IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Stevens, 2006 NSPC 72

Date: 20061120
Docket: 1585428, 1585429, 1585430
Registry: Kentville

Between:

R.

v.

Harry Wayne Stevens

Judge:	The Honourable Judge Alan T. Tufts
Heard:	September 6, 2006, at Kentville, Nova Scotia
Charge:	s. 220(b) CC s. 253(b) CC s. 253(a) CC
Counsel:	Darrell I. Carmichael, for the Crown William Ryan, Q.C., for the defence

By the Court (orally):

[1] This is the matter of Regina v. Harry Wayne Stevens. The accused is charged under s. 220(b), 253(b) and 253(a) of the **Criminal Code**. Particularly it is alleged:

> 1) the accused was criminally negligent in allowing Marcus Russell, hereafter called “the deceased” to operate his, the accused's, motor vehicle while the deceased was impaired by alcohol and operating with a beginner's license while the accused was intoxicated and asleep in the passenger seat of the vehicle and thereby caused the deceased's death when the automobile both were travelling in left the roadway.
>
> 2) that the accused aided and abetted the deceased in having care or control of a motor vehicle while his, the deceased's, blood alcohol exceeded the legal limit, and;
>
> 3) had care or control of the motor vehicle while his, the accused's, ability to operate same was impaired by alcohol.

[2] A preliminary inquiry was held pursuant to s. 535 *et. seq.* of the **Criminal Code**. The Crown tendered police reports, witness statements and expert reports through the *vive voce* testimony of the investigating officer. No evidence was presented on behalf of the accused.

[3] I will detail the evidence more fully in my reasons below; however, to summarize, the accused and others, including the deceased, were at the home of Rhonda and Carey Russell in New Ross, Lunenburg County, Nova Scotia where some alcohol was consumed by those gathered including the deceased. In fact, the accused had purchased some of the alcohol consumed or facilitated its purchase. Later the accused persuaded the deceased to drive him to the New Minas area in the accused's car where both attended, among other places, a bar. The deceased was sixteen years old and only had a beginner or learner's class license. The accused was forty-seven years old at the time and was a licensed driver. There were no other occupants of the vehicle.

[4] When the accused and the deceased returned from New Minas driving south on Highway 12 it appears the vehicle hit the right shoulder of the highway and then veered left across the centre line and left the highway on the opposite side of the

road. The police expert opined the deceased “over-corrected” when he hit the right shoulder and proceeded across the centre line and left the opposite side of the road. No conclusion could be reached for why the accident occurred. The deceased was killed as a result of the accident.

[5] I will now summarize the law with respect to the test for committal upon a Preliminary Inquiry. This Court is required to consider whether there is sufficient evidence to put the accused on trial for the offences charged or any other indictable offences in respect of the same transaction, otherwise the Court must discharge him—see s. 548(1) and (2) of the **Criminal Code**. The Crown has not sought committal beyond the offences alleged.

[6] The test to determine if sufficient evidence is present is set out in **U.S.A. v. Shephard** [1977] 2 S.C.R. 1067; it is simply “whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty”. Cases where the evidence is circumstantial, as in this case, the Supreme Court of Canada has determined in **R. v. Arcuri,** [2001] 2 S.C.R. 828 the following: the test is the same whether the evidence is direct or circumstantial. The nature of the judge's task however varies according to the type of evidence that the Crown has advanced. In **Arcuri**, at para. 23, McLachlin C.J.C. writing for a unanimous court said:

> The judge’s task is somewhat more complicated where the Crown has not presented direct evidence as to every element of the offence. The question then becomes whether the remaining elements of the offence – that is, those elements as to which the Crown has not advanced direct evidence – may reasonably be inferred from the circumstantial evidence. Answering this question inevitably requires the judge to engage in a limited weighing of the evidence because, with circumstantial evidence, there is, by definition, an inferential gap between the evidence and the matter to be established – that is, an inferential gap <u>beyond</u> the question of whether the evidence should be believed

and later, the Court says,

> The judge must therefore weigh the evidence, in the sense of assessing whether it is reasonably capable of supporting the inferences that the Crown asks the jury to draw. This weighing, however, is limited. The judge does not ask whether she herself would conclude that the accused is guilty. Nor does the judge draw factual inferences or assess

> credibility. The judge asks only whether the evidence, if believed, could reasonably support an inference of guilt.[underlining in original]

[7] At this stage of the proceeding the Court does not make any findings of fact or determine credibility or weigh the evidence in the ordinary sense; this is left for the trier of fact. This Court is only required to determine if there is sufficient evidence which a jury, properly instructed, could conclude that the accused was guilty of the offence as alleged. Necessary to this consideration is whether a jury could make reasonable inferences if no direct evidence is available as to any of the elements of the alleged offence. This Court is required therefore to determine whether a jury is capable of making such inferences based on the sufficiency of the evidence presented. This is a low threshold. It is not whether this Court believes the evidence would support a conviction or whether this Court would make the necessary inferences. It is whether a jury could make the required inferences and could find the accused guilty which is the test.

[8] I will now review the evidence for each of the offences charged and determine if sufficient evidence is presented to allow a jury to make reasonable such inferences and whether there is sufficient evidence on which a jury could find the accused guilty.

[9] I will deal first with the s. 253(b) charge and then the s. 253(a) and finally the charge under s. 220.

Count 2 - s. 253(b)

[10] The Crown alleges that the accused aided and abetted the deceased driving the motor vehicle while over 80 mg. % alcohol. There is certainly evidence that the deceased was driving the vehicle and his blood alcohol was “over 80" at the time of the accident. The issue is whether there is sufficient evidence that the accused aided or abetted the deceased in this regard. Section 21 of the **Criminal Code** applies and provides as follows:

> 21 (1) Every one is a party to an offence who

> (a) actually commits it;
>
> (b) does or omits to do anything for the purpose of aiding any person to commit it;
>
> or
>
> (c) abets any person in committing it.

[11] It is necessary for the evidence to be capable of establishing that the accused knew he was aiding or abetting the deceased in committing the offence, in this case to operate the motor vehicle while his blood alcohol level exceeded 80 mg. of alcohol in 100 ml. of blood. In my opinion, and again after considering the submissions made this morning I am satisfied that knowledge is required and that the **R. v. F.W. Woodworth** (1974) 18 C.C.C. (2d) 23 is authoritative of that proposition. Alternatively, the Crown would be required to show that the accused was wilfully blind to the deceased's blood alcohol limit exceeding the legal limit, see **R. v. Roach** (2004) 192 C.C.C. (3d) 557.

[12] The Crown argues that the evidence shows that the accused knew the deceased was drinking and had procured the alcohol for him and further the accused insisted on the deceased driving the subject vehicle. The Crown refers to **R. v. Halmo** (1941) 76 C.C.C. 116 (Ont. C.A.) and **R. v. Kaulbacki** [1966] 1 C.C.C. 167 (Man. C.A.). However in both cases it was apparent to the accused that the principle was committing the impugned offence. In **Halmo** the accused was the owner passenger in the vehicle and permitted his hired operator to operate the motor vehicle when he knew the chauffeur was drunk.

[13] In **Kaulbacki** the accused was convicted of dangerous driving when he allowed a sixteen-year-old girl to take the wheel of his car and was present while she drove the vehicle over an unimproved road in excess of ninety miles per hour, the accused being well aware of her dangerous driving and permitting her to continue to operate the vehicle.

[14] Here there is no evidence that the accused knew the deceased's BAL was “over 80" or that he was wilfully blind to that reality. There is evidence the deceased had consumed two “beers” before going to New Minas with the accused -

one upon leaving and one at the Russell residence. Justin McDow said that the deceased had two “beers” he knew of and Janelle Russell saw him drink one he had when he left school. Also, there is evidence that when the deceased and the accused both left for New Minas each were carrying two “beers”, however there was no evidence that the deceased drank any of these. There is evidence the deceased had taken some pills but there was no evidence that he was affected by them or that the accused knew he had consumed them in any event.

[15] In my opinion it is not possible to reasonably infer that the accused knew that the accused had more to drink. While it is clear he did because his BAL was 90 mg.% alcohol at the time of the crash, there is simply no evidence to show when he consumed the alcohol necessary to produce that result and more importantly no evidence that the accused knew he had consumed the alcohol which could have produced that result. Furthermore there is no evidence that the deceased was exhibiting any signs of alcohol influence which would make it possible for a jury to infer when the deceased had consumed sufficient amounts of alcohol to put him over the legal limit or even to the point where the accused would have been wilfully blind to that fact. Even if the deceased was persuaded or induced to drive or even aided and abetted to drive by the accused, it is not possible for a jury, in my opinion, to conclude that the accused knew that the deceased's BAL was “over 80" or that he was wilfully blind to that fact. The accused is therefore discharged from Count 2.

Count 3 - s. 253(a)

[16] The Crown alleges that there is sufficient evidence to commit the accused to stand trial as a principle to a charge of impaired driving. Clearly there is evidence that the accused himself was intoxicated and his ability to operate a motor vehicle was impaired by alcohol. The primary issue here is whether there is sufficient evidence in the sense described above that the accused had care or control of the motor vehicle.

[17] The Crown submits that the evidence is sufficient to allow a finding to be made that the accused was in care or control of the motor vehicle. Particularly the Crown points to the evidence that the accused was the owner of the subject vehicle

and allowed, encouraged or persuaded a sixteen-year-old boy to operate the motor vehicle. The Crown relies on two cases: **R. v. Saletes** [1985] Q.J. No. 37 and **R. v. Slessor** [1970] 2 C.C.C. (2d) 247. Both of these cases can be distinguished. In **Saletes** the defendant was a passenger found in care or control of a motor vehicle for the purposes of an offence of "failing to give ones name or address following a motor vehicle accident". The reasoning in that case cannot be transferred in my opinion to the situation here. The definition of or meaning of "care or control" in that context in my opinion differs in that in the context with impaired driving—the test for care or control which I will refer to shortly.

[18] The same can be said of the **Slessor** case where the Ontario Court of Appeal said that the accused could not be held to be guilty of failing to stop at an accident while he was asleep unless he awoke and left without complying with the requirements of the **Code**. The facts of that case make is distinguishable from the case at bar. Here there is no evidence that the accused gave any driving directions or assistance to the deceased in his operation of the motor vehicle. The fact he was in the position to assert control because he was the owner is not evidence of care or control, in my opinion. Section 70 of the **Motor Vehicle Act** requires a person who is operating a motor vehicle with a Learner's Class Drivers License to be accompanied by an experienced driving holding a valid Driver's license seated in the front seat of the subject vehicle. There is no statutory duty or obligation created by this provision or any other one referred to me upon the experienced driver. Nor is there any statutory presumption created that the experienced driver is in care or control of the subject motor vehicle. The simple fact that the accused was accompanying a person operating the motor vehicle with a Learner's Class driving license in accordance with s. 70 is not evidence in my opinion that the accused had care or control of the motor vehicle as defined by the authorities. I agree with the reasoning of LeBlanc, PCJ, as he was then, in **R. v. Cochrane** [1992] N.J. No. 395 where it was found that a similar provision in the Newfoundland statute did not amount to proof of actual care or control. Other cases support the same view that the mere presence of the accused as a passenger without more does not constitute care or control. I refer specifically to **R. v. Lumiala** 118 C.C.C. 69, **R. v. Kay** 33 C.C.C. (2d) 284 , **R. v. Rudsvick** 6 C.C.C. (2d) 427, **R. v. Collins** (1975) 10 Nfld. & PE.I.R. 509, **R. v. Doyle** (1975) 10 Nfld. & P.E.I.R. 542 and **R. v. Wicks** [1972] 3 W.W. R. 318.

[19] In my opinion there is simply no evidence that the accused here gave any directional instructions or guidance to the driving or assisted or directed the deceased's driving. Further there is no evidence that the deceased was unable to drive without the accused's assistance or that he needed or had the accused's assistance and there is no evidence upon which a jury could make any inferences to that effect, in my opinion.

[20] The fact that the deceased was operating the motor vehicle with just a Learner's Class permit and accompanied by the accused who was a licensed driver is not sufficient evidence that the accused had care or control of a motor vehicle and is certainly not sufficient evidence upon which a jury could make an inference that the accused was in fact in care or control. In my opinion the evidence on this element of the offence is not sufficient to meet the test described above. Accordingly the accused is therefore discharged from this offence.

Count 1 - s. 220

[21] The Crown alleges that there is sufficient evidence that the accused could be found to be criminally negligent and caused the death of the deceased. The Crown need only establish that the criminal negligence was a contributing cause beyond the *de minimis* range or better-stated, was a “significant contributing cause”. The Crown argues that the evidence showed that the accused created a situation in which the risk of the deceased being killed was substantial and that he had died as a result of the combination of youth, inexperience and impairment. The Crown alleges that it is open to the jury to make this finding.

[22] Section 219 of the **Criminal Code** defines criminal negligence and says as follows:

> 219. (1) Every one is criminally negligent who
>
> (a) in doing anything, or
>
> (b) in omitting to do anything that it is his duty to do,
>
> shows wanton or reckless disregard for the lives or safety of other persons.
>
> (2) For the purposes of this section, “duty” means a duty imposed by law.

[23] It must be shown that the accused's conduct alleged constituted a marked and significant departure from that of the reasonable person in the circumstances. Although it was not specifically argued in my opinion it is possible to conclude that there is a common-law duty of care imposed on the accused to supervise the driving of the deceased. While I have concluded that a statutory obligation or duty is not imposed directly by s. 70 the position of the accompanying experienced driver who is a necessary occupant of the motor vehicle driven by a Learner Class license holder is supportive of the conclusion that in these circumstances the accused owed the deceased a civil duty of care.

[24] By supervision, I mean that the accused had a duty to be available to watch and be aware of the deceased's driving and provide instruction as necessary. As I indicated earlier this does not mean care or control of the vehicle but amounts to a duty to be in a position to provide assistance notwithstanding that there was no evidence he in fact did so which was necessary to determine if the accused was himself in care or control.

[25] I believe this conclusion is supported by the fact that the accused was only sixteen years of age. It is reasonable to infer that he was a relatively inexperienced driver and that the accused persuaded him to drive in circumstances where the accused knew the deceased had consumed some alcohol although as I indicated earlier, not sufficient to conclude that the accused knew the deceased was over the legal limit or reckless to that fact, and other alcohol was present, again by reference to the evidence that both left with two bottles of beer.

[26] In these circumstances the accused in my opinion owed a duty to “supervise”, as I defined earlier, the deceased's driving - a civil common-law duty. The issue is whether there is any evidence or sufficient evidence that he failed in that duty and whether his actions or inaction showed wanton or reckless disregard for the lives and safety of others.

[27] Further, and finally it will be necessary to determine if there is any evidence that the accused's action or inaction caused the death of Marcus Russell. Clearly

there is evidence which could establish that the accused failed in his duty to supervise the deceased's driving or that he “omitted to do something it was his duty to do” to use the words of the impugned section. Further there is evidence that a jury could conclude that his omission from his duty showed a marked and substantial departure from that of a reasonable person in the circumstances. The evidence was he was intoxicated and asleep during at least part of the drive back to New Ross and at the time of the crash. There is evidence that he was asleep and passed out as a result of the voluntary consumption of alcohol.

[28] This is evidence in my opinion for which a finding could be made that the accused's conduct constituted a marked and substantial departure from what a reasonable person would do in the circumstances. There is evidence the deceased had some alcohol, was only sixteen years of age and a reasonable inference being he was an inexperienced driver and that he was tired. It is possible for a jury to conclude that the deceased's presence on the highway as a driver of an automobile presented a foreseeable risk. In other words it was reasonably foreseeable that the deceased, given these circumstances, may become involved in a motor vehicle accident and cause harm to people. At least a jury could reasonably come to this conclusion. It could be concluded that the accused's failure to properly supervise significantly contributed to this risk.

[29] The evidence therefore is capable of allowing a jury to conclude that he acted with a wanton or reckless disregard for the lives or safety of others. Whether the accused “acted” or “did anything” again to use the words of the impugned section, is also in issue. The Crown argues that the accused created the circumstances which led to this tragedy and thereby did something which showed a wanton or reckless disregard for the lives and safety of others.

[30] I am not persuaded by this argument. The definition of criminal negligence requires the accused to do something, “in doing anything” being the words used in the **Code**. The Crown argues that the accused created a situation which presented a substantial risk. I agree that the deceased's driving may have constituted a reasonable foreseeable risk of harm. I cannot agree that the accused created that risk in the sense that he did something. He did not do anything. It is not possible for a properly instructed jury to conclude this, in my opinion. At best his negligence was his failure or omission in his duty I described earlier.

[31] The issue remaining therefore is whether the accused's action or inaction which if found to constitute criminal negligence caused the death of the accused or more particularly whether there is any evidence which a jury properly instructed could make such finding. There is no evidence of the cause of the crash other than the vehicle hit one shoulder of the highway, veered left over the centre line and left the roadway on the opposite side of the highway. There is no direct evidence of why the deceased, who it appears was driving at the time, made these manoeuvres or why the vehicle moved in the manner that it did if those manoeuvres were not performed by the deceased. Could then a jury reasonably infer that the accused's inaction or his failure to supervise the deceased's driving caused the death of the deceased?

[32] The level of causation required is “significant contributing cause”, see **R. v. Nette** (2001) 141 C.C.C. (3d) 130. Could a jury find based on the evidence presented that the accused's failure to perform his duty was a significant cause of the accident which occurred? Could a jury make or draw reasonable inferences from the evidence that because the accused was not awake he was therefore not available to prevent the accident and that had he been awake he would have been in a position to do so? The difficulty here of course is that there is simply no evidence as to why the vehicle in this incident left the road in the manner I described above. Without any evidence in this regard it is simply impossible to conclude whether the accused could have done anything to prevent the accident even if he had been completely sober, awake and in a position to “supervise” the deceased's driving.

[33] It is not possible in my opinion that a jury could conclude that the accused's failure or omission in his duty caused the accident which resulted in the deceased's death. In my opinion it is not possible to make or draw any reasonable inference to find this. It would be mere speculation to suggest otherwise because as I stated there is simply no evidence as to how the accident happened and to speculate that it was the result of the deceased's inexperience, alcohol consumption or tiredness which was undoubtedly present or for any other reason would not be proper in my opinion. Speculation is simply not a reasonable inference, which is what the jury is required to do. Furthermore, to return to the Crown's earlier submission, even if the accused did something in the sense that he created a situation, because there is no

evidence as to why the accident happened, it is impossible to conclude, for the same reason I just explained, that the “situation” caused the accident.

[34] Before concluding I might just say that this accident was clearly a tragedy and a very regrettable one; however I do not believe that there is sufficient evidence of a crime, at least of the ones alleged, to put the accused on trial. It may be that Parliament or the Legislature may wish to impose some kind of statutory obligation or create some kind of statutory offence for those placed in the position of an experienced driver, if that is constitutionally possible.

[35] In short there is simply no evidence of criminal negligence upon which a jury could return a verdict of guilty based on the test I described earlier and he is accordingly discharged from this final count.

A. Tufts, JPC