

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

v.

GG

REASONS FOR JUDGMENT

BEFORE THE HONOURABLE JUSTICE S. CLEMENT

on June 15, 2018

at TORONTO, Ontario

APPEARANCES:

P. Vandenberg

Appearing for the Crown

D. Genis

Appearing for Ms. GG

FRIDAY, JUNE 15, 2018:

R E A S O N S F O R J U D G M E N T

CLEMENT, S. (Orally):

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O'Neil Dellefonte and Sandra Lanbat observed GG's vehicle approaching their vehicle at a high rate of speed. This occurred between 4:30 and 5:00 a.m., on February 27th, 2017. It was very dark. The road had a slight s-curve and it was dry. There were no other vehicles. Dellefonte was concerned about the speed at which the vehicle proceeded towards him so he decided to stop to let it pass. In the Crown's submission his decision to stop was unusual and demonstrated the very real concern he had about its speed. As the Crown suggested, Dellefonte intuited that something was going to happen. The GG vehicle was unable to negotiate the turn, passed in front of Dellefonte's vehicle, left the roadway and struck a tree, where it came to rest. It did not brake before leaving the roadway. Defence counsel submitted that the accident was consistent with mere momentary inattention and by itself may not amount to careless driving. The accident can be fairly described as unexplained, though speed may have been a contributing factor, as well as the driver's impairment by alcohol, as the Crown submitted.

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R. v. GG

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Both civilian witnesses testified that GG attempted, without success to reverse her vehicle but her wheels spun. Lanbat said she went to the passenger side of the GG vehicle, as did Dellefonte, although Lanbat recalled him going to the driver's side. Dellefonte testified he could not get to the driver's side because of the tree which the vehicle had struck. Dellefonte knocked on the passenger window to get GG's attention, without initial success. Momentarily he got her attention and instructed her to wind down her window. She had difficulty doing so and it took her a number of attempts before she was able to complete the task. Lanbat observed GG fumble with the window buttons. They assisted her by shining a light from his cell phone. On Dellefonte's evidence GG appeared confused. With the window down, Dellefonte had a conversation with GG about turning off the vehicle's engine, which was still running. She asked him to do so and offered him the key but he refused. Dellefonte thought she did not understand how to do it. That said, she eventually turned it off herself. The Crown submitted that GG's slow reaction and her difficulty getting out of her vehicle and turning off the engine was consistent with impairment. The defendant submitted that these observed reactions were consistent with a person in the state of shock following an accident.

Both civilian witnesses could smell alcohol from

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the interior of the vehicle and both witnesses described GG's speech as slurred. That said, neither witness described the words 'slurred' and acknowledged that she had a thick accent. Lanbat testified that the accused could not walk upright and kept leaning on her vehicle when she exited. Lanbat did not smell any alcohol on her breath, nor did Dellefonte, although he testified that he called the police because he could smell alcohol coming off her and she was incoherent, as he explained, because she could not turn off the car. Neither witness observed any obvious injury to GG, nor were they able to recall if the airbags in her vehicle had been deployed following the accident. GG never complained to the police about any medical condition, nor did P.C. Cannon, an investigating officer, or P.C. McConnell, the breath technician observe any injury. Both Dellefonte and Lanbat acknowledged that their observation about GG's demeanour, conduct, movement and speech following the accident were consistent with a person being in a state of shock.

As the Crown noted, they were candid witnesses and their testimony was characterized by fairness and lack of a bias.

On scene, while his partner was conducting his investigation of GG, P.C. Cannon interviewed Dellefonte and Lanbat. At some point Cannon's partner advised him that she had detected the

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smell of alcohol on GG's breath and was going to arrest her for impaired driving. While his opportunity to make observations of GG was limited, Cannon testified he observed GG seated in the passenger seat of her vehicle when he arrived on scene. That contrasted with the testimony of the two civilian witnesses who placed GG outside her vehicle when the police arrived. He also testified about having observed GG's unsteadiness and need to lean on her vehicle. His memo book entry suggested that observation about her unsteadiness were made while she was seated in the police cruiser.

On re-examination, however, he confirmed he made observations about her unsteadiness before she got into the police vehicle. These observations were consistent with similar observations made by Lanbat. Cannon testified that GG's speech was slurred, though he acknowledged she had an accent. Her accent, on his evidence did not adversely impact his assessment that she slurred her speech.

English was not the accused's first language. She was assisted by a Korean speaking police officer during the breath test procedure. While McConnell did not hear her speak English and had no opinion about whether she slurred her words, he observed that it was difficult, based on his experience, to determine if somebody was slurring their words if English was not their

first language and they had an accent. That observation accords with common sense and experience. Moreover, neither Cannon nor the two civilian witnesses described the words 'slurred.' Given her accent and the absence of any idea what words were slurred or the context in which she allegedly slurred those words, I'm unable to give any weight to the testimony about slurred speech.

Cannon expressed the opinion that the accused's ability to operate a motor vehicle was impaired by alcohol. That was based on his observation that her breath smelled of alcohol, that she slurred her speech and that she was unsteady on her feet and needed to lean on her motor vehicle for support. McConnell, the breath technician, completed a Subject Appearance Report, exhibit 2, in which he checked descriptors for various categories, including odour of alcohol, eyes, skin tone, speech, attitude, footwear, gait, fine motor control, clothing and overall effect of alcohol. He described the odour of alcohol as very strong but agreed that it confirmed consumption but not the amount consumed. He was reluctant to agree that the smell of alcohol did not establish impairment. As regards GG's eyes, he checked off boxes indicating that her eyes were bloodshot, very glassy and watery. In respect to skin tone, he observed that she was very red, tanned and non-white. He made no observations about slurred speech, as she spoke

only in Korean in his presence. He observed she wore medium-heeled boots and made no observations about her gait. Likewise, he noted nothing about her fine motor control. He noted that her clothing was neat and that her attitude was polite and quiet. He concluded on this report that the overall effect of alcohol was obvious, even though he made no observations about her speech, gait and fine motor skills. Moreover, she was polite and quiet. The most significant indicia of alcohol consumption was the strong odour of alcohol, bloodshot, glassy and watery eyes and red skin tone. Based on those observations he concluded her level of impairment on a scale of one to ten was five. Under the category of fine motor control and gait he had the option to select "unable to determine." Instead he chose "nothing noted" in each category. I infer that there was a complete absence of any difficulty with her gait or fine motor control. That contrasted sharply with the testimony of Cannon, Dellefonte and Lanbat. While McConnell testified that he did not consider the breath test results in his conclusion about the degree of impairment, it's difficult to accept, given his conclusion based solely on the smell of alcohol, the condition of her eyes and skin tone.

The evidence of GG's impairment was circumstantial. A finding that her ability to operate a motor vehicle was impaired by alcohol

depends on whether that is a reasonable inference to draw from the underlying or subsidiary facts and whether it's the only reasonable inference established by those facts.

In assessing circumstantial evidence, inferences consistent with innocence, do not have to arise from proven facts provided they're reasonable considering human experience and common sense. See R. v. Villaroman, V-I-L-L-A-R-O-M-A-N, 2016 SCC 33 at paragraph 35.

Is GG's guilt the only reasonable conclusion available on the totality of the evidence? Many years ago, Justice McDonnell in R. v. Cooper, 1993 46 MVR 231 at paragraph 18 observed that the smell of alcohol, redness of eyes, slurred speech and unsteadiness did not necessarily indicate impairment by alcohol. That said, it did not rob these indicia of their value as circumstantial evidence. However, he cautioned each of them had their shortcomings as a badge of impairment. A strong odour of an alcoholic beverage confirms the consumption of intoxicants but says nothing about the effects of the consumption. The remaining circumstances require subjective assumptions by the officer as to the normal state of the subject's eyes, speech and motor skill. Where the subject is a stranger, these particular circumstances may be weak indicators of impairment of the ability to drive.

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In addition, we have the circumstance of an unexplained accident in the sense there was no apparent reason to explain why GG lost control, left the roadway and struck a tree. The Court may infer impairment based on an unexplained accident, combined with other indicia. See R. v. Boomer, 2001 BCJ 760 at paragraph 22.

That said, common sense suggests that following an accident such as occurred in this case a driver may experience shock, disorientation and confusion. While the existence of an injury may make that a more compelling inference to draw, the absence of injury does not preclude the reasonable hypothesis that shock, disorientation and confusion are likely by-products of a motor vehicle accident. The observation or observations made of GG while still in her vehicle could be explained by this phenomenon. Likewise, unsteadiness outside her vehicle shortly after the accident can be explained by these circumstances. This is plausible, not merely possible.

The offences of impaired operation or the offence of impaired operation or impaired care and control are established by proof of any degree of impairment, ranging from slight to great. The Crown need not establish the marked departure from normal behaviour. See R. v. Stellato, 1994 2 SCR 478.

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The issue to be resolved is not whether GG drank and drove but whether the consumption of alcohol impaired her ability to drive. That issue, in the context of the Crown's ultimate burden was expressly addressed in R. v. Andrews, 1996 104 CCC 3rd 392, where the Alberta Court of Appeal adopted and explained the reasoning in Stellato as follows. "It's so important not to deal with the issue of impairment separate from impairment of one's ability to drive. Stellato must not be understood to mean that a person who has anything to drink and then drives a motor vehicle commits the offence under Section 235(a)" now 235(1a). "Nor does it mean any lack of sobriety is sufficient. The ratio of the judgment in Stellato is that it's not necessary for the Crown to establish a marked degree of impairment of the accused's ability to drive, rather, any degree of impairment of that ability beyond a reasonable doubt will sustain a conviction. It is not deviation from normal conduct, slight or otherwise, that is in issue. What is in issue is the ability to drive. Where the totality of that evidence indicates only a slight deviation from normal conduct, it would be dangerous to find proof beyond a reasonable doubt of impairment of the ability to drive, slight or otherwise."

While proof of the ability to operate a motor vehicle consists of observations about the

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driver's conduct, the extent to which that conduct deviates from normal behaviour could be used to assess the evidence and determine if the required standard of proof has been met. Any inference of an impaired ability to drive may be drawn only where the evidence, viewed objectively, is consistent with impairment and inconsistent with any other rational explanation. The Court must consider the totality of the evidence in determining if this is the only rational inference. It's improper to consider each relevant piece of evidence in isolation. For example, the smell of alcohol merely establishes that the individual consumed alcohol. It says nothing about the degree of impairment, if any. It's not enough to merely consider the circumstances that support an inference of impairment without considering the other circumstances that support another inference. R. v. Moreno-Baches, M-O-R-E-N-O - B-A-C-H-E-S, 2005 OJ 4978.

Even slight impairment may, as noted in R. v. Bush, 2010 ONCA 554 at paragraph 47 relate to a reduced ability to carry out complex motor functions. In this case the evidence suggested that GG's level of intoxication or impairment, when observed by McConnell, had not reduced her ability to carry out complex motor skills, even to a slight degree. Proof beyond a reasonable doubt is a heavy burden. It's not enough to believe that GG is probably guilty or likely

5 guilty, as that is not proof beyond a reasonable
doubt. Proof beyond a reasonable doubt is much
closer to proof of absolute certainty than it is
to proof of probable guilt. After considering
all the evidence I must be sure that GG
committed the offence of impaired operation
before finding her guilty of that offence
because it is only at that point that I can be
satisfied beyond a reasonable doubt as to her
10 guilt.

15 The totality of the factors which I must
consider are as follows. An unexplained
accident, the consumption of alcohol, an attempt
to reverse her vehicle following the accident,
difficulty opening her car window, confusion
about turning off her engine, unsteadiness
outside her car, use of her vehicle for support,
bloodshot, glassy and watery eyes, red skin
20 tone, a polite and quiet attitude, no unusual
gait and no loss of fine motor control.

25 An unexplained accident is not in itself
evidence of impairment by alcohol. The
consumption of alcohol may or may not be
consistent with impairment, depending on the
amount consumed.

30 An attempt to move a vehicle following an
accident may be consistent with poor judgment
caused by alcohol impairment or may be
appropriate, depending on whether the vehicle

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was disabled or not. The absence of evidence about the operability of GG's vehicle following the accident or the absence of evidence about how persistent she was in attempting to move the vehicle invites improper speculation about the import of her attempt to move it.

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Difficulty opening a car window may indicate the effects of alcohol or equally may relate to reasonable disorientation following an accident, as is the case with confusion about the turning off the vehicle engine.

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Unsteadiness and the need to use one's car for support is consistent with impairment but equally consistent with the effects of momentary shock and disorientation following an accident. McDonnell's observations did not confirm any unsteadiness.

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The presence of bloodshot, glassy, watery eyes is often an effect produced by the consumption of alcohol but is not exclusive of any other explanation, given the subsection assumptions as to the normal state of subject's eyes.

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Same observation is applicable to the evidence about skin tone. While McDonnell noted that GG was not wearing glasses, a condition of her license, he never inquired about whether she was wearing contact lenses. He was unable to comment about whether contact lenses could cause

the conditions he observed about her eyes.

The absence of observations about gait and fine motor control supports an inference other than impairment, as does the polite and quiet attitude.

While suspicious, I'm not satisfied that GG's guilt is the only reasonable conclusion available on the totality of the evidence.

Accordingly, she's acquitted of the impaired driving charge.

Form 2

I, Cindy Liscombe, certify that this document is a true and accurate transcript of the recordings of Regina v. GG in the Ontario Court of Justice held at 1000 Finch Avenue West, Toronto, Ontario, taken from recording No. 4814_302_20180615_094900__6_CLEMENF.dcr which has been certified in Form 1.

October 29, 2018

Date

Cindy Liscombe

Signature

Photostatic copies of this transcript are not certified and have not been paid for unless they bear the original signature of C. Liscombe.