident, the accused's presentation, and an admission of driving. I take this evidence at face value – as evidence of the actual BAC's – not merely as evidence of ingestion of alcohol as earlier case law might suggest (discussed in R. v. Devison [2016] N.S.J. No. 274 at par. 101 *et seq* and 131-147). Although this is not a case where a s.320.31(4) extrapolation is called for, that section gives me reason to think that at the time of driving the accused's BAC was even higher (here noting that there is absolutely no evidence of drinking after the time of operation). In the result, the accused's testimony about her drinking pattern is a patent falsehood.

[25] I will note that in the recent case of R. v. Watts, 2021 NSPC 8 my colleague Judge Hoskins takes a different approach, taking the BACs to be evidence only of ingestion of alcohol (at par 137 et seq). In the case at hand, if one were one to adopt the line of authority by which the readings are evidence only that there was

some alcohol in her system, this would *not* be inconsistent the accused's testimony of her prior drinking pattern. Hence, on this interpretation of the BACs, there would *not* be the impact on credibility which is critical to the findings here.

[26] In my view the BAC's would be relevant and admissible evidence of impairment if that were still a live issue. Doubt about whether she was the driver obviates the potential importance of the BAC's to the impaired operation charge. But on the refusal charge, I make use of these readings in assessing her credibility, particularly as it relates to her purported excuse for failing to provide the final sample.

[27] Ms. Lamond said "my kidneys are shot, I don't process alcohol properly". I am not familiar with how the kidneys process alcohol at all, but more to the point I see this as a disingenuous attempt to reconcile an impossible contradiction.

[28] Lastly, however uncomfortable she may have been, Ms. Lamond was indeed able to provide two sufficient samples of her breath. It strikes me as odd that she would suddenly become incapable of providing a proper sample, having done so successfully in the preceding few minutes.

[29] For these reasons I reject the accused's excuse for failing to provide the final, required sample. While I need not determine her motive for non-compliance, it seems to me that she saw the writing on the wall. I conclude she was unwilling to allow the police to complete the analysis of her breath. I find she had no reasonable excuse.

[30] I am entering a finding of guilty on the charge of refusal of the s.320.28 breath demand, an offence contrary to s.320.15(1).