R. v. Daniel Ross Epp, 2014 NWTTC 16

Date: 2014 06 09
File: T-1-CR-2013 000710

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

DANIEL ROSS EPP

REASONS FOR DECISION

of the

HONOURABLE CHIEF JUDGE ROBERT D. GORIN

Heard at:	Yellowknife, Northwest Territories April 24, 2014
Reasons Filed:	June 9, 2014
Counsel for the Crown:	M. Feldthusen
Counsel for the Accused:	T. Dunlap

[Sections 253(1)(a) and 253(1)(b) of the *Criminal Code*]

R. v. Daniel Ross Epp, 2014 NWTTC 16

Date: 2014 06 09
File: T-1-CR-2013 000710

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

DANIEL ROSS EPP

A INTRODUCTION

[1] The accused was charged with having care or control of a motor vehicle while his blood alcohol level was "over 80" and while his ability to operate a motor vehicle was impaired by alcohol or a drug contrary to ss. 253(1)(a) and 253(1)(b) of the *Criminal Code*. His trial was heard on April 24th of this year.

[2] Defence Counsel had previously filed notice alleging a number of breaches of the accused's rights guaranteed under *Canadian Charter of Rights and Freedoms* and requested that a number of alternative remedies be granted.

[3] Firstly, defence counsel submitted that that his client's s. 7 Charter right not to be deprived of his rights to life, liberty and security of the person except in accordance with the principles of fundamental justice had been violated as a result of the Crown not having fulfilled its obligation to provide certain disclosure.

[4] The Charter notice also alleged that the accused's s. 9 Charter right not to be arbitrarily detained was violated when the investigating officer delayed releasing the accused following the completion of his investigation.

[5] Additionally, the notice claimed that the accused's right to counsel guaranteed under s. 10(b) of the Charter had been violated because he was not afforded a reasonable opportunity to speak with counsel. The notice more specifically alleged that the accused was not given a long enough period of time to confer with the lawyer with whom the accused spoke following his arrest.

[6] Finally, the notice further alleged that the accused's section 8 Charter right to be free from unreasonable search and seizure had been violated as a result of there not being the grounds required by s. 254(3) of the *Criminal Code* to make the breath test demand.

[7] The notice advised that the accused would be seeking a number of possible orders to remedy the breaches alleged. Those remedies included: a judicial stay of proceedings pursuant to s. 24(1) of the Charter; an order excluding all evidence obtained during the investigation pursuant to s. 24(2); or an order pursuant to that section excluding the breath test certificate and any other evidence that arose as a result of the breach in question.

[8] Counsel agreed to deal with the accused's application pursuant to s. 7 at the outset of the trial. The accused requested that a judicial stay of proceedings be entered as a result of that purported breach. After hearing the submissions of counsel, I required time before I ruled on the matter. Defence counsel had traveled to Yellowknife from Calgary, so upon the agreement of counsel, in order to avoid protracting the trial, I reserved my decision until I heard all of the evidence and submissions that related to other matters that were in issue.

[9] Upon the further agreement of counsel, much of the evidence on the other matters in issue was presented during a "blended *voir dire*" agreed to by both counsel, which dealt with the accused's various Charter applications. As also agreed by counsel following all of the evidence adduced during the proceedings, I heard submissions on the admissibility of the evidence, and also whether or not guilt had been established to the requisite standard on each of the two charges.

[10] At the conclusion of the evidence adduced during the *voir dire*, defence counsel conceded that the reasonable grounds were necessary and abandoned his position on s. 8. However, he shifted his position on s. 10(b) and advised that he would be submitting that his client's right to his "counsel of choice" had been violated. Although this allegation was not contained in his Charter notice, I found the evidence giving rise to it was undisclosed and unanticipated and on that basis allowed the application to proceed.

[11] As agreed, after all of the evidence on the *voir dire* and trial had been entered, I heard the submissions of counsel on the remaining issues – the accused's

applications pursuant to ss. 9, 10(b), 24(1) and 24(2) of the Charter and, depending on the outcome of those applications, whether the Crown had proved the accused's guilt to the requisite standard.

[12] When making submission on whether the Crown had proved his client's guilt on the charge contrary to s. 253(1)(b), defence counsel argued that the breath tests were not taken as soon as practicable as required by s. 254(3)(a) of the *Criminal Code* . He submitted that therefore the presumption of identity – the presumption that the accused's blood alcohol level at the time of being in care or control of the motor vehicle was the same as at the time of the breath tests – did not apply. He further submitted that as a consequence, the evidence could not support a conviction on the count contrary to s. 254(1)(b).

[13] In relation to the count contrary to s. 253(1)(a), defence counsel argued that based on all of the evidence, the Crown had neither proved that the accused was in care or control of the motor vehicle in which he was observed by the police, nor that the accused's ability to drive was impaired at the time.

[14] The Crown opposed each of the Charter applications made by defence counsel. Crown counsel further took the position that the evidence established the guilt of the accused on both of the counts before the court.

[15] After hearing counsels' submissions, I ruled on all of the issues that remained before me. I refused the accused's application for a judicial stay pursuant to s. 24(1) of the Charter. I found that no violation of either ss. 7 or 9 of the Charter had been established. However, I ruled that the accused's s. 10(b) right to counsel had been violated and that the breach was sufficiently serious to warrant exclusion of the evidence of the breath test results.

[16] That being the case, I found it unnecessary to deal with the accused's submissions on the applicability of s. 258(1)(c) of the Code. There being no evidence of his blood alcohol level, I found the accused not guilty on the count that alleged an offence contrary to s. 253(1)(b).

[17] I further found that the evidence did not establish beyond a reasonable doubt that the accused's ability to operate a motor vehicle was impaired beyond the *de*

minimis level. I therefore found him not guilty on the remaining count under s. 253(1)(a).

[18] I advised that my reasons for making each of the foregoing findings would be provided at a later date. Those reasons are set out in the following paragraphs.

B SECTION 7 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

[19] The accused's application for a judicial stay of proceedings was unusual in that it was based entirely on factual allegations made during the submissions of counsel. No affidavits were filed and no witnesses were called. There was no agreed statement of facts. Normally, an application for a final order, such as a judicial stay, cannot be based on information and belief. However, when I raised the point with counsel, they both stated that they had no difficulty with me deciding the issue based on the facts presented during their submissions.

[20] Be that as it may, during the hearing of the application, the parties presented facts that differed in some respects. It is extremely difficult for a trier of fact to find or discern the relevant facts when counsel present varying accounts. At the end of the day any finding of credibility is, practically speaking, impossible. The onus is on the accused to establish both the breach contrary to s. 7 and that a judicial stay is warranted under s. 24(1). Since he bears the onus of proof, it would be very difficult to resolve conflicts in the facts presented in the submissions of counsel in his favour.

[21] Based on Crown counsel's representations, it appears that all of the disclosure requested by defence counsel, and to which the Crown and the police had access, was provided on a timely basis. Consequently, I am unprepared to find that there was a breach of the accused's s. 7 Charter rights.

C SECTION 9 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

[22] Defence counsel submitted that the evidence heard at the *voir dire* established that the investigating officer did not release the accused following the breath tests being carried out, in order to punish him for disrespectful conduct. He further submitted that this amounted to an arbitrary detention in contravention of s. 9 of the Charter.

[23] As stated, I refused the application. Once again, I was unable to find that the accused had discharged his burden of proof.

[24] The investigating officer testified that after he conducted the breath tests on the accused, he placed him in a cell so that certain documents, including his release documents, could be prepared. He said that a short time later a coworker advised him that the accused was acting up and being very loud. When he asked her details, she advised that the accused had called her certain crude and insulting names. The investigating officer stated that as a result, he concluded that it would be unreasonable to release the accused at that time.

[25] Defence counsel objected to the investigating officer relating what his coworker told him about the accused's behaviour on the basis that it was hearsay. I ruled that the evidence in question was not hearsay in that it was offered, not for the truth of its contents, but in response to the accused's allegation that he had been arbitrarily detained. Certainly the officer's evidence on what he was told about the accused's conduct was not something I could consider as evidence relevant to his level of impairment. However, the evidence was relevant to the accused's allegation that he had been arbitrarily detained, since it was connected to why the officer did not release the accused after he completed his investigation. In determining whether the accused should be immediately released, he was entitled to take into account the information provided by his coworker.

[26] Defence counsel cross-examined the investigating officer thoroughly on the issue. The officer admitted that he had made no notes about the abusive names that the accused was said to have uttered. He also said that he did not make the decision to not release the accused until after he heard of the accused's misconduct.

[27] During cross-examination, the officer stated that he decided to detain the accused because after hearing about his abusive behaviour, he thought that there

was a chance he might commit further crimes if released in his present condition. He also had concerns about the accused's ability to understand the documents. He agreed that it was immediately after he heard from his coworker that he went to the location where the accused was being held and advised him that he was going to be remaining in custody.

[28] The accused has the onus of establishing the alleged breach of his s. 9 Charter rights on a balance of probabilities. Certainly, I was suspicious that at least one of the reasons why the investigating officer did not release him after the investigation was completed was in order to punish him for his disrespectful behaviour. However, I found that the evidence fell short of the required standard of proof. I found the officer's explanation for not releasing the accused was not unreasonable. After already having concluded that the accused's ability to operate a motor vehicle was impaired by alcohol, he was advised that the accused had just acted out in a loud, aggressive, and very abusive manner. There was a reasonable basis for his conclusion that releasing the accused would present a risk to the public. It was also reasonable for him to conclude that he was more intoxicated than he had previously thought and to therefore be concerned about his ability to comprehend the documents that the police were required to provide to him.

[29] I was unable to find that the officer was not telling the truth when he testified as to his reasons for not releasing the accused immediately following the conclusion of his investigation. I was therefore unable to find a breach of s. 9 of the Charter.

D SECTION 10(b) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

[30] As stated, following the conclusion of the investigating officer's testimony provided during the *voir dire*, defence counsel advised that he wished to modify his position on s. 10(b) of the Charter. He advised that he would now be taking the position that his client's 10(b) rights were violated as a result of him not having been afforded the right to consult with counsel of his own choosing – rather than not being afforded a reasonable opportunity to consult with the lawyer with whom

he spoke, as originally alleged in his Charter notice. I concluded that the evidence giving rise to the accused's change of position was unanticipated and allowed the application to proceed on that basis.

[31] During the *voir dire*, I heard evidence that after arresting the accused and making the breath demand, the investigating officer advised the accused of his Charter rights. The s. 10(b) information the officer provided to the accused appears to have been complete. In particular, it included the right to consult counsel of the accused's own choosing. When, after advising the accused of his s. 10(b) rights, the officer asked the accused if he wished to speak with a lawyer, the accused responded affirmatively.

[32] When they arrived at the police station, the arresting officer took the accused to a room that was locked from the outside in which there was a phone he could use. There were phone books outside the room but it appears that at no time was the accused given the opportunity to use them. Once the accused was secured in the room, the officer telephoned the on call legal aid lawyer and put the call through to the accused. I agree with defence counsel that there is no room for any other interpretation of the arresting officer's testimony. The accused spoke with the lawyer whom the investigating officer had chosen for a total time of approximately three minutes.

[33] Based on the evidence, it appears that the accused at no time advised the officer with whom he wished to speak. It appears that he simply said he wanted to speak to a lawyer. However, he certainly did not say that he was prepared to consult with any lawyer contacted by the police and there appears to have been no accommodation for the accused to contact, or attempt to contact, the lawyer of his choosing. It was the investigating officer who chose the legal aid lawyer who was on call. Moreover, the investigating officer chose that lawyer only after he put the accused into the locked telephone room.

[34] During reexamination, Crown counsel asked the officer whether or not the accused ever advised him that he wished to speak with anyone else. The officer replied that no such request was made. However, I agree with defence counsel that that is not at all surprising. The accused was given no opportunity to talk to another lawyer prior to that point. Upon the accused proceeding to the telephone

room, the arresting officer had taken immediate control of the determination of with whom the accused would exercise his right to counsel. Under the circumstances, it is unlikely that the accused would believe that he had any further options after the call was completed. I recognize that the investigating officer, when reading the accused his rights immediately following his arrest, told him that he could call any lawyer he wanted. However, I find that his actions at the police station conveyed the opposite message. I find that there was a violation of s. 10(b) of the Charter and that the violation was serious.

[35] The right to counsel guaranteed under s. 10(b) includes the right to consult with counsel of choice: *R. v. Willier*, [2010] SCR 429 at para. 24. Certainly that right is limited and extends only to the point where the lawyer chosen cannot be made available after a reasonable delay at which time the detainee is expected to call another lawyer, including duty counsel: *R. v. Ross*, [1989] 1SCR 3, at para. 13; R. *v. McCrimmon*, [2010] 2 SCR 492, at para. 17; *Willier*, (supra) at para. 24. However, in the present case, the accused was not given the opportunity to choose. As stated, the accused was placed inside a locked room. The investigating officer dialed the legal aid hotline, and once there was an answer, put the call through to the accused.

[36] Crown counsel argued that regardless of which lawyer the accused might otherwise have contacted, that lawyer would undoubtedly have advised the accused to comply with the breath test demand. However, in *R. v. Bartle*, [1994] SCJ 74, the Supreme Court of Canada made it clear that trial courts should be reluctant to assume what advice a lawyer would have provided to an accused. The accused certainly bears the ultimate burden of establishing, on a balance of probabilities, that the admission of the evidence in question would bring the administration of justice into disrepute: *R. v. Bartle* (supra), at para. 49. Nonetheless, the Crown bears the burden to persuade the court that the accused would have conducted himself or herself in the same way had there been no violation of s. 10(b) and that therefore the evidence would have been obtained: *Bartle*, (supra) at paras. 52 – 59.

[37] I found that the Crown had not discharged its persuasive burden and therefore was required to find that the breath test evidence. Furthermore, under all of the circumstances I concluded that having regard to all the circumstances, admitting the evidence of the breath test results would bring the administration of

justice into disrepute. I determined that therefore it was appropriate to remedy the violation of the accused's s. 10(b) right to counsel by excluding that evidence. Had there been any evidence of indicia of intoxication observed of the accused as a result of the breath tests being carried out, I would also have ordered that evidence excluded.

[38] I will add that in my view the more onerous test required for a judicial stay of proceedings to be entered pursuant to s. 24(1) of the Charter as a result of the breach was clearly not met.

C REASONS FOR AQUITTAL

The Charge under s. 253(1)(a) of the *Criminal Code*

[39] Because the evidence of the results of the accused's breath tests had been excluded, it was unnecessary to consider the submissions of defence counsel that the prerequisites for the "presumption of identity" provided for under s. 258(1)(c) had not been established to the requisite standard. There being no evidence of the accused's blood alcohol level, there was no option other than finding him not guilty of the count contrary to s. 253(1)(b) of the *Code*.

The Charge under s. 253(1)(b) of the *Criminal Code*

"Care or Control"

[40] Defence counsel submitted that the Crown had failed to prove that there was a realistic risk that the accused would place the vehicle in which he was found in motion and that therefore he could not be found to have been in "care or control" of that vehicle. Defence counsel stated that because some of the evidence suggested that the accused did not intend to drive, the risk that he would do so was only theoretical and did not meet the level of risk set out by the Supreme Court of Canada in the recent case of *R. Boudreault*, [2012] 3 SCR 157.

[41] In *Boudreault*, (supra) Fish J., on behalf of the majority affirmed that the essential elements of "care or control" within the meaning of s. 253 were (at para. 33):

> (1) an intentional course of conduct associated with a motor vehicle;
>
> (2) by a person whose ability to drive is impaired, or whose blood alcohol level exceeds the legal limit;
>
> **(3) in circumstances that create a *realistic* risk of danger to persons or property. (*emphasis mine*)**

[42] However, the majority in *Boudreault* (at para. 33) made it clear that requirement that the risk be "realistic" establishes a low threshold. The court held that in the absence of evidence to the contrary, a realistic risk of danger will normally be the only reasonable inference where the Crown establishes impairment and a present ability to set the vehicle in motion. The majority further stated that in order to avoid conviction, the accused will in practice face a tactical necessity of adducing evidence to prove that no realistic risk of danger existed in the particular circumstances of the case.

[43] The facts of *Boudreault* bear examination. At Boudreault's trial, the judge had found that the accused had asked for a taxi to be called because he was too drunk to drive. He waited for it inside his vehicle, and turned on the engine in order to warm up. Upon his arrival the taxi driver found him asleep in his truck and called the police.

[44] After considering all of the evidence the trial judge ultimately concluded that there was no risk that the vehicle would be put in motion and found that care or control had therefore not been made out. On appeal, the Court of Appeal of Quebec held that, since an intention to drive was not an essential element of the offence, the trial judge had erred in considering a lack of intention to drive as proof that there was no risk of setting the vehicle in motion.

[45] The majority of the Supreme Court in *Boudreault* reversed the judgment of the Quebec Court of Appeal and held that the existence of the required *realistic* risk of danger is a question of fact. The court held that the trial judge applied the correct legal test to the evidence he accepted and found as a fact that the risk had

not been proved. The majority went on to hold that since there was some evidence which supported the facts found by the trial judge no ground of appeal existed. At para. 15, Fish J. stated:

> The judge's conclusion on the facts, however surprising or unreasonable it may appear to another court, did not give rise to *a question of law alone*. And, as I indicated earlier, this is the only ground upon which the Crown, pursuant to s. 676(1)(*a*) of the *Criminal Code*, can appeal the acquittal of an accused at trial.

[46] In the present case, had the Crown established significant impairment of the ability to drive, I would have found the accused to have been in care or control of the vehicle. Certainly, there was some evidence that the accused did not intend to put the vehicle in motion. The accused's spouse testified that although the accused was found in the driver's seat of the vehicle with the keys in the ignition with the engine running, they had planned on her being the one who would drive the vehicle. Without going into detail, that evidence was rather questionable. More importantly even had I accepted that evidence, I would have found that there remained *a realistic risk of danger to persons or property*. In particular, I would have found a realistic risk that the accused would change his mind and operate the motor vehicle in which he was found. He was in the driver's seat with the engine running. Had impairment of the accused's ability to drive been established, I would have found the risk to be more than simply theoretical. As stated by the court in *Boudreault* at para. 52:

> A plan may seem watertight, but the accused's level of impairment, demeanour or actions may demonstrate that there was nevertheless a realistic risk that the plan would be abandoned before its implementation. Where judgment is impaired by alcohol, it cannot be lightly assumed that the actions of the accused when behind the wheel will accord with his or her intentions either then or afterwards.

Impairment of the Ability to Drive

[47] However, as I have stated, I found that the evidence on the remaining count contrary to s. 253(1)(a) did not establish all elements of the offence alleged beyond a reasonable doubt. Specifically, I found that evidence of impairment of the ability to operate a motor vehicle was inadequate.

[48] In this case the only witness called by the Crown was the investigating officer. I did not hear from the breath test technician or the coworker who reported to the investigating officer that the accused was acting out in an abusive manner. As a result, only one of at least three people who were in a position to describe the accused's indicia of impairment, or lack thereof, was called by the Crown.

[49] The indicia described during the examination in chief of the investigating officer were:

a) a strong odour of liquor on the accused's breath;
b) slurred speech;
c) brief fumbling with the keys to the vehicle when taking them out of the ignition.
c) very slow and deliberate action when providing documentation;
d) swaying while walking;
e) the accused, while handcuffed and getting into the back of the police truck, slipped while stepping on the running board; and
f) a demeanor ranging from polite and courteous to abusive and belligerent.

[50] During cross-examination, the officer confirmed that when he requested information from the accused, the accused complied and provided him with appropriate and correct responses. He confirmed that he had had no contact with the accused prior to the date in question. It therefore follows that he did not know how the accused usually speaks. He confirmed that when he asked the accused for his drivers' license he was able to produce it. In fact he testified that when the accused was providing his driver's license, he realized that it was attached to another document and was able to separate it prior to handing it over. It appears that although his movements were slow and deliberate there was no fumbling when the accused handled his document. The investigating officer also conceded that he did not find it surprising that a handcuffed person would have difficulty getting into the police vehicle.

[51] During his examination in chief, the investigating officer had provided no examples of the accused's belligerent behavior. However, during his reexamination by the Crown, the investigating officer gave some examples of the accused's

alleged belligerence. He said that on a number of occasions the accused had said words to the effect that the officer should be out catching real criminals. The accused also asked him if he had been involved in a fatal shooting that had occurred in Yellowknife. These were the only firsthand examples of the accused's "belligerent" behaviour that the investigating officer provided.

[52] The test for impairment of the ability to drive set out by the Supreme Court of Canada in *R. v. Stellato*, [1994] 2 S.C.R. 478, is impairment of the ability to drive beyond the *de minimis* level. Impairment of the ability to drive that is "even slight" will suffice to satisfy that element of the offence. However, in *R. v. Andrews* (1996), 178 A.R. 182 (leave to appeal to SCC refused), the Alberta Court of Appeal stated that when determining whether or not the test set out in *Stellato* (supra) is satisfied, it cannot be assumed that a person's ability to operate a motor vehicle is impaired beyond the *de minimis* level simply because his functional ability is effected in some respects by alcohol. The court further stated that where the proof of impairment consists of observations of conduct, in most cases, if the conduct is a slight departure from normal conduct, it would be unsafe to conclude beyond a reasonable doubt that the ability to drive was impaired by alcohol.

[53] I considered the indicia of intoxication described by the investigating officer elicited by the Crown, including the officer's opinion that the accused's ability to operate a motor vehicle was impaired. However, I also considered the qualification of some of that evidence brought out during cross examination. The officer said that the accused's speech was slurred. However, he was unaware how the accused normally speaks. There was no evidence that the officer had any difficulty understanding the accused. He said that the accused fumbled briefly when removing the keys from the ignition and placing them on the dash. However, I do not know precisely what this means. As well, it is not at all unusual for people who are sober to become flustered and fumble with items when they are confronted by the police. The officer found the accused's movements very slow and deliberate when he provided his documentation. However, while he may have been slow there was no evidence that the accused fumbled when handling the documents, even when they were stuck together. The investigating officer said that the accused swayed when walking. However, he provided no elaboration on this point and I do not know how pronounced the swaying was. The officer was

unable to give evidence on how the accused normally walks. The accused slipped while getting into the police vehicle. However, the investigating officer conceded that it was not surprising that anybody who was handcuffed, as the accused was, would have difficulty while boarding the vehicle. The officer testified that the accused's demeanor ranged from "polite to belligerent". However, the officer does not know how the accused usually behaves. Emotional behavior on the part of people who have just been physically detained by the police is understandable, even in sober individuals.

[54] As well, as I stated earlier, I am not able to consider the hearsay statement provided to the investigating officer by his coworker as evidence of the accused's impairment.

[55] Certainly, I believe that the evidence presented in this case established that the accused was under the influence of alcohol. I am satisfied that the accused's functional ability was in some respects affected by the consumption of alcohol. However, while the case was certainly close, after applying the test in *Andrews* (supra), I was unable to conclude that it had been proved beyond a reasonable doubt that there was impairment of the ability to drive that went beyond the *de minimis* level. It was on that basis that I found the accused not guilty on the count, contrary to s. 253(1)(a)

[56] I thank both counsel for their assistance in this matter.

Robert David Gorin
T.C.C.J.

Dated at Yellowknife, Northwest Territories, this 9th day of June 2014.

R. v. Daniel Ross Epp, 2014 NWTTC 16

Date: 2014 06 09
File: T-1-CR-2013 000710

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

DANEIL ROSS EPP

REASONS FOR DECISION
of the
HONOURABLE CHIEF JUDGE
ROBERT D. GORIN
