

ONTARIO COURT OF JUSTICE

DATE: 2015-02-25

COURT FILE No.: Newmarket 14-0733

BETWEEN:

HER MAJESTY THE QUEEN

— AND —

K.M.G.

Before Justice S. W. Konyer

Heard on February 17, 2015

Reasons for Judgment released on February 25, 2015

Ms. S. Kumaresan, counsel for the Crown

Mr. D. Genis, counsel for the defendant K.M.G.

KONYER J.:

[1] K.M.G. is charged with operating a motor vehicle while impaired by alcohol, and operating a motor vehicle with an excessive blood-alcohol concentration, on June 23, 2014. There are two issues which I have to decide in this case: first, whether the Crown has proven that Mr. K.M.G.'s ability to drive was impaired by alcohol; and second, whether the samples of Mr. K.M.G.'s breath which were seized and analyzed were taken as soon as practicable.

SUMMARY OF THE EVIDENCE

[2] Cst. Kang of the York Regional Police Service finished his shift at 3 a.m. on June 23, 2014. After leaving the detachment in his personal vehicle, and wearing civilian clothing, he traveled onto a portion of Highway 7 where his attention was drawn to a vehicle operated by Mr. K.M.G.. The K.M.G. vehicle was traveling at a speed which the officer estimated to be about 20 km/hr below the posted limit of 60 km/hr, and was seen swerving between the two eastbound lanes, almost striking the curb at one point.

[3] Mr. K.M.G. then stopped his vehicle appropriately in the left turn lane at the intersection of Markham Road, and waited for the red signal to change. At this point Cst. Kang, dressed in civilian clothing, approached the vehicle and knocked on the driver's door. He testified that he showed Mr. K.M.G. his police badge and warrant card, and that Mr. K.M.G. responded by waving his arm and then driving on, turning eastbound on Markham Road once the traffic signal turned green.

[4] The officer returned to his own vehicle and continued to follow Mr. K.M.G. a short distance on Markham Road to Deer Park Lane, where the K.M.G. vehicle once again turned and pulled into a driveway. While traveling on Markham Road, Cst. Kang testified that the vehicle continued to swerve in the same manner as he had previously observed.

[5] Cst. Kang estimated the time of this incident to be around 3:10 a.m. He called 911 at some point during the incident, but could not be sure whether he placed that call while following the K.M.G. vehicle, or after the K.M.G. vehicle stopped at the Deer Park residence. I did not receive any evidence as to the time that the 911 call was placed.

[6] After the K.M.G. vehicle stopped in the driveway, Cst. Kang stated that Mr. K.M.G. exited the vehicle and approached him, shouting in a foreign language which we now know to be Cantonese. Cst. Kang attempted to communicate with Mr. K.M.G., and told him that he would need to wait for police. This elicited a response from Mr. K.M.G., who uttered the words “no police” in English and also touched Cst. Kang in the chest in what the officer described as using “no force but to get my attention.”

[7] In his evidence in chief, Cst. Kang testified, unprompted, that he made observations of Mr. K.M.G. while awaiting the arrival of on-duty officers. Specifically, he stated that he did not see Mr. K.M.G. stumbling on his feet or swaying when walking, though he did note an odour of alcohol emanating from Mr. K.M.G.’s breath.

[8] Cst. Kang did not make note of any times during his dealings with Mr. K.M.G.. After the arrival of two on-duty officers within moments of one another, Cst. Kang conveyed his observations and departed the scene prior to the arrest of Mr. K.M.G..

[9] Cst. Mashinter was the first on-duty officer to arrive on scene at 3:19 a.m. She spoke to Cst. Kang and received information from him about the poor driving, and she then dealt with Mr. K.M.G. directly. She detected a strong odour of alcohol emanating from his breath. She conversed with Mr. K.M.G. with the assistance of a female resident of the Deer Park address, who acted as a translator. In response to questioning from Cst. Mashinter, Mr. K.M.G. admitted to the consumption of one drink. The admission and the odour of alcohol together led Cst. Mashinter to form a suspicion that Mr. K.M.G. had alcohol in his body. Together with the information that he had been operating a vehicle, she made a proper demand that Mr. K.M.G. provide a sample of his breath into an approved instrument for analysis. The correct procedure was followed, and a fail result was obtained. She then placed Mr. K.M.G. under arrest for the over 80 offence.

[10] Cst. Mashinter did not take note of the time that she formed her suspicion, the time that she made the demand, the time the fail result was obtained, or the time that Mr. K.M.G. was arrested. She did not note any other indicia of impairment beyond the odour of alcohol on Mr. K.M.G.’s breath.

[11] Cst. Lee, who speaks Cantonese, arrived on scene at 3:20 a.m., after Cst. Mashinter, but during the roadside screening process. He took over the arrest process. He placed the time of arrest at 3:23 a.m., after which he searched, handcuffed and lodged Mr. K.M.G. in the rear of his cruiser. He read the appropriate rights, caution and breathalyzer demand to Mr. K.M.G., all of which was understood. Mr. K.M.G. indicated a desire to speak with duty counsel.

[12] Cst. Lee also noted an odour of alcohol emanating from Mr. K.M.G.’s breath. Further, he testified that Mr. K.M.G.’s speech was slurred, and that he was unsteady on his feet at the roadside. Mr. K.M.G. was, according to Cst. Lee, having difficulty maintaining his balance or standing upright at the time he was being dealt with by all three officers on scene.

[13] Cst. Lee completed reading the required rights, caution and demand to Mr. K.M.G. at 3:38 a.m. He departed the scene 5 minutes later at 3:43, arriving at the detachment at 3:47. Cst. Lee had no explanation for the reason for this 5 minute delay. After arrival at the detachment, Mr. K.M.G. was paraded before the cell block Staff Sergeant and booked at 3:50. At 4:04, Cst. Lee called the duty counsel number, and testified that Mr. K.M.G. spoke to a Cantonese speaking lawyer from 4:07 until 4:27. No explanation was offered for the delay between 3:50 and 4:04.

[14] After the consultation with duty counsel, Cst. Lee turned Mr. K.M.G. over to a qualified technician at 4:34, receiving custody back at 5:11. Cst. Lee could offer no explanation for the delay between 4:27 and 4:34, except to say that he would have lodged Mr. K.M.G. in a cell during this

period. Cst. Lee stated that he would have conveyed his grounds to the technician at some point, but did not note the time and has no recollection of when this occurred.

[15] It is worth noting that all of the times referred to above were testified to by Cst. Lee in his evidence in chief. In cross-examination, a portion of the cell block video was played which indicates that the delay between the completion of Mr. K.M.G.'s call to duty counsel and the transfer of his custody to the technician was 12 minutes, rather than the 7 minutes the officer testified to in chief. The video showed that Mr. K.M.G. completed his call to counsel, was removed from the telephone room and lodged in a cell steps away at 4:19 a.m. He was removed from the cell and taken to the breath room, which is also mere steps away, at 4:41 a.m.

[16] A Certificate of a Qualified Technician was filed on consent as Exhibit 1, indicating that samples of Mr. K.M.G.'s breath were analyzed at 4:42 and 5:08, both yielding results of 170 milligrams of alcohol in 100 millilitres of blood. The technician did not testify. The defence called no evidence at trial.

WAS THE ACCUSED'S ABILITY TO DRIVE IMPAIRED BY ALCOHOL?

[17] The only issue on Count 1 is whether the Crown has proven beyond reasonable doubt that Mr. K.M.G.'s ability to operate a motor vehicle was impaired by alcohol at the time he was seen driving by Cst. Kang. I accept the uncontradicted evidence of Cst. Kang that Mr. K.M.G. was driving at a noticeably slow rate of speed and that his vehicle was swerving, which drew the officer's attention. I also find that Mr. K.M.G. had the odour of an alcoholic beverage emanating from his breath. From this I can reasonably infer that Mr. K.M.G. had consumed some alcohol, but the odour itself tells me nothing about how much alcohol Mr. K.M.G. consumed.

[18] Cst. Kang testified that Mr. K.M.G.'s eyes were red, glassy and watery. Neither Cst. Mashinter nor Cst. Lee described anything unusual about Mr. K.M.G.'s eyes, which is something I would have expected trained police officers conducting an investigation into a suspected impaired driver to have examined. Therefore I am not satisfied that Mr. K.M.G.'s eyes were remarkable in any way. Even if they were red, glassy and watery, however, these symptoms are consistent with the consumption of alcohol but do not support any reasonable inference about the level of intoxication.

[19] I am not satisfied that Mr. K.M.G. displayed any unsteadiness on his feet as described by Cst. Lee, since this evidence was specifically contradicted by Cst. Kang and Cst. Mashinter. Again, these officers were engaged in the investigation of a suspected case of impaired driving, and surely would have been looking for and would have noted any signs of impairment. I have also had the opportunity to view the cellblock video showing some limited movement by the accused shortly after his arrest. There is nothing on the video which supports Cst. Lee's evidence that Mr. K.M.G. could not stand or walk without obvious difficulty. I therefore disbelieve Cst. Lee on this point.

[20] I am also unable to find that Mr. K.M.G.'s speech was slurred. Again, this observation was noted only by Cst. Lee in circumstances where other trained observers would have been looking for such evidence. I appreciate that most of the words spoken by Mr. K.M.G. were in Cantonese, but he nevertheless did speak some English without apparent difficulty. In any event, I find the evidence of Cst. Lee about slurring to have been imprecise, lacking in specificity and therefore unhelpful in resolving the issue of whether Mr. K.M.G.'s ability to drive was impaired. For reasons referred to earlier, I have concerns about the reliability of this officer's evidence in general, and I attach no weight to his evidence that Mr. K.M.G.'s speech was slurred.

[21] Therefore, on the issue of impairment I am left with evidence of unexplained poor driving in the form of swerving for a short distance, together with evidence which I accept that Mr. K.M.G. had consumed some alcohol. I must also consider the fact that Mr. K.M.G. apparently negotiated his

way into the left turn lane at the intersection of Highway 7 and Markham Road, that he stopped properly and waited for the light to change, that he proceeded safely through the intersection when it was appropriate to do so, and that he pulled into the driveway of the Deer Park Lane residence and parked his vehicle without difficulty. He did not display any obvious signs of physical impairment when dealing with the police. In all of the circumstances, it would in my view be unsafe to conclude that the poor driving in this case was the result of impairment by alcohol.

[22] Although not determinative of the issue, it is noteworthy that the responding on-duty officer, Cst. Mashinter, appears to have reached the same conclusion. She received information directly from Cst. Kang about the manner in which Mr. K.M.G. had been driving, and she is a trained and experienced police officer who had an opportunity to observe Mr. K.M.G. in person. She reasonably suspected, based on the information received and the observations made, that Mr. K.M.G. had alcohol in his body, but did not believe that reasonable grounds existed to arrest Mr. K.M.G. for impaired driving based on this evidence alone. I concur with that assessment.

[23] For the foregoing reasons, I am left with a reasonable doubt that Mr. K.M.G.'s ability to operate his motor vehicle at the relevant time was impaired by alcohol.

WERE THE BREATH SAMPLES TAKEN AS SOON AS PRACTICABLE?

[24] Section 258(1)(c)(ii) provides that the results of the analysis of breath samples is presumed to reflect the blood alcohol concentration in the accused driver at the time of driving, provided that the samples are taken "as soon as practicable" and within an outer limit of two hours for the taking of the first sample. This presumption relieves the prosecution of the burden of calling expert evidence in each and every case in order to "read back" the results of the breath sample analysis to the time of driving. In order to avail itself of this evidentiary shortcut, the Crown must demonstrate that the samples were taken as soon as reasonably possible.

[25] In Mr. K.M.G.'s case, the first sample of his breath was taken at 4:42 a.m. according to the Certificate of Analysis. The time at which Mr. K.M.G. was operating his vehicle has not been fixed precisely, but Cst. Kang estimated it to be approximately 3:10 a.m. Since he finished his shift at 3:00 a.m. and Cst. Mashinter arrived on scene at 3:19 a.m., it is clear that Mr. K.M.G. was operating his vehicle within that period of time, which is within the outer limit of two hours for application of the s.258(1)(c)(ii) presumption.

[26] The leading authority on the meaning of the term "as soon as practicable" is the decision of the Ontario Court of Appeal in *R. v. Vanderbruggen* 2006 CanLII 9039 (ON CA), [2006] O.J. No. 1138. In that case, the Court held that "the phrase means nothing more than that the tests were taken within a reasonably prompt time under the circumstances.[...] There is no requirement that the tests be taken as soon as possible. The touchstone for determining whether the tests were taken as soon as practicable is whether the police acted reasonably." [para 12]. The police are not required to provide a minute-by-minute explanation of the entire time that a driver is in custody. In assessing whether the delay in a particular case is reasonable, trial courts should bear in mind that the Code provides for an outer limit of two hours for the taking of the first test and should consider the entire chain of events when assessing reasonableness.

[27] The question I must answer, therefore, is whether the police acted reasonably promptly in Mr. K.M.G.'s case in obtaining samples of his breath for analysis. In doing so I must consider all of the circumstances.

[28] I find the circumstances in this case to be troubling when I consider the "as soon as practicable" requirement. The on-duty officers were dispatched to the scene of a suspected impaired driver. Cst. Kang, who was off-duty, did not make contemporaneous notes of his dealings with Mr. K.M.G.. Therefore, the police would not have been able to fix the time of driving with

precision. Applying common sense and reason, one would think this fact would compel the officers to act with dispatch to ensure that the requirements of s.258(1)(c)(ii) were respected, and to ensure that a clear record existed to account for any necessary delay in obtaining the samples. Instead, no one took note of important steps in the process such as the time at which the reasonable suspicion for the ASD demand was formed, the timing of that demand, the time of the fail result or subsequent arrest. Although I appreciate that the precise timing of these investigative steps was not at issue in this trial, the failure of the police to record significant events leaves me with a less than complete explanation of the unfolding of the investigation.

[29] For the bulk of the time that Mr. K.M.G. was in police custody, I am left to rely solely upon the evidence of Cst. Lee to account for the reason why it took from 3:23 a.m. when he says Mr. K.M.G. was arrested until 4:42 when the first sample of his breath was obtained. I have already found that Cst. Lee's evidence to be unreliable with respect to the presence of signs of impairment. His evidence with respect to the timing of events that occurred after Mr. K.M.G.'s arrest is demonstrably wrong with respect to the period of delay between the completion of the call to counsel and turning over Mr. K.M.G. to the technician. Cst. Lee recorded two entries in his notebook which bookend this period of delay at 7 minutes, when it is actually shown on the cell block video to be 12 minutes. He cannot account for this discrepancy, which does little to inspire confidence in the reliability of this officer's accounting of other periods of delay between arrest and turning the accused over to the technician.

[30] Further, Cst. Lee was unable to recall, and apparently had not noted, when he conveyed his grounds for arrest to the qualified technician, although he is certain that he would have done so. This is a basic investigative step in a drinking and driving case. A reasonable police officer would have properly documented this step. So not only can Cst. Lee offer no explanation for the 12 minute period of delay immediately following the completion of the call to counsel, he is unable to offer any explanation for any of the delay which occurred after Mr. K.M.G.'s arrival at the police station. For example, there are 14 minutes of unexplained delay between Mr. K.M.G.'s booking at 3:50 and the placing of the call to duty counsel at 4:04. There are the previously discussed 12 minutes unaccounted for after the completion of the call to duty counsel before Mr. K.M.G. is turned over to the qualified technician. Are either of these periods accounted for by Cst. Lee conveying his grounds to the technician? Or did the officer instead perform this task during the 20 minute call between Mr. K.M.G. and duty counsel? Did he convey his grounds to the technician at all? I cannot say with any certainty because Cst. Lee was unable to tell me. What I am left with is a minimum of 26 minutes of unexplained delay during the period of time that the accused was in the custody of an officer who I have found to be an unreliable witness. To determine whether the police acted reasonably, therefore, I am left to rely primarily upon the troubling evidence of Cst. Lee.

[31] Assuming that Cst. Kang's estimate as to the time of driving being 3:10 a.m. is accurate, that leaves a period of over one and a half hours before the first sample of Mr. K.M.G.'s breath was analysed. Although within the two hour outer limit, the period is significant enough in a case where on-duty officers responded promptly and the police station where the accused was taken was a mere four minute drive away to warrant an inquiry as to whether the samples were taken as soon as reasonably possible. These are the circumstances in which I must assess whether the police acted reasonably given that 26 minutes of this period are unexplained.

[32] This unexplained period constitutes approximately one third of the elapsed time between the time of driving and the time the first sample of Mr. K.M.G.'s breath was obtained. It also constitutes roughly one quarter of the two hour outside time limit established by s.258(1)(c)(ii). In other words, it is a significant period of delay which is simply unexplained. In these circumstances, I

am unable to find that the police acted reasonably. Therefore, I find as a fact that the samples of Mr. K.M.G.'s breath were not taken as soon as practicable. The Crown is not entitled to rely upon the presumption. Accordingly, there is no evidence before me as to Mr. K.M.G.'s blood alcohol concentration.

CONCLUSION

[33] For the foregoing reasons, I have a reasonable doubt that Mr. K.M.G.'s ability to operate a motor vehicle was impaired by alcohol. I also find as a fact that the samples of his breath which were analyzed were not taken as soon as practicable, and that the results of the analysis are therefore not admissible. Accordingly, **both charges are dismissed.**

Released: February 25, 2015

Signed: "Justice S. W. Konyer"