Information No. 18-14655

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

v.

HERBERT MCGROARTY

R E A S O N S F O R J U D G M E N T

BEFORE THE HONOURABLE MADAM JUSTICE A. DELLANDREA
on March 18, 2022, at BRAMPTON, Ontario

APPEARANCES:

J. Ng, Esq.	Counsel for the Crown
R. Singh Bal, Esq.	Counsel for H. McGroaty
T. Bal, Student-at-law	Agent for H. McGroaty

ONTARIO COURT OF JUSTICE

T A B L E O F C O N T E N T S

Transcript Ordered: .....July 7, 2022

Transcript Completed: .....July 29, 2022

Ordering Party Notified: .....July 29, 2022

R E A S O N S F O R J U D G M E N T

DELLANDREA, A. (Orally)

I will start with the *Charter* application.

The common law justification on the delay of the provision of s.10(b) rights in the context of roadside screening of course does not apply with equal force to the rights guaranteed under s.10(a), being informed for the purpose of the stop and resulting detention.

Here there was no conventional road stop in the sense that the accused was already stationary and had been in his vehicle for hours before being wakened by Constable Donahue. The officer knocked and woke up the defendant and quickly formed reasonable suspicion of alcohol being in the defendant's body while in care and control of the motor vehicle.

He asked Mr. McGroaty to step out of the car and invited him to attend with him to his vehicle, on his evidence, to do the screening test. That test of course was for the ASD, which is for the purpose of determining sobriety or more accurately, the presence of alcohol within a person's system. The defendant testified that he understood that he had to blow and that what was going on was serious. He said that most of his confusion arose when he was charged because he did not understand the concept of care and control.

In this case, as the Crown submitted, the timeline from the moment of the defendant being invited to exit his vehicle, and the taking of the ASD, was quite swift. Indeed, it was only a matter of minutes, which included within that portion of time, Constable Donahue demonstrating to Mr. McGroaty how to conduct the ASD test and then proceeding to give the defendant the opportunity to blow in the screening device. Within that period of time, I am satisfied that it would have been evident to Mr. McGroaty what the reason was for his detention, namely to provide a sample for the purpose of determining the quantity of alcohol in his system at the roadside, and consequentially I conclude there is no breach of s.10(a) established.

Turning to s.10(b), Counsel of choice. Counsel of choice was the particular defect alleged by the applicant in this case with respect to the implementational component of his rights under s.10(b) of *Charter*. Having considered the evidence in relation to this issue and heard the helpful submissions of both Counsel on this point, I conclude that there was a breach of the accused's implementation of rights under s.10(b).

In the final analysis, there was curative conduct by the breath technician in this case, which Counsel has conceded operated to mitigate the breach earlier occasioned, almost entirely to

insignificance such that I would have not excluded the breath readings under s.24(2). However, I do feel a few comments are necessary with respect to the nature of the breach in this case, which can perhaps be conveyed by the Crown to the officer, for his own awareness and future use, I hope.

In one of the cases provided by the applicant, *Sritharan*, the decision of Justice Green from October 21st 2021, which I understand is an unreported decision. His Honour makes an important observation about the significance of police notes, particularly as they relate to the critical details around the exercise of detainees' constitutional rights.

So reading from paragraph 31 of that decision, Justice Green says as follows, "The police are not expected to write novels in their notes or summaries of every single thing that they do. But they should have some kind of entry to remind them of pivotal steps. It is not onerous to expect an officer to be able to account for what investigative steps he or she took at a roadside, especially during an Impaired Driving investigation, or what he or she did to fulfill his or her professional duties at the station."

The officer in that case was observed by that Court to have had significant gaps in his notes as well, a finding which I consider to be applicable to the circumstances of this case as they have

been very fairly conceded by the Crown to exist in respect of Constable Donahue's notes.

In this case, it's not surprising that Constable Donahue had no independent recollection of an exchange with a detainee from three years ago; no one would expect him to have one. This is precisely the reason why it is essential for officers to take some meaningful notes of exactly what detainees say in response to the question, "Do you want to call a lawyer now?" or words to that effect, when rights to Counsel are very importantly repeated to a detainee upon their attendance at the cells of a police division.

It's well known, it's been part of Canada since *R. v. Bartle,* [1994] 3 SCR 173, and in numerous subsequent cases, has repeated the reason why right to Counsel is so important, which is to balance the scales of power between the detainee and the State at the moment of detention or arrest. It is the exercise of an accused's right to Counsel that ensures this balance.

In response to that question put to Mr. McGroaty at the station as to whether or not he wanted to call a lawyer, Mr. McGroaty stated the name of a lawyer. Then according to the officer, he said that at some time shortly thereafter, the accused declined to call any lawyer. The next entry by the officer some minutes later simply said that Duty Counsel had been called.

To my assessment, the only reasonable inference available on the officer's evidence is that during that juncture of time, he didn't repeat the name of the accused's Counsel of choice back to him and ask him whether or not the defendant wanted the police to call that person.

This failure amounts to a constitutional failure to provide a reasonable opportunity to consult Counsel of choice, based on the accused's initial and only response to the invitation of his right to Counsel, having been the assertion of a particular lawyer's name. In Justice Durno's well known decision of *Kurarasamy*, the Court held that the police, "Cannot go directly to Duty Counsel when a detainee wants to contact her Counsel of choice."

In essence, I conclude that that is what occurred here. As Counsel for the applicant fairly stated, the initial breach was significantly neutralized by Constable Peel's clear invitation to the accused in the breath room to, "Call the lawyer you mentioned before", which Mr. McGroaty clearly declined.

Having expressly waived his rights to Counsel of choice at that juncture and having confirmed that he was satisfied with his understanding of the advice received from Duty Counsel before being invited to provide breath samples, the breach of

his rights under s.10(b) was significantly attenuated and would not lead to the exclusion of evidence under s.24(2).

Turning to the trial proper. The presumption under s.258(1)(a), which is the old provision, is adopted essentially in the same terms in the new amendments under s.320(3) through (5).

Section 258 states that when a person occupies the driver's seat of a motor vehicle, the *Criminal Code* presumes he is in care and control of that vehicle. The accused may rebut the presumption by calling evidence that shows, on a balance of probabilities, that he or she did not occupy the driver's seat for the purpose of putting the car in motion.

The Ontario Court of Appeal in *O'Neill,* 2016 ONCA 307, explained that in seeking to rebut the presumption, the accused is not required to rebut all other potential risks at that initial stage. The risk of danger, of course, remains relevant, not for the purpose of rebutting a presumption, but for determining whether or not the accused was in actual care or control.

Numerous cases have considered the question of whether or not a person sleeping in a reclined driver's seat is in care and control such that the presumption applies, and Counsel responsibly conceded that there can be no doubt that it does.

The totality of circumstances are of course what needs to be evaluated to determine if that presumption has been rebutted. In *R. v. Boudreault,* [2012] 3 SCR 157 the Supreme Court of Canada explained that, "The risk of danger must be realistic and not just theoretically possible." However, it need not be probable or serious or substantial.

A realistic risk aligns with Parliament's intention of preventing a danger to public safety, and it is a relatively low threshold. A person who satisfies the Court that he or she had no intention to set the vehicle in motion might not necessarily escape conviction as they may nevertheless present such a realistic risk of danger.

In the absence of a contemporaneous intention to drive, a realistic risk of danger may arise in at least these three ways:

1. They might wake up still impaired or with excess alcohol and change their mind about driving, believing that they are fit to do so.

2. They may unintentionally set the vehicle in motion. And,

3. Through negligence or bad judgment, their stationary car might pose a realistic threat to the public.

Mr. Ng, for the Crown, very fairly concedes that on the evidence of this case only the first risk need be considered. I agree with this responsible concession, which the Court always appreciates hearing Counsel make where applicable.

Boudreault affirms that in the absence of evidence to the contrary, realistic risk will normally be the only reasonable inference where the Crown establishes impairment and a present ability to set the vehicle in motion or excess. The accused may avoid conviction only where they adduce credible and reliable evidence tending to prove that no realistic risk existed in the circumstances of their case.

A number of factors have been considered by Courts on the realistic risk analysis. These may include:

1) The level of impairment at the time that would be necessary for the person to become fit to drive.

2) Whether keys are present and in the ignition.

3) Whether the vehicle or its fittings are running.

4) The location of the vehicle.

5) Whether the accused had reached their destination or still had a journey ahead.

6) The accused's disposition and attitude.

7) Whether the accused drove to the location of drinking.

8) Whether the accused had a plan to get home that did not involve driving.

9) Whether they were wearing a seatbelt.

See *R. v. Szymanski,* [2009] OJ 3623 from the Superior Court of Justice at paragraph 93.

After considering all the evidence in this case, I conclude that by the evidence called by the defendant, the statutory presumption of care and control was successfully rebutted in this case. Let me briefly explain my reasons for so concluding.

The narrative of this case was unlike many, if not most allegations, of care and control, which often include the detection of motors in clear circumstances suggestive of recent or imminent driving such as a recent accident, car in the ditch, individuals sitting outside drinking establishments with their car running, to name but

a few. Quite uniquely in this case, the officer was set up in all likelihood looking for those more obvious targets from his position across the street from the nightclub in question in a near empty parking lot.

The parking lot had only one other parked vehicle not far from his cruiser, and that was the accused's truck. It was approximately 15 feet away from the police car. It was running but not moving for over five minutes. When the officer investigated, he found the accused asleep reclined at the wheel. There was an open can of alcohol within the vehicle, and the officer understandably formed reasonable suspicion with respect to the potential for alcohol being in the body of the person in the driver's seat.

The accused's version of what preceded his arrival to his vehicle that night before meeting Officer Donahue was given by him in his testimony. I will not repeat all of the details of the defendant's evidence, which includes some troublesome personal circumstances which he was dealing with that night, and to which he readily admitted to both the officers following his arrest and to this Court. Importantly, Mr. McGroaty's evidence was both consistent, credibly delivered, and almost entirely unchallenged when it came to his articulation of the narrative leading to his arrival at that location and his admittedly misguided plans for the rest of the evening.

Mr. McGroaty testified to having booked a room within a few hundred metres of the parking lot where he was found, at a motel that he was familiar with. He was staying there to cool his head after having received some stressful news about his father's health as well as due to some serious personal and relationship challenges. His decision to park at that plaza instead of the hotel, he said, was to avoid the possible detection of his wife who had discovered his truck at some of his previously chosen motel locations during times of trouble within their marriage.

Again, his evidence on this issue was not seriously challenged. He testified that he hadn't been to his truck for over 24 hours since he parked at that location after returning with his brother from Collingwood. He said he walked from the nightclub to the truck to sit inside and charge his phone with the only cable he had available as he had some important and rather emotional calls to make to his family that night.

He testified that he turned the truck on to engage the battery and to keep warm. He spoke to his family members for a significant period of time and then fell asleep it would seem for at least a few hours before being wakened by the police.

As for the plan for the rest of the night, the defendant admitted that he was planning to be met

by a female employee of the night club at the end of her shift to return to his hotel room on foot. He was waiting there for her to come meet him. Mr. McGroaty admitted that his conduct was morally questionable and he was notably ashamed of his behaviour during his testimony. But he was unshaken and entirely unchallenged on the existence and firmness of his stated plan.

Applying the principles of *R. v. W.(D.)*, [1991] 1 SCR 742, to the defendant's evidence, I cannot say that I accept every word of his testimony, but I find that it more than sufficiently supports the absence of any intention to drive that night. He had a place to go, which was within walking distance of the location where he was seated in his vehicle. He had walked there to his truck for a concrete and credible reason, and he had a plan to walk to the hotel at the end of the night.

Having displaced the presumption, I now turn to risk analysis. For several of the same reasons leading me to accept the accused's evidence on his lack of intention to drive, I likewise conclude that the Crown has failed to establish that the defendant presented a realistic risk of harm on the night in question beyond a reasonable doubt. The factors of *Szymanski*, which I draw on in making this conclusion are, one, level of impairment. In this case it's notable that there was minimal to no evidence of impairment, beyond the defendant's glassy eyes observed by the

arresting officer, which could easily be explained by having been wakened from a two-hour sleep, there were no obvious signs of impairment at all.

The odour of alcohol was the only additional indicator, which of course supports consumption but cannot be considered a proxy for impairment. He was not charged with Impaired Operation and neither officer noted a single observation of what they would have described as impairment in any way.

To the contrary, on the breath room video, both officers noted that to their estimation, the defendant was the most polite, well-controlled and respectful detainee whom they had ever encountered and there was therefore no realistic risk of danger arising from impairment in Mr. McGroaty's case in terms of evaluating that factor, because there simply was none detected by the officers or discernable on video.

The keys were in the ignition and the vehicle was running, but there was an explanation, namely of charging the phone and waiting for his companion, which I have accepted as they relate to those factors. The location of the vehicle in Mr. McGroaty's case likewise errs away from a risk of danger in the sense that his vehicle was not on the side of the road, but rather was in a relatively discreet isolated parking lot, for which there were no other vehicles beyond the

police officer's cruiser. The defendant had essentially reached his destination in the sense that he had a location to stay within walking distance from where he was located. There was no evidence of his having driven within the preceding 24 hours to that location.

In terms of the credibility of the plan to avoid driving that night, I conclude that the defendant had a credible compelling plan that to avoid his operating his vehicle on that night. It was perhaps not the wisest plan, but it is one which I accept to have existed, and from which there was no risk of his changing his mind and deciding to drive anywhere that night.

The Crown suggested the possibility of Mr. McGroaty changing his mind and deciding to drive home to his wife or to his brother as alternatives, which he urged me to accept. I accept the defendant's evidence that the last place that he would have wanted to go at that time of night or state of mind was to see his wife. And further, that there was no reason for him to go to his brother's residence in Toronto having spoken to him on the phone that very evening at some length and spent the preceding day with him.

For all of these reasons, having concluded that the accused has rebutted the presumption of Care and Control, and in the absence of evidence beyond reasonable doubt of a realistic risk of harm, I

find the defendant not guilty of the offence charged.

MR. SINGH BAL: Thank you, Your Honour.

THE COURT: Thank you both very much.

MR. NG: Thank you, Your Honour. Thank you.

THE COURT: All right. Thank you.

THIS TO CERTIFY THAT
the foregoing is a true and
accurate transcription from
recordings made herein **by R. Jain,** to the
best of my skill and ability.

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OFFICIAL COURT REPORTER

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FORM 2

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I, D. Wells, certify that this document is a true and accurate transcript of the recording of R. v. McGroaty in the Ontario Court of Justice held at 7755 Hurontario Street, taken from Recording No. 3111 110 20220318 092816 30 DELLANAL.dcr

July 29, 2022

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