Date: 2007 06 04
Docket: S-1-CR-2006-000074

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

RONALD WASSELL KUCEY

Appeal from conviction.

Heard at Yellowknife, NT on May 14, 2007.

Reasons filed: June 4, 2007

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE L.A. CHARBONNEAU

Counsel for the Crown: Maureen McGuire
Counsel for Ronald Kucey: R.S. (Ravi) Prithipaul

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REASONS FOR JUDGMENT

[1] Ronald Kucey appeals from his conviction by a Territorial Court Judge on a charge of impaired driving. He was tried on this charge on August 25th, 2006. At the trial, the Crown called a civilian witness, Kelly Schofield, and Cst. Christopher Worden. No evidence was called by the Defence. Mr. Kucey argues that the Trial Judge made a number of errors in his assessment of the evidence and that those errors resulted in an unreasonable verdict.

A) STANDARD OF REVIEW

[2] The standard of review that applies when the reasonableness of a verdict is at issue is whether the verdict is one that a properly instructed jury actingjudicially could have reasonably rendered. This standard applies to verdicts rendered by juries and judges alike. It also applies to verdicts based on findings of credibility. *R.* v. *Yebes* [1987] 2 S.C.R. 168; *R.* v. *W. (R)* (1992), 74 C.C.C. (3d) 134 (SCC); R. v. *Biniaris*, [2000] S.C.R. 381; *R.* v. *Beaudry* (2007), 2007 216 C.C.C. (3d) 353 (SCC).

[3] The appellate court is required to review, analyze, and, within the limits of appellate disadvantage, re-weigh the evidence. In doing so, great deference must be

accorded to findings of credibility made at trial, given the advantageousposition of the trial court in that regard. In cases involving the assessment of credibility, the appellate court's power of review must be exercised sparingly. However, it is the appellate court's duty to intervene if, after having carried out its review, it concludes that the conviction rests on shaky grounds and it would be unsafe to maintain it. *R.* v. *Burke* [1996] 1 S.C.R. 474.

[4] Errors or faulty thought processes in a trial judge's reasons can sometimes explain an unreasonable conclusion. However, a verdict is not necessarily unreasonable because a judge has made errors in his or her analysis. Not every misapprehension of evidence warrants appellate intervention. In every case, all the evidence must be considered. It is the conclusion of the trial court that is the focus of the review, not the process followed to reach it.
R. v. *Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont.C.A.); *R.* v. *Beaudry*, *supra*, at para.58.

B) ANALYSIS

1. Trial Judge's assessment of evidence of driving pattern

[5] Mr. Kucey argues that the Trial Judge placed too much emphasis on the evidence about his driving pattern on the date in question. The only evidenceabout the driving came from Kelly Schofield. Mr. Schofield was a passenger in a vehicle driven by one Allyn Rohatyn on the date of this incident. He testified that just as Mr. Rohatyn was about to turn onto a service road, Mr. Kucey cut them off. Mr. Schofield said that if Mr. Rohatyn had not been alert, there would have been an accident. Mr. Kucey then drove ahead of them for a distance of approximately 300 meters. Mr. Schofield did not observe anything unusual about the driving over that distance. Mr. Kucey then turned into the parking lot of the Caribou Bar and Restaurant. Mr. Schofield said that the vehicle turned into the parking lot, turned right, and then immediately turned left, which caused it to go sideways.

[6] During submissions on the appeal, Mr. Kucey'scounsel acknowledgedthat this was evidence of unsafe driving. In his Factum he characterized this as "purposeful, aggressive driving manoeuvres". He distinguished this from weaving or swerving, failure to obey traffic control devices or signs from which, he says, impairment of ability to drive can be easily inferred. He argued that the Trial Judge ought to have

cautioned himself that erratic driving is not necessarily synonymous with impaired driving.

[7] In his Reasons for Judgment, the Trial Judge summarized Mr. Schofield's evidence about his observations of Mr. Kucey's driving. Later in his Reasons, as he outlined his findings, he referred to the evidence about the driving pattern in the following terms:

> "(...) [Mr. Kucey's] judgment at the time was obviously very bad, he almost hit the vehicle Schofield was in, and he was driving in a very dangerous manner.
> He took the very sharp actions as he was driving, causing the vehicle to slide sideways, and he was driving erratically."

[8] Nothing in the Reasons for Judgment suggests that the Trial Judge equated erratic driving with impaired driving. He considered and gave weight to the evidence of erratic driving but there is nothing in his Reasons that substantiates the claimthat he overemphasized that evidence. The crux of his finding was that Mr. Kucey was driving the vehicle in a dangerous manner, something that was essentially concededin submissions on this appeal. I find no error in how the Trial Judge dealt with that aspect of the evidence.

2. Curtailment of cross-examination and misapprehension of Defence's theory linked to post-driving drinking

[9] During the cross-examination of Cst. Worden, Defence counselelicited evidence to the effect that Mr. Kucey told Cst. Worden that he consumeda substantialamount of alcohol after leaving his vehicle at the Caribou Bar. The Crown objected to this line of questioning. The following exchange then took place:

> DEFENCE COUNSEL: It's not being adduced for the truth of its contents, Sir. I do have a purpose in asking these questions and I would like to develop the theme, if I could.
>
> CROWN COUNSEL: My point - - -
>
> THE COURT: I find it hard to understand the purpose.
>
> DEFENCE COUNSEL: I'd like to know what investigation, if any, was undertaken as a result of that information.

THE COURT: Go ahead.

CROWN COUNSEL: Sorry, my objection here is that if it's respect [sic] to statements taken from the accused or provided from the accused to the police, now whether the Crown's tendering it or the defence through another witness, it has to meet the requirements, and if my friend is saying that evidence is inadmissible because of a Charter breach, the defence can't lead that evidence through the police officer either.

DEFENCE COUNSEL: Yes we can.

THE COURT: He is not leading it for the truth, he is asking if there was an investigation.

DEFENCE COUNSEL: That is exactly where I am going with this, Sir.

CROWN COUNSEL: Okay.

THE COURT: Go ahead.

[10] Defence counsel then pursued this line of questioning. He asked whether Cst. Worden had taken steps to verify whether Mr. Kucey's claim of post-driving drinking was true. Cst. Worden acknowledged that Mr. Kucey gave him the name of the person he was drinking with, and that this person lived not far from where Mr. Kucey was found. Cst. Worden testified that he did not make any attempt to speak to that person or otherwise verify the information that Mr. Kucey had given him. A number of questions and answers followed, and the Trial Judge intervened during one of the witness' answers:

Q. You made no attempt to obtain any information from that person?

A. No, I didn't.

Q. Wouldn't that be relevant?

A. Well, given the results from the breathalyser, and I know they're not admissible, but given those and his state of intoxication and the time line that he was suggesting, I didn't feel that it affected my opinion that he had been operating a motor vehicle while impaired by alcohol.

Q. Even though he told you he had a substantial amount of hard liquor to drink after leaving the vehicle?

A. Yes, yes.

Q. That could be relevant, is that fair to say?

A. It could be relevant. By the same token it could be irrelevant. I've talked to a lot of people who tell me a lot of things that have either no bearing or are incorrect, and I'm not saying that information was incorrect. However given the situations, the readings that I had seen off the breathalyser –

THE COURT: I am going to stop you there, I do not need this. Go ahead.

Defence counsel then moved to another area of questioning.

[11] As I understood counsel's argument on the appeal, the purpose of this line of questioning was to challenge Cst. Worden's conclusion that the various symptoms of impairment that he observed showed that Mr. Kucey had been impaired at the time of driving. From my review of the transcript, it seems Defence counsel was in fact permitted to explore this issue. The Trial Judge allowed the questions about what Mr. Kucey had told the officer and follow-up questions about what steps the officer took to verify this information. Cst. Worden maintained that the informationhe receivedfrom Mr. Kucey did not change his opinion that Mr. Kucey had been impaired at the time of driving and explained why. The Trial Judge's intervention came, not in response to a question put to Cst. Worden, but at a point where Cst. Worden, for the second time, referred to results of the breathalyser tests.

[12] The Trial Judge's concern about reference to the breathalyser tests is understandable in the context of how this case unfolded. Mr. Kucey was originally charged on a 2-count Information which included one charge for impaireddriving and one charge for driving while the concentration of alcohol in his blood exceeded 80 milligrams of alcohol in 100 milliliters of blood. Defence filed a motion seeking exclusion of the breathalyser results on the basis of an alleged breach of Mr. Kucey's rights under the *Canadian Charter of Rights and Freedoms*. At the beginning of the trial, Crown counsel advised the Trial Judge that the Crown was conceding that the evidence should be excluded and would be proceeding to trial on the impaired driving charge only.

[13] Under the circumstances, it is not surprising that the Trial Judge would want to avoid hearing evidence about the breathalyser results. He intervened to prevent Cst. Worden from saying anything more on the subject of the results which were inadmissible. In my view, the record does not support the claimthat Defencecounsel's cross-examination of Cst. Worden was curtailed in any way.

[14] Evidence of post-driving drinking might have also been used by the Defence to suggest that the symptoms observed by Cst. Worden did not necessarily prove that the same level of impairment existed at the time of driving, some 20 minutes earlier. However, for this use to be available to Defence, evidence would have had to have been adduced that Mr. Kucey consumed alcohol after he abandoned his vehicle. It is a long standing rule of evidence that a statement made by an accused person is only admissible at the instance of the Crown. This is a subset of the rule that prevents the introduction of prior consistent statements. As with every evidentiary rule, there are exceptions, but I did not hear argument on this appeal, nor did the Trial Judge at the trial, that any such exception applied in this case.

[15] As for the alleged misapprehension of the relevance of the evidence of post-driving drinking, it is true that the Trial Judge alluded to "bolus drinking" in his Reasons for Judgment. This expression is generallyunderstood to refer to the ingestion alcohol between the time of driving and the time breathalyser tests are performed. It is evidence that is ordinarily used to rebut the presumption set out at section 258 of the *Criminal Code* that the breathalyser results correspond to the concentration of alcohol in the person's blood at the time of driving.

[16] This was not a case where the Crown was adducing breathalyser results,and the theory of the defence was not based on bolus drinking. The Trial Judge's reference to bolus drinking may be taken as showing, to that extent, a misapprehension of the theory of the Defence. In my view, that misapprehension was inconsequential. Had the Defence adduced admissible evidence showing that Mr. Kucey consumed a large quantity of alcohol after having left his vehicle, a misapprehension about the significance of that evidence for the Defence theory might have been of concern. However, there was no admissible evidence of post-driving drinking before the Trial Judge. Therefore, any error or misconstruction of that theory on his part could not have had an impact on the reasonableness of the verdict.

3. Misapprehension of Cst. Worden's testimony about symptoms of impairment

[17] Mr. Kucey complains about the manner in which the Trial Judge dealt with Cst. Worden's testimony about his observations as to signs of impairment.

[18] During his Examination-in-Chief, Cst. Worden testified that when he first encountered Mr. Kucey on the road, he noticed that he was swaying when he walked. It was not a huge stagger, he said, but a definite sway. Cst. Worden also said that when Mr. Kucey was within four feet of him, he detected a strong smell of alcohol, which Cst. Worden later determined came from Mr. Kucey's mouth. When they started talking he noted that Mr. Kucey's speech was slurred, that his face was flushed, and that his eyes were red and bloodshot. Cst. Worden asked Mr. Kucey to sit in the police vehicle. He noted that his movement was not sharp, describing it as "uncoordinated just like sort of sloppy movements", and saying that Mr. Kucey was "not entirely coordinated".

[19] During Cross-Examination Cst. Worden acknowledged that Mr. Kucey was polite and cooperative throughout his dealings with him. He appeared to understand the various warnings he was given and Cst. Worden had no difficulty understanding him when he spoke. Mr. Kucey appeared "almost sleepy", "relaxed or dazed". Cst. Worden was asked questions about things he wrote on the form used to record observations of suspects in these kinds of investigations. He acknowledgedthat he had not noted anything under the heading of "unusual actions" and that he had recorded that Mr. Kucey's clothes were orderly. He also recorded that Mr. Kucey's balance was "fair" and that he had a "slight sway".

[20] In his submissions at trial, the Appellant's counsel argued that some of Cst. Worden's observations were consistent with sobriety, or with a low level of impairment. In the course of those submissions, the Trial Judge made the following observations:

> THE COURT: Well, we are dealing with the notes that he made in the police report, which is really conclusory statements. We do not know how he backed it up other than the evidence at the start. In this case we did not hear the usual evidence of how the accused entered the police car; how he sat in the police car; how he walked from the police car down to the detachment, or maybe it was in the detachment; I do not know; how he walked down

> the hallway; how he sat in the chair in the breathalyser room. We do not have that evidence.

[21] Defence counsel responded by referring to aspects of Cst. Worden's evidence showing areas where he had not noted anything remarkable about Mr. Kucey's actions.

[22] In his Reasons for Judgment, the Trial Judge made some comments that parallelled his earlier comments:

> THE COURT: (...) There was no evidence as to how the accused got into the police vehicle, how he got out of the police vehicle at the detachment, how he walked to the booking area, how he walked from the booking area to the telephone room, how he walked from the telephone room to the breathalyser when breath tests, I gather, were performed, and how he acted there.
>
> The officer testified that the accused was polite and cooperative and he had no problem understanding him. In his notes he noted that the accused's balance was fair, but there was no detailed observation to back up that conclusion. He seemed relaxed or dazed, the officer said. The officer had no previous dealings with this person.

[23] Mr. Kucey argues that the Trial Judge erred in his assessment of Cst. Worden's testimony. He argues that Cst. Worden had an opportunity to make observations for a period of time, on the road, and later on at the detachment. He argues, therefore, that the Trial Judge was in error when he characterized some of the notes Cst. Worden took as "conclusory statements"

[24] The Trial Judge's comments must be examined in the context when they were made, and with regard to his Reasons for Judgment as a whole. Defence counsel was inviting the Trial Judge to place great weight on some of the things Cst. Worden recorded in his notes, such as the fact that there was nothing noted under the heading "unusual actions", the fact that Mr. Kucey's clothes were orderly, that his balance was described as "fair". Cst. Worden acknowledged making those notes and essentially adopted them. However, Cst. Worden also testified about many things that he observed that were consistent with impairment, and led him to form the belief that Mr. Kucey had been impaired when he operated the motor vehicle. It was for the Trial

Judge to decide what weight he would attribute to each of those elements of the evidence and which inferences he would or would not draw from that evidence.

[25] The Trial Judge did exactly that. He assessed and weighed Cst. Worden's evidence along with the rest of the evidence. On the whole, he found that the observations made by Cst. Worden were consistentwith impairment. Dealingwith that evidence, he said:

> The first witness did not have the chance to get close to the accused, so we have no evidence from him about smell of alcohol and so forth, but we do have that evidence from the officer who approached the accused shortly after the driving. The physiological symptoms were consistent with drinking such as flushed face, the watery bloodshot eyes, and the drowsiness.

[26] This excerpt does not show a misapprehension of Cst. Worden's testimony. The fact that Mr. Kucey did not display all the possible symptoms of impairment that police forms contemplate, or the fact that some of the symptoms were not extremely pronounced, did not preclude the Trial Judge from concluding, based on the evidence as a whole, that Mr. Kucey was impaired.

4. Reversal of Standard of Proof

[27] Mr. Kucey also argues that the Trial Judge'streatment of the evidenceamounted to a reversal of the standard of proof by requiring the Defence to call evidence demonstrating sobriety instead of placing the onus on the Crown to prove impairment. He relies on the excerpts quoted at Paragraphs 22 and 24, *supra*, and in particular on the comments made about certain gaps in the evidence.

[28] In my view, the record falls short of establishing that the Trial Judge was mistaken or confused about which party bore the standard of proof in this case. Judges are not required to demonstrate their knowledge of every legal principle that they are called upon to apply. *R.* v. *Burns* [1994] 1 S.C.R. 656 at paras 17-18.

[29] Where the record discloses an error in the reasoning process, or if the Reasons for Judgment do not set out that process in an intelligible manner, the notion that judges are presumed to know the law is of limited relevance. *R.* v. *Sheppard* [2002] 1 S.C.R. 869, at paras 32 and 54-55. However, the Reasons for Judgment disclose no such errors. On the contrary, they show that the Trial Judge considered all of the

evidence, weighed it, and drew conclusions from it. He was entitled to find that Cst. Worden's observations consistent with impairment were more probative and compelling than other observations that were not consistent with impairment. I do not interpret his comments during submissions or in his Reasons for Judgment as an indication that he reversed the standard of proof, especially not when these comments are considered in the context of the Reasons for Judgment as a whole.

5. Unreasonableness of Verdict

[30] Having concluded that the Trial Judge did not make the errors that Mr. Kucey claims he did, the issue remains whether there was evidence upon which a jury, properly instructed and acting judicially, could have found Mr. Kucey guilty. In my view, there clearly was evidence to support the verdict. The evidence of driving came from Mr. Schofield. The evidence of impairment came from Cst. Worden's observations, already referred to, but also from Mr. Schofield's observations.

[31] The Defence did not call evidence at this trial. In essence, its theory of the case was that the evidence adduced by the Crown could be explained innocently. The first part of that theory was that the erratic driving and the behavior observed by Mr. Schofield were the result of "road rage" linked to a heated argument that Mr. Kucey was having with a passenger in his vehicle. The second part of the theory was that the odour of alcohol and other signs of impairment observed by Cst. Worden a relatively short time later were the result of Mr. Kucey's ingestion of alcohol after he left the vehicle.

[32] There was little evidence to support the first part of the Defence theory. The only evidence was Mr. Schofield's testimony that Mr. Kucey appeared to be arguing with someone when he got out of his vehicle. During Mr. Schofield's Cross-Examination, the question of who Mr. Kucey was swearing at was explored. The following question and answer are among those that arose during the Cross-Examination:

> Q. He was facing the vehicle when he was swearing?
>
> A. He was facing the vehicle as he was stumbling, and he was swearingboth - - - when he was stumbling and swearing he was at the vehicle, but as he was still stumbling he was facing the Caribou and still swearing. And as I said those words to him, he turned around and faced me, which would then be west, and

> was still swearing. So I guess North, East, West, I can't really say if he was swearing South, but he was definitely swearing.

[33] There was hardly conclusive evidence that Mr. Kucey was swearingat someone in the vehicle. It was open to the Trial Judge to reject the notion that the unsafe driving, stumbling and swearing observed by Mr. Schofield could be innocently explained .

[34] As for the second branch of the Defence theory, the Trial Judge was entitled to draw the inference that Mr. Kucey was impaired at the time of driving, given the relative short period of time that elapsed between the time he left his vehicle and the time Cst. Worden observed the various symptoms of impairment. *R.* v. *Bulman* [2007] O.J. No.913 (Ont CA), at para.15. As outlined in Paragraphs 10 to 16, *supra*, there was no admissible evidence that Mr. Kucey consumed alcohol between the time of the driving and his first contact with Cst. Worden, so there was no evidence of an alternative explanation for the symptoms Cst. Worden observed.

[35] An accused person is entitled to rely on the presumption of innocence and remain silent throughout the proceedings and if he or she does so, that is not something that can be used by the trier of facts to draw an inference of guilt. However, an appellate court is entitled, on review, to consider that factor in assessing the reasonableness of the verdict. *R.* v. *Noble* (1997), 114 C.C.C. (3d) 161 (SCC); *R.* v. *Rowley* (1999), 140 C.C.C. (3d) 361 (Ont CA), at para.19. The absence of evidence supporting the Defence's theory is a relevant factor in assessing the reasonableness of the Trial Judge's decision.

C) CONCLUSION

[36] There may well have been other inferences that the Trial Judge could have drawn on the basis of the evidence, but it was his function and prerogative to analyze the evidence and make findings of facts. The question is not whether this Court would have drawn the same inferences or reached the same conclusions. The question is whether the conclusions that the Trial Judge did reach were supportedby the evidence. I have concluded that they were, and that the decision was one that a properly instructed jury acting judicially could have rendered and for that reason, Mr. Kucey's conviction appeal is dismissed.

[37] Mr. Kucey was sentenced to a jail term to be served intermittently. He was subsequently granted bail pending appeal and is working at a mine site as part of a remediation project. His current work shift ends on June 12, 2007. Under the circumstances, rather than direct Mr. Kucey's immediate surrender to the authorities,I direct that he surrender himself to the custody of the Royal Canadian Mounted Police in Hay River no later than 5:00PM on June 13, 2007, to resume serving his sentence.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
4th day of June 2007

Counsel for the Crown: Maureen McGuire
Counsel for Ronald Kucey: R.S. (Ravi) Prithipaul

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