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R. v. Evans

Between
Regina, and
Flora Evans

[1995] Y.J. No. 96
DRS 95-19723
Whitehorse Registry No. T.C. 94-01231A

Yukon Territorial Court
Whitehorse, Yukon Territory
Thomas Terr. Ct. J.

Oral judgment: March 17, 1995.
Filed: May 26, 1995.
(8 pp.)

Criminal law — Offences against person and reputation — Motor vehicle — Impaired driving — Evidence and proof.

The accused was tried for impaired driving. She was stopped for speeding. The constable noted signs of impairment, including an overpowering smell of alcohol. Sitting beside the accused was a person who had a lot to drink during the evening. The accused said that she consumed two one-half litre glasses of beer between 5:30 and 7:00, a beer between 7:00 and 8:30, had some sips of someone else's beer and finished with a one half of a one-ounce shooter before leaving. She explained her symptoms. The constable had little recollection of the events and had to refer to his notes.

HELD: The charge was dismissed. The police officer's observations were equally consistent with causes other than impairment by alcohol. His evidence had serious frailties which caused the Court to place little weight in his observations of the accused's condition, which observations were the only evidence before the Court on the charge.

Statutes, Regulations and Rules Cited:

Criminal Code, s. 253(a), 253(b).

Counsel for the Crown: Janikke Heiberg.
Counsel for the Defence: Leigh Gower.

¶ 1 **THOMAS TERR. CT. J.** (orally):— Flora Evans is charged with an offence contrary to s.253(a) and 253(b) of the Criminal Code. During the trial the Crown indicated that she did not intend to prove the s.253(b) charge. Evidence was not tendered on that charge, and therefore I dismiss the charge contrary to s.253(b). The trial proceeded on the remaining charge contrary to s.253(a).

¶ 2 Evidence for the Crown consisted in the testimony of Constable Parsons, the investigating officer. The following evidence of Constable Parsons was offered by the Crown in support of the s.253(a) charge. The

accused, who was driving home on the Alaska Highway on November 9th, 1994, was clocked by Constable Parsons on his radar at 121 kilometres an hour in a 90 kilometre an hour zone. Constable Parsons turned his vehicle and followed the accused's vehicle to further his investigation into a speeding infraction. While he followed the accused's vehicle, Constable Parsons says that the accused's vehicle, a 1991 Honda, reached a speed of 148 kilometres an hour. The accused's vehicle then pulled over to the shoulder and stopped abruptly. Aside from the speeding, there was no sign of erratic driving.

¶ 3 In examination in chief, Constable Parsons said that when he approached the driver's side of the vehicle, he noticed the following signs of alcohol consumption with respect to the accused, who was the driver of the vehicle: an overpowering smell of alcohol, dilated pupils, froth at the sides of her mouth, which Constable Parsons said during his testimony is a sign of intoxication, slurred speech, difficulty in focusing on the constable, and after she left her vehicle, uncertain balance, swaying and stumbling into the side of her vehicle and a flushed face. He testified that she seemed confused and that her answers did not seem responsive to his questions. His opinion was that she was very impaired.

¶ 4 The accused and two other witnesses testified in her defence. I do not place much weight on the evidence of Dave Marcus, the passenger in the accused's vehicle, who had consumed at least ten drinks during the course of the evening, some of which were double rums.

¶ 5 Mr. Peters, with whom the accused and David Marcus were socializing that evening, corroborated to some extent the amount the accused said that she had to drink. She said that she consumed two one-half-litre glasses of beer between 5:30 and 7:00, a can of beer between approximately 7:00 and 8:30, and some sips of someone else's beer later in the evening, amounting to no more than one quarter of the beer, and lastly, one half of a one-ounce shooter of a creamy drink similar to a Bailey's. I have no reason to disbelieve the amount the accused said she had consumed, and there was no evidence of the accused's alcohol consumption other than her evidence and the evidence of Mr. Peters.

¶ 6 On cross-examination, Constable Parsons agreed that watery, bloodshot eyes can be caused by reasons other than alcohol consumption. The accused testified, and I have no reason to disbelieve her evidence on this issue, that after spending an evening in a smoky environment, as she had that evening, her eyes became bloodshot as a consequence of wearing contact lenses. Constable Parsons agreed that the froth he saw at the corner of her mouth could be described as a sort of milky material. The accused testified that she had had a drink which she described as a one-half shooter similar to a Bailey's kind of drink shortly before driving. I accept her evidence on that point. Constable Parsons agreed that a flushed face may be attributable to causes other than alcohol consumption. The accused testified that she has what she describes as high colour. She said that she flushes easily when embarrassed. I observed the accused during her testimony and noticed that her face was quite flushed throughout. Constable Parsons also testified to a difficulty the accused appeared to have in focusing on him when he first approached her seated in the vehicle. He did agree, however, that this difficulty may have been a result of her reaction to the flashlight he shone into the vehicle. Throughout the evidence, there is no indication that the accused had any difficulty in focusing during the course of the investigation, other than when he first spoke to her at the roadside, when he shone the flashlight into the car.

¶ 7 In the circumstances of this case, I find that the observations of Constable Parsons, which I have so far described, are equally consistent with causes other than impairment by alcohol. The issue in this case is not whether there is evidence of alcohol consumption, the issue is whether the accused's ability to operate a motor vehicle was impaired by alcohol, however slightly.

¶ 8 This test is set out in the case of the R. v. Stellato (1993), 78 C.C.C. (3d) 380, a decision of the Ontario Court of Appeal, which has been affirmed by the Supreme Court of Canada (1994), 18 O.R. (3d) 800. The Court of Appeal said in that case:

> In all criminal cases the trial judge must be satisfied as to the accused's guilt beyond a reasonable doubt before a conviction can be registered. Accordingly, before convicting an accused of impaired driving, the trial judge must be satisfied that the accused's ability to operate a motor vehicle was impaired by alcohol or a drug. If the evidence of impairment is

> so frail as to leave the trial judge with a reasonable doubt as to impairment, the accused must be acquitted. If the evidence of impairment establishes any degree of impairment ranging from slight to great, the offence has been made out.

¶ 9 There were observations by Constable Parsons made of the accused other than those that I've just described, and which he addressed on cross-examination. They were an overpowering odour of alcohol, slurred speech, apparent confusion and poor balance. With respect to the observation of an overpowering odour of alcohol, this observation was made when he first spoke to the accused as she sat in the driver's seat of her vehicle after having been stopped. Although David Marcus, who had consumed approximately ten drinks and was, in Constable Parsons' opinion, very drunk, was in the passenger seat, Constable Parsons appears to attribute the overpowering smell of alcohol to the accused, whose face was one to one and a half feet away from him at the time of the observation. I do not recall Constable Parsons testifying to an overpowering odour of alcohol emanating from the accused at any other time during the investigation.

¶ 10 Counsel for the accused argues that I should be very cautious in relying on the evidence of Constable Parsons as to his observations of the accused's condition. His argument is that Constable Parsons does not have much independent recollection of the events and that, where he has no real recollection, he fills in the gaps and provides answers which are most likely to advance the case against the accused. Counsel for the accused cites the following as an example. Constable Parsons testified that he went in to help the accused dial the phone at least twice after she had been taken back to the detachment. The implication of that evidence is that she was too intoxicated to use the phone properly.

¶ 11 Constable Parsons said in his evidence, "Well, I went in a couple of times and assisted. Like she'd point on a list which number she was trying so then I'd help her with that. And I would depart again." However, Constable Parsons later admitted during cross-examination that he has no independent recollection of assisting in the dialling on two occasions, but he thinks he must have because he's got written in his notes, "l finally helped again." When further pressed, he admitted he may have assisted the accused only once, and that when he first took her into the phone room. Taken on its own, this may be a small point, however, I consider it significant in the context of Constable Parsons' evidence as a whole.

¶ 12 In cross-examination Constable Parsons was asked whether he had administered a roadside screening device test to the accused. In response to questions on that issue, Constable Parsons said there had been no roadside test, and based that evidence on the absence in his notes of any reference to a roadside test. He had no independent recollection of not giving the test and said the following:

> Like I said, I deal with so many impaireds, all I can do is rely on my notes at the scene, and that's what I am trying to do now, is rely on my notes because yes, there is certain things I recall of the evening. You know, there's always certain things of impaireds that I recall, but one impaired is basically like the rest. They just sort of all intertwine...

¶ 13 This evidence is important because, in assessing the weight to be given to Constable Parsons' evidence, one of the factors I considered is whether he really had much independent recall of the events he related to the Court. Later in his cross-examination, after he testified that for some things he relies on his notes, and for other things he remembers them independently, he was asked about the accused's movement from the phone room to the breathalyzer room. The following exchange occurred between counsel for the accused and Constable Parsons.

> Q When Ms. Evans went into the breathalyzer room you said that she was hanging on to a desk?
>
> A Yes. Just -- I don't know, guiding herself into the room, if you want to say that.
>
> Q That's something that you recall?
>
> A Yes.

Q If you have a look at your notes...

A Yes.

Q It looks like "Escort the subject into the breath room."

A "Breath room. Noted."

Q "Noted..." Can you read that?

A "...walk still unsteady. Noted. .."hanging into -- onto -- into, no.

Q Looks like "banging into the desk in the breath room."

A I believe you're right, it is "banging." And, I have problems reading my own writing. I believe you're right, it is "banging into the desk in the breath room."

Q And yet today your recollection is that she didn't bang into the desk, she was hanging onto it?

A No, I think I'd have to go by my notes, so I made a mistake before in my testimony. It would be "banging into the desk." If that's what I made reference at the time, that's what I would have noted.

¶ 14 This passage reveals a serious frailty in Constable Parsons' evidence, in my view. He first said, clearly, that he recalled the accused hanging on to the desk and then when the difference in his notes were brought to his attention his response clearly showed that he had no recollection of that incident whatsoever.

¶ 15 The burden is on the Crown to prove the case beyond a reasonable doubt. The frailties in the evidence of Constable Parsons, some of which I have outlined in these reasons, have caused me to place little weight in his observations of the accused's condition. His observations of the accused's condition are the only evidence before the Court with respect to the charge; therefore, the charge contrary to s.253(a) must be dismissed.

THOMAS TERR. CT. J.

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