*R.* v. *Sloat*, 2002 NWTSC 56

Date: 2002 09 03
Docket: S-1-CR-2002000037

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

SHANE SLOAT

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

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Summary conviction appeal from the Appellant's conviction after a trial in the Territorial Court on a charge of impaired driving.

Heard at Yellowknife, NT on August 22, 2002

Reasons filed: September 3, 2002

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REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Counsel for the Appellant: R.S. Prithipaul
Counsel for the Respondent: Andrew E. Fox

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REASONS FOR JUDGMENT

[1] This is a summary conviction appeal from the Appellant's conviction after a trial in the Territorial Court on a charge of impaired driving. The only evidence at trial was that of the investigating officer.

[2] The Respondent Crown concedes that the trial judge ought not to have considered as indicia of impairment of ability to drive two observations made by the investigating officer. The first is his observation that the Appellant was staggering. The officer conceded that he had, on subsequent occasions, observed that to be the Appellant's normal style of walking. The second is his observation that the Appellant's face was flushed, as that evidence was elicited only on a *voir dire* and there was no agreement by counsel that it be applied to the trial proper.

[3] The issue then is whether the remainder of the evidence before the trial judge provides a sufficient basis from which to draw the inference that the Appellant's ability to drive was impaired by alcohol. The Appellant argues that it does not and that the conviction is therefore unsafe and an acquittal should be entered. The Respondent

submits that the remainder of the evidence is evidence from which a court could reasonably draw the inference that the Appellant's ability to drive was impaired.

[4] Apart from the staggering and the flushed face, the evidence which the trial judge referred to as indicia of impairment was as follows: the Appellant had slurred speech, he was speeding (95 to 100 kilometers in a 60 kilometer zone), he had a fairly strong odour of alcohol about him, he fumbled getting his documents out of his wallet and he had red bloodshot eyes.

[5] The Appellant complains of the trial judge's description of some of the evidence, primarily his description of the Appellant as having "fumbled getting his documents out of his wallet". The police officer's testimony was actually that the Appellant "had a little difficulty getting the wallet out, he was shaking when he was taking his driver's licence out from his wallet". However, I see no significant difference between the police officer's evidence and the way it was summarized by the trial judge. Similarly, on another point raised by the Appellant, I do not accept that the officer's evidence that the Appellant had slurred speech was somehow qualified by his testimony that the Appellant was also talkative.

[6] Not specifically referred to by the trial judge, but also before him, was the officer's evidence that the Appellant pulled over properly and promptly after the officer's emergency equipment was activated, that he was polite and cooperative throughout the investigation, that he appeared to understand everything that was said to him including the breath demand, the words of arrest and the *Charter* information and that the police officer had no difficulty understanding the Appellant.

[7] The Appellant submits that in failing to refer to the evidence which I have just outlined the trial judge effectively ignored evidence which is inconsistent with an inference of impairment of ability to drive or at least renders the totality of the evidence equivocal on that issue.

[8] Although the trial judge did not itemize that evidence, in my view the following portions of his reasons for conviction indicate that he did consider it (at p. 131 of the transcript):

> With regard to Count 1, the issue of whether or not there is evidence beyond a reasonable doubt of impairment, in my view what we have is evidence that the Court can look at as to impairment of the accused. He obviously was not stumbling around drunk, falling down drunk and incoherent. But there is evidence that he staggered, there is evidence that he

> had some slurred speech, he was speeding, he had a strong odour of alcohol about him, he fumbled getting his documents out of his wallet, he had red bloodshot eyes, he was flushed. There is a number of indicia which are indications of impairment.
>
> Again, the Court must be satisfied beyond a reasonable doubt, and it is not necessarily quantity, it is quality again. In my view, however, when I put all of the evidence together that is before me on the trial there is evidence, in my view, that the Court can be satisfied beyond a reasonable doubt that his ability was impaired.
>
> ...
>
> But in my view there is sufficient evidence ... to satisfy me beyond a reasonable doubt that his ability was impaired to operate the vehicle when I look at the way the vehicle was operated and the observations of the accused's behaviour. Obviously, he was not falling down drunk, but I am satisfied his ability to operate was impaired and I find him guilty ... (*underlining added*)

[9] In my view, the underlined portions indicate that the trial judge did consider all the evidence. Although he did not itemize the evidence of the Appellant's normal behaviour, he did specifically refer to the totality of the evidence. He recognized that it did not reveal a high degree of impairment.

[10] Impairment of ability to drive is an issue of fact that the trial judge must decide on the evidence before the court. If the evidence of impairment establishes any degree of impairment from slight to great, the offence has been made out: *R. v. Stellato* (1993), 78 C.C.C. (3d) 380 (Ont. C.A.); affirmed 90 C.C.C. (3d) 160n. (S.C.C.); *R. v. Andrews* (1996), 104 C.C.C. (3d) 392 (Alta. C.A.). It is clear also from the cases that the evidence must establish impairment of ability to drive, not merely impairment of other functions.

[11] In *Andrews*, Conrad J.A. discussed the relationship between *Stellato* and the earlier case of *R. v. McKenzie* (1955), 111 C.C.C. 317 (Alta. Dist. Ct.). She held that *McKenzie* does not stand for the proposition that there must be impairment of the ability to drive of a marked degree; rather, it speaks to proof or the assessment of evidence of impairment. As summarized by Conrad J.A., at p. 402 in *Andrews*, "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".

[12] At p. 406 of *Andrews*, Conrad J.A. referred again to assessment of evidence of impairment:

> What is in issue is the ability to drive. Where circumstantial evidence alone or equivocal evidence is relied on to prove impairment of that ability, and the totality of that evidence indicates only a slight deviation from normal conduct, it would be dangerous to find proof beyond a reasonable doubt of impairment of the ability to drive, slight or otherwise.

[13] The Appellant relies on the above and also the following comments at p. 404 of *Andrews* :

> 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?

[14] I do not understand the above excerpts from *Andrews* to mean that exceeding the speed limit can never be indicative of impairment of ability to drive, or that it can never amount to more than a slight deviation from normal conduct. Whether it is safe to draw an inference of impairment of ability to drive will always depend on the totality of the evidence on that issue. Speeding is a circumstance that a trial judge must be entitled to take into account because it relates to the manner of driving and thus to the ability to drive. Although the mere fact of exceeding the speed limit without any other evidence is not proof of impairment of ability to drive, in combination with other factors it can provide a sufficient evidentiary basis from which the inference of impairment of ability to drive can be drawn. As a matter of common sense, the extent to which an individual was speeding may be probative on the issue.

[15] In this case, the evidence is that the Appellant had slurred speech, bloodshot eyes, a fairly strong odour of alcohol about him, had some difficulty getting his wallet out and was shaking when he took his driver's licence out. All of that is evidence from which it could be inferred that there was some degree of impairment by alcohol, notwithstanding that he understood what was said to him. When one adds to it the evidence that the Appellant was travelling at 35 to 40 kilometers over the speed limit, notwithstanding that

he pulled over correctly when alerted to do so by the police officer, it provides a basis from which, in my view, an inference can safely be drawn that the Appellant's ability to drive was impaired to at least some degree. There is a difference between evidence which indicates only a slight deviation from normal conduct and evidence which indicates a slight impairment of the ability to drive. The totality of the evidence in this case is indicative of more than a slight deviation from normal conduct, even if it does not indicate a high degree of impairment.

[16] In my view, therefore, despite the errors made by the trial judge in considering the evidence of staggering and flushed appearance, the remainder of the evidence provides a sufficient basis from which an inference of impairment of ability to drive can be drawn and so there has been no substantial wrong or miscarriage of justice. On the test set out in *R. v. Biniaris*, [2000] 1 S.C.R. 381, a reasonable jury, properly instructed, could judicially have arrived at a verdict of guilty on that evidence.

Accordingly, the appeal is dismissed.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
3rd day of September 2002

Counsel for the Appellant: R.S. Prithipaul
Counsel for the Respondent: Andrew E. Fox

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