Citation: *R. v. Tibbo*, 2020 YKTC 9

Date: 20200220
Docket: 18-10025
Registry: Watson Lake
Heard: Watson Lake
and Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Chief Judge Chisholm

REGINA

v.

CRYSTAL ANNE TIBBO

Appearances:
Amy Porteous — Counsel for the Crown
Joni Ellerton — Counsel for the Defence

RULING ON *VOIR DIRE* AND REASONS FOR JUDGMENT

Introduction

[1] CHISHOLM C.J.T.C. (Oral): Ms. Crystal Anne Tibbo faces three *Criminal Code* charges, namely that: she had care and control of a motor vehicle while her ability to operate it was impaired by alcohol (s. 253(1)(a)); she had care and control of a motor vehicle while her blood alcohol level exceeded the legal limit (s. 253(1)(b)); and she failed or refused, without reasonable excuse, to comply with a demand to accompany a peace officer for the purpose of enabling a sample of her breath to be analysed by an approved screening device (s. 254(5)).

[2] Ms. Tibbo does not take issue that the events concerning theses allegations occurred on March 30, 2018, at or near the Town of Watson Lake. Police swore the Information on September 11, 2018. The Crown proceeded by way of summary conviction.

[3] Additionally, counsel agree that Count 3 of the Information may be amended to conform with evidence led at trial and read that she: "did without reasonable excuse fail or refuse to comply with a demand made to her by Cst. Cole Nedohin, a peace officer, under subsection 254(2) of the *Criminal Code*, to provide forthwith a sample of the breath of Crystal Anne Tibbo as in the opinion of Cst. Cole Nedohin was necessary to be taken for analysis by means of an approved screening device contrary to section 254(5) of the *Criminal Code*".

[4] The defence challenges these charges on a number of bases, including by way of a Notice of *Charter* Application seeking the exclusion of evidence, based on an alleged s. 10(b) *Charter* breach.

[5] The evidence regarding the *Charter* application was adduced in a *voir dire* and the Crown led other evidence in the trial proper. Counsel agreed to a blended hearing whereby any admissible evidence led in the *voir dire* would become part of the trial proper. On the first day of the trial, the Crown called five civilian witnesses. On the continuation date, the investigating officer testified in a *voir dire*. Subsequently, a forensic toxicologist testified for the Crown. The defence called no evidence in the *voir dire*, nor in the trial proper.

[6] I adjourned the matter at the request of counsel for the filing of written submissions on both the *Charter* and trial issues.

[7] This is my decision on both the *voir dire* and the trial.

Summary of the Relevant Facts

[8] Deanna Zorn testified that she saw and spoke to Ms. Tibbo in the late afternoon/early evening of March 30, 2018. A few days earlier, Ms. Zorn's brother, Garth, had died unexpectedly, and as a result she travelled to Watson Lake to assist with his affairs. Ms. Tibbo dated her brother 10 to 15 years before his death, and as a result Ms. Zorn had met her a few times years ago. During the afternoon of March 30, Ms. Zorn and her mother, Georgina Flower, received people offering condolences at Ms. Zorn's brother's home.

[9] Ms. Zorn testified that a number of people had left the residence just prior to Ms. Tibbo's unexpected arrival. Ms. Zorn smelled alcohol on her breath, and observed that she staggered "a little bit". Additionally, Ms. Zorn felt that Ms. Tibbo was loud, obnoxious, and belligerent. She asked Ms. Tibbo to leave because Ms. Zorn believed that she was acting inappropriately. Ms. Zorn watched her drive away, but did not contact the RCMP. She estimated that this incident occurred between 5 and 6 p.m. Her late brother was a volunteer firefighter and had a radio in his home. Ms. Zorn recalls hearing of a single vehicle accident out of town towards Whitehorse via the radio about an hour after Ms. Tibbo departed. She recalled saying that she hoped that "it's not Crystal for [Crystal's son's] sake".

[10] Georgina Flower testified that she was staying at her deceased son's (Garth's) home when Ms. Tibbo arrived there in a vehicle late in the afternoon or early evening. A number of people who had come to offer condolences regarding her son's death had just departed. Ms. Flower had only met Ms. Tibbo on a few previous occasions between 15 and 20 years ago when she was dating Garth. Ms. Flower described Ms. Tibbo as being loud, bold, brash and rude on this day. She entered the house with a dog and did not remove her footwear. She did not offer her condolences for Ms. Flower's loss. Instead, Ms. Tibbo asked for her late son's plants. She described her as smelling of alcohol. She suggested to Ms. Tibbo that she should not be driving. Ms. Tibbo responded by saying something to the effect of "don't start with me". Ms. Flower testified that she believed Ms. Tibbo was inebriated, although she did not appear to have difficulty with her balance when walking. Ms. Flower did not contact the RCMP.

[11] Cst. Nedohin of the RCMP in Watson Lake was dispatched to a report of a motor vehicle accident on the Alaska Highway at approximately 7:40 p.m. He testified to arriving at the scene approximately 20 minutes later. The highway was snow covered and very icy. Upon arrival at the scene, he noted vehicles parked on both sides of the highway. He also observed tracks of a vehicle leaving the westbound lane and proceeding over a steep embankment. At the bottom of the embankment, he noted a car at the end of the tracks which had come to a stop in deep snow.

[12] The officer descended the embankment and located a woman in the driver's seat and a dog in the back seat. He later determined the woman to be Crystal Tibbo. Her head and body were leaning to the right and she appeared unconscious. The officer smelled alcohol but could not determine its origin. He performed traffic control while

Emergency Medical Services ("EMS") personnel removed Ms. Tibbo from the car. Cst. Nedohin understood from another officer that Ms. Tibbo was yelling, screaming and being combative while EMS personnel tried to extract her. Based on information he had received, and his observations of Ms. Tibbo at the scene, he was of the view that there was a chance that she was impaired. After members of the fire department and EMS extracted Ms. Tibbo from the vehicle, she was placed in an ambulance for transport to the Watson Lake hospital. Cst. Nedohin contacted another officer to bring an approved screening device ("ASD") to the hospital in the event that the investigation moved in that direction.

[13] Sheldon Lutz testified that he and members of his family were returning to Watson Lake from Whitehorse when they came upon the single vehicle accident. He was the first to descend the embankment to reach the vehicle. He estimated the snow was one-half metre deep. He testified that a woman who had also gone down the slope to assist opened the driver's side door and turned off the ignition. He noted that the female driver was unconscious. Mr. Lutz remained at the scene until the police, ambulance, and firefighters arrived. The vehicle which had gone off the road was partially covered in snow. He estimated that EMS arrived approximately 45 minutes later.

[14] Amy Wright, a primary care paramedic, testified that she arrived on scene at 8:06 p.m. When she attended to assist the driver of the vehicle, she noted Ms. Tibbo's eyes were closed and that she was moaning and drooling. Ms. Wright noted the smell of alcohol on Ms. Tibbo's breath; that she was not answering questions appropriately, and described her as uncooperative, violent and difficult to reason with. Ms. Tibbo became

combative when Ms. Wright and other emergency professionals attempted to extricate her from the vehicle and immobilize her. She did not observe any visible injuries and did not note any obvious trauma. She indicated that there was no damage to the vehicle and no airbag deployment. Ms. Wright agreed that there were other reasons that people may act somewhat erratically, including anxiety, some form of trauma or PTSD.

[15] Ms. Wright observed a number of alcohol containers in the vehicle including an empty bottle of Wiser's rye on the driver's side floor and an open can of a Grower's cooler.

[16] Richard Rotondi, a long time member of the local EMS, happened upon the scene of the accident and assisted in removing Ms. Tibbo from the vehicle. She was unconscious and unresponsive, but her heart rate and respiratory rate were normal. His primary assessment of her neck, back and extremities revealed that there were no injuries. He observed that there was no damage to the vehicle from her body, such as a cracked or broken windshield, a common occurrence in such a situation as a result of the driver striking their head. He described Ms. Tibbo as being very fortunate.

[17] Mr. Rotondi noted a smell of alcohol in the vehicle and saw a beer can on the floor of the front passenger seat. Ms. Tibbo became conscious but disoriented, and started to respond to verbal commands. However, she was combative when he and other responders attempted to remove her with a device that restricts the body. He described Ms. Tibbo as being in and out of consciousness as they placed the extrication device on her.

[18] Mr. Rotondi testified that he believed the vehicle that Ms. Tibbo had been operating must have left the road at a high rate of speed in order to pass through the ice and snow combination at the side of the road and to continue down the embankment.

[19] When Cst. Nedohin arrived at the hospital around 9:30 p.m., he heard Ms. Tibbo yelling and screaming in the ambulance bay. She was being very combative by punching and kicking. He assisted emergency and medical personnel restrain her by holding her arms down. He noted a strong smell of alcohol coming from her breath. He detained her for an impaired driving investigation. Once he finished assisting medical personnel, he spoke to the attending physician to ensure that no medical procedures were contemplated for Ms. Tibbo. He made an ASD demand approximately eight minutes after forming his grounds.

[20] Cst. Nedohin did not believe that Ms. Tibbo understood the demand when he read it from his card. She was looking at him, but not responding. She laughed, yelled and turned her head. He attempted to explain the demand in simpler terms and the consequences of not providing a sample. She did not respond to him verbally, but he felt that she had a better understanding than after he had read the demand to her. Nonetheless, she continued to yell and laugh. The officer explained to Ms. Tibbo how to blow into the ASD.

[21] In response, Ms. Tibbo made attempts to blow but provided insufficient samples. At times, she bit the mouthpiece resulting in it dislodging from the machine. After a number of attempts and explanations from the officer, she turned her head away from him and stated “no”.

[22] Cst. Nedohin arrested her and provided her with her s. 10(b) *Charter* rights. Ms. Tibbo responded by laughing. When he asked if she understood, she turned her head away from him. He believed that she understood her rights, but he could not be certain. He did not make further attempts to clarify this.

[23] The officer did receive further information from his partner at 10:34 p.m. with respect to Ms. Tibbo's state earlier in the evening when she interacted with Ms. Zorn and Ms. Flower. He was advised that Ms. Tibbo was heavily intoxicated when leaving the residence. When he spoke to the attending physician at 10:47 p.m. to determine if blood would be drawn from Ms. Tibbo, he learned that blood had been drawn 40 minutes earlier.

[24] He subsequently obtained a warrant to seize a sample of this blood.

[25] Karen Chan, a forensic alcohol specialist, was qualified to provide expert evidence in the areas of physiology of alcohol, which includes absorption, distribution, and elimination of alcohol from the human body, and the pharmacology of alcohol, including the effects of alcohol on behaviour and motor function and how this relates to the operation of motor vehicles.

[26] Ms. Chan examined a vial of blood received from Cst. Nedohin that medical personnel at the Watson Lake hospital drew from Ms. Tibbo at 10:07 p.m. on March 30, 2018. The National Forensic Laboratory Services analyzed this blood sample and determined that the blood alcohol concentration ("BAC") of Ms. Tibbo at 10:07 p.m. was 386 milligrams of alcohol in 100 millilitres of blood (mg/%). By way of extrapolation, Ms.

Chan determined that Ms. Tibbo's blood alcohol concentration at 7:38 p.m. was between 411 and 436 mg/%.

[27] Ms. Chan based her opinion on the following information:

- That Ms. Tibbo had an elimination rate of 10 to 20 milligrams per hour;
- That Ms. Tibbo had consumed no alcohol in the 30 minutes prior to the time of the incident; and
- That Ms. Tibbo had consumed no alcohol between the time of the incident and the time medical personnel took the sample.

[28] Ms. Chan found that in order for Ms. Tibbo to have had a blood alcohol concentration of 80 mg/% (the legal limit) at 7:38 p.m. and subsequently produce a BAC of 386 mg/% at 10:07 p.m., there would had to have been at a minimum 11.9 to 12.8 ounces of 40% v/v liquor, unabsorbed in Ms. Tibbo's stomach at the time of the incident or consumed after the incident and before the sample was collected.

[29] This calculation is a theoretical minimum and in a real drinking situation, the actual amount of alcohol required to increase the blood alcohol concentration to that level could be up to twice the above-noted amount.

[30] Ms. Chan's report sets out the expected symptoms of a social drinker with a blood alcohol concentration of over 300 mg/%. This blood alcohol concentration "is generally associated with severe intoxication, characterized by significant mental and motor dysfunction which could result in inertia (lack of movement), apathy (lack of emotional reactions), incontinence, stupor, loss of consciousness, coma and possible death due to respiratory depression".

[31] Ms. Chan acknowledges that if the drinker is accustomed to the effects of alcohol through repeat exposure to high blood alcohol concentration, they may require a higher blood alcohol concentration to display the above-noted symptoms.

[32] Ms. Chan also testified that at 80 mg/%, a driver "will exhibit impairment in some or all of the skills necessary to safely operate a motor vehicle".

Position of the Parties

Defence

Issue I) – s. 10(b) Charter

[33] The defence submits that as soon as Cst. Nedohin formed the opinion that Ms. Tibbo's ability to operate a motor vehicle was impaired by alcohol, he was obligated to inform her of her right to counsel and provide her with her right to counsel. He delayed providing her s. 10(b) rights until after her refusal to provide an ASD sample. Even then, he did not takes steps to ensure that she understood her rights and did not take steps to implement those rights by providing her access to a lawyer. As a result of this *Charter* breach, the subsequent evidence of the ASD demand, refusal and blood samples seized by warrant from the hospital should be excluded pursuant to s. 24(2).

Issue II) – Proof of Impairment

[34] Secondly, the defence argues that the Crown has not proved beyond a reasonable doubt that when the police arrived at the accident scene, Ms. Tibbo's ability to operate a motor vehicle was impaired by alcohol. The defence contends that the observations of the witnesses at the scene, aside from the smell of alcohol, are

consistent with the shock of being in an accident and/or head trauma resulting from the accident. As the Crown did not lead evidence to refute the inference that the symptoms the defendant displayed were the result of head trauma and/or shock, the defence contends that it cannot be concluded that impairment by alcohol was the cause.

Issue III) A) – Validity of the s. 254(2) Demand

[35] In the alternative, the defence argues that the s. 254(2) demand was invalid because the officer had already concluded that he had reasonable grounds to believe that her ability to operate a motor vehicle was impaired by alcohol. Therefore, Ms. Tibbo was not obligated to comply with the demand.

Issue III) B) – Reliability of the Expert Opinion Evidence regarding BAC at the time of Incident

[36] Also, the defence submits that the Crown has not proved the assumption made by the forensic toxicologist that Ms. Tibbo had not consumed alcohol 30 minutes prior to the incident. As there is a basis to conclude from the empty liquor containers in the vehicle that she had consumed alcohol in that 30 minutes, the Court cannot rely on the opinion of Ms. Chan regarding the defendant's BAC.

Issue III) C) – Care and Control

[37] Finally, the defence maintains that Ms. Tibbo has rebutted the presumption that she occupied the driver's seat for the purpose of setting the vehicle in motion. At the time the police located Ms. Tibbo in the driver's seat, her vehicle was inoperable as a

result of being stuck in snow and there was no realistic risk of danger to people or property.

Crown

Issue I) – s. 10(b) Charter

[38] The Crown contends that Cst. Nedohin only made the ASD demand at the hospital after ensuring that Ms. Tibbo did not have any other pressing medical needs. In all the circumstances, he made the demand forthwith and there was no breach to her right to counsel.

[39] After arresting Ms. Tibbo for refusal, the Crown submits that the investigating officer properly read her right to counsel. Although it would have been preferable had he confirmed her understanding of her s. 10(b) rights, there was no evidence that the police detained her subsequent to this time. The police did not attempt to elicit information or other incriminatory evidence from her. The Crown argues that there was no obligation for the police to advise her of any ongoing investigation. If there was a *Charter* breach, it was of minimal seriousness.

Issue II) – Proof of Impairment

[40] The Crown submits that the evidence of Ms. Zorn and Ms. Flower is sufficient to find that Ms. Tibbo's ability to operate a motor vehicle was impaired by alcohol. The Crown contends that the offence of care and control of a motor vehicle, for which Ms. Tibbo is charged, is an included offence of operating a motor vehicle. Additionally,

based on the observations of Cst. Nedohin and others at approximately 7:40 p.m. and beyond, the Crown argues that the impaired care and control charge is made out.

Issue III) A) – Validity of the s. 254(2) Demand

[41] The Crown maintains that Cst. Nedohin had a suspicion that Ms. Tibbo had alcohol in her body, but that he was not convinced that he had objective reasonable grounds that her ability to operate a motor vehicle was impaired by alcohol. Therefore, he properly made an ASD demand to Ms. Tibbo. Further, the Crown submits that even if the officer had actually formed reasonable grounds to believe that the defendant had committed a s. 253 offence, the ASD demand should be considered valid. It is a screening tool that police should be able to rely on to properly investigate possible drinking and driving offences.

Issue III) B) – Reliability of the Expert Opinion Evidence regarding BAC at the time of Incident

[42] The Crown submits that even though there were alcohol containers within the vehicle, it alone is insufficient to raise a bolus drinking defence and meet the evidentiary burden that the defendant has.

Issue III) C) – Care and Control

[43] The Crown also argues that as a result of the defendant having been found in the driver's seat, the s. 258(1)(a) presumption is engaged and Ms. Tibbo has not rebutted that presumption. The fact that the vehicle was immoveable as a result of being stuck

in the snow neither rebuts the presumption nor removes an essential element of care and control.

Analysis

Issue I) – s. 10(b) Charter – a) from Detention to ASD use

[44] In the context of a drinking and driving investigation, a limit on the right to counsel is prescribed during roadside screening methods, including the period of detention for a driver to comply with an ASD demand pursuant to s. 254(2) of the *Criminal Code* (*R. v. Thomsen*, [1988] 1 S.C.R. 640; and *R. v. Orbanski*; *R. v. Elias*, 2005 SCC 37).

[45] An officer making an ASD demand must also ensure that the breath sample is provided forthwith. In assessing the "forthwith" requirement, a court must consider the overall circumstances. In *R. v. Quansah*, 2012 ONCA 123, the Court stated at para. 52:

> In my respectful opinion, articulation of the precise linguistic equivalent for "forthwith" is less important than a careful consideration of all the circumstances of the particular case. …

[46] In the matter before me, the defence submits that as the investigating officer had subjective reasonable grounds to believe that Ms. Tibbo's ability to operate a motor vehicle was impaired by alcohol before making the ASD demand, the officer was obligated to provide her with her right to counsel.

[47] As indicated, Cst. Nedohin testified that at the hospital, he smelled alcohol from Ms. Tibbo's breath. Based on this and his earlier observations of her, although he believed that she was "impaired", he was cognizant that she may have sustained head

trauma in the accident. I understood him to mean that any head trauma suffered might account for some of the behaviour that she was exhibiting, which behaviour was also consistent with impairment. Therefore, as he was concerned about the objective nature of his reasonable grounds that she was in care and control of a motor vehicle while impaired, he made the ASD demand.

[48] In these circumstances, I find that there was no breach of Ms. Tibbo's s. 10(b) rights.

[49] As outlined, there was an eight minute delay between the time the officer developed his grounds and the reading of the demand. He testified that during this period of time, he assisted medical personnel in restraining her. He also spoke to the attending doctor to determine if any medical procedures had to be performed immediately, as well as whether the doctor cleared Ms. Tibbo medically to blow into the ASD. The officer's course of action in delaying the ASD test was reasonable. In the result, I find that the officer administered the ASD forthwith.

s. 10(b) *Charter* – b) Following use of the ASD

[50] The right to counsel is composed of both informational and implementational components. The police have the duty to explain to a detainee their right to retain and instruct counsel without delay, including the availability of legal aid and duty counsel. Once a detainee has indicated a desire to do so, the police are to give them a reasonable opportunity to exercise this right and are to refrain from eliciting evidence from the detainee until they have been provided such an opportunity (*R. v. Bartle*, [1994] 3 S.C.R. 173, at para. 17).

[51] In this case, Cst. Nedohin neglected to confirm Ms. Tibbo's understanding of the informational component. Her right to counsel was therefore breached.

c) Section 24(2) Analysis

[52] The three branches of the *R. v. Grant*, 2009 SCC 32, analysis are:

1. Seriousness of the *Charter*-infringing state conduct;
2. Impact of the breach on the *Charter*-protected interests of the accused; and
3. Society's interests in an adjudication of the case on its merits.

[53] In performing this analysis, courts are to assess the long-term effect of admitting evidence obtained in breach of an accused's *Charter* rights on public confidence in the justice system.

[54] Under the first heading, the investigating officer should have been more diligent in ensuring that Ms. Tibbo understood her s. 10(b) rights and in determining whether or not she wished to exercise them. Police must understand the importance of ensuring that a detainee fully understands their right to counsel.

[55] At the same time, this situation is unlike the accused in *R. v. Taylor*, 2014 SCC 50, who expressly requested to speak to his lawyer, but was never afforded the opportunity. Indeed, in this matter, there is no direct evidence that Ms. Tibbo did not understand the informational component or that she was left in a state of uncertainty as to her s. 10(b) rights.

[56] Regarding the second heading, in the circumstances of this case, I find that the impact of this breach on Ms. Tibbo's *Charter*-protected interests to be on the lower end of the spectrum. I make this finding because there is no evidence to indicate that the police continued to detain Ms. Tibbo after her arrest. In fact, in the circumstances of this case, there is no apparent reason for the officer to have arrested Ms. Tibbo after her refusal to provide a breath sample, considering the reasons for arrest enumerated in s. 495(2) of the *Code*.

[57] Additionally, there is no evidence that the officer pursued the impaired driving investigation directly with Ms. Tibbo. It was only after learning of some evidence of Ms. Tibbo's impairment prior to the accident that he spoke to the attending physician and learned that medical staff had already drawn blood from her. The officer did not attempt to elicit any further information from her.

[58] The police sought and obtained judicial authorization to seize the blood from the hospital approximately 13 days later. Unlike in *Taylor*, there is an absence of a clear nexus between the s. 10(b) breach, the drawing of blood and its ultimate seizure by warrant.

[59] Under the third heading, society's interest in the adjudication of this case on its merits is substantial. As conceded by the defence, the evidence from the seized blood sample is "highly reliable". Also, there is a strong societal interest in the adjudication of serious charges on reliable evidence.

[60] A balancing of the factors in this case leads to the inclusion of the evidence.

Issue II) Proof of Impairment

[61] The defence submits that as Ms. Tibbo has been charged with the offence of "care and control" and not of impaired operation, the relevant time for the determination of impairment is when the police attended the scene of the single vehicle accident and not at any point prior, such as when she visited the Zorn residence. The Crown takes a contrary view, arguing that a defendant charged with "care and control" may be convicted of impaired operation of a motor vehicle.

[62] I need not review and consider the case law in this regard, as at the end of the day, I have a reasonable doubt as to whether Ms. Tibbo's ability to operate a motor vehicle was impaired by alcohol at the time that she visited the Zorn residence. Neither Ms. Zorn nor Ms. Flower knew Ms. Tibbo very well and their limited interactions with her were very dated. Their respective evidence is also contradictory in one respect. Ms. Zorn believed that the defendant was staggering a little bit, whereas Ms. Flower concluded that she had no difficulty walking. Although both were confident that Ms. Tibbo had consumed alcohol, and was acting inappropriately, their evidence with respect to this latter point was not especially detailed. Neither decided to call the police and they did not observe any bad driving. Therefore, in my view, the evidence as a whole is insufficient to meet the threshold established in *R. v. Stellato*, 1993 ONCA 3375, aff'd [1994] 2 S.C.R. 478, namely that the Crown prove that there was impairment by alcohol, ranging from slight to great, of the defendant's ability to operate a motor vehicle.

[63] Regarding the question of impairment, the defence argues that aside from the smell of alcohol, the observations made by witnesses at the scene of the accident are consistent with the panic or shock of being in an accident and/or a blow to the head.

[64] It is important to consider all the facts from the time Ms. Tibbo visited the Zorn residence to the time that Ms. Tibbo was seen at the hospital by medical personnel and the police.

[65] As noted, Ms. Tibbo had consumed alcohol before attending the Zorn residence in the late afternoon/early evening. While, as mentioned, the evidence of the two witnesses was contradictory on one point, both described her speaking loudly. Other adjectives used by these witnesses to describe her behaviour included being obnoxious, bold and belligerent. Ms. Tibbo subsequently went off the road and down an embankment into deep snow.

[66] When first responders dealt with Ms. Tibbo at the scene of the accident, Amy Wright, one of the on-call paramedics, described her as uncooperative, violent and difficult to reason with. Her combative behaviour continued to be noted at the hospital more than an hour and a half later.

[67] Alcohol containers, including an empty 13 ounce bottle of rye, were located in the motor vehicle. There was a strong smell of alcohol coming from the vehicle and later noted on Ms. Tibbo's breath. In my view, all of this evidence is supportive of Ms. Tibbo's ability to operate a motor vehicle being impaired by alcohol.

[68] I also take into account that Mr. Rotondi, the off-duty paramedic, testified that there was no evidence that Ms. Tibbo had struck her head in the vehicle, and that his assessment and palpation of her neck, back and extremities revealed no trauma or injury. I consider the evidence of Ms. Wright who testified that there was no obvious trauma to Ms. Tibbo, the airbag had not deployed, and there was no damage to the vehicle. She observed Ms. Tibbo moaning, drooling and not responding to verbal commands, and later becoming combative with those trying to assist her.

[69] Despite what police described as very icy road conditions, Mr. Rotondi testified that in his view the vehicle in which Ms. Tibbo was located must have been going at a high rate of speed to travel through the snow/ice barrier at the side of the road and to proceed down the embankment. It would be expected in those conditions that users of the road would be driving cautiously.

[70] As a whole, this evidence establishes beyond a reasonable doubt that Ms. Tibbo's ability to drive was impaired to some degree by alcohol (*R. v. Andrews*, 1996 ABCA 23, at para. 25).[1]

Issue III) A) – Validity of the s. 254(2) Demand

[71] The defence argues that as the investigating officer had reasonable grounds to believe that Ms. Tibbo had committed a s. 253 offence, there was no reason to use a screening device to establish his grounds for a blood or breathalyser demand.

[1] I have found that the defendant's ability to operate a motor vehicle was impaired by alcohol without considering her blood alcohol readings at the time of the incident. However, as set out further in this decision, I find that those readings are admissible. Based on the evidence of Ms. Chan, those readings provide further proof of impairment by alcohol of the defendant's ability to operate a motor vehicle.

[72] Cst. Nedohin indicated that he felt that he had subjective grounds to believe that the defendant had committed a s. 253 offence, however he was concerned about a possible head injury as a result of the accident. He testified that he thought that someone else considering the circumstances of Ms. Tibbo might view the situation differently and not conclude his belief to be a reasonable one. Therefore, out of an abundance of caution, he employed the ASD.

[73] A number of cases have considered this type of issue with differing results (see, for example, *R. v. Carty*, 1998 ABQB 2; *R. v. Minielly*, 2009 YKTC 9; *R. v. Dunphy*, 2012 ONCJ 492; *R. v. Gruythuyzen,* 2013 ONCJ 188; and *R. v. Minhas*, 2017 ONSC 2332). In a nutshell, the difference of opinion in these decisions turns on whether a police officer has the authority to make an ASD demand once the officer has formed reasonable grounds to believe that the driver has committed a s. 253 offence.

[74] In the circumstances of the matter before me, I find that I need not weigh in on this subject. After a consideration of his evidence as a whole, it is clear to me that Cst. Nedohin was uncertain that there were reasonable grounds to believe that Ms. Tibbo had contravened s. 253. As a result, he properly employed the ASD.

Issue III) B) – Reliability of the Expert Opinion Evidence regarding BAC at the time of Incident

[75] The defence contests the forensic alcohol specialist's assumption that Ms. Tibbo did not consume alcohol 30 minutes prior to the "incident time", being 7:38 p.m. on March 30, 2018.

[76] The Crown has the obligation of establishing the factual basis upon which an opinion is based (*R. v. Abbey*, [1982] 2 S.C.R. 24, at para. 52).

[77] Ms. Chan calculated Ms. Tibbo's BAC between 411-436 mg/% at the time of the incident. She acknowledged that if Ms. Tibbo had been drinking alcohol during the 30 minutes prior to the incident (i.e. 7:08 -7:38 p.m.), the above-noted calculation would overstate the actual BAC by an amount proportional to the amount of alcohol consumed. This is because the amount of alcohol consumed during that period would be sitting in the stomach, having not been absorbed into the blood stream. On average, it takes 30 minutes from the end of drinking for the BAC to reach the maximum or peak BAC, after which that concentration begins to decline.

[78] In order to have a BAC within the legal range at 7:38 p.m., but a BAC of 386 mg/% at 10:07 p.m. (when blood was drawn at the hospital), a 57 kg woman would have had to have a minimum of 11.9 to 12.8 ounces of hard liquor (40% v/v liquor) unabsorbed in her stomach at 7:38 p.m.

[79] The issue that arises is what is known as bolus drinking which has been described as "the consumption of a large amount of alcohol within 30 minutes of the alleged offence" (*R. v. Saul*, 2015 BCCA 149, at para 25). It is a phenomenon that has been described as "relatively rare" (*R. v. Phillips* (1988), 42 C.C.C. (3d) 150, at pp. 158-162)

[80] In *R. v. Paszczenko*, 2010 ONCA 615, the Court referred to the unenviable position of the Crown in having to prove a negative (i.e. that the defendant has not engaged in bolus drinking). In this regard, the Court stated at paras. 29 and 30:

> 29 At one level, the answer is straightforward: the Crown need do very little. The toxicologist's report is premised -- amongst other things -- on there being no bolus drinking. In the absence of something on the record to suggest the contrary, on what basis could a trier of fact conclude there was bolus drinking? This court has answered the question posed by concluding that triers of fact may resort to a common sense inference in such circumstances, namely, that people do not normally ingest large amounts of alcohol just prior to, or while, driving: see Grosse, Hall, and R. v. Bulman, [2007] O.J. No. 913, 2007 ONCA 169. As noted above, bolus drinking has been said to be a "relatively rare" phenomenon: Phillips, at pp. 158-62 C.C.C. "No bolus drinking" is therefore largely a matter of common knowledge and common sense about how people behave.
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> 30 In Grosse, at p. 792 O.R., the court said:
>
> > The trial judge was also entitled to consider that it was inherently unlikely that the respondent, in the space of less than 30 minutes, before embarking on his trip home to Brampton would consume the equivalent of nine ounces of alcohol. This was not a matter of taking judicial notice of drinking patterns but merely applying common sense as to how ordinary people behave.

[81] It is true that three alcohol containers were located in Ms. Tibbo's vehicle, including an empty 13 ounce rye bottle at her feet. Is this, in and of itself, sufficient to suggest that Ms. Tibbo consumed a significant portion of that bottle of alcohol in the 30 minutes prior to being located in the ditch?

[82] The containers do give rise to the possibility that Ms. Tibbo consumed alcohol while the vehicle was on and/or off the road, however, this is not the end of the matter. It is important to keep in mind that the evidence establishes that Ms. Tibbo had already started drinking alcohol earlier in the day. Aside from displaying some signs of alcohol consumption, there is nothing to suggest that her pattern of drinking was unusual at that point, or that in the relatively near future she would commence bolus drinking.

[83] The other significant point is that while Ms. Wright and Mr. Rotondi did not observed any obvious trauma, Ms. Tibbo was unconscious when located. Sheldon Lutz, who was the first person to arrive at her vehicle, testified that it took approximately 45 minutes for the ambulance to arrive. The paramedic, Amy Wright, testified that she arrived at the scene at 8:06 p.m. She described Ms. Tibbo as being slumped over in the driver's seat. Her description reveals that the defendant was, at best, semi-conscious at that time. In my view, the empty rye bottle does not suggest bolus drinking in circumstances where Ms. Tibbo was earlier seen under the influence of alcohol, to some extent, while having access to a motor vehicle, and later found unconscious in a motor vehicle after having gone off the road. This is especially the case where the amount of bolus drinking that would have been required in the 30 minutes before being located is significant.

[84] I find that the Crown has proved the facts underlying Ms. Chan's "no bolus drinking" assumption.

Issue III) C) – Care and Control

[85] The evidence in this matter establishes that the presumption of care and control provided for in s. 258(1)(a) of the *Code* is engaged. Ms. Tibbo was seen driving the vehicle earlier in the day. She clearly drove the vehicle to the point where she went off the road. She was the sole occupant of the running vehicle and passers-by located her in the driver's seat. The defendant has not demonstrated that the occupancy of the driver's seat began without the purpose of setting the vehicle in motion (*R. v. Sarasin*,

2018 ABCA 169; *R. v. Hatfield*, [1997] 33 O.R. (3d) 350 (C.A.); and *R. v. Miller*, 2004 CanLII 24819 (ON CA)).

[86] The s. 258(1)(a) presumption applies and the defendant has not rebutted it.

[87] The defence, however, relies on the decision in *R. v. Boudreault*, 2012 SCC 56, to argue that even where the Crown is able to rely on the s. 258(1)(a) presumption, a realistic risk of danger to persons or property must still be demonstrated before care and control is conclusively established. It is argued that Ms. Tibbo's vehicle was both inoperable and immoveable and presented no realistic risk of danger to persons or property. The defence cites the decision in *R. v. Lu*, 2013 ONCJ 73, to support this position.

[88] *Boudreault* held that when the Crown seeks to establish *de facto* "care and control", it is required to prove a realistic risk of danger. However, when the defendant is unable to rebut the presumption, it does not follow that the Crown still has to prove a realistic risk of danger.

[89] In fact, there are a number of decisions which have made this finding (see, for example, *R. v. MacKenzie*, 2013 ABQB 446; *R. v. Brzozowski*, 2013 ONSC 2271; *R. v. Tharumakulasingam*, 2014 ONCJ 362; and *R. v. Blair*, 2014 ONSC 5327).

[90] As noted in *MacKenzie*, at para. 22:

> If the presumption did not apply unless the Crown established a "realistic risk of danger", the presumption would serve no purpose. The Crown would be required to prove that the accused was seated in the driver's

> seat of a vehicle, an intentional course of conduct associated with a vehicle, and that sitting in the driver's seat created a realistic risk of danger to persons or property. This is the same onus that the Crown would have to satisfy if the presumption did not exist. To interpret the presumption in this way would make it ineffective and essentially meaningless.

[91] Even in situations where the s. 258(1)(a) presumption applies, *R. v. Amyotte*, 2009 CanLII 66900 (ON SC), holds that the presumption may be rebutted if the vehicle is inoperable. In that case, a vehicle was stuck on a hill and could not be moved without the assistance of a tow truck. However, despite the fact that the police and trial judge referred to the truck as "inoperable", there was no evidence that it could not have been driven if it became unstuck. The Summary Conviction Appeal Court, agreeing with the ultimate conclusion of the trial judge, found that an immoveable vehicle, such as the truck in that case, does not "defeat the presumption or remove an essential element of care and control" (para. 110).

[92] The Court in *R. v. Jonah*, 2015 NBQB 4, came to the same determination where the vehicle in question was stuck on a snow bank in a ditch. The truck was immoveable or immobilized, but not inoperable in the event that it became unstuck. Similarly, Ms. Tibbo's vehicle was running and had sustained no apparent damage. There is no evidence that Ms. Tibbo could not have driven it had it become unstuck, for example, with the assistance of a tow truck.

Conclusion

[93] In the result, I find Ms. Tibbo guilty of all three counts. I conditionally stay the s. 253(1)(a) charge on the basis of the rule against multiple convictions in *R. v. Kienapple*, [1975] 1 S.C.R. 729.

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CHISHOLM C.J.T.C.