R. v. *Schmidt*, 2003 NWTSC 3

Date: 2003 01 30
Docket: S-1-CR-2002000079

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JACOB MICHAEL SCHMIDT

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

Summary conviction appeal from conviction on a charge of care or control of a vehicle while ability to drive is impaired by alcohol. Appeal allowed. New trial ordered.

Heard at Yellowknife, NT, on January 23, 2003

Reasons filed: January 30, 2003

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

Counsel for the Appellant: P.B. Gunn
Counsel for the Respondent: S.H. Smallwood

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REASONS FOR JUDGMENT

[1] The Appellant was convicted in Territorial Court on a charge of having care or control of a motor vehicle while his ability to operate the vehicle was impaired by alcohol, contrary to s.253(a) of the *Criminal Code*. He appeals to this court arguing that the verdict is unreasonable and not supported by the evidence.

[2] Section 686(1)(a)(I) of the *Criminal Code* provides that an appeal may be allowed where the appellate court concludes that the verdict reached at trial was unreasonable or unsupported by the evidence. This applies to both indictable and summary conviction appeals. The test is whether a properly instructed trier of fact, acting judicially, could reasonably have rendered the same verdict: *R.* v. *Yebes*, [1987] 2 S.C.R. 168; *R.* v. *Biniaris*, [2000] 1 S.C.R. 381. This requires the appellate court to re-examine and to some extent re-weigh the evidence but not to the point of simply substituting its opinion for that of the original trier of fact.

[3] This appeal essentially turns on an analysis of the trial judge's reasons for convicting the appellant in the context of the evidentiary record. Those reasons are to be considered as a whole and with the recognition that they are not meant to be "a verbalization of the entire process engaged in by the trial judge in reaching a verdict": *R.* v. *Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), at 204. It is the result reached by

the trial judge that is said to be unreasonable in light of the evidence adduced at the trial. As noted by Doherty J.A. in *R.* v. *Harvey* (2001), 160 C.C.C. (3d) 52 (Ont. C.A.), at 59 (appeal dismissed [2002] S.C.J. No. 81):

> A finding that a verdict is unreasonable does not depend on a demonstration of error in the course of the trial proceedings. An error-free trial may still result in an unreasonable verdict... Practically speaking, however, an appellant will have a difficult time demonstrating that a verdict reached by a judge, sitting without a jury, is unreasonable unless the appellant can show either an absence of reasoning, or an error in the reasoning process that led to the conviction. In drawing the connection between a review of a trial judge's reasons and the reasonableness of a verdict, in *R.* v. *Biniaris*, *supra*, at p. 406 S.C.R., p. 21 C.C.C., Arbour J. said:
>
> > [T]he reviewing appellate court may be able to identify a flaw in the evaluation of the evidence, or in the analysis, that will serve to explain the unreasonable conclusion reached, and justify the reversal.

[4] In a prosecution for impaired driving, the principles are well-known. The trial judge must consider the whole of the evidence and decide whether it is safe to draw the inference that the ability of the accused to operate a motor vehicle was impaired. It does not matter whether the impairment was slight or marked. But the focus is on impairment of the ability to drive, not mere impairment of functional ability. One cannot simply assume that where a person's functional ability is affected in some respects by alcohol, then his or her ability to drive is also impaired: *R.* v. *Stellato* (1993), 78 C.C.C. (3d) 380 (Ont. C.A.), aff'd [1994] 2 S.C.R. 478n; *R.* v. *Andrews* (1996), 104 C.C.C. (3d) 392 (Alta. C.A.), leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 115.

[5] The determination of whether an accused's ability to drive was impaired by alcohol is a question of fact. It depends to a great extent on the drawing of inferences from circumstantial evidence of observed behaviour. Where the evidence is ambiguous or equivocal, then obviously it would not meet the requisite criminal standard of proof. As noted in *R.* v. *Campbell* (1991), 26 M.V.R. (2d) 319 (P.E.I.C.A.), at 320:

> The Criminal code does not prescribe any special test for determining impairment. It is an issue of fact which the trial judge must decide on the evidence. The standard of proof is neither more nor less than that required for any other element of a criminal offence. Before he can convict, a trial judge must receive sufficient evidence to satisfy himself beyond a reasonable doubt that the accused's ability to operate a motor vehicle was impaired by alcohol.

[6] In this case the evidence of impairment consisted of the observations made by two police officers. At trial, however, these observations were attacked as being unreliable.

[7] The officers came upon a truck stopped in a ditch beside a roadway in Hay River. This was approximately 12:30 A.M., in February, so it was cold and dark. The truck's headlights were on and the vehicle was running but it was turned off when the police vehicle pulled up. The appellant was seen to exit the truck from the driver's side and a male passenger exited from the passenger side.

[8] Cst. Allen testified that he saw the appellant "stumble or slip". It could have been because of ice on the roadway. He noted a faint odour of alcohol, glossy eyes and slurred speech. Later at the police detachment he observed the appellant staggering slightly. On cross-examination, Cst. Allen acknowledged that it was his practice to make notes as to his observations of lack of sobriety but in this case, even though he made seven pages of notes in his notebook, he did not have any notation as to signs of lack of sobriety. He did have a notation, however, that the appellant appeared "tired, polite and co-operative". Cst. Allen though made notes in a "continuation report" afterward. In it he noted that the appellant "stumbled" when he first saw him and that the appellant was unsteady on his feet, had glossy bloodshot eyes, was "submissive", and had an odour of alcohol. He made no note of slurred speech though. In fact, Cst. Allen testified that the appellant spoke very little.

[9] The second officer, Cst. Quartey, testified that at the scene he was primarily occupied with the passenger who was described as being drunk and belligerent. He did say that he saw the appellant staggering and that he noticed a strong smell of alcohol, slurred speech and bloodshot eyes. Cst. Quartey's practice as well is to make notes if he observes signs of a lack of sobriety but in this case he made no such notes. So he testified from memory (although it came out that on the day before the trial he and Cst. Allen returned to the scene to review some things).

[10] Cst. Quartey administered a breathalyser test to the appellant at the detachment. He testified that during the test the appellant was co-operative and "seemed fine". The appellant was also charged with an offence contrary to s.253(b) of the *Criminal Code*, having care or control of a motor vehicle with a blood-alcohol concentration exceeding .80, but that charge was withdrawn by the Crown due to problems with the form of the certificate of analysis. Cst. Quartey made several mistakes with respect to the analysis evidence and the form of the requisite certificates. It was partly because of these mistakes that appellant's counsel argued that all of Cst. Quartey's evidence, including his observations of the appellant, should be considered unreliable.

[11] Appellant's counsel made a number of submissions attacking the verdict but they essentially come down to the same point: there was insufficient reliable evidence to justify the conclusion that the appellant's ability to drive was impaired. The trial judge's conclusions were expressed in his reasons as follows:

> ... it seems to me if one has slurred speech and one is unsteady on their feet, together with an odour of alcohol, there is some question as to the impairment. Obviously there are signs of impairment, in my view.
>
> Now, there were obviously the other observations. I must say that Mr. Gunn has raised an issue that I did find a little strange too, that somebody with the experience, particularly of Constable Quartey, has no notes whatsoever of these signs. It is a little unusual that one would depend on their memory, particularly if the case did not get down for trial until two years later. How much weigh could the Court then put on that memory then?
>
> I suppose that saving grace is in regards to Constable Allen's report, which does provide some indicia of impairment that he observed at the time. Constable Allen indicates he observed the staggering, he observed slurred speech, he observed glassy eyes, he observed an odour of alcohol, and he thought that the accused was being overly friendly with him.
>
> It is all relative to some degree, but it seems to me those are indicia of impairment, and I am satisfied that the Crown has established that at the time he was in care and control of the vehicle that his ability to operate a vehicle was impaired by alcohol. I therefore find him guilty of count number 1.

[12] Appellant's counsel submitted that the evidence in support of impairment was unreliable because neither officer made notes (other than Cst. Allen's notations in the "continuation report"). He argued that there were some inconsistencies in the evidence of the two officers. He further submitted that the trial judge failed to put his mind to the evidence tending to show a lack of impairment.

[13] If these were the only complaints I may be inclined to respond that these were matters for the trial judge to weigh and assess. And, in my opinion, the trial judge did consider these points. He made reference to "other observations" and he acknowledged the submission regarding the lack of notes. He assessed the officers' evidence and he accepted their observations as being reliable. There was no evidence from the defence in this case so it is not as if the trial judge had to weigh confusing or contradictory evidence. A significant degree of deference is due to a trial judge in these circumstances.

[14] The reasons, however, reveal what I consider to be a fundamental flaw. The trial judge accepted the officers' evidence as to "indicia of impairment". He then states the conclusion as to impairment of ability to drive without any apparent explanation as to why "indicia of impairment" necessarily lead to proof of impaired ability to drive.

[15] The trial judge said, in the final paragraph quoted above, "those are indicia of impairment, and I am satisfied that the Crown has established that... his ability to operate a vehicle was impaired". This raises the very problem identified in cases such as *Stellato* and *Cameron*: the assumption that mere evidence of impairment is sufficient to establish impaired ability to drive. Here (unlike, for example, the reasons for conviction under consideration in *R.* v. *Sloat*, [2002] N.W.T.J. No. 69) there is no explanation for what appears to be the automatic conclusion of impaired ability to drive flowing from evidence of mere "indicia of impairment". And this is particularly problematic in this case since there is no evidence as to the appellant's actual driving pattern on the night in question. That is not to say that such evidence is necessary; but in the absence of such evidence a trial judge must give even more careful consideration as to whether the inference of impaired ability to drive is a safe inference to draw.

[16] I recognize that a trial judge is not required nor expected to articulate with precision every factor leading to his or her conclusion. But a trial judge is expected to provide reasons that are sufficient for the circumstances of the particular case, unless the basis for the trial judge's conclusion is apparent from the record without even being articulated. In *R.* v. *Sheppard*, [2002] S.C.J. No. 30, the Supreme Court of Canada cautioned against the use of merely conclusory reasons in a criminal case. Trial judges are required to at least state their conclusions "in brief compass", in other words, to state more than merely the result: see paras. 32-33. In my respectful opinion, the conviction here rests on such a conclusory statement without any apparent or self-evident reasons for it. This in my respectful view is an error in analysis that results in the verdict being unreasonable.

[17] The conviction and sentence are therefore set aside. Since it cannot be said that there was no evidence in this case to be left with the trier of fact, the appropriate disposition is to order a new trial. The matter is therefore sent back to the Territorial Court for a new trial on the s.253(a) charge (if of course the Crown decides to proceed with one).

J.Z. Vertes,

J.S.C.

Dated at Yellowknife, NT, this
30th day of January 2003

Counsel for the Appellant: P.B. Gunn
Counsel for the Respondent: S.H. Smallwood

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