

Citation: *R. v. MacKinnon*, 2020 YKTC 28

Date: 20201007
Docket: 18-11021
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REGINA

v.

JUSTIN MACKINNON

Appearances:
Leo Lane
Vincent Larochelle

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] RUDDY T.C.J. (Oral): Justin MacKinnon is facing a single count of impaired care and control of a motor vehicle contrary to s. 253(1)(a) of the *Criminal Code*, alleged to have occurred in Dawson City, Yukon, on September 14, 2018. The evidence was not particularly contentious in terms of credibility and reliability. At issue is whether the totality of the evidence is sufficient to establish impairment beyond a reasonable doubt.

The Evidence

[2] Crown relies on the evidence of three witness, one civilian and two police officers. Heidi Warren, a school principal from Beaver Creek, was in Dawson City for a conference on September 14, 2018. At approximately 5:30 p.m., Ms. Warren was

walking to meet friends at Klondike Kate's Cabins when she observed a silver truck pull up and stop at the intersection of 4th Avenue and King Street. The driver, who was alone in the vehicle, got out and started to urinate in the middle of the street. The open driver's side door blocked much of Ms. Warren's view of the individual, but she could see below the door that he was urinating. She could not see the driver's face, but could tell it was a man wearing a gray sweatshirt and a baseball cap. Ms. Warren says the driver was swaying and holding on to the door. She believed him to be intoxicated based on her past experience as a bartender.

[3] Ms. Warren saw the driver get back in the vehicle and pulled on to King Street. He started driving slowly, but sped up, which raised concerns for her as there were children in the area. She thinks the truck turned onto 7th Avenue and may possibly have come back in her direction shortly thereafter, but she is not sure if it was the same truck or a similar one. On cross-examination, Ms. Warren agreed that the vehicle slowed appropriately to turn onto 7th Avenue, and that she did not observe any erratic driving.

[4] Ms. Warren had taken note of the vehicle's Manitoba licence plate number and called the Dawson City RCMP detachment. When there was no answer, she called 911 and explained what she had seen.

[5] Cst. Joshua Tower was on duty on September 14, 2018, when he received a call from Dispatch in Whitehorse at 7:09 p.m. indicating that an anonymous caller had reported a male slumped over the driver's seat of a vehicle at the corner of 2nd Avenue and York, in Dawson City.

[6] Cst. Tower arrived at the location at 7:17 p.m. and observed a gray truck at the stop sign. The driver, later identified as Mr. MacKinnon, was slumped over in the driver's seat as reported. He was alone in the vehicle. Cst. Tower approached the truck. The window was open. He said, "Hey, can you wake up?", but there was no response. He noted Mr. MacKinnon was swaying back and forth in the seat. Cst. Tower tapped Mr. MacKinnon on the arm. Mr. MacKinnon opened his eyes and mumbled something, but his speech was muffled.

[7] Cst. Tower noted Mr. MacKinnon's eyes to be red and glossy, and that there was a strong odour of liquor on Mr. MacKinnon's breath. Cst. Tower asked him for identification. Mr. MacKinnon reached over to the passenger side and passed Cst. Tower a green beverage can, later learned to be a can of cider. Cst. Tower asked again for identification, and Mr. MacKinnon put the can back. He then leaned over the center console and began gagging as if he were going to vomit.

[8] Cst. Tower advised Mr. MacKinnon that he was under arrest and asked him to turn off the engine. The truck was in park, but running. Mr. MacKinnon turned off the engine as requested. Mr. MacKinnon had a Powerade bottle between his legs. He stumbled when he got out of the truck. Cst. Tower escorted Mr. MacKinnon to the police vehicle at 7:22 p.m., where he read him the *Charter* and police warning. Mr. MacKinnon was mumbling, but then sat up straight and responded to questions. Cst. Tower agreed, on cross-examination, that Mr. MacKinnon was falling asleep in between questions.

[9] Cst. Tower ran the license plate of the truck which came back as registered to Mr. MacKinnon. A debit card found in the vehicle was in Mr. MacKinnon's name.

[10] It was admitted that the license plate of the truck was the same as that noted by Ms. Warren earlier. It was further admitted that when Cst. Tower placed Mr. MacKinnon in the police vehicle, Mr. MacKinnon was wearing a gray sweatshirt and ball cap.

[11] Cst. Perry arrived to deal with the truck. Cst. Tower drove Mr. MacKinnon to the detachment. Cst. Tower noted no issues with Mr. MacKinnon's balance at the detachment. As a breath demand had been made, Cst. Tower attempted to locate a qualified breath technician to perform the requisite tests, but was unsuccessful. At 8:30 p.m., Cst. Tower gave up and released Mr. MacKinnon.

[12] Cst. Perry was also on duty on September 14, 2018. He was contacted at home in relation to the report made by Ms. Warren of a possible impaired driver. He indicated that her call was logged at 5:36 p.m. Cst. Perry patrolled for approximately one hour, but was unable to locate the truck.

[13] Shortly after 7:00 p.m., Cst. Perry received a second call thought to be related. He attended at the scene. Mr. MacKinnon was already in custody in Cst. Tower's police vehicle.

[14] Cst. Perry searched the truck and located an open dark green can of pear cider in the center console and an unopened can in the passenger side wheel well. He found ID, including a driver's licence in the center console.

[15] Later at the detachment, Cst. Perry photographed and fingerprinted Mr. MacKinnon. Cst. Perry noted that Mr. MacKinnon was crying and emotional. Mr. MacKinnon smelled of alcohol, but Cst. Perry noted no indicia of impairment.

The Law

[16] There is no issue that Mr. MacKinnon was in care and control of the truck when located by Cst. Tower. Mr. MacKinnon was located in the driver's seat with the engine running, circumstances which "create a *realistic* risk of danger to persons or property" (see *R. v. Boudreault*, 2012 SCC 56). The sole issue to be determined, therefore, is whether the evidence is sufficient to establish, beyond a reasonable doubt, that Mr. MacKinnon was impaired when he was in care and control of the truck.

[17] The legal starting point in assessing evidence of impairment to operate a motor vehicle is *R. v. Stellato*, [1994] 2 S.C.R. 478, in which the Supreme Court of Canada adopted the reasoning of the Ontario Court of Appeal. At para. 14 of the Ontario Court of Appeal decision, 1993 ONCA 3375, Labrosse J. wrote:

...[B]efore 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.

[18] The law of impairment was further refined by the Alberta Court of Appeal in *R. v. Andrews*, 1996 ABCA 23, which set out the following principles at para. 29:

- (1) the onus of proof that the ability to drive is impaired to some degree by alcohol or a drug is proof beyond a reasonable doubt;
- (2) there must be impairment of the ability to drive of the individual;
- (3) that the impairment of the ability to drive must be caused by the consumption of alcohol or a drug;
- (4) that the impairment of the ability to drive by alcohol or drugs need not be to a marked degree; and
- (5) proof can take many forms. Where it is necessary to prove impairment of ability to drive by observation of the accused and his conduct, those observations must indicate behaviour that deviates from normal behaviour to a degree that the required onus of proof be met. To that extent the degree of deviation from normal conduct is a useful tool in the appropriate circumstances to utilize in assessing the evidence and arriving at the required standard of proof that the ability to drive is actually impaired.

[19] At para. 31, the Court went on to address the assessment of circumstantial evidence:

[31] The test of weighing circumstantial evidence of conduct in support of an inference of impairment of ability to drive has not changed to mean that equal weight should be attributed to conduct which indicates a marked departure from normal conduct and conduct which indicates a slight deviation from normal conduct. That would have the practical effect of lowering the standard of proof of the offence. It is not deviation from normal conduct, slight or otherwise, that is in issue. What is in issue is the ability to drive. Where circumstantial evidence alone or equivocal evidence is relied on to prove impairment of that ability, and 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.

[20] Counsel for Mr. MacKinnon has filed a number of cases that have some factual similarities to this case, though counsel disagree on the extent to which the circumstances can be seen as equivalent. While the cases offer some guidance, at the end of the day, the question of impairment is fact specific.

[21] Evidence of impairment typically falls into four categories: evidence of erratic driving, evidence of consumption, evidence of issues with speech, and evidence of issues with fine and gross motor coordination.

[22] In this case, the facts indicate little to nothing in relation to erratic driving. The only evidence in this regard comes from Ms. Warren, who indicated that she observed the truck start up slowly then speed up, but the truck appears to have otherwise been operated without issue. The evidence with respect to actual driving offers little outside the norm from which to conclude Mr. MacKinnon's ability to operate a motor vehicle was impaired let alone impaired by alcohol. In addition, the observation occurred almost one and a half hours before Mr. MacKinnon was located by police.

[23] Evidence with respect to consumption includes the smell of alcohol on Mr. MacKinnon's breath as noted by both Cst. Tower and Cst. Perry. In addition, Cst. Tower noted glossy and red eyes, both of which are indicia often referred to as indicative of consumption of alcohol; however, both glossy and red eyes are also potentially indicative of other things such as fatigue. Furthermore, neither smell of alcohol or glossy, red eyes are indicative of impairment.

[24] Regarding Mr. MacKinnon's speech, the only evidence of unusual issues with speech is Cst. Tower's indication that when he was able to wake Mr. MacKinnon, he mumbled something but his speech was muffled. In his direct evidence, Cst. Tower also referenced some slurring at this point; however, in cross-examination, it became clear that he had made no notes in relation to any slurring. Cst. Tower was overall a very solid and credible witness, but I am satisfied that, given the lack of any notation

regarding slurring and the passage of time, he was simply mistaken on this point. The issues with speech offer little in assessing impairment. Muffled speech or mumbling may be consistent with someone who is impaired, but neither can be said to be clear indicators of impairment like slurred speech. In addition, it appears that once Mr. MacKinnon was in the police vehicle he appeared to have no difficulty responding to questions.

[25] The evidence in relation to fine and gross motor coordination is similarly limited. Ms. Warren says the individual she saw was swaying and holding on to the door. She concluded that he was intoxicated, a not unreasonable assumption based on her observations; however, her view of the man was largely obscured by the vehicle door. I should note that counsel has raised a question about identification, as Ms. Warren did not see the face of the individual. In my view, given the fact that the truck Ms. Warren saw was Mr. MacKinnon's and that Mr. MacKinnon was found an hour and a half later in his truck wearing similar clothing to that seen by Ms. Warren, I am satisfied that the man seen by Ms. Warren was, indeed, Mr. MacKinnon. That being said, the swaying observed is a factor to be considered in weighing the evidence of impairment.

[26] The only other evidence of coordination issues came from Cst. Tower who indicated that Mr. MacKinnon stumbled when he got out of the truck. However, Cst. Tower prefaced this testimony by referring to the fact that there was a Powerade bottle between Mr. MacKinnon's legs. It was unclear to me whether or not the bottle may have caused Mr. MacKinnon to stumble as he got out, particularly as Cst. Tower did not note any other issues with Mr. MacKinnon's balance or coordination.

[27] A review of the traditional indicators of impairment falls well short of proof beyond a reasonable doubt that Mr. MacKinnon's ability to operate a motor vehicle was impaired by alcohol. However, this case also includes evidence of behaviour outside of the norm which must be considered in conjunction with more traditional indicia in assessing impairment. This includes Mr. MacKinnon stopping in the middle of a public road in broad daylight to urinate, Mr. MacKinnon being found slumped in the driver's seat while stopped in the middle of the road, his swaying back and forth, the gagging or retching, and Mr. MacKinnon passing Cst. Tower a can of cider when asked for identification. This behaviour is highly unusual, even bizarre, raising questions of both judgment and comprehension issues that could well be consistent with impairment; and certainly, when combined with smell of alcohol on Mr. MacKinnon's breath and the other conventional indicia noted, is more than enough to establish reasonable grounds to believe that Mr. MacKinnon's ability to operate a motor vehicle was impaired by alcohol.

[28] Is it enough, however, to establish proof beyond a reasonable doubt of impairment? The difficulty I have with concluding that the evidence is sufficient to establish impairment to the requisite standard is the fact that while Cst. Tower's initial interaction with Mr. MacKinnon includes highly suspicious behaviour suggestive of impairment, when Cst. Perry is fingerprinting and photographing Mr. MacKinnon less than an hour later, he observes absolutely no indicia of impairment. This raises a real question in my mind as to whether the initial observations made by Cst. Tower were, in fact, caused by alcohol impairment or by some other factor such as fatigue, perhaps the more logical inference to be drawn to reconcile the disparity in what the two officers observed.

[29] In the result, I find that I am left with a reasonable doubt as to whether Mr. MacKinnon's ability to operate a motor vehicle was impaired by alcohol, and an acquittal must therefore be entered in relation to the single count contrary to s. 253(1)(a).

RUDDY T.C.J.