Citation: *R. v. Jordan*, 2006 YKTC 98

Date: 20061120
Docket: 05-00689
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Faulkner

R e g i n a

v.

Jordan James Arntzen Jordan

Appearances:
Ludovic Gouaillier — Counsel for Crown
Andre Roothman — Counsel for Defence

REASONS FOR JUDGMENT

[1] On February 26, 2006, at 9:46 A.M., Corporal Gaetz of the Whitehorse R.C.M.P. went to the parking lot of the Canadian Tire Store in response to a complaint of a possible impaired driver. There, Corporal Gaetz found the accused, Jordan Jordan, passed out in his pickup truck. Mr. Jordan was slumped down in the driver's seat. The engine was running and the headlights were on. The vehicle was in park and the park brake may have been on.

[2] Corporal Gaetz had great difficulty in arousing Mr. Jordan who was grossly intoxicated. Mr. Jordan was wearing two dissimilar shoes and had vomited on his shirt. Mr. Jordan was arrested both for impaired driving and public intoxication and taken to the Whitehorse R.C.M.P. detachment. There, Mr. Jordan provided two breath samples. Analysis of those samples produced readings of 170 and 160 milligrams of alcohol in 100 milliliters of blood. Due to

Mr. Jordan's degree of intoxication, he was lodged in cells and released at around 5:00 P.M.

[3] As a result of the police investigation, Mr. Jordan was charged with offences contrary to sections 253(a) and 253(b) of the *Criminal Code*.

[4] At trial, Mr. Jordan testified that on the evening of February 25, 2006, he had driven downtown and attended several bars with some friends. He did not consume any alcohol as he was the designated driver. During the evening, he lost touch with his friends but encountered another acquaintance who invited Mr. Jordan to a party in the Riverdale area of Whitehorse. Mr. Jordan decided to leave his truck at the Canadian Tire parking lot and he and his friend went to the party in a taxicab.

[5] At the party, Mr. Jordan recalled drinking two drinks of vodka. This was at around 3:00 A.M. on February 26th. From this point on, Mr. Jordan says he remembers nothing until he awoke in the R.C.M.P. cells at 5:00 P.M. In other words, he has no idea how he got from the party in Riverdale to his truck or what he intended to do once he got into it. He does not know who started the truck or turned on the lights. He has no idea how he came to be wearing two different shoes – neither of them his.

[6] Having regard to Mr. Jordan's footwear and that he was inadequately dressed to be outside on a -20 degree night, it may be safely assumed that Mr. Jordan did not walk from Riverdale to the Canadian Tire parking lot. Beyond this, any conclusions about Mr. Jordan's activities or intentions would be sheer speculation.

[7] The evidence is clear that Mr. Jordan was occupying the driver's seat of his vehicle when Corporal Gaetz arrived. As a result, the presumption provided for by section 258(1) of the *Criminal Code* applies:

> **258.** (1) In any proceedings under subsection 255(1) in respect of an offence committed under section 253 or in any proceedings under subsection 255(2) or (3),
> (*a*) where it is proved that the accused occupied the seat or position ordinarily occupied by a person who operates a motor vehicle, vessel or aircraft or any railway equipment or who assists in the operation of an aircraft or of railway equipment, the accused shall be deemed to have had the care or control of the vehicle, vessel, aircraft or railway equipment, as the case may be, unless the accused establishes that the accused did not occupy that seat or position for the purpose of setting the vehicle, vessel, aircraft or railway equipment in motion or assisting in the operation of the aircraft or railway equipment, as the case may be;
>
> . . .

[8] The law is clear that the onus on the accused can only be discharged by evidence on a balance of probabilities. *R. v. Appleby*, [1972] S.C.R. 303, *R. v. Ford*, [1982] 1. S.C.R. 231. The problem for the accused in this case is that he, himself, can offer nothing of his intentions on entering the vehicle or at any time thereafter. I agree with Mr. Roothman, who appeared on behalf of the accused, that the evidence does not necessarily have to come from the accused. The proof of lack of intention to drive could come from other evidence, but it must come from somewhere. Here, there is no evidence from any quarter capable of rebutting the presumption.

[9] Mr. Roothman urged that the fact that the vehicle was in park with the park brake likely engaged, together with the fact that Mr. Jordan was asleep, supported the theory that Mr. Jordan did not intend to drive. To so argue is to misunderstand the whole notion of care or control. The relevant time for determining the accused's purpose is when he first occupied the driver's seat, and not when he was observed in the driver's seat by police (*R. v. Weir*, 2005 BCSC 1740 at para. 36). Of course, the accused may change his purpose after entering the vehicle such that the presumption could be rebutted (*R. v. Shuparski* (2003), 173 C.C.C. (3d) 97 (Sask.C.A.) at para. 31). The accused would be required to prove on a balance of probabilities that such a change in intention

occurred between the time the accused entered the vehicle and the time when he was found in the driver's seat.

[10] All that these facts prove is that the accused was not actually driving the vehicle when Corporal Gaetz arrived. This is not to say that these facts are irrelevant, but they are simply incapable, without more, of proving that the accused did not enter the vehicle for the purpose of putting it in motion.

[11] There have been cases very much like the case at bar where courts have held that the presumption was not rebutted when the accused could not recall how he came to be in the driver's seat or why he had entered the car in the first place. In *R. v. Petracek,* [1993] S.J. No. 194, the Saskatchewan Court of Queen's Bench held that the trial judge had not erred in finding the accused had not rebutted the presumption of care or control where the accused could not remember how he ended up in the driver's seat. The accused had been at a party. The last thing he remembered was asking who would drive him home and getting into the passenger seat. The police found him asleep in the driver's seat approximately 12 miles from the party.

[12] In *R. v. Pries*, 2005 SKPC 60, the Saskatchewan Provincial Court considered a case in which the accused had a very sketchy recall of the evening in question and held at para 27:

> In the present case, I find the accused has not rebutted this presumption. Given his statement about how little he remembered after midnight and his evidence about his intoxicated condition upon being ejected from Holly's and his statement two days later to Cst. Russell about how little he recalled about the circumstances around these charges, I am not satisfied on a balance of probabilities that Mr. Pries could, at the date of trial, accurately recall why he went to sit in his vehicle.

[13] Similarly, the Newfoundland Court of Appeal held in *R. v. George* (1994), 90 C.C.C. (3d) 502, that mere indecision on the part of an accused whether to drive or to sleep will be insufficient to rebut the presumption.

[14] Mr. Jordan was found in the driver's seat of his vehicle and, therefore, bears the burden of establishing on a balance of probabilities that he did not enter the vehicle for the purpose of putting it in motion. Since the accused, owing to lack of memory, is unable to provide any evidence of a different purpose, he is unable to rebut the presumption. As a result, the Crown is not required to establish actual care or control or that there was a risk of danger from the vehicle's being put into motion.

[15] I find the accused guilty on count two, the charge contrary to section 253(b) of the *Criminal Code*. The charge contrary to section 253(a) is conditionally stayed.

Faulkner C.J.T.C.