PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Ross*, 2021 NSPC 54

Date: 20211129
Docket: 8466379
Registry: Truro

Between:

Her Majesty The Queen

v.

Mitchell Zalman Ross

Judge:	The Honourable Judge Bégin,
Heard:	November 29, 2021, in Truro, Nova Scotia
Decision	November 29, 2021
Charge:	320.14(1)(a) *Criminal Code of Canada*
Counsel:	Thomas Kayter, for the Crown Attorney Kathryn Piché, for the Defendent

By the Court:

[1] This was a criminal trial. The Crown had the onus of establishing beyond a reasonable doubt that Mitchell Ross committed the offense of Impaired Driving contrary to s. 320.14(1)(a) of the Criminal Code.

[2] The Crown proceeded by Summary Conviction.

[3] There is absolutely no dispute that Mitchell Ross was driving. What is in dispute is whether he was impaired by alcohol at the time that he drove his truck into a ditch at a very high rate of speed on July 2, 2020.

[4] There was no Approved Screening Device demand, nor any Approved Screening Device test results. Nor were there any breathalyzer demands or results. The evidence of impairment was solely from lay witnesses so it can be characterized as circumstantial evidence. The issue in this case is how do I treat that evidence to determine if Mr. Ross was impaired when he drove his truck into the ditch?

[5] The onus of proof never switches from the Crown to the accused. Proof beyond a reasonable doubt does not involve proof to an absolute certainty. It is not proof beyond any doubt. Nor is it an imaginary or frivolous doubt. In ***R. v. Starr*** (2000) 2SCR 144, the Supreme Court of Canada held that this burden of proof lies much closer to absolute certainty than to a balance of probabilities.
Mere probability of guilt is never enough in a criminal matter.

[6] The Supreme Court of Canada in ***R. v. Lifchus*** [1997] 3 SCR 320 noted at paragraph 39:

> 39. Instructions pertaining to the requisite standard of proof in a criminal trial of proof beyond a reasonable doubt might be given along these lines:
>
> The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty.
>
> What does the expression “beyond a reasonable doubt” mean?

> The term "beyond a reasonable doubt" has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think that it needs no explanation, yet something must be said regarding its meaning.
>
> A reasonable doubt is not an imaginary or frivolous doubt. It must not be based on sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.
>
> Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.
>
> On the other hand, you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.
>
> In short, if based on the evidence before the Court, you are sure that the accused committed the offence, you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.

[7] In ***R. v. W.D.*** the Supreme Court of Canada indicated the manner in which a trial court should assess the evidence of an accused who testifies. The accused's evidence is treated in a way different from other evidence. I must consider whether I believe the accused's evidence, and if so, then he is entitled to be acquitted on a charge where I believe his denial. Even where I do not believe the accused's evidence, if it serves to raise a reasonable doubt in relation to his guilt for any of the occurrences, then he is entitled to the benefit of the doubt and he is entitled to be acquitted of the charges relating to that occurrence.

[8] Even where I do not believe the accused, and his evidence fails to raise doubt, I must still consider whether on the evidence I do accept, if the Crown has proved the essential elements of each offense beyond a reasonable doubt. I may only convict the accused of offenses proven beyond a reasonable doubt. Proof beyond a reasonable doubt also applies to issues of credibility.

[9] Finally, if I am left in doubt where I don't know who or what to believe, then I am by definition in doubt and the accused is entitled to the benefit of the

doubt. Having said that, however, the accused's evidence is not considered in isolation. It is part of the whole of the evidence that I have heard and must consider.

[10] A criminal trial is **not** a credibility contest.

[11] On the issue of credibility, I am guided by the case of ***Faryna v. Chorny*** [1952] 2 DLR 34 where the Court held that the test for credibility is whether the witness's account is consistent with the probabilities that surrounded currently existing conditions. The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. **In short, the real test of the story of the witness in such a case must be how it relates and compares with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.**

[12] Or as stated by our Court of Appeal in *R. v. D.D.S.* [2006] NSJ No 103 (NSCA), **"Experience tells us that one of the best tools to determine credibility and reliability is the painstaking, careful and repeated testing of the evidence to see how it stacks up. How does the witness's account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard of proof in a …criminal trial?"**

[13] With respect to the demeanor of witnesses, I am mindful of the cautious approach that I must take in considering the demeanor of witnesses as they testify. There are a multitude of variables that could explain or contribute to a witness' demeanor while testifying. As noted in ***D.D.S.***, demeanor can be taken into account by a trier of fact when testing the evidence but standing alone it is hardly determinative.

[14] Credibility and reliability are different. Credibility has to do with a witness's veracity, whereas reliability has to do with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately observe, recall and recount events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point.

[15] Credibility, on the other hand, is not a proxy for reliability. A credible witness may give unreliable evidence. Reliability relates to the worth of the item

of evidence, whereas credibility relates to the sincerity of the witness. A witness may be truthful in testifying, but may, however, be honestly mistaken.

[16] The relationship between reliability and credibility was explained in ***Cameco Corporation v. The Queen***, 2018 TCC 195:

> [11] The reliability of a witness refers to the ability of the witness to recount facts accurately. If a witness is credible, reliability addresses the kinds of things that can cause even an honest witness to be mistaken. A finding that the evidence of a witness is not reliable goes to the weight to be accorded to that evidence. Reliability may be affected by any number of factors, including the passage of time. In ***R. v. Norman***, 1993 CanLII 3387 (ON CA), [1993] O.J. No. 2802 (QL), 68 O.A.C. 22, the Ontario Court of Appeal explained the importance of reliability as follows at paragraph 47:
>
> > …The issue is not merely whether the complainant sincerely believes her evidence to be true; it is also whether this evidence is reliable. Accordingly, her demeanour and credibility are not the only issues. The reliability of the evidence is what is paramount...

[17] As well, the Ontario Court of Appeal in ***R. v. G(M)*** [1994] 73 OAC 356 stated at paragraph 27:

> Probably the most valuable means of assessing the credibility of a crucial witness is to examine the consistency between what the witness said in the witness box and what the witness has said on other occasions, whether on oath or not. Inconsistencies on minor matters or matters of detail are normal and are to be expected. They do not generally affect the credibility of the witness…**But where the inconsistency involves a material matter about which an honest witness is unlikely to be mistaken, the inconsistency can demonstrate a carelessness with the truth. The trier of fact is then placed in the dilemma of trying to decide whether or not it can rely on the testimony of a witness who has demonstrated carelessness with the truth.**"
>
> And at paragraph 28, "…it is essential that the credibility and reliability of the complainant's evidence be tested in the light of all of the other evidence presented…….**While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness's evidence.** There is no rule as to when, in the face of inconsistency, such doubt may arise, but at least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness's evidence

> is reliable. This is particularly so when there is no supporting evidence on the central issue…"

[18] In the case of ***R. v. Reid*** (2003) 167 (OAC) the Ontario Court of Appeal stated that although the trial judge is at liberty to accept none, some, or all, of a witness' evidence, this must not be done arbitrarily. When a witness is found to have deliberately fabricated criminal allegations against the accused, the trial judge must have a clear and logical basis for choosing to accept one part of that witness' testimony while rejecting the rest of it.

[19] A credibility assessment is not a science. As noted in ***R. v. Gagnon***, 2006 SCC 17 (S.C.C.), para.20, it is not always possible to "articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events..."

[20] And in ***R. v. M. (R.E.),*** 2008 SCC 51 (S.C.C.), para. 49 the Court noted that "Assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization."

[21] There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety: ***Novak Estate, Re***, 2008 NSSC 283 (N.S.S.C.). On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence.

[22] A trier of fact is entitled to believe all, some, or none of a witness' testimony. I am entitled to accept parts of a witness' evidence and reject other parts. Similarly, I can afford different weight to different parts of the evidence that I have accepted.

[23] It is important to remind myself of my role, and duty, as the trial judge. The Nova Scotia Court of Appeal in ***R. v. Brown*** [1994] NSJ 269 (NSCA) confirmed at paragraph 17 that:

> …There is a danger that the Court asked itself the wrong question: that is which story was correct, rather than whether the Crown proved its case beyond a reasonable doubt."

> And at paragraph 18 of that same ***Brown*** case the Nova Scotia Court of Appeal referred to paragraph 35 of the BC Court of Appeal case ***R. v. K.(V.)*** which stated: "I have already alluded to **the danger, in a case where the evidence consists**

> **primarily of the allegations of a Complainant and the denial of the accused, that the trier of fact will see the issue as one of deciding whom to believe**. Earlier in the judgement I noted the gender-related stereotypical thinking that led to assumptions about the credibility of Complainants in sexual assault cases which we have at long last discarded as totally inappropriate. It is important to ensure that they are not replaced by an equally pernicious set of assumptions about the believability of Complainants which would have the effect of shifting the burden of proof to those accused of such crimes.

[24] In the case of ***R. v. Mah*** 2002 NSCA 99, the Court stated:

> The W.D. principle is not a magic incantation which trial judges must mouth to avoid appellate intervention. Rather, W.D. describes how the assessment of credibility related to the issue of reasonable doubt. **What the judge must not do is simply choose between alternative versions and, having done so, convict if the complainant's version is preferred. W.D. reminds us that the judge at a criminal trial is not attempting to resolve the broad factual question of what happened. The judge's function is the more limited one of deciding whether the essential elements of the charge have been proved beyond reasonable doubt**…the ultimate issue is not whether the judge believes the accused or the complainant or part or all of what they each had to say. The issue at the end of the day in a criminal trial is not credibility but reasonable doubt."

[25] The ***Mah*** case makes it clear that my function as a judge at a criminal trial is **not** to attempt to resolve the broad question of what happened. My function is more limited to having to decide whether the essential elements of the charges against the accused have been proved beyond a reasonable doubt. The onus is always on the Crown to prove the elements of the offenses beyond a reasonable doubt. The onus is **not** on the Defence to disprove anything.

[26] I have already noted that the evidence in this case was circumstantial evidence. How do I treat this evidence?

Judicial Caution to be Exercised with Circumstantial Evidence

[27] In ***R. v. Griffin*** 2009 SCC 28 (S.C.C.) Charron J. set out the proper approach for assessing a case based upon this type of evidence at para. 34:

> The trial judge repeatedly made clear to the jury that **a guilty verdict can only be rendered if guilt is the sole rational inference to be drawn from the circumstantial evidence**…It is argued that the impugned language had the potential to engage the jury in an abstract comparative exercise, **assessing the qualitative reasonableness of one inference against another when the mere**

> **existence of any rational, non-guilty inference is sufficient to raise a reasonable doubt.**

[28] In ***Bowlin v. R***. 2010 NBCA 90 (N.B.C.A.) Deschenes J.A. restated an important principle from ***Griffin*** at paragraph 8

> …The essential component of an instruction on circumstantial evidence is to instill in the jury that in order to convict, they must be satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty…

[29] In ***R. v. Moose*** 2015 ABCA 71 (A.C.A.) the court said this about circumstantial evidence at paragraph 12:

> When the Crown relies on circumstantial evidence to prove its case, the Crown does not need to prove beyond a reasonable doubt each fact which is said to support the inference of guilt…It seems to us that the contrary must also be true when there is exculpatory evidence. One piece of exculpatory evidence might not be sufficient to raise a reasonable doubt but the cumulative effect of a number of pieces of exculpatory evidence may well do so.

[30] In ***R. v. Smith*** 2016 ONCA 25 (O.C.A.) the court said at paragraphs 79 to 82:

> Two brief principles that govern proof by circumstantial evidence merit brief mention.
>
> The first has to do with the standard of proof required in cases involving circumstantial evidence. There is no legal requirement for a special self-instruction on circumstantial evidence. **To convict, a trial judge must be satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the circumstantial evidence is one of guilt**: ***R. v. Griffin***, 2009 SCC 28, [2009] 2 S.C.R. 42, at para. 33.
>
> The second principle assumes particular significance when, as here, arguments are advanced that individual items of circumstantial evidence are explicable on bases other than guilt. **It is essential to keep in mind that it is the cumulative effect of all the evidence that must satisfy the criminal standard of proof, not each individual item which is merely a link in the chain of proof: *R. v. Morin***, [1988] 2 S.C.R. 345, at p. 361; ***R. v. Uhrig***, 2012 ONCA 470, at para. 13.
>
> Often, individual items of evidence adduced by the Crown examined separately lack a very strong probative value. But it is all the evidence that a trier of fact is to

> consider. Each item is considered in relation to the others and to the evidence as a whole. **And it is all the evidence taken together, often greater than the sum of individual pieces, that is to be considered and may afford a basis for a finding of guilt**: ***Uhrig***, at para. 13. See also: ***Côté v. The King*** (1941), 77 C.C.C. 75 (S.C.C.), at p. 76."

[31] In other words, it is the cumulative weight of the facts that must prove the accused guilty beyond a reasonable doubt and not each individual fact examined separately as confirmed in ***R. v. Morin*** (1988), 1988 CanLII 8 (SCC), 44 C.C.C. (3d) 193 (S.C.C.).

[32] In ***R. v. Villaroman*** 2016 SCC 33 (S.C.C.) the court made this statement about what the jury should be told about the handling of circumstantial evidence at paragraphs 37 and 30:

> **When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt**: ***R. v. Comba***, [1938] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., aff'd [1938] S.C.R. 396; ***R. v. Baigent***, 2013 BCCA 28, 335 B.C.A.C. 11, at para. 20; ***R. v. Mitchell***, [2008] QCA 394 (AustLII), at para. 35. **I agree with the appellant that the Crown thus may need to negative these reasonable possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused***": **R. v. Bagshaw,*** [1972] S.C.R. 2, at p. 8. "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.

[33] The Supreme Court of Canada in ***Villaroman*** indicated that the distinction between direct and circumstantial evidence must be recognized. It suggested that in cases involving juries the following instruction would be appropriate (at paragraph 30):

> It follows that in a case in which proof of one or more elements of the offence depends exclusively or largely on circumstantial evidence**, it will generally be helpful to the jury to be cautioned about too readily drawing inferences of guilt...Telling the jury that an inference of guilt drawn from circumstantial evidence should be the only reasonable inference that such evidence permits will often be a succinct and accurate way of helping the jury to guard against the risk of "filling in the blanks" by too quickly overlooking reasonable alternative inferences...**

[34] In ***Villaroman*** the court stated that inferences consistent with the evidence do not have to arise from proven facts. The trier must consider other "plausible

explanations" but those must be based on logic and experience applied to the evidence, or absence of evidence, and **not** based on speculation.

[35] And as noted by the Nova Scotia Court of Appeal in ***R. v. Lee*** 2020 NSCA 16:

> [11] In ***R. v. Villaroman***, *supra,* Cromwell, J., at para. 20 referenced Charron, J., in ***R. v. Griffin,*** 2009 SCC 28 citing with approval ***R. v. Fleet***, (1997) 1997 CanLII 867 (ON CA), 120 C.C.C. (3d) 457 at para. 20. In a circumstantial case, the question for a jury will be whether **it is satisfied beyond a reasonable doubt that the guilt of the accused is the only rational inference to be drawn from the proven facts.** He was careful not to shift the burden to an accused in circumstantial evidence cases saying:
>
> [35] … [I]n assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts: ***R. v. Khela***, 2009 SCC 4, at para. 58. … Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.

[36] As well, in ***R. v. Roberts***, 2020 NSCA 20:

> 25 If reasonable inferences other than guilt can be drawn from circumstantial evidence the Crown has not met the standard of proof beyond a reasonable doubt. Reasonable doubt can be logically based on the evidence or lack of evidence, must be reasonable given that evidence or lack thereof, and assessed logically in light of human experience and common sense.

[37] Defence counsel referred the Court to the case of ***R. v. Andrews*** 1996 ABCA 23 that considered the issue of circumstantial evidence by lay witnesses as it related to the issue of impairment. Highlights of that case are as follows:

> 21 Such an interpretation of the penultimate paragraph in ***Stellato*** would also be contrary to the pronouncement of Dickson J. in ***R. v. Graat,*** [1982] 2 S.C.R. 819. The Supreme Court of Canada has made it clear that **"impaired" in this**

section means a certain degree of drunkenness, and not simply any, minimal degree. In ***Graat***, a case dealing mainly with the question of whether a lay-person could give an opinion of whether a driver was impaired, Dickson J. (as he then was) said at p. 837:

> Drinking alcohol to the extent that one's ability to drive is impaired is a degree of intoxication.

And at p. 839, he stated:

I would adopt the following passage from the reasons of Lord MacDermott in ***Sherrard v. Jacob*** ...:

> **The next stage is to enquire if the opinion of the same witnesses was also admissible on the question whether the respondent, if he was under the influence of drink, was so to an extent which made him incapable of having proper control of the car he was driving. ...**

And, finally, also at p. 839:

> **... whether a person's ability to drive is impaired by alcohol is a question of fact, not of law. It does not involve the application of any legal standard. It is akin to an opinion that someone is too drunk to climb a ladder or to go swimming ...**

Ultimately, this is why it is so important not to deal with the issue of impairment separate from impairment of one's ability to drive. ***Stellato*** must not be understood to mean that a person who has anything to drink and then drives a motor vehicle commits the offence under s. 253(a). Nor does it mean any lack of sobriety is sufficient. This is evident from the approval in ***Stellato*** (at p. 383) of the opinion of Mitchell J.A. in ***Campbell*** that "It is not an offence to drive a motor vehicle after having consumed some alcohol as long as it has not impaired the ability to drive."

23 …. In short, ***McKenzie*** speaks to the *kind of evidence* from which an inference of impairment of the ability to operate a motor vehicle may be drawn. **Where one is relying on circumstances, if the combination of the conduct relied upon constitutes a sufficient departure from the conduct of unimpaired, or normal, individuals it is safe to infer from that conduct an existence of impairment of the person's ability to drive. It sets out, not a rule of law, but a helpful guide to use in assessing evidence.**

25 Impairment is a question of fact which can be proven in different ways. On occasion, proof may consist of expert evidence, coupled with proof of the amount consumed. The driving pattern, or the deviation in conduct, may be unnecessary to prove impairment. **More frequently, as suggested by Sissons C.J.D.C. in *McKenzie*, proof consists of observations of conduct. Where the evidence indicates that an accused's ability to walk, talk, and perform basic tests of manual dexterity was impaired by alcohol, the logical inference may be drawn that the accused's ability to drive was also impaired.** In most cases, if the conduct of the accused was a slight departure from normal conduct, it would be unsafe to conclude, beyond a reasonable doubt, that his or her ability to drive was impaired by alcohol. Put another way, as was done in Stellato, the conduct observed must satisfy the trier of fact beyond a reasonable doubt that the ability to drive was impaired to some degree by alcohol. ***McKenzie*** does not state a rule of law. It suggests a reasonable, common sense approach to the assessment of evidence necessary for proof...

28 In my view, Stellato and ***McKenzie*** are compatible cases. Stellato speaks to the degree of impairment of the ability to drive necessary to sustain a conviction; ***McKenzie*** speaks to the manner of proof of that impairment. Stellato supports the proposition that a marked degree of impairment of ability to drive is not required, whereas ***McKenzie*** says that **an inference of any impairment of the ability to drive can reasonably be drawn from conduct that exhibits a marked departure from the norm**. It does not say that it ought not to be drawn if it is not a marked degree. It only proscribes that inference if there is a slight variation from the normal. It speaks to degree of proof. In other words, as framed in Stellato, the conduct must be of such a nature that an impairment of the ability to operate a vehicle (be it slight or marked impairment) is proven beyond a reasonable doubt…

30 …But I think a careful reading of ***Smith*** simply points out the need to ensure that, **notwithstanding consumption of some alcohol, it is necessary to be satisfied that the consumption has resulted in an impairment of the *ability to operate* a motor vehicle**. This is consistent with the recognition that not all consumption results in an offence...**The question is simply whether the totality of the accused's conduct and condition can lead to a conclusion other than that his or her ability to drive is impaired to some degree.** Obviously, if the totality of the evidence is ambiguous in that regard, the onus will not be met. **Common sense dictates that the greater the departure from the norm, the greater the indication that the person's ability to drive is impaired**. For instance, if one is assessing driving conduct, exceeding the speed limit is something that many people do whether or not they have consumed alcohol. Thus, that factor would naturally be less indicative of one's ability to drive being

impaired, than would weaving back and forth from lane to lane, or travelling on the wrong side of the road. In the end the test remains, is the *ability to drive* of the person impaired?

31 In my view the following general principles emerge in an impaired driving charge:

(1) the onus of proof that the *ability to drive is impaired* to some degree *by alcohol or a drug* is proof beyond a reasonable doubt;

(2) there must be impairment of the *ability to drive* of the individual;

(3) that the impairment of the ability to drive must be *caused* by the consumption of alcohol or a drug;

(4) that the impairment of the *ability to drive* by alcohol or drugs need not be to a marked degree; and

(5) proof can take many forms. **Where it is necessary to prove impairment of ability to drive by observation of the accused and his conduct, those observations must indicate behaviour that deviates from normal behaviour to a degree that the required onus of proof be met. To that extent the degree of deviation from normal conduct is a useful tool in the appropriate circumstances to utilize in assessing the evidence and arriving at the required standard of proof that the *ability to drive* is actually impaired.**

[38] Defence counsel also referred to ***R. v. Thomas*** 2012 SKCA 30 and para 13 is as follows:

[13] As to the first alleged error, I find no basis upon which to conclude the trial judge erred by relying on lay witness opinion evidence as to impairment of Mr. Thomas's ability to drive. A conviction for impaired driving will rest where there is sufficient evidence to conclude beyond a reasonable doubt that an accused has driven while his or her ability to operate a motor vehicle was impaired by alcohol or a drug. To meet its burden of proof, the Crown may lead evidence of alcohol consumption and aberrant driving; but, given the nature of an impaired ability to drive, the standard may be met in the absence of evidence of aberrant driving through sufficient evidence of, among other things, a deterioration of the accused's judgment or attention, a loss of motor co-ordination or control, increased reaction times, or diminished sensory perceptions, brought on by the voluntary consumption of alcohol or a drug. See R. v. Polturak (1988), 1988 ABCA 306 (CanLII), 90 A.R. 158, 61 Alta. L.R. (2d) 306 (C.A.), at para. 3, and Beals v. R. (1956), 1956 CanLII 534 (NS SC), 25 C.R. 85, 117 C.C.C. 22 (N.S.C.A.): see also R. v. E. (A.L.), 2009 SKCA 65; 359 Sask. R. 59.

[39] At the end of the day, the question for the trial judge is whether the circumstantial evidence viewed logically, and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty. The fundamental question is whether the circumstantial evidence, assessed in light of human experience, excludes any other *reasonable* alternative. Put another way, the alternative inferences sought to be drawn must be reasonable and rational in the circumstances of the matter — not merely possible. For Mr. Ross, the proposed 'reasonable and rational' alternative is in his being in a perpetual state of rage that results in behaviour that would give the appearance to those that do not know him when he is sober of someone who is impaired (such as his aggressive behaviour, his slurring, and his reckless driving).

The Evidence

[40] I have reviewed all the evidence, including the Exhibits, that was presented at the trial. It is not my function as a trial judge when rendering a decision to act as a court reporter and recite all of the evidence that I have heard and considered. It suffices for me to highlight the pertinent parts. Further, any quotes that I attribute to a witness may not be an exact quote but will paraphrase and capture the essence of their testimony.

Leah Minugh

[41] Ms. Minugh testified that she knows Mr. Ross through his girlfriend Destiny Lloy. She testified that she could tell if Mr. Ross was sober or intoxicated from her work as a hostess at Boston Pizza.

[42] Ms. Minugh was sober on the night in question.

[43] She testified that:

- **She saw Mr. Ross consume 2 beers while he was playing caps in the basement, and she saw him with beer cans in both of his hands at one point**
- Mr. Ross was getting aggressive with someone outside
- **Mr. Ross wanted to drive Destiny home, but Ms. Minugh would not permit him to do so**

- Mr. Ross was making a scene and driving up and down the street, revving his truck engine while doing so
- **She described Mr. Ross as "very intoxicated" and placed him as an "8 out of 10" on a scale of drunkenness**
- **She described Mr. Ross as:**
    - **Slurring**
    - **Swaying**
    - **Aggressive behaviour**
    - **Eyes bloodshot**
    - **Couldn't keep his eyes open**
- **Mr. Ross had walked Destiny to his truck, but no-one would let him drive her home**
- She was 6 feet from Mr. Ross' truck as these events occurred
- After Destiny gets a call from Mr. Ross, she attends at the accident scene with Destiny

[44] On cross-examination Ms. Minugh testified that:

- She is not a friend of Mr. Ross' and only knows him through Destiny
- She had not seen Mr. Ross drunk previously
- **On one occasion she had spoken with Mr. Ross for a period of 30-60 minutes when he was sober**
- She could not tell us how many drinks Mr. Ross had consumed
- **There were only 20-30 people at the party, and it was not "shoulder-to-shoulder" with people**
- She did not state that Mr. Ross had bloodshot eyes, and that he could not keep his eyes open, in her statement to the police
- **She drove Mr. Ross and Destiny to Brookfield and there was very little interaction in the vehicle between them**, although Mr. Ross did apologize for his behaviour

<u>Olivia Meech</u>

[45] Ms. Meech testified that she had known Mr. Ross for approximately one year although she had not seen him very often.

[46] Ms. Meech also testified that:

- She is the person that called the police to report Mr. Ross' accident
- She observed Mr. Ross playing beer pong with his friends **and she saw Mr. Ross drinking beer**
- She saw Mr. Ross and Destiny get into an argument over Mr. Ross getting into an altercation with someone at the party
- **Mr. Ross was driving up and down the street in an aggressive manner**
- She was standing in the driveway when Mr. Ross got into his vehicle
- **She wouldn't let Destiny get into Mr. Ross' vehicle as Mr. Ross had been drinking, stating "I can tell when someone is too intoxicated to drive" and she described Mr. Ross as:**
    - **Slurring**
    - **Staggering**

- **Being aggressive for no reason**

[47] On cross-examination Ms. Meech testified that:

- **She had seen Mr. Ross at parties previously, and that she had previously seen Mr. Ross sober stating, "I have seen him sober"**
- She could not state whether Mr. Ross had anger or temper issues when sober
- **There were 20-30 people at the party, and it was not "shoulder-to-shoulder"**
- She confirmed that she did not state that Mr. Ross was staggering in her statement to the police
- **The slurring of words by Mr. Ross occurred when she was interacting with Mr. Ross by his truck, and while Mr. Ross was screaming**

[48] **On re-direct examination, Ms. Meech stated that Mr. Ross did not slur, nor stagger, when she had seen him sober. And she further stated that Mr. Ross was <u>not</u> aggressive when she had seen him sober.**

<u>RCMP Cst. Aaron Patton</u>

[49] Constable Patton testified by video from Nunavut. He was the police officer that responded to the call to the police about the motor vehicle accident involving Mr. Ross. By the time he arrives on scene, the vehicle is out of the ditch. After speaking with Ms. Meech, he goes to Brookfield to Mr. Ross' residence. He arrives there approximately 45 minutes after the initial call.

[50] Cst. Patton further testifies that:

- He knocks on the front door of the residence and there is no answer. The same for the back door.
- He returns to the scene of the accident and notes that the skid marks (as seen in Exhibit 2 photo booklet) are 40-50 yards long and appeared to be the result of the driver taking the on ramp to the highway too quickly.
- He had left his business card at Mr. Ross' residence.
- He obtained statements from Ms. Meech and Ms. Minugh
- Destiny Lloy never provided a statement although he had requested that she do so.

[51] On cross-examination Cst. Patton testified that:

- He cannot testify as to Mr. Ross' state of intoxication
- When he attended at Mr. Ross' residence, he was in an unmarked police car

Destiny Raulston Lloy

[52] Ms. Lloy testified that she resides in Brookfield with Mr. Ross. She was working at Boston Pizza on July 1st when Mr. Ross was there but she has no idea if he was drinking.

[53] Ms. Lloy also testified that:

- When she gets home after work Mr. Ross is in the garage with his friend Connor
- Ms. Minugh is her driver for the evening, and they initially go to Wentworth for a party but they end up at a party in Truro Heights
- **Upon arrival she goes to the basement where she plays beer pong with Mr. Ross, but she drinks the beer for both herself and Mr. Ross. This is in contradiction to the testimony of Ms. Meech and Ms. Minugh who both stated that they saw Mr. Ross drinking beer.**
- **She states that Mr. Ross was not drinking at the time as "he had no alcohol." This is in contradiction to the testimony of Ms. Meech and Ms. Minugh who both stated that they saw Mr. Ross drinking beer.**
- **She states that there were 30 people downstairs, 20 people crowding the staircase, 30 people upstairs, and another 30 people outside, and that it was "shoulder-to-shoulder" with people. This is in contradiction to the testimony of Ms. Meech and Ms. Minugh who both stated that there was a total of 20-30 people in total at the party, and that it was not "shoulder-to-shoulder."**

- She was able to keep an eye on Mr. Ross while he was in the house from her position outside
- She wanted to keep an eye on Mr. Ross as it was not his crowd of people and that he was not enjoying himself
- She stated that "there was nothing abnormal" about Mr. Ross' behaviour
- **She stated that Mr. Ross wanted to leave the party and that "he was not drinking"**
- Once outside, Mr. Ross and his friend Connor get into a confrontation with another individual "over God knows what." Apparently this behaviour is not unusual for Mr. Ross while he is sober
- Mr. Ross escalates in his behaviour towards Ms. Lloy, and he throws his drink, getting some liquid on her shoes, and he eventually storms off in his truck and she states "there goes Mitchell" as "he likes to make a scene and be seen and heard."
- Mr. Ross returns to the party and he tries to convince Ms. Lloy to get in his truck
- **Ms. Lloy's friends tell her that if she gets in the truck with Mr. Ross that they will never talk to her again. Ms. Lloy claims that her friends told her this "because she never goes out" as opposed to being because of Mr. Ross being intoxicated**
- She states that Ms. Meech "was drunk" and places her own level of intoxication as "I was definitely trying to get intoxicated" but by that time she had only drank 3 of her 6 Coldstream drinks
- Within 10 minutes of Mr. Ross leaving she gets a call from him telling her that "he had crashed his truck"
- She states that Mr. Ross "has a very bad anger"
- She describes Mr. Ross' behaviour at the party as "horrible" "unacceptable" and "he was very mad"
- She also described Mr. Ross as a "reckless driver"
- **On the drive to Brookfield with Ms. Minugh they were all laughing at the moon. This is in contradiction to the evidence of Ms. Minugh who stated that there was very little interaction in the vehicle.**
- Once they arrive in Brookfield she watches a movie with Mr. Ross and falls asleep.
- They hear knocking at the door, and she tells Mr. Ross that they should go to the door to see who is there. She puts her clothes on but does not see anyone there, but she does see a vehicle that she describes to Mr. Ross.

- **She and Mr. Ross go to bed, scared. They were afraid that someone was coming for Mr. Ross and that such an event happening "wouldn't be the first time" and that such an event "would not be shocking"**
- The following morning they see the business card left by Cst. Patton
- **She states that, contrary to the evidence of Cst. Patton, Cst. Patton had never asked her to give a statement.**
- **With regards to Mr. Ross' behaviour "It's sober when he is angry. He's a very happy drunk." The angry when sober statement would be in contradiction to the evidence of Ms. Meech and Ms. Minugh who had both interacted with Mr. Ross when he was sober and had not noted any anger.**
- **Of interest to the Court, Ms. Lloy stated with regards to Mr. Ross that "He never drinks lightly" and we know from the evidence of Mr. Ross that he was drinking that evening. We also know from the evidence of Ms. Minugh and Ms. Meech that Mr. Ross was drinking that evening, contrary to the evidence of Ms. Lloy.**
- **With regards to Mr. Ross' level of impairment that evening she testified that "He was not impaired by alcohol whatsoever." This is in contradiction to the evidence of Ms. Minugh and Ms. Meech who both testified that Mr. Ross was intoxicated.**

[54] On cross-examination Ms. Lloy testified that:

- When she went to the doors to see who was knocking, Mr. Ross stayed in bed
- Nothing made them think that someone may be knocking at their door because of Mr. Ross' accident because there was no other vehicle involved in the accident
- Mr. Ross always behaves the way he did at the party when he is sober. He gets upset when he does not get his way, and he is jealous of other people speaking with Ms. Lloy
- Ms. Meech and Ms. Minugh both tried to stop Mr. Ross from driving, and they both threatened their friendship with her over her getting in the truck with him.
- She is not aware of any 'bad blood' between Ms. Minugh and Mr. Ross
- **Ms. Meech tried to stop Mr. Ross from driving because he had been drinking**
- **She also claimed that Ms. Meech tried to stop her from getting into the truck with Mr. Ross because Ms. Lloy never went out, and apparently**

Ms. Lloy was supposed to go back home with Ms. Minugh as Ms. Minugh was her drive that evening so this would have somehow been upsetting to Ms. Minugh and Ms. Meech. It is difficult for the Court to follow the logic of this statement.

- **While previously testifying that Mr. Ross had not drank, she then confirmed that she twice saw Mr. Ross with a beer can.**
- **She testified that she observed Mr. Ross "pretty frequently" at the party**

When challenged that she could not state if Mr. Ross was drinking when he was not with her, she stated "he was in my vision."

[55] **Ms. Lloy was trying far too hard to keep Mr. Ross not drinking and sober in her testimony, and this greatly affected her credibility, as it was contradicted by Mr. Ross, Ms. Meech, and Ms. Minugh.**

Mitchell Ross

[56] Mr. Ross testified that he has been dating Destiny Lloy for two years, and that they reside together in Brookfield.

[57] He further testified that:

- He and Connor had supper at Boston Pizza, and he had 2 draught Budweiser beer with supper over a 1.5 hour period
- He and Connor go to his residence in Brookfield and are in the garage for 1.5 hours. During that time "I think that I opened a beer when I was there." And that "I might have had a few sips" of the beer but that he did not finish it.
- Upon arrival at the Truro Heights party they go downstairs for a game of beer pong. **Contrary to the evidence of Ms. Meech and Ms. Minugh he did not drink while playing beer pong.** He was not drinking as he wanted to get a feel for the party and Ms. Lloy was drinking for him as she "wanted to get tipsy"
- As to the number of people at the party "it was very crowded, and hard to get around"
- He was not enjoying the party so he tells Ms. Lloy that he wants to leave but she refuses
- **He goes into the kitchen and opens a can of beer to "get a feel for the party." This in contradiction to the evidence of Ms. Lloy that Mr. Ross**

was not drinking and that she knew this from observing Mr. Ross from outside.

- He acknowledges throwing his can of beer when arguing with Ms. Lloy and getting some beer on her as a result. He then storms off in his truck.
- He returns to the party and tries to convince Ms. Lloy to leave with him
- When asked if Ms. Meech accused him of being drunk, he responded that he was so angry at the time that he is not sure what she said, and that he was not really paying any attention to her
- He acknowledged being jealous of Ms. Lloy at the party and that this would have contributed to his anger
- When asked about slurring his words that evening he stated that "when I get angry my words don't come out right."
- **When asked about him being unsteady on his feet at the party he stated that the party was so crowded that it was hard to get around. The difficulty with this statement is that Ms. Meech and Ms. Minugh were stating that Mr. Ross was staggering while he was outside, near his vehicle, and not about him inside the house.**
- He describes himself as being a very aggressive driver, and that the thought of Ms. Lloy being at the party with other men increased his anger, which presumably would have made his driving even more reckless
- He acknowledges driving his truck into the ditch
- **He describes the drive to Brookfield as normal, with some laughter. This is contrary to the evidence of Ms. Minugh.**
- **When at the residence in Brookfield they hear someone knocking at the door, and Ms. Lloy says that they should answer it and he responds by stating to her "No, I am tired, and I have to work tomorrow." This is in contradiction to the evidence of Ms. Lloy that they went to bed scared because they thought that someone was coming after Mr. Ross.**
- He never told Ms. Lloy that Cst. Patton wanted to talk to her as "I didn't feel it was important" and that "I kind of kept that silent."
- He described his total alcohol consumption as "no more than 4 beers" stating "I didn't want to drink a lot in case I had to drive away from the party."
- **And he described his level of impairment as "none at all"**

[58] On cross-examination Mr. Ross stated that:

- **Ms. Meech felt that he was unfit to drive not because of him consuming alcohol, but because of how he was treating Ms. Lloy and how he was driving. The problem with this is that Mr. Ross and Ms. Lloy testified**

that Mr. Ross always behaved in this manner when sober, so why would Ms. Meech be concerned on this occasion if it was no different than on any other occasion?

- He described the accident as "I slid into the ditch" instead of it being a fairly substantial accident
- He did "nothing" to report the accident
- **With regards to the knock on the door 1.5 hours after the accident he stated, "I don't feel the need to answer my door at 2 in the morning. It was 2 am, who shows up at 2 am?" This evidence is in contradiction to the evidence of Ms. Lloy where she stated that they went to bed scared as someone may have been coming after Mr. Ross.**
- He then claims that the knock on the door may have been the guy that Connor was having "a beef with" at the party although there was no evidence that this person knew where Mr. Ross lived, and the dispute was primarily between Connor and that individual
- He testified that he "rarely" exhibits aggressive behaviour when he is drinking, and that he is belligerent most of the time when he is sober
- **He described his behaviour when sober as including actions such as:**
    - **throwing beer**
    - **driving aggressively**
    - **slurring his speech**

  and that they were all trying to protect Ms. Lloy from his normal behaviour when they stopped her from getting into his truck

<u>Summary/Decision</u>

[59] Do I accept that Mitchell Ross is in a perpetual state of rage and that in such a state that he slurs his words, is constantly aggressive, and a reckless driver? And that further, that Mr. Ross was staggering at the party because of there being so many persons at the party that made it impossible for Mr. Ross to walk straight?

[60] Whenever the evidence of Mr. Ross and Ms. Lloy is different from that of Ms. Meech and Ms. Minugh, I accept the evidence of Ms. Minugh and Ms. Meech, and reject the evidence of Mr. Ross and Ms. Lloy. I consider Ms. Meech and Ms. Minugh to be disinterested witnesses to these events. Their evidence was logical and believable, unlike the evidence of Mr. Ross and Ms. Lloy. Ms. Meech and Ms. Minugh were credible and reliable.

[61] The evidence of Mr. Ross and Ms. Lloy was often contradictory. Their testimony as to what they did after they heard knocking on the door of their residence is completely unbelievable.

[62] I accept that Cst. Patton did ask Ms. Lloy for a statement.

[63] It is not believable that Mr. Ross' behaviour that evening was his normal, sober behaviour and that their friends Ms. Meech and Ms. Minugh would step in to prevent Ms. Lloy from getting into the truck to protect her from Mr. Ross' sober, normal behaviour. They stepped in because Mr. Ross was impaired from his consumption of alcohol as confirmed by his staggering, his slurred speech, his bloodshot eyes, his aggressive behaviour, and his inability to keep his eyes open.

[64] Ms. Meech and Ms. Minugh both knew how Mr. Ross was when he was sober, and Mr. Ross was **not** sober when he got in his truck and drove away from the party.

[65] I find as fact, based on the evidence of Ms. Minugh and Ms. Meech, which I fully accept, that Mr. Ross' ability to operate a conveyance was impaired by alcohol.

[66] There is little evidence by Ms. Lloy that I accept or believe, but I do accept the evidence of Ms. Lloy that when Mr. Ross drinks, he drinks to excess. And there is no dispute that Mr. Ross was drinking that evening. And there is evidence by two witnesses that he drank to excess.

[67] As noted, to convict based on circumstantial evidence, I must be satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the circumstantial evidence is one of guilt (***Griffin***). And, pursuant to ***Morin*** and ***Uhrig***, the cumulative effect of all the evidence must satisfy me to the required criminal standard of proof, not each individual item which is merely a link in the chain of proof.

[68] **Is the circumstantial evidence of impairment by Mr. Ross, viewed logically, and in light of human experience, reasonably capable of supporting an inference other than that Mr. Ross is guilty? No**.

[69] The circumstantial evidence, assessed in light of human experience, excludes any other *reasonable* alternative that Mr. Ross was impaired by alcohol. Put another way, the alternative inferences sought to be drawn must be reasonable

and rational in the circumstances of the matter — not merely possible. That is not the case with the proposition advanced by Mr. Ross that his behaviour that evening was simply his normal, sober, behaviour, of his being in an almost perpetual state of rage.

[70] I noted at the start that I was guided by the case of ***R. v. W.D.*** I must consider whether I believe Mr. Ross' evidence, and if so, then he is entitled to be acquitted on the charges where I believe his evidence. I do not believe the evidence of Mr. Ross, and of the evidence presented on his behalf, so I must turn to the second stage of ***R. v. W.D.***

[71] Even where I do not believe Mr. Ross' evidence, if it serves to raise a reasonable doubt in relation to his guilt for any of the occurrences, then he is entitled to the benefit of the doubt and he is entitled to be acquitted of the charges relating to that occurrence. The evidence by Mr. Ross, and the evidence presented on his behalf, did not raise a reasonable doubt so I must turn to the third stage of ***R. v. W.D.***

[72] Even where I do not believe Mr. Ross, and Mr. Ross' evidence fails to raise doubt, I must still consider whether on the evidence I do accept if the Crown has proved the essential elements of each offense beyond a reasonable doubt. I may only convict Mr. Ross of the offenses proven beyond a reasonable doubt. The Crown has done so.

[73] Mr. Ross is guilty of the offense of operating a conveyance while impaired by alcohol contrary to s. 320.14(1)(a).

Judge Alain Bégin, JPC