Citation: *R. v. Knaack*, 2006 YKTC 87

Date: 20060922
Docket: 05–00391
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Lilles

R e g i n a

v.

Stuart Walter Knaack

Appearances:
Melissa Atkinson — Counsel for Crown
Ed Horembala — Counsel for Defence

REASONS FOR JUDGMENT

[1] As a result of events which occurred in the early morning of October 2, 2005, Mr. Stuart Knaack was charged with having care and control of a motor vehicle while his ability to operate the vehicle was impaired by alcohol (an offence contrary to s. 253(a) of the *Criminal Code*) and with having care and control of a motor vehicle when the concentration of alcohol in his blood exceeded 80 milligrams of alcohol in one hundred millilitres of blood (an offence contrary to s. 253(b)).

[2] During the trial I heard evidence from Constable Buxton-Carr, the accused, Mr. Knaack and his two friends, Brian Gardiner and Mike Dunbar. The evidence of Mr. Gardiner, Mr. Dunbar and Mr. Knaack as to what occurred prior to Mr. Knaack's arrest was consistent and credible. Constable Buxton-Carr's evidence as to his observations at the scene were not challenged. The task for

the court in this case is not one of fact finding; rather, it is identifying and applying the legal principles relating to “care or control” to the facts.

The Facts

[3] Mr. Knaack worked for Midnight Sun Drilling at the time of the incident. Typically he spent three weeks at the work site and was back in town for three or four days. He lived with his mother in Marsh Lake, some distance outside of Whitehorse. He was in Whitehorse on the weekend of September 30 – October 2, 2005.

[4] He contacted his friend, Mr. Gardiner, about going out together. Mr. Gardiner advised that he was moving, meaning changing his residence, on the Friday, but would meet Mr. Knaack for drinks at Lizard’s Lounge on Saturday evening. They also agreed that Mr. Knaack could stay at Mr. Gardiner’s residence after drinks, as he often did when they were out together.

[5] Prior to meeting up with Mr. Gardiner at Lizard’s Lounge, Mr. Knaack went to see a movie with another friend, Mr. Dunbar. After the movie, Mr. Knaack drove himself and Mr. Dunbar to Lizard’s in his blue Toyota, 2-door pickup truck with a standard gear shift. He parked the vehicle legally on 4th Avenue, in front of the Royal Bank.

[6] At the lounge, Mr. Knaack socialized with Mr. Gardiner, Mr. Dunbar and others. They were not always together. Around 12:30 a.m., Mr. Dunbar phoned some friends at their homes to ask them to come to Lizard’s and give him, Mr. Knaack and Mr. Gardiner rides home. This was a common practise when they were out drinking together. If they were unable to persuade someone to give them a ride, they would take a cab. They would not drive. Unfortunately, Mr. Dunbar was not successful in his efforts to solicit a ride. He called his girlfriend last. I understood that she was not pleased with the call, and that Mr. Dunbar was out drinking with his friends. Mr. Dunbar said he “got into trouble

with his girlfriend", and decided that he should leave and go to her apartment right away.

[7] At closing, around 2:00 a.m., Mr. Gardiner looked for Mr. Knaack, both inside and outside the lounge. He could not find him, so he and his girlfriend took a taxi home. He said that he had seen Mr. Knaack earlier in the evening with a female friend and thought that he went home with her. Mr. Gardiner also confirmed Mr. Knaack's evidence that Mr. Gardiner had not communicated his new address to Mr. Knaack, having moved a day earlier.

[8] Mr. Knaack confirmed Mr. Dunbar's evidence that the plan had been for Mr. Dunbar to call around for a ride for the three of them. He knew Mr. Dunbar had left early. He also said that at closing he started looking for Mr. Gardiner, as the plan was for him to go home with and sleep at Mr. Gardiner's place. He did not find Mr. Gardiner. He also did not know Mr. Gardiner's new address. He did not have enough money for a hotel room, and his mother's home in Marsh Lake was too far away to take a taxi.

[9] As a result, Mr. Knaack decided to sleep in his truck until the morning. If he was sober in the morning, he would drive. But if not, he would find a ride home with someone else. He got into his truck which was still parked on the street. He got in the driver's side and sat behind the wheel. He may have had the seat reclined a "little bit". He was only wearing a light jacket, and as it was October, it was cold outside. He decided to put the vehicle's heater on. He put the key in the ignition and started the motor. The vehicle's lights came on automatically when he started the motor. He then fell asleep.

[10] The evidence also established that the vehicle's emergency/parking brake was on and that in order to put the vehicle in gear, the clutch must be depressed all the way to the floor.

[11] When Constable Buxton-Carr attended the scene some two hours later, Mr. Knaack was sound asleep. It took some effort to wake him up and get him to

roll down the window so the officer could get the door open. Mr. Knaack displayed some symptoms of intoxication. He was arrested, taken to the police detachment and provided breath samples for analysis. The readings were 180 mg %. Mr. Knaack was reported by the officer as being cooperative. The detailed circumstances of the arrest are set out in an earlier decision of this court at 2006 YKTC 81.

Legislation

[12] The *Criminal Code* provides as follows:

> 253. Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not,
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> (a) while the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or
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> (b) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.
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> 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),
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> (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 me be; …

Issues

[13] The Crown did not attempt to rely on the presumption set out in s. 258(1) of the *Criminal Code* and I find that it has no application to the facts. The evidence of Mr. Knaack, which I accept, is that he entered the vehicle for the sole purpose of sleeping. I am satisfied on a balance of probabilities that that was his purpose and that purpose did not change while he occupied the driver's seat.

[14] The real issue in this case is whether the '*actus reus'* of the offence of "care or control" has been proven beyond a reasonable doubt. It goes without saying that in the absence of the presumption in s. 285(1), the onus on the Crown is to establish the essential elements of "care or control" beyond a reasonable doubt.

[15] The *actus reus* of the offence is the act of assumption of care or control when the voluntary consumption of alcohol has impaired the ability to drive. The *mens rea* for the crime is the intent to assume care or control after the voluntary consumption of alcohol has impaired the ability to drive: *Queen* v*. Toews,* [1985] 2 S.C.R. 119, 21 C.C.C. (3d) 24 (S.C.C.) at p. 28. Proof of the mental element of this offence does not require a showing that the accused intended to drive the vehicle: *Ford* v*. Queen,* [1982] 1 S.C.R. 231, 65 C.C.C. (2d) 392 at 399, per Ritchie J.

[16] The test for establishing care or control, absent the presumption in s. 258(1)(a), is set out by Justice McIntyre in *R. v. Toews* (supra) at p. 30 as follows:

> … acts of care or control, short of driving, are acts which involve some use of the car or its fittings and equipment, or some course of conduct associated with the vehicle which would involve a risk of putting the vehicle in motion so that it could become dangerous. Each case will depend on its own facts and the circumstances in which acts of care or control may be found will vary widely.

[17] I have reviewed a great number of cases dealing with “care or control” of a motor vehicle. I agree with Cameron J.A. in *R.* v*. Decker,* 2002 NFCA 9 at para. 18 where he states:

> It is not possible to reconcile all of the numerous cases which address the issue of what constitutes care or control. However, they may be generally categorized into two groups: those which hold to the proposition that there need not be a risk of danger to establish care and control and those which would make it an essential element of care or control that there be the risk of danger either by the vehicle being set in motion or otherwise.

[18] He then lists and summarizes a number of cases in the two categories. In the first category, a number of cases find liability solely on the basis of a “possibility that an impaired driver who has no present intention of driving will change his or her mind in the future”, when he is still impaired. Although there is no tangible risk of putting the vehicle in motion accidentally or intentionally, the accused is convicted. Addressing this point, the majority in *Decker,* supra, stated (at para. 31):

> … To speculate risk of danger on the basis that an impaired driver might change his mind and for no other reason is to find liability for being intoxicated in a vehicle, a conclusion which has been rejected by the Supreme Court of Canada. It must be left open to the trial judge to hold that the accused did not have any intention of driving at the time he was discovered in the vehicle or in any period of time when in the circumstances one could anticipate that he would be intoxicated.

[19] A similar concern was raised in *R.* v*. Shuparski* (2002), 173 C.C.C. (3d) 97 (Sask. C.A.). The Court stated (at para. 46):

> In my respectful view, the defendant's "position to resume driving the vehicle at any time" is not an "act" let alone one capable of constituting the actus reus. It is axiomatic that a person cannot be convicted for something he has not done. The fact he is in a "position" to do something wrong that he may or may not do, does not create some sort of inchoate form of culpability for which he must answer. Conjecture has no role to play in a criminal offence. I note that in Toews the defendant was in a "position" to drive the

> vehicle he was sleeping in "at any time", but that "position" played no role in the Court's determination of finding no actus reus.
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> I conclude this issue of "position" by this observation. As many cases have noted, including the cases cited earlier, the element of dangerousness arising from the risk of putting a vehicle in motion while a person is under the influence of alcohol is at the centre of these care or control cases. The elimination of that element of dangerousness is what Parliament had in mind when it passed the legislation in question. Whether a potential for dangerousness should be a cause for concern where a person is in a "position" to set a vehicle in motion depends not so much on the physical "position" the person happens to be in as it does on his attitude or disposition towards potential dangerous situations. If it is nonchalant, non-caring or reckless, that is one thing. If the attitude is to specifically *[page115]* address the situation with a view to eliminating it, that is quite another thing. In the present case, the defendant's deliberate rational decision, after he realized his driving may be creating a dangerous situation, to stop his driving in order to sleep is strong evidence of his attitude to potential dangerous situations: it is an attitude towards eliminating those situations after a realization takes hold. Given that attitude, it is unlikely that after eliminating one potential dangerous situation, he would be apt to create a new dangerous situation by driving after he awoke if he was unfit to drive. In other words, when the facts of the case are viewed from an "overall" perspective that element of dangerousness that is central to all of these care or control cases was not present in this case, which is to say the Crown failed to prove this element of the offence beyond a reasonable doubt.

[20] Wittman A.C.J. in *R. v. Ogrodnick,* 2006 ABQB 91 reviewed and analyzed the recent jurisprudence dealing with “care or control”. The court stated (at para. 45):

> In *R* v. *Smith* (2005), 22 M.V.R. (5th) 52, 2005 NSSC 191, Warner J. at paras. 26-29 knitted the reasoning in *Shuparski* and *Decker* together into a similar formulation:
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> > The dictionary defines conjecture and speculation as “guesswork" or "an opinion or theory based on insufficient evidence". Risk assessment should not involve conjecture (*Shuparski*) or speculation (*Decker*). ... In both *Shuparski* and *Decker*, the courts did make an assessment of whether there existed a risk that the accused might change his

> mind, and, in each instance, did so based on [past] events.... .... While I agree with the view that the mere presence in a vehicle by an impaired driver is not, in and of itself, sufficient to satisfy the requirement for care or control, each trial court is required to assess the sequence of events that led up to the time of discovery, and the circumstances existing at the time of discovery, to assess the risk that the driver may, while impaired or with a BAC over 80, set the vehicle in motion and thereby cause danger.

[21] I agree with and adopt the following analysis and conclusions in *Ogrodnick,* supra, (beginning at para. 54):

> Speculation and conjecture about future conduct is no basis for a criminal conviction. It is one thing to convict a person of impaired care or control because the level of intoxication demonstrates unpredictability or a risky pattern of behaviour. It is an entirely different matter to apprehend an impaired person, accept that the person does not intend to drive, yet convict solely because that person might change his or her mind, without anything else to establish risk. To do so allows for the potential of absurd results, and ignores that the accused might be sober once the change of mind occurs.
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> To ground a conviction, the inquiry into the risk of changing one's mind must establish a concrete and tangible risk of deliberately setting the vehicle in motion. It is trivial to say that "anything can happen" and "everything has risk". Convictions based upon trivial speculation offend the notion of justice. I agree with Bayda C.J.A. that conjecture or speculation has no place in the criminal law. That cannot be how the phrase "care or control" should be construed. I say this for four reasons.
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> First, as a matter of construction the inquiry into intent found in s. 258(1)(a) is redundant if "care or control" is construed so that merely being intoxicated in a vehicle triggers the offence. Defeating the reverse onus with evidence of a lack of intent would then serve no purpose.
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> Second, s. 253 should be interpreted in a way that does not breach the ***Charter***. According to *Toews* and *Penno* to establish *de facto* care or control under s. 253 the Crown cannot merely rely on the presence of an intoxicated accused in a motor vehicle, but must prove a risk of deliberately or inadvertently setting the vehicle in

motion. If the threshold to establish that risk is minimal then the accused has a *de facto* burden of proving his or her conduct was not risky to escape an impaired care or control conviction. A low threshold of risk means s. 253 operates like s. 258(1)(a), in that it creates a reverse onus, but without the constitutional safeguard of proof of intent not to drive defeating conviction. For s. 253 to be constitutional the risk must be tangible. Although imputing intent for a self-intoxicated accused may be permitted in some circumstances by s. 1 (per Lamer C.J. in *Penno*), the Crown here goes farther and suggests that the appellant's intent not to set the vehicle in motion ought to be ignored. Such an interpretation of care or control is not justified by s. 1 of the ***Charter***.

Third, care or control should not be found in cases of minimal risk. The Supreme Court of Canada in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General),* [2004] 1 S.C.R. 76 at paras. 2 and 132, acknowledged that, while problematic, the common law defence of *de minimis non curat lex* exists in the criminal context. Care or control should not be interpreted to capture actions which are taken to prevent harm, and have no real harm in themselves.

Fourth, Parliament intended these provisions to discourage people from driving while impaired, and the *Criminal Code* should not be interpreted in a way that may defeat that purpose, particularly in a climate where winter weather can be deadly. A broad interpretation of care or control which offers a person the choice of freezing or risking a criminal conviction upon entering their vehicle, regardless of whether he or she drives, may not deter the choice to drive.

This policy objective was commented on by LoVecchio J. in *R. v. Grover* (2000), 87 Alta. L.R. (3d) 276 at para. 58, 2000 ABQB 779:

> The rationale for the recognition of good [judgment] is simple. If the individual pulls over and the vehicle may not be put in motion, as the driver has changed his intention and the use of the motor vehicle, the risk posed by driving the vehicle no longer exists.

Therefore, I conclude that, for the purpose of s. 253, absent a risk of unintentionally setting the vehicle in motion, care or control is established where the circumstances demonstrate a tangible risk that the accused will change his or her mind to put the vehicle in motion

Conclusion

[22] The evidence of the witnesses Knaack, Dunbar and Gardiner were not challenged or contradicted. I found their evidence to be consistent, reasonable and credible.

[23] As I have indicated earlier, the presumption found in s. 258 of the *Criminal Code* does not apply. As a result, the Crown has the onus of proving "care or control" beyond a reasonable doubt.

[24] I agree with Bayda J.A. in *R.* v*. Shuparski* (supra) that the following three factors constitute care and control:

a) acts involving the use of a car, or its fittings and equipment or alternatively, a course of conduct with the vehicle; plus

b) an element of risk of setting the vehicle in motion, whether intentionally or unintentionally; plus

c) an element of dangerousness arising from the risk of setting the vehicle in motion.

[25] The evidence established that the motor was running, the parking brake was engaged and that in order for the vehicle to be put in gear, the clutch must first be pushed to the floor. In the circumstances, the Crown has not established, beyond a reasonable doubt, that there was a tangible risk of setting the vehicle in motion unintentionally.

[26] There was clear and uncontradicted evidence that Mr. Knaack did not intend to drive after drinking with his friends. There was a plan in place to leave his truck, meet up with Mr. Gardiner and go to his residence for the night using a taxi. Unfortunately, due to unforeseen circumstances, that plan fell through. Mr. Knaack's other alternatives, take a hotel room or get a ride to his mother's house in Marsh Lake were not practical in the circumstances.

[27] I am satisfied that Mr. Knaack took deliberate steps throughout the evening to avoid driving after drinking. Given that state of mind or attitude, I find

it highly unlikely that he would create a dangerous situation after he awoke by driving if he was unfit to drive.

[28] Any risk that he might wake up and drive the vehicle while impaired, in my view, and on those facts, is mere speculation or conjecture. Such risk in the circumstances of his case falls short of the tangible risk defined in *Ogrodnick* (supra) which is of concern to this Court, namely that Mr. Knaack would change his mind and put the vehicle in motion while still impaired.

[29] In conclusion, the Crown has not satisfied me that there existed, on these facts, the required element of dangerousness arising from the risk of setting the vehicle in motion.

[30] I find Mr. Knaack “Not Guilty” of the charges before the Court.

Lilles, T.C.J.