

IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. MacKay*, 2003 NSPC 054

Date: 20031110
Case No.(s): 548671
548672
Registry: Halifax

Between:

R.

v.

Eric MacKay

Judge: The Honourable Judge C. H. F. Williams, JPC

Heard: Decision rendered orally on November 10, 2003,
in Halifax Nova Scotia

Counsel: Christopher W. Morris, for the Crown
Blair H. Mitchell, for the Defence

BY THE COURT

Introduction and Relevant Evidence

- [1] On the evening of June 25, 1994 the accused, Eric MacKay, drove his borrowed Pontiac Gran Am motor vehicle to visit his friend, Derek Sutherland, who lived on Tobin Street in the Halifax Regional Municipality. MacKay parked his vehicle on Tobin Street near his friend's home and, as was usual, he and his friend walked to nearby pubs to enjoy an evening of drinking alcohol beverages. He was dressed appropriately for the weather, wearing a sweat shirt, shorts, deck shoes and no socks. Sometime during their drinking odyssey and because the accused wanted to remain out at a later hour, they separated. However, they did not know when this happened, and his friend went home but could not recall the time that he did so. At an indeterminate time after they had separated, the accused decided to go to his friend's home where he would normally sleep on a sofa.
- [2] Arriving and ringing the doorbell and receiving no response, he decided to enter his vehicle for the purpose of going to sleep. He, however, did not know what time he arrived or when he entered the vehicle. Nonetheless, at 0445 hours on November 26, the police, in response to a complaint, arrived on the scene and discovered that the vehicle's engine was running and that the accused was seated and asleep in the driver's seat behind the controls. It took the police about five minutes of knocking on the windows and rocking the vehicle before the accused awoke. When he exited the vehicle, they detected a strong smell of alcohol from his person, and observed that he had blood shot eyes and was unsteady on his feet.
- [3] The police arrested him for the care and control of a motor vehicle while impaired and, after they Chartered and cautioned him, on demand, he gave samples of his breath that, upon analysis, showed that his blood alcohol concentration exceeded the legal limit. The accused submitted, at trial, that the police had no grounds to make the demand as, in the circumstances, he was not in care or control of the motor vehicle. This case therefore is a consideration of whether, in the circumstances, the Crown has proved care and control beyond a reasonable doubt.

Analysis

- [4] The leading authorities on "care and control" are *R. v. Toews* (1985), 20 D.L.R. (4th) 758 (S.C.C.), *R. v. Ford* (1982), 65 C.C.C. (2d) 392 (S.C.C.), *R. v. Hein*, [1999] N.S.J. No. 421 (S.C.), *R. v. Lockerby*, [1999] N.S.J. No. 349, 1999 NSCA 122 (C.A.). Put succinctly, our courts have decided that when a person whose blood alcohol concentration exceeds the legal limit has the present ability to make a vehicle respond to that person's wishes, there is always a risk that the vehicle may be placed in motion even though the person might not have entered it with the intention to do so.

- [5] Here, I find that the accused had parked his vehicle on a public roadway so that he and his friend could walk about, visit pubs and consume alcohol without any chances of driving while intoxicated. Further I find that it was their usual practice, on such occasions, for them to stay and return together to the friend's apartment where he would sleep off the effects of his alcohol consumption. I accept and find that the accused and his friend separated but did not know when they did so. Further I accept and find that his friend went home but also did not know when he did so. Curiously, he however made no arrangements for the accused to enter his apartment at a later time to sleep, as was the usual practice, and he never heard the accused ring his intercom bell, as asserted.
- [6] The accused admitted that he entered the vehicle to sleep as he could not get into his friend's apartment. He asserted that it was a cool morning but he was in summer dress wear and it was late June. He, however, does not aver that he made any conscious effort to turn on the heater to warm the car's interior, only that the heater works when the engine was running. Likewise, although he could have utilized the rear seat or the passenger side seat for his supposed purpose, he decided to sit in the driver's seat. He did not know when he got into the vehicle or how long he was in the vehicle before the police efforts awoke him but he knew that he was intoxicated.
- [7] I find that the accused was sitting in the driver's seat and that he had turned on the ignition. I accept and find that he had consumed a quantity of alcohol before he entered the vehicle. He was on a public highway and from his seating position he could have inadvertently or otherwise engage the emergency brakes or put the car in gear. He could not enter his friend's apartment as apparently he was not expected, and, in my view, giving their normal practice, the risk of him deciding to go to his own home was high. I find that in his impaired state he fell asleep in the driver's seat. The fact that, in my view, he could not account clearly for his physical activities highlights the risks involved when he sat behind the vehicle's controls. Considering this risk of him setting the vehicle in motion and on the evidence that I accept, and on the above authorities, I find that he did have care and control of the vehicle when he was approached by the police.
- [8] Further, I find that he gave samples of his breath for analysis. I accept and find that the first reading showed that the concentration of alcohol in his blood was 210 milligrams of alcohol in 100 milliliters of his blood and that the second reading was 220 milligrams of alcohol in 100 milliliters of his blood.

Conclusion

- [9] On the evidence that I accept, I find that there was a risk of the accused setting the vehicle in motion while he was in a highly intoxicated condition although he may not have entered the vehicle to do so. Sitting in the driver's seat before the vehicle's controls in an impaired state created a risk that he could, in the context of the facts which I accept, set the vehicle

in motion. This, on the authorities cited, amounted to care and control. I am therefore satisfied that the Crown has proved beyond a reasonable doubt that the accused had care and control of a motor vehicle and that his blood alcohol concentration exceeded the legal limit. I therefore find him guilty as charged.