PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Jessome*, 2021 NSPC 50

Date: 20211203

Docket: #830748-10

Registry: Sydney

Between:

He Majesty the Queen

v.

Mark Charles Jessome

Judge:	The Honourable Judge A. Peter Ross
Heard:	July 7, July 30, October 1, October 29, 2021, at Sydney, Nova Scotia
Decision	December 6, 2021
Charge:	s.253(1)(a), 254(5) and 255(2), *Criminal Code of Canada*
Counsel:	Darcy MacPherson, for the Crown Darlene MacRury, for the Accused

Summary:

Accused is charged with impaired driving causing bodily harm and refusal of a breath demand. The overriding issue is whether the evidence proves him to be the driver. His girlfriend was in the vehicle - she claimed that he was driving and left the scene. The accused made a spontaneous statement upon arrest and later, at cells, allegedly made an admission to driving to a paramedic. Other evidence included testimony of a witness to the immediate aftermath of the crash.

Issues:

1. Admissibility of the spontaneous utterance on arrest and when refusing
2. Admissibility of the statement to the paramedic
3. Sufficiency of the grounds for the demand and proof of the refusal
4. Whether the evidence in totality proves that the accused was driving at the material time, which includes (i) an assessment of the credibility of his girlfriend and (ii) the meaning and significance of his spontaneous statement on arrest

Found:

1. The statement made at arrest is admissible.
2. The alleged admission made to the paramedic is not admissible. There were reliability concerns arising from the manner in which the statement was elicited, not knowing the questions which provoked the comment, not knowing the precise words uttered, and possible supposition on the part of officer who recorded the statement.
3. The officer had sufficient grounds to make a breath demand, which grounds included hearsay relayed to her by her fellow officer. The accused's refusal was clear and final.
4. The accused was driving at the material time. Some weight was attributed to the comment "did you catch me driving". The evidence of the girlfriend, the accused's

comment upon arrest, and the surrounding circumstances suffice to prove the driving element to the criminal standard.

REASONS FOR DECISION

[1] Early on the Sunday morning of December 2nd, 2018 Ashley MacKinnon left her home in New Waterford and took "the South Bar route" into Sydney to go to work. As she was driving on Victoria Road in the Whitney Pier section of the Cape Breton Regional Municipality, approaching Jamieson St., she saw a vehicle turn the corner and come toward her. She testified that "it seemed like (he) was not driving straight – (he) was all over the place." The vehicle crossed over into her lane and hit her head-on. She suffered a broken hip and numerous scrapes and bruises.

[2] Sarah MacKinnon (no relation) lived with Mr. Jessome in his apartment on 212 Robert St., Whitney Pier, just two blocks from the scene of the collision. She testified that they had been up all night drinking. She says they left Robert St. that morning in his black Jeep Liberty with the accused driving and she in the passenger seat. She says when the accused turned on to Victoria Rd. the accused was speeding, "went into the opposite lane", and "hit a woman in a vehicle." The vehicles collided on the drivers' sides. She described the accused as being "in a complete rage, threatening to end us both" as they left the apartment.

[3] According to Sarah MacKinnon the accused left the scene before 'first responders' arrived, while she stayed in the area and spoke with police and ambulance attendants.

[4] Police located the accused at his apartment a short time later. They arrested him and made a demand for breath samples, which he refused to provide. He was taken to police lock-up.

[5] Based on statements from Sarah MacKinnon and other fruits of the investigation, police charged the accused with driving while impaired, refusal of a breath demand and impaired driving causing bodily harm to Ashley MacKinnon. Mr. Jessome elected trial by provincial court judge on May 7th, 2019. He failed to appear for trial on January 13th 2020. For various reasons

subsequent trial dates were lost. The trial commenced on July 7th, 2021 and continued on July 30th and October 1st. Final argument was made on October 29th, and the matter adjourned for decision to December 3rd, 2021.

[6] The principal point of contention is whether the Crown has proven beyond a reasonable doubt that the accused was driving the Jeep Liberty. Defence argues that the evidence does not prove this to the criminal standard. It argues that the evidence leaves open the possibility that Sarah MacKinnon or someone else may have been driving.

[7] During the trial a *voir dire* was held into the admissibility of statements made by the accused while in police custody. Defence framed the issue as voluntariness; it did not allege a Charter breach of any sort. At the same time, Defence seemed to fold Charter-related considerations into argument. Both parties agreed that the trial and *voir dire* would be "blended", which is to say that evidence received on the *voir dire* also became evidence in the trial itself. A decision on admissibility of the statements was deferred to the end of the case. Counsel addressed all outstanding issues in final argument.

[8] Mr. Jessome did not testify. Defence did not call evidence. Certain aspects of the Crown's evidence are set out above. I will continue the review of witness testimony below, with the following issues before me:

- The credibility of Sarah MacKinnon
- The validity of the demand for breath samples
- The refusal
- The admissibility of certain statements made to police by the accused
- The meaning to be attributed to the accused's utterances
- Whether the totality of the evidence proves that the accused was driving the Jeep Liberty

[9] There is no issue about the fact that Ashley MacKinnon suffered bodily harm, nor about the fact that the accused was intoxicated at the material time.

Victoria Road

[10] At the time of the collision Maurice Farrell was cleaning frost off his windshield at 1118 Victoria Road. He estimated the time to be between 6:00 and 6:30 a.m. His house is at the corner of Victoria Rd. and Church St. While no witness gave an estimate in feet or meters, one sees from photo 0003 in Exhibit #1 that this is a very short distance from the crash site. He turned when he heard the crash, seeing only the result. His partner, a nurse, called 911. He saw Sarah MacKinnon walking up the sidewalk towards his house. She was "distraught . . . angry and irate". She was limping. She had white powder on her face. Farrell stayed with her until police and ambulance arrived, about 10 to 15 minutes later. For her part, Ms. MacKinnon testified that she was "in extreme pain", "in a state of shock", and "terrified" as a result of the accused's actions.

[11] Farrell saw a man "standing around the dark vehicle". He saw the injured party, Ashley MacKinnon, inside "the silver car". He says the male left the scene of the collision, "walking slowly" in the general direction of the funeral home on Church St.. He did not know or recognize him; he did not identify him in court.

[12] The evidence of Mr. Farrell and that of Sarah MacKinnon differ somewhat on (a) Sarah's movements on the sidewalk and (b) the route taken by the male who left the scene. Ms. MacKinnon says that after getting herself out of the Jeep she went *towards* Jamieson St. in order to get away from the accused, at which point she met Mr. Farrell walking in the opposite direction. Farrell recalls her walking *away from* Jamieson St. towards his house when they met. Ms. MacKinnon says that the accused left the scene by walking up to the corner of Church St., cutting *in front* of the Farrell residence, then proceeding up Church St. past the funeral home, at which point she lost sight of him. Farrell says the man walked *behind* the house before turning up Church St.

[13] Mr. Farrell's evidence is more reliable than Sarah MacKinnon's in describing the path taken by the "man" who left the scene of the crash. Farrell was sober and unhurt. I also accept that he saw Sarah MacKinnon "come from the vehicle to the sidewalk and towards me", not walking towards Jamieson St. as she claims. These are collateral points. Given the trauma suffered in the collision it is possible she is honestly mistaken about these things.

[14] At trial Sarah MacKinnon stated, for the first time, her belief that the accused deliberately drove into the oncoming vehicle. She says the accused told her he was "going for the South Bar cliff" and threatened to "end us both." She claims to have expressed her fear of the accused to Mr. Farrell, but Farrell made no mention of any such comment. This gives rise to another concern about Ms. MacKinnon's credibility, i.e. the possibility that she is embellishing aspects of her account, that she is imputing motives to the accused to make him seem repugnant, and to deflect blame from herself. She countered this suggestion in cross-examination by forcefully denying that she harboured any ill will towards Mr. Jessome. She pointed out that they remained in a relationship for a number of months after the event.

[15] The court heard from various police witnesses - Constables Dawson and MacDonald, who attended the scene, and Constables MacKay and Harris who tracked down Mr. Jessome at his apartment at 212 Robert St.

[16] Dawson put his time of arrival at between 7:30 and 8:00 a.m. MacDonald said simply that he was dispatched to a call in the early morning and arrived at the same time as Dawson. MacKay says she was dispatched to the incident at 6:20, arrived at Robert St. at about 7:00 and arrested the accused inside at 7:20. Harris says they arrived at the residence "around 7:19". The time disparities are odd but inconsequential.

[17] MacDonald saw Ashley MacKinnon in the silver car; he was unable to open the door. He says there was one person in the Jeep Liberty – a female, in the passenger side seat – who did get herself out of that vehicle. He says he took this person to his police car to calm down. In a curious discrepancy, Dawson says that he took the female who had been in the Jeep to his cruiser to keep her out of harm's way until EHS arrived. The lady identified herself as Sarah MacKinnon. In her testimony Sarah agreed that she was taken to a police car, although briefly.

[18] It is possible that Dawson was involved in taking Sarah MacKinnon to MacDonald's cruiser. More importantly I am satisfied that MacDonald spoke with Sarah MacKinnon who told him

- That she was Mark Jessome's girlfriend

- That they had both been drinking
- That they were having a fight
- That Jessome swerved into the oncoming vehicle

[19] MacDonald cited these assertions to support his belief that the accused had been driving while impaired and had caused bodily harm to the person in the other vehicle. While he did not articulate it in connection with his grounds, I note that when he first saw Sarah MacKinnon she was in the passenger seat of the Jeep, and that he started his conversation with her by asking "where the driver was." MacDonald testified that Mr. Farrell told him that a male had left the scene but it is not clear that he had this piece of information when he communicated with Cst. MacKay about tracking down the accused. Putting that aside, what Sarah MacKinnon told him, in view of the surrounding circumstances, provided him with reasonable grounds to believe that the driver was Mark Jessome.

[20] MacDonald was familiar with the accused, and associated him with 212 Robert St. He contacted other members "to go there and arrest him." His notes read that he asked his partners to go to that address "to see if he was there." However I am satisfied he further conveyed the reason for this. He did not want his unit members to simply locate the accused, but to take him in.

<u>212 Robert St.</u>

[21] Cst. MacKay testified that she was first dispatched to Victoria Road. MacDonald then advised that the driver of a vehicle had left, and she was given an address – 212 Robert St. She and Harris were both in full uniform when they went there. They found a vehicle in the yard. The accused's father met them outside. He told them the accused was inside with his mother. He told them where he had earlier encountered the accused. The officers went to the door. The accused's mother let them in. The accused emerged from a back room, covered in white powder. The officers believed this was airbag dust resulting from a motor vehicle collision, based on past experience at accident scenes. The accused was staggering, had slurred speech, bloodshot eyes and a large bump on his head.

[22] MacKay said that she was aware of the motor vehicle accident, that MacDonald told her who the driver was, and that dispatch had given her the address at which to find him. The parents told MacKay and Harris that the accused had arrived at their residence on Church St. intoxicated, that their daughter alerted them to his presence, and that they then took him to his residence at Robert St., driving around the accident scene in order to do so.

[23] In response to being arrested and read his Charter rights and police caution, the accused spontaneously uttered “Did you catch me driving?” In response to the breath demand he said he would not take the test because “(you) didn’t catch me driving”.

[24] The foregoing gives rise to a number of points in issue – whether the above statement is admissible as a spontaneous utterance, whether there was a valid demand, and what meaning to ascribe to his statements (beyond the mere fact of refusal) if they are admitted into evidence.

[25] The comment was not elicited in any sense by the police. He blurted it out upon hearing that he was under arrest for impaired driving and before he could be cautioned. Defence has not alleged an illegal detention or applied for any form of Charter relief. In the *voir dire* the primary focus of the defence objection to admissibility was a second statement - an alleged admission to driving - made when the accused was in a holding cell at the police detachment lock-up. These first utterances, made at 212 Robert St., are ruled admissible. They were given to persons in authority but not as a result of any promises, threats or inducements. They were a reaction to police actions, but were spontaneous utterances made entirely of his own volition. I will return to the second statement below.

[26] Defence also challenged the form and validity of the demand. I note again that Defence has raised this in argument without any accompanying Charter application. The demand is inextricably connected to the alleged refusal. A person cannot be convicted of refusing a breath demand unless the demand itself is unequivocal and gives the accused a clear understanding of what s/he must do.

[27] A distinction may be drawn between a refusal and an accompanying statement. Here, Crown alleges, and MacKay has testified, that the accused refused the test because, in his words,

the police “did not catch me driving.” The fact of refusal can be separated from this accompanying statement, which the Crown proffers as inculpatory in its own right, relevant not to the refusal charge but to whether the accused was driving.

[28] Defence has questioned the sufficiency of grounds for the demand. For the reasons which follow I find that (1) there were indeed ample grounds to make the demand, (2) the demand was proper in form, (3) the refusal was clear, unambiguous and informed and (4) the accompanying statement was voluntary and admissible as evidence against the accused on the s.253(a) and s.255(2) charges. I will defer comment on how the statement ought to be interpreted, and what weight it should get, to later in these reasons.

[29] There is no question that both MacKay and Harris knew they were part of a concerted response to an emergency situation involving a motor vehicle collision. They had been told to arrest Mark Jessome for impaired driving. What they observed at Robert St. (signs of impairment, air bag dust) corroborated what had been conveyed to them by Cst. MacDonald and gave support to the further step of a breath demand. They had reason to believe that the events had unfolded recently. More to the point, they had reason to believe that the driving under investigation had occurred within the previous three hours, thus permitting them to make a demand of the accused under s.254(3). (I note parenthetically that these events occurred just prior to the in-force date of recent amendments to impaired driving legislation). In taking such measures they were entitled to rely on the information supplied by their fellow police officer and the hearsay statements of the accused’s father.

[30] MacDonald himself, based on what he observed at the scene and was told by Sarah MacKinnon, had an honest and reasonable belief that her boyfriend, Mark Jessome, had been driving at the material time. While traffic is much lighter early on a Sunday morning than late afternoon of a workday, Victoria Road is a main thoroughfare through this portion of the CBRM. It is also a residential neighbourhood. It was entirely reasonable to believe that the events had occurred in close proximity to the time he was dispatched to the scene.

[31] Taken together with the information given to her by her fellow police officers I find that MacKay had sufficient grounds to arrest the accused and to make a demand for breath samples under the *Criminal Code*. I further find that the demand was given at 7:20, as MacKay testified.

[32] The evidence is sufficient, if not ideal, as to the form (wording) of the demand. MacKay did not have her "standard issue card" with her in the witness box, but she recited the substance of the demand to the best of her recollection and confirmed that the demand she gave at the time was read from her card. The card also contained standard wording for advising a detainee on their right to counsel and their right to remain silent. These too were recited to the accused. Again, MacKay summarized the 'police caution' component as she recalled it from memory.

[33] Crown asked a leading question - whether the accused was told that refusing the demand would result in him being charged with refusal. While I am concerned about the suggestive nature of the question, I none the less conclude that this component of the demand was a part of what she read to the accused.

[34] In response to the right to counsel and the opportunity which would be given to him to phone a lawyer in due course, the accused screamed that "he was not talking to anyone." Asked whether he understood that he need not say anything he screamed "yes". As noted above he gave as his reason for refusing that the police did not catch him driving.

Police detachment lock-up

[35] MacKay and Harris took the accused to the local lock-up, a ten minute drive. He was processed and put in cell number 9. There were no promises, inducements or other concerning comments from police in the intervening time.

[36] Neither the breath demand nor the police caution was repeated at the lock-up. MacKay testified that at the residence the accused "was adamant that he was not speaking with a lawyer." He had also displayed a degree of belligerence towards them.

[37] According to Special Constable Blair Burns the accused arrived at lock-up shortly after 7:00 a.m., at the beginning of his shift. Burns was with him during the booking process and took

him to cells. The accused was agitated and upset. He attempted to damage the toilet. Eventually he settled down and slept. Because he became more difficult to wake during standard checks, Burns decided he should be checked by paramedics and called EHS.

[38] The examination of the accused by EHS occurred in the cell. Burns stayed at the cell door to monitor the situation. He could overhear the conversation between the accused and paramedics. They questioned him, presumably to assess his condition. The accused disclosed that he had been drinking alcohol and had ingested cocaine.

[39] Having elicited this much, Crown counsel asked Burns "what, if anything, did the accused say about who was driving?" In answer, Burns replied that the accused inquired about the condition of his Jeep, and what company had towed it. Crown repeated the question about the driving. This time, Burns' answer was that the accused told paramedics that he was driving and then inquired about the condition of the Jeep.

[40] Defence objected to the form of question. The alleged statement would constitute an admission to a critical element of the offences. I agreed that the question was leading but permitted the witness to answer. The witness had notes of the EHS visit. I did not think that the form of question should constitute a complete bar to receiving the evidence, but the manner in which the alleged statement was elicited, together with the circumstances in which it was uttered, give rise to serious concerns about reliability.

[41] As mentioned earlier, Defence mounted an argument against admissibility within the context of a traditional voluntariness *voir dire*. It did not make a Charter application, but it referred to cases in which confidential medical information elicited from detainees in somewhat similar circumstances was obtained in breach of s.8. It also submitted that the accused, housed in a jail, was compelled to answer the inquiries of the paramedics, and hence his statements were not voluntary. This seems to verge upon if not merge with an argument that the accused's s.7 right to silence was infringed.

[42] Absent a Charter application many aspects of this situation cannot and need not be fully addressed. That said, the statement about being a driver is not confidential medical information.

It does not seem to me that the paramedics became as agents of the state to obtain incriminating information in the same way as a doctor is conscripted to obtain blood samples from an incapacitated impaired driving suspect. The police called the ambulance attendants in order to protect the accused, and it is reasonable that police would maintain a security presence in the cell, particularly in light of the accused's prior behavior.

[43] However, I am spared a consideration of these points, not simply because there has been no Charter application but because I think there is problem of a different sort. I am not convinced that the statement was made at all. De-weighting of evidence is permitted when it arises from a leading question. More significantly, I have concerns about how Burns formed his belief that the accused made the admission about driving. As Defence submitted, I have virtually no evidence about the form of questioning by the paramedics, none of whom testified. I do not know whether their questions of the accused may have suggested a particular answer. Questions from the paramedics may have been more 'leading' than the Crown's question of Burns at trial. This leads to the danger that what Burns recollected was not, in fact, a true admission, but the mere adoption of words. These concerns are amplified by the fact that the accused was intoxicated, had recently been in a car crash, and had been woken from a deep sleep.

[44] I have a further concern. While I think Burns is an honest witness, I worry that he believes something on the basis of supposition. The accused was in custody because he was suspected of impaired driving. Burns would have known this, and it could easily colour how Burns construed the conversation with paramedics. I do not have the precise words which were uttered; to my knowledge no note was made of the exact phrase which came out of the accused's mouth.

[45] For these reasons I find the alleged utterance of the accused in the police lock-up inadmissible. I have considerable doubt whether he actually said any such thing. In a sense, there is nothing to admit.

<u>Further discussion</u>

[46] Here I will sum up my conclusions thus far. There was a valid demand made under former s.254(3) of the Code. The accused understood this demand and refused to comply with it under s.254(5). With the exception of the alleged admission made at the police lock-up, which I decline to admit into evidence for the reasons stated above, all the evidence heard at trial and in the parallel *voir dire* is received for consideration on the remaining issue – whether the evidence proves beyond a reasonable doubt that the accused was the driver of the Jeep at the time of collision.

[47] There may be different 'reasoning paths' from here. Mine will first traverse the strength of the evidence that puts Mr. Jessome inside the Jeep at the time of collision, looking only at evidence from sources other than the accused himself. I will not consider the accused's spontaneous utterances at 212 Robert St. ('catch me driving') at this juncture.

[48] Photographs of papers scattered around inside the Jeep at the crash scene show letters addressed to Mark Jessome at 212 Robert St., Apt. 2. Sarah MacKinnon has testified that the accused owned the Jeep and was driving at the material time. While there are concerns surrounding her credibility, as noted above, her evidence retains significant force.

[49] Mr. Farrell's attention was drawn to the crash the instant it happened. Farrell describes a male at the scene of the accident, moments after it occurred. He did not recount this person making his way *to* the accident scene, but recalls clearly the person walking *away from* it. While this male person walked in the opposite direction from the accused's apartment, these locations are all in such close proximity that the accused could easily have returned to his residence by the time MacKay and Harris arrived to arrest him. He was covered in airbag dust. I thus have no doubt that Mr. Jessome was in the vehicle at the time of the crash.

[50] It remains to determine whether the evidence further proves beyond a reasonable doubt that the accused was not merely a passenger, but was driving.

[51] If Sarah MacKinnon was driving the Jeep, she has obvious reason to point the finger of blame at the accused. There are some credibility concerns with her evidence, i.e. indications that she may have exaggerated certain portions of her evidence, that she may be imputing ill will to

the accused without clear justification, and inconsistencies with the evidence of Mr. Farrell. I nevertheless find Ms. MacKinnon credible when she speaks of the accused as driver of the vehicle. Her idea that the accused deliberately ran into the oncoming vehicle may be something that occurred to her after-the-fact. But in recalling the events of the previous night, in recounting the events at the scene, in describing how she exited the vehicle and then encountered Mr. Farrell, and in describing how she felt towards the accused and towards the driver of the other car afterwards, she appeared forthright and truthful. She was not shaken from these assertions in cross-examination.

[52] Sarah MacKinnon said "I'm sorry" to Ashley MacKinnon, when both were being transported to hospital in an ambulance. To my mind this was not an apology nor indicative of a guilty conscience. It does not tend to show that she was driving nor that she bore responsibility for the ensuing injuries. I accept her explanation that she was simply expressing sympathy because she "felt horrible" about what had occurred.

[53] The reliability of Sarah MacKinnon's claim about who was driving is not a concern *per se*. A person identifying a driver in a passing vehicle may do so with absolute sincerity, but with a questionable degree of accuracy. Here, there are no grey areas. I will consider the possibility she is lying, but there is no possibility of mistake.

[54] Sarah MacKinnon testified that she had no driver's licence at the time. This assertion is uncontradicted, and I accept it. The vehicle was the accused's. It seems inherently unlikely that she would have taken control of it that morning.

[55] Mr. Jessome's comments to police at the apartment – "did you catch me driving?" upon arrest, and "you didn't catch me driving" in response to the demand – must be interpreted in view of the fact that he was in the vehicle at the time of collision. The phrase "did you catch me driving?" may be equivocal if police approach an innocent person out of the blue, who had no knowledge of the events in question. It is somewhat more telling when posed to someone who was one of two people in a vehicle when it crossed into an opposite lane and precipitated a head-on collision. Given that I have no doubt that Mr. Jessome was in the Jeep Liberty I should consider whether the remark has inculpatory connotations. The remark is not a clear admission,

but I do think that the words he chose, and repeated – "catch" coupled with "driving" – is somewhat indicative of a guilty mind.

[56] It may be useful, if not strictly necessary, look at this through the lens of "after-the-fact conduct". "Conduct" in this sense includes words. In *R. v. Calnen*, [2019] 1 S.C.R. 301, the legal principles outlined in par.106 *et seq* were endorsed by the majority at par.10. These passages explain that the treatment of after-the-fact evidence is highly context and fact specific. Determining the relevance of any such piece of evidence is necessarily a case-by-case exercise. The evidence will be relevant if it has "some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than the proposition would be in the absence of the evidence" (see par. 108). A trier of fact is entitled to draw upon ordinary experience and common sense in making this assessment.

[57] In the case before me, the proposition is that Mr. Jessome was the driver and Sarah MacKinnon the passenger. I should ask whether the utterance "Did you catch me driving" and its counterpart "You didn't catch me driving" make this proposition more likely than the reverse proposition that Mr. Jessome was the passenger and Sarah MacKinnon the driver. I ask this question knowing that one of the two propositions must be true. If one thinks of them as balanced on a scale, each equally probable, one asks whether the utterance tilts the scale in one direction or the other. To my mind it tilts in favour of the proposition that Mr. Jessome was the driver.

[58] I think that it is possible that Mr. Jessome may have uttered this phrase as a way of stating his belief that police cannot make a lawful breath demand *on anyone* unless they actually see (catch) the person in the act of driving. I also think it possible that he may have stated this belief in this way *even if he were the passenger*. However, while far from determinative, I do think that the words he uttered make it somewhat more likely that he was, in fact, the driver. They are worthy of some weight in that direction. These were spontaneous utterances made in response to the fact that the police were accusing him of wrongdoing, of driving while impaired. He was covered in airbag dust. He was involved in the incident just a short time before. He may be taken to know that the Jeep had crossed the center line and collided with the oncoming

vehicle, i.e. that the driver of the Jeep, whether he or Ms. MacKinnon, was at fault for the accident.

[59] If the phrase had been uttered by a person whose first language was not English, or received through translation, I would take a much more cautious approach to meaning and inferences.

[60] Danger that consideration of after-the-fact conduct will engage propensity reasoning does not arise here.

[61] To sum, Mr. Jessome had just been involved in a serious crash. He and his girlfriend were in the Jeep. One of them was driving. An accused person has no burden to prove his innocence. On the day in question the accused had the right to remain silent and was under no obligation to cooperate with the police. He certainly was under no obligation to name Sarah MacKinnon if she, in fact, was the driver. But Mr. Jessome blurted out this remark, and I am entitled to consider what it might signify about his knowledge of what had just occurred.

[62] The evidence of Sarah MacKinnon, the spontaneous statement of the accused, and other circumstantial evidence in the case combine to prove beyond a reasonable doubt that the accused was driving the Jeep at the material time.

[63] Observations of the accused by police and the evidence of Sarah MacKinnon combine to prove beyond a reasonable doubt that his ability to drive was impaired by alcohol. Ashley MacKinnon unquestionably suffered serious injuries.

[64] As stated above, there was a valid breath demand and a clear refusal.

<u>conclusion</u>

[65] I enter findings of guilty on the charge of refusal, s.254(5) and the charge of impaired driving causing bodily harm, s.255(2). I enter a stay of proceedings on the included offence of impaired driving, s.253(1)(a).

Dated at Sydney, N.S. this 3rd day of December, 2021

Peter Ross, PCJ