
CANADA / JUDGMENT

R. v. Lock

2007 BCSC 839

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 839 R. v. Lock

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Lock,

2007 BCSC 839

Date: 20070608

Docket: 56444

Registry: Kelowna

Regina

against

Darcy William Lock

Before: The Honourable Mr. Justice Rogers

Reasons for Judgment

Counsel for the Crown:

D. Campbell

Counsel for the Accused:

O. Butterfield

Date and Place of Hearing:

June 6, 2007

Kelowna, B.C.

Introduction

- [1] In his appeal of his summary conviction of driving with a blood-alcohol concentration over .08, Mr. Lock argues that the learned trial judge misapprehended a portion of the evidence and that the trial judge relied upon that misapprehension when he came to the conclusion that Mr. Lock was guilty. Mr. Lock takes the position that this misapprehension led to a miscarriage of justice and that his conviction should be set aside and an acquittal entered or, alternatively, that there be an order for a new trial.
- [2] In its cross-appeal, the Crown argues that the learned trial judge erred by concentrating upon a single piece of evidence rather than assessing, as he should have, the whole body of evidence before him relating to the charge of driving while impaired. The crown says that the learned trial judge ought not to have acquitted Mr. Lock of driving while impaired but should, instead, have convicted him of that offence.

The Decision Below

- [3] The incident that gave rise to the two driving counts against Mr. Lock occurred in Westbank near Kelowna, B.C. on September 14, 2002. Mr. Lock was operating his pickup truck when, at approximately 12:30 a.m., he drove his truck into collision with his neighbour's house.
- [4] Aside from Mr. Lock himself, there were three witnesses who heard the collision and saw its immediate aftermath. Two witnesses were inside the house. Ms. Kristine Hinter heard the collision and immediately went outside. She testified that she came to the conclusion that Mr. Lock's ability to operate his truck was impaired because just prior to the sound of the impact she heard a vehicle, which she assumed was Mr. Lock's truck, accelerating. She thought that accelerating while driving towards her house was consistent with impaired judgment. She also thought that Mr. Lock was impaired because when he got out of the truck his movements were slow. She did not get close enough to Mr. Lock to detect an odour of alcohol about him and she did not see him exhibit poor balance.
- [5] The other occupant of the house was Ms. Sheena Hinter. She testified that she, too, thought that Mr. Lock was drunk. She came to that conclusion because when she was within four or five feet of him she detected a strong odour of alcohol on his breath. She also felt that his speech was kind of slurred. Finally, she thought that he was impaired because his having driven into the house was consistent with impaired judgment.
- [6] The third witness was Ms. April Zumpano. She came to the conclusion that Mr. Lock was impaired too, but for a somewhat different reason than the Hinters. Ms. Zumpano felt that Mr. Lock was much too calm after the collision, and that his attitude was not consistent with his having just run his truck into a house.

- [7] Ms. Sheena Hinter telephoned the police a minute or two after the accident. In the approximately 15 minutes between the collision and the arrival of Constable Burpee, Mr. Lock traveled between the Hinters' house and his own house, which was located next door, three times. That is to say, in the space of 15 minutes he was in view of and interacting with Kristine and Sheena Hinter and also Ms. Zumpano, but he was also for some part of that time inside his house and out of their view.
- [8] Constable Burpee felt that Mr. Lock was impaired. He came to that conclusion because Constable Burpee detected a smell of alcohol on Mr. Lock's breath, his eyes were bloodshot, his face was flushed, his balance was either only fair or unsteady, and finally his speech was slurred and deliberate. Constable Burpee testified that during his interaction with Mr. Lock at the accident scene Mr. Lock said that he had consumed four cans of beer at his house after the accident. Mr. Lock also told Constable Burpee that the accident happened because his truck's brakes failed. The function of the brakes was never examined.
- [9] Constable Burpee concluded that he had reasonable and probable grounds to demand a sample of Mr. Lock's breath. Constable Burpee took Mr. Lock to the local detachment. The breathalyzer technician, whose name was Constable Hamilton, noted that Mr. Lock appeared to be moderately impaired. The technician did not, however, note any specific indicia of impairment. While he was at the detachment, Mr. Lock elaborated on his story about drinking. He told Constable Burpee that he did not drink any alcohol before the accident, and that after the accident he had four cans of beer and a drink of vodka out of the kind of bottle you would get on an airplane. At 1:40 and 2:00 a.m. Mr. Lock supplied samples of breath for analysis. Both samples produced a result of .160 mg of alcohol per 100 mL of blood.
- [10] Mr. Lock was charged with impaired driving and driving while his blood alcohol concentration exceeded .08. The trial of those charges commenced in Kelowna on August 9, 2005. After one day of trial the case was not complete and the matter was adjourned. The trial resumed and concluded on March 28, 2006.
- [11] In addition to the three civilian witnesses, Constable Burpee and Constable Hamilton, the learned trial judge heard from two experts in the fields of alcohol consumption and the effects of alcohol on human behaviour. The Crown called Mr. Image and Mr. Lock called Mr. Shajani.
- [12] Mr. Image and Mr. Shajani gave essentially the same testimony about the rates of absorption and elimination of alcohol by a person with similar characteristics to Mr. Lock. Mr. Image testified that assuming Mr. Lock had no alcohol from half an hour before the accident to when he gave his breath sample, his blood alcohol concentration at the time of the accident, i.e.: 12:30 a.m., would have been .171 to .183.

- [13] Mr. Image was not able to say how much vodka would be in the type of bottle that a person would get on an airplane. Crown counsel asked him to assume that such a bottle would hold two ounces of liquor. Mr. Image testified that if a person fitting Mr. Lock's characteristics had no alcohol in his blood at 12:30 a.m., and then in the fifteen minutes between 12:30 and 12:45 he consumed four regular Canadian beers plus two ounces of vodka, his blood alcohol concentration would have been lower than the .160 that Mr. Lock's breath samples produced.
- [14] Mr. Shajani's evidence was in much the same vein but from a slightly different approach. Mr. Shajani testified that if Mr. Lock had consumed four beers between 12:30 a.m. and 12:45 a.m., his blood alcohol concentration at 12:30 would have been on the order of .54 to .65. Mr. Shajani testified that if one assumes that Mr. Lock consumed vodka in addition to the four beers, his blood alcohol concentration at 12:30 would necessarily have been less than .54 to .65. Mr. Shajani was not asked to assume that Mr. Lock consumed any particular volume of vodka, and so his testimony did not go farther than that.
- [15] At no point during the trial was there evidence of how much liquor is in a bottle such as one would get on an airplane.
- [16] The learned trial judge carefully reviewed the witnesses' observations of the indicia of impairment that they observed. The learned trial judge also instructed himself correctly with respect to the law relating to exculpatory outside-the-court statements made by an accused. Such evidence may be adduced for the truth of its content and it is for the trier of fact to determine what weight if any to give to that evidence. The learned trial judge also noted the principles expressed by the Supreme Court of Canada in *R. v. W. (D.)* [1991] 1 S.C.R. 742 relating to reasonable doubt and the treatment of evidence from an accused.
- [17] The learned trial judge reasoned that there was evidence from the accused that the collision between his pickup and the Hinters' house was caused by a failure of the truck's brakes. The learned trial judge observed that the brakes' function was never tested. He said:
- [27] With regards to impaired driving that [i.e.: the fact that the accused crashed into a stationary house] really was the primary piece of evidence suggesting the impaired driving and while there is no obligation to show a marked departure from the norm if, in fact, this was not brake related but was simply poor judgment of the driving related, then in this particular case there actually would be a marked departure from the norm. But at the end of the day because the brakes were not tested, I am left with a reasonable doubt on Count 1 and I acquit.
- [18] As for Count 2, the over .08 charge, the learned trial judge said:

- [20] The biggest difficulty I have with that evidence in this particular case is that even the defence expert testifies that if the drinking pattern were what, you know, was the five cans of beer and the one vodka, which is what the accused told the officer on the night of the alleged offence, that there would have been a reading of fifty-four to sixty-five milligrams per cent at 12:30. In other words, that there would have needed to have been some consumption of alcohol prior to the driving at 12:30.
- [21] I look at the fact that this alleged drinking pattern is unsworn evidence. I believe that is something I can take into consideration when dealing with weight to be given to the evidence. I look at the fact that the evidence is inconsistent with the defence expert's evidence with regards to whether any alcohol had been consumed prior to 12:30.
- [22] And, lastly, I look at whether there is any air of reality to thinking that during this fifteen minute period of time the accused consumed five drinks, bearing in mind that during that fifteen minutes the evidence is that for a significant portion of that amount of time the accused had kept coming back out to the accident scene. I never could figure out exactly how many minutes the accused was in the residence, but it was something considerably less than fifteen. No one observed him consuming any alcohol outside the residence. And while I can accept that it is conceivable that someone could drink five drinks of alcohol in ten minutes, it is not a very realistic consumption pattern, especially when coupled with the other points that I have just mentioned regarding the inconsistency with that drinking pattern and the fact that the expert says that with that drinking pattern the accused would have still had a reading of fifty-four to sixty-five milligrams per cent at the time of driving.
- .
- [24] In this particular case when looking at all of the evidence, I am not left with any reasonable doubt. There is no air of reality to any so-called evidence to the contrary and I therefore find that the Crown has proved Count 2, the over .08 count, beyond a reasonable doubt.
- [19] Mr. Lock was sentenced to a conditional sentence of four months for the one count on which he was convicted. He has completed his service of that sentence.

Issues

- [20] Mr. Lock contends the learned trial judge misapprehended Mr. Shajani's evidence. The trial transcript reveals that Mr. Shajani did not testify that if Mr. Lock had consumed four beers plus vodka after the accident his blood alcohol concentration would necessarily have been some positive number at 12:30 a.m. Instead, all that Mr. Shajani said was that if Mr. Lock consumed four beers plus vodka his blood alcohol concentration at 12:30 would have been less than .54 to .65. Mr. Lock says that because there was no evidence of the volume of vodka he says he consumed after the accident, the experts could not opine that at 12:30 his blood alcohol concentration must necessarily have been some positive number. He argues that it is conceivable that the vodka he says he consumed, combined with the four beers he says he also drank, could have driven his blood-alcohol concentration from .0 at 12:30 up to .160 at

1:40 and 2:00.

- [21] If that is so, Mr. Lock says that the trial judge was simply wrong when he said that the defence expert's testimony could be used to negate Mr. Lock's evidence that he had had nothing to drink before the accident. Mr. Lock says that Mr. Shajani never went so far as to say that his blood alcohol concentration could not have been zero at 12:30. He says that it was unfair, improper and a misapprehension of the evidence for the learned trial judge to have used Mr. Shajani's evidence to come to the conclusion that Mr. Lock lied when he told Constable Burpee about having nothing to drink before the accident. It follows, according to Mr. Lock, that it was improper for the learned trial judge to reject Mr. Lock's evidence about having had nothing to drink before the accident based wholly or in part upon Mr. Shajani's testimony.
- [22] In response, the Crown notes that the learned trial judge made a point of saying, at para. 24 of his Reasons, that in coming to his conclusion he looked at all of the evidence. That includes, in the Crown's submission, the fact that Mr. Lock's evidence was unsworn, the fact that no witness saw Mr. Lock with alcohol during the 15 minutes immediately after the accident, and the learned trial judge's common sense observation that drinking four beers and a quantity of vodka in something less than 15 minutes while at the same time walking three times between the scene of the accident and his own home is an unusual and unlikely drinking pattern.
- [23] As for the appeal on Count 1, the Crown submits that the learned trial judge did not give adequate weight to the evidence relating to Mr. Lock's apparent impairment at the scene of the accident nor to the evidence of the circumstances of the accident itself. The Crown argues that the learned trial judge erred by concentrating upon the question of brake failure to the exclusion of other salient evidence relating to the impairment count.
- [24] Mr. Lock says that the learned trial judge did recount that other relevant evidence but found himself with a reasonable doubt on the basis of the brake failure issue. Mr. Lock says that it cannot be a reversible error for the learned trial judge to give credence to a piece of evidence which raised a reasonable doubt.

Discussion

- [25] Mr. Lock told a story to the police that tended to contradict the breathalyzer result. That story was adduced at trial through the evidence of the police officer to whom it was told. It was for the learned trial judge to determine first: whether that story was admissible as evidence in the trial; and second: whether the evidence raised at least a reasonable doubt that at the time of driving Mr. Lock's blood alcohol concentration was below the legal limit.
- [26] The learned trial judge correctly determined that Mr. Lock's story about his alcohol consumption was admissible into evidence.

- [27] The more difficult issue is whether the learned trial judge erred when he rejected that evidence. The neat question is whether the learned trial judge's reasoning process that led to that rejection was tainted by a misapprehension of the evidence.
- [28] It is clear that in coming to his conclusion that Mr. Lock's story was not worthy of belief the learned trial judge relied on:
1. Mr. Shajani's testimony;
 2. The evidence from the civilian witnesses that they had Mr. Lock under observation for at least part of the critical 15 minutes and they never saw Mr. Lock with a drink in that time;
 3. His common-sense conclusion that consuming four beers and some unspecified amount of vodka in less than 15 minutes while also migrating between his own residence and the accident scene next-door is an unusual and unlikely drinking pattern; and
 4. Mr. Lock's story comprised no more than an unsworn conversation with a police officer.
- [29] It is also clear that the learned trial judge cannot have committed an error by relying upon factors 2, 3 and 4 in the list. Those were completely proper things for him to have taken into consideration when he assessed the weight of Mr. Lock's story of his drinking pattern that night.
- [30] It comes around, then, to whether the learned trial judge misapprehended Mr. Shajani's evidence, and whether that misapprehension played "an essential part in the reasoning process resulting in a conviction" (R. v. Kazakoff 2005 BCCA 321).
- [31] The learned trial judge did, I think, misapprehend Mr. Shajani's evidence. That misapprehension was entirely understandable and occurred by no fault of the judge himself. This trial was bifurcated over two days and the gap between those two days verged on unconscionably long. Neither trial counsel made an effort to quantify the volume of vodka that might be found in a bottle such as is distributed on airplanes. The evidence relating to that fact was left in an unsatisfactory state, and yet the parties were prepared to nevertheless argue the case. These difficulties no doubt complicated the learned trial judge's effort to tease nuances from Mr. Shajani's evidence.
- [32] Nevertheless, it remains that Mr. Shajani never opined that Mr. Lock's story was inconsistent with him having a blood alcohol concentration of zero at the time of driving. In his Reasons the learned trial judge said that Mr. Shajani did express that very opinion, and the learned trial judge clearly relied upon that opinion when he concluded that Mr. Lock's story of having had nothing to drink before the accident was not true. It is no great leap to surmise that having found that Mr. Lock told an untruth to the police about not drinking before the accident, the learned trial judge depended on that finding when the judge concluded that Mr. Lock's story about drinking after the accident was also untrue.

- [33] Did that misapprehension play an essential part in the reasoning process that led to rejection of Mr. Lock's story? The learned trial judge referred to it three times in his Reasons, and those references came in every paragraph dealing with the weight the trial judge thought Mr. Lock's story deserved. Whether it was essential I cannot say, but it was certainly important to the learned trial judge. In my view Mr. Shajani's evidence bore directly upon whether the evidence contrary to the breathalyser result raised a reasonable doubt about Mr. Lock's guilt on Count 2. That was a main, and perhaps only real, issue in the trial of Count 2. The learned trial judge's regrettable but understandable misapprehension of Mr. Shajani's evidence resulted in a verdict that was not based upon the actual evidence at trial. It follows that Mr. Lock's appeal of his conviction on Count 2 must be allowed.
- [34] I can find no error in the learned trial judge's conclusion on Count 1. The learned judge's Reasons contain an accurate and complete account of the witnesses' evidence relating to the elements of the offence. He obviously turned his mind to the relevance and weight of that evidence. The learned judge went on to say that the circumstances of the collision alone, absent Mr. Lock's exculpatory statement that his brakes failed, could bottom a conviction of impaired driving. However, the learned trial judge was obliged to assess Mr. Lock's statement about brake failure - he could not simply ignore it. No evidence was led at trial to refute it. Unlike Mr. Lock's fantastical story about alcohol consumption, his assertion about brake failure had a neutral quality: it could be true or it could be false. What that evidence did do, and properly so, was raise a reasonable doubt in the mind of the trial judge. Having a reasonable doubt, the learned trial judge correctly acquitted Mr. Lock on Count 1.

Remedy

- [35] The proper disposition of Mr. Lock's successful appeal is, in my view, to set aside the conviction and order a new trial. Only by a new trial can the true issue of the case be argued, assessed, and adjudicated.

Conclusion

- [36] Mr. Lock's appeal is allowed, the conviction on Count 2 will be set aside and there will be a new trial of that charge. The Crown's cross-appeal is dismissed.

"P.J. Rogers, J."

The Honourable Mr. Justice Rogers

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