Citation: *R. v. Soosay,* 2025 YKTC 44

Date: 20250609
Docket: 24-00391
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Cairns

REX

v.

LORRAINE SOOSAY

Appearances:
Kevin Drolet — Counsel for the Crown
Karlena Koot — Counsel for the Defence

This decision was delivered from the Bench in the form of Oral Reasons. The Reasons have since been edited without changing the substance.

REASONS FOR JUDGMENT

[1] CAIRNS T.C.J. (Oral): Lorraine Soosay has pleaded not guilty to charges contrary to sections 320.14(1)(a), 320.14(1)(b) and 270(1)(a) of the *Criminal Code.* These offences are alleged to have occurred on May 27, 2024, at or near the City of Whitehorse.

[2] At the beginning of the trial, Ms. Soosay's counsel advised that date, jurisdiction, the lawfulness of the ASD demand and the breath sample results are not disputed.

[3] The Crown is not seeking a conviction on Count 1, the charge contrary to 320.14(1)(a). Ms. Soosay is acquitted of that charge.

A. Overview

i. Count 2 – s. 320.14(1)(b)

[4] In relation to the offence contrary to section 320.14(1)(b), the primary issue is whether Ms. Soosay was the driver of the vehicle. Ms. Kaur Chohal testified for the Crown that she observed Ms. Soosay get into her vehicle and drive alone out of the parking lot of the Casa Loma Motel.

[5] In her defence, Ms. Soosay makes two arguments. The first is that, given the frailties of eyewitness evidence, Ms. Kaur Chohal's evidence is unreliable and should not be believed. The second is that she was not operating the vehicle and was driven home by her daughter, Kaylee.

A Certificate of a Qualified Technician was filed establishing that Ms. Soosay provided two breath samples, the first at 00:24 and the second at 00:47. The results of these samples were, respectively, 170mg and 160mg of alcohol in 100 millilitres of blood. If I find that Ms. Soosay was driving, the Crown says that I should find that the breath samples were taken from Ms. Soosay within two hours of operation. Counsel for Ms. Soosay says the evidence does not clearly establish when Ms. Soosay left the Casa Loma Motel, allegedly driving the vehicle home. While the timing of operation is not an element of the office (*R. v. Brake*, [2025] N.J. 1, at para 65), I note that it can be critical in determining an accused's blood alcohol level at the time of operation. If I find

that the breath samples were taken outside of the two-hour window, I must turn to the presumption in s. 320.31(4) to determine Ms. Soosay's blood alcohol concentration at the time of operation.

ii. Count 3 – s. 270(1)(a)

[6] In relation to the charge of assaulting a peace officer, the issue is whether, having considered all the evidence, I am satisfied beyond a reasonable doubt that Ms. Soosay assaulted Cst. Verstegen.

B. Analysis

[7] Everyone charged with a criminal offence in Canada is presumed innocent until the Crown has proven beyond a reasonable doubt that she has committed the offence charged. The onus never shifts from the Crown to the accused. In determining whether the Crown has proven the case against Ms. Soosay, I must consider the whole of the evidence and I may only convict if I am satisfied that the Crown has established Ms. Soosay's guilt beyond a reasonable doubt.

i. S. 320.14(1)(b)

a. Was Ms. Soosay operating the vehicle when it was driven away from the Casa Loma Motel?

I. Ms. Kaur Chohal's evidence

[8] On May 27, 2024, Ms. Kaur Chohal was working as a bartender at the Casa Loma Motel, her place of employment since April 2024. She was the only bartender on

shift that evening. Ms. Soosay was known to Ms. Kaur Chohal both as a co-worker and a regular at the bar of the Casa Loma Motel.

[9] Ms. Kaur Chohal arrived at around 6:45 p.m. for her 7:00 p.m. shift. There were only 3-4 patrons at the bar, Ms. Soosay being one of them. Ms. Kaur Chohal noted there were two drinks in front of Ms. Soosay. She served Ms. Soosay 3-4 additional drinks. While she could not remember the precise time, she says she observed Ms. Soosay get up, stumble, leave and get into the driver's seat of a vehicle. Ms. Kaur Chohal described the bar as having a large window which allowed an unobstructed view of the parking lot. As it was summer, it was not dark. She rushed outside to stop Ms. Soosay as, in her view, Ms. Soosay was intoxicated. She explained that she wanted to offer Ms. Soosay a ride to prevent her from driving. However, by the time Ms. Kaur Chohal made it outside, Ms. Soosay was reversing in the parking lot and driving away. She said she immediately called the police and provided a licence plate number.

[10] Ms. Kaur Chohal did not recall the time she called police but said that she called right away, maybe 1 – 3 minutes, after the car left. While maintaining that she did not remember when she made the call, she said it could have been 9 or 10 p.m.

[11] Ms. Kaur Chohal was unshaken on cross-examination in relation to her observations of Ms. Soosay as the driver and sole occupant of the vehicle. She confirmed that she did see Ms. Soosay get in the driver's side of the vehicle. Ms. Kaur Chohal testified she was standing behind the bar when she made this observation and the vehicle was right outside the window facing in. She confirmed that,

while she didn't recall the time she called police, it could have been as early as 9:00 p.m.

[12] I found Ms. Kaur Chohal to be a credible witness.

II. Is Ms. Kaur Chohal's eyewitness evidence reliable?

[13] Defence counsel argues that Ms. Kaur Chohal's evidence should be approached with caution given the well-known frailties of eyewitness identification evidence. On this issue, reference was made to a number of cases: *R. v. Nikolovski*, [1996] 3 S.C.R. 1197; *R v Tuel and Wuor*, 2023 YKSC 12; and *R. v. Parker,* 2023 YKTC 42. Two cases were filed by defence: *HMTQ v Wirll*, 2021 SKPC 56 and *R. v. Craft,* 2006 YKTC 70.

[14] The defence further argues that there is an increased risk of error with cross-racial identification as occurred here - Ms. Soosay being Indigenous, while Ms. Kaur Chohal is not.

[15] As noted by the Supreme Court of Yukon in *R v Tuel and Wuor,* 2023 YKSC 12 at paragraph 32:

> [31] It is a generally accepted principle that identification evidence is inherently unreliable. The court in *R v Gough*, 2013 ONCA 137, wrote:
>
> > [35] Being notoriously unreliable, eyewitness identification evidence calls for considerable caution by a trier of fact: …. **It is generally the reliability, not the credibility, of the eyewitness' identification that must be established.** The danger is an honest but inaccurate identification: ….
> >
> > [36] The trier of fact must take into account the frailties of eyewitness identification in considering such issues as whether the suspect was known to the witness, the

> circumstances of the contact during the commission of the crime (including whether the opportunity to see the suspect was lengthy or fleeting) and whether the circumstances surrounding the opportunity to observe the suspect were stressful…[citations omitted].

[16] I am mindful of the frailties of eyewitness evidence as described in the above-noted cases, including in a cross-cultural context. However, I find that, on the facts of this case, those frailties do not arise. Ms. Kaur Chohal knew Ms. Soosay, both as a current colleague and a regular patron of the Casa Loma bar. The two were present together at the Casa Loma Motel for over two hours on May 27, 2024, with only a few other people present. In her role as bartender, Ms. Kaur Chohal interacted with Ms. Soosay, serving Ms. Soosay drinks that night. Ms. Kaur Chohal's evidence that she "rushed out" to stop Ms. Soosay from driving makes plain that the passage of time was very brief between Ms. Soosay departing the bar and stepping into the vehicle. Further, Ms. Kaur Chohal's evidence is that there were no obstructions to her ability to observe Ms. Soosay getting into the driver's side of a vehicle as the vehicle was parked directly in front of the large windows of the bar and facing forward. It was not dark. There is no evidence that her observations were affected by alcohol or other substances; nor, as in other cases, was her identification of Ms. Soosay affected by inappropriate police or other procedures between the time of her observation and her testimony (*R v Bigsky*, 2006 SKCA 145, at para 41). There is also no evidence that this interaction was particularly stressful for Ms. Kaur Chohal.

[17] The facts of this case can be easily distinguished from both the *Wirll* and *Craft* decisions filed by counsel for Ms. Soosay. In the *Craft* decision, the eyewitness had

seen the accused only five times over four years. Additionally, the eyewitness's opportunity to observe the driver of a vehicle was fleeting – a few seconds - and obstructed by tinted windows and the inability to fully see the head of the driver. In *Craft*, the brother of the accused testified that he was driving. The Court found that the accused and his brother bore a "striking similarity" to each other, being described as "very similar, although not identical" (*Craft,* para 8).

[18] In this case, counsel for Ms. Soosay made the same argument in submissions about Kaylee and her mother, Ms. Soosay. I do not accept that Ms. Soosay and her 23-year-old daughter have the similarities the Court identified for the *Craft* brothers. I find it implausible that Ms. Kaur Chohol could have mistaken Kaylee for Ms. Soosay. There is also Ms. Kaur Chohal's evidence was that Ms. Soosay was alone in the vehicle. This evidence is irreconcilable with the defence evidence that Ms. Soosay was driven home by her daughter, Kaylee.

[19] The *Wirll* case is also distinguishable. In that case, the accused was not known to the eyewitness, a police officer. The police officer was unable to provide more than a general description, described as lacking in detail. There was a concern about confirmation bias arising from viewing photographs and there were also inconsistencies with the evidence of another eyewitness.

I find Ms. Kaur Chohal's evidence to be reliable.

III. Does the defence evidence raise a reasonable doubt that Ms. Soosay was operating the vehicle?

[20] As the defence called evidence, I must apply the three-step procedure as set in *R. v. W.(D.)* [1991] 1 S.C.R. 742, at para 28:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[21] In this case, I heard from three defence witnesses. Their evidence is summarised below.

[22] Kaylee Soosay, age 23, daughter of Ms. Soosay, testified that, a few days before this incident, on May 24th, she had returned to Canada following six months in New Zealand. She said she did not remember the night well. She was not living at her mother's home but says that she was visiting with her brothers that night – her evidence was that she was "hanging with her brothers". She testified that she walked over to the Casa Loma Motel, picked up her mother, drove her home, gave her the keys, and left. She said she was then picked up to go out with friends. She said twice that her friend – whom she did not name but referred to as a "she" – was waiting outside to pick her up. During cross-examination, when asked for the name of her friend, she said she was picked up by her ex-boyfriend, Ryan King. She went to Crestview to hang out with friends and consumed alcohol. Kaylee testified that "shortly afterwards – fifteen minutes, not very long at all" after delivering her mother home - her

brother, Wylee, contacted her to say her mother had been arrested. The evidence that she heard from her brother – and her mom – shortly after dropping her mom off was consistent during both direct and cross-examination. However, despite saying twice that she was alerted to the arrest of her mom shortly after she had dropped her mom off, she also commented that she was confused about why the police took so long to get to the house. She said she could not come back from Crestview because she had been drinking and that, when she asked her brother if she should take a cab home, he said it was fine. She did not ever come forward to tell police that she had driven her mother home that night. She also said that all potentially confirming texts and phone calls had been deleted from her cell.

[23] Wylee Soosay, age 17, son of Ms. Soosay, testified that he was playing an electronic video game on May 27th with his little brother. He did not remember if his sister had been there that night; however, his evidence was that she had not been hanging out with him. Wylee did not know how his mother got home. He had not heard his mother arrive but thought she had been home for one and a half hours or "not even" that long. Wylee answered the door to Cst. Verstegen's knock and brought his mom, who had been "chilling outside" having a smoke, to the door. He said he contacted his sister after the arrest and that she said she was on her way back. He said Kaylee never told him she had been driving.

[24] Lorraine Soosay testified. She denied driving home from the Casa Loma, saying Kaylee had picked her up. She said there was always a ride if she needed it, or she could take a cab, or it was a 'cigarette walk away'. Her evidence was that she had been home for one to two hours before Cst. Verstegen came to the door. She put her

young son to bed when she came home as it was after 9 pm. She denied touching Cst. Verstegen, saying she worked with officers, respected them, and would never touch them. She also said that all potentially confirming texts and phone calls had been deleted from her cell.

[25] There are inconsistencies in the evidence provided by the defence witnesses and I find some of the defence evidence implausible. The following is a summary of the inconsistencies I noted.

[26] Evidence regarding how long Ms. Soosay had been home prior to her arrest:

- Ms. Soosay says it was one to two hours;
- Wylee said he did not hear his mom come home but he said he thought his mom had been home one and a half hours, “not even”, and “something like that”;
- When questioned during direct examination, Kaylee, having testified that she drove her mother home, says she received a call from her brother that “shortly after [she dropped her mom off], not very long, fifteen minutes” letting her know that her mom had been arrested;
- In cross-examination, when asked how long after she had dropped her mom at home had she received a call that her mom was being arrested, Kaylee reiterated she had received the call “fifteen minutes” and “it was not long at all”;
- Kaylee later revised this evidence, saying the “police took so long to even get to the house.”

[27] Additional inconsistencies include:

- Kaylee said she was at the house earlier that night, giving her mom a break – Wylee was not sure she was there that night;
- Kaylee says she was hanging with her brothers that night before picking up her mother and going to see friends; however, Wylee said explicitly that she was not hanging out with him;
- Kaylee refers to the person who picked her up as a "she" twice, then changes it to say it was her ex-boyfriend;
- Kaylee's evidence was that, after speaking with her brother and learning about her mother's arrest, she could not go back because she'd been drinking; Kaylee also said that she asked Wylee if she should take a cab back, and that Wylee said it was fine; in contrast, Wylee's evidence was that Kaylee was "on her way back".

[28] I have concerns with Kaylee's evidence. Her testimony was vague at times, hesitant and unsure. She said that she was really jet-lagged and hardly remembered that time in her life. Her evidence was both internally inconsistent and inconsistent with her brother's evidence.

[29] I find it implausible that Kaylee, knowing her mother was facing criminal charges, had her vehicle impounded, and licence suspended did not even tell her brother that she had driven her mother home that night.

[30] Kaylee is a critical witness for the defence. I do not believe Kaylee's evidence that she was present at her mother's house on May 27, 2024 "hanging with her brothers" or that she attended the Casa Loma Motel and drove her mother home.

b. Were the breath samples taken within two hours of operation?

[31] The offence contrary to s. 320.14(1)(b) requires proof that, within two hours of operating the vehicle, Ms. Soosay's blood alcohol level exceeded the legal limit. As noted above, a Certificate of a Qualified Technician was filed establishing that Ms. Soosay provided two breath samples, the first at 00:24 and the second at 00:47. The results of these samples were, respectively, 170mg and 160mg of alcohol in 100 millilitres of blood.

[32] To determine if the breath samples were taken within two hours of operation, I must consider the evidence concerning when Ms. Soosay left the Casa Loma Motel. As noted earlier, while the time of operation is not an element of the office (*R. v. Brake*, [2025] N.J. 1, at para 65), it can be critical in determining an accused's blood alcohol level at the time of operation.

[33] The evidence does not establish precisely when Ms. Soosay drove away from the Casa Loma Motel. Ms. Kaur Chohal did not recall what time she called the RCMP to report her concerns about Ms. Soosay but was clear that she called shortly after witnessing Ms. Soosay drive away. She testified that it could have been as early as 9:00 p.m. or 10 p.m. The investigating officer, Cst. Verstegen, testified that she received the call from dispatch at 23:02, drove through the Casa Loma Motel parking lot at 23:16, and arrived at Ms. Soosay's house at 23:18. Ms. Soosay's evidence was

that she had been home for one to two hours when Cst. Verstegen arrived and that she had put her young son to bed as it was after 9:00 p.m.

[34] The Crown argues that I should find that dispatch contacted Cst. Verstegen promptly after receiving the call from Ms. Kaur Chohal and, on that basis, I can find that Ms. Soosay left the Casa Loma Motel close to 11 p.m., the result being that the breath samples were taken within two hours of operation. While this may be a reasonable inference to make, I agree with counsel for Ms. Soosay there is no evidence to support that timing.

[35] Accordingly, for the purposes of this analysis, I rely on the evidence of Ms. Kaur Chohal regarding Ms. Soosay's departure from the Casa Loma Motel. This evidence is consistent with Ms. Soosay's testimony that she was home for one to two hours before Cst. Verstegen arrived and places Ms. Soosay's approximate departure at either 9 p.m. or 10 p.m. The first breath sample was taken at 00:24. Whether Ms. Soosay drove away at 9 p.m. or 10 p.m., this is over two hours after Ms. Kaur Chohal places Ms. Soosay as the driver of the vehicle.

[36] As part of the 2018 Bill C-46 Legislative amendments, a "conclusive presumption" of blood alcohol concentration was created by virtue of section 320.31(4).

> **320.31(4)** For the purpose of paragraphs 320.14(1)(b) and (d), if the first of the samples of breath was taken, or the sample of blood was taken, more than two hours after the person ceased to operate the conveyance and the person's blood alcohol concentration was equal to or exceeded 20 mg of alcohol in 100 mL of blood, the person's blood alcohol concentration within those two hours is conclusively presumed to be the concentration established in accordance with subsection (1) or (2), as the case may be, plus an additional 5 mg of alcohol in 100 mL of blood for every interval of 30 minutes in excess of those two hours.

[37] This section applies in cases where the breath samples were taken after the expiry of the two-hour period in s. 320.14(1)(b) and the remaining conditions in section 320.31(4) apply, which they do here. The presumption adds 5mg of alcohol for every half hour outside the two-hour window before the breath tests were taken.

[38] Whether Ms. Soosay operated the vehicle at 9:00 p.m. or 10 p.m., the application of s. 320.31(4) means her blood alcohol level is conclusively presumed to be over the legal limit at the time of operation. If Ms. Soosay ceased operation of the vehicle at 9:00 p.m., the lowest of the breath samples was taken approximately three and a half hours after she ceased operation of the vehicle, or one and a half hours outside of the two-hour window. Application of the presumption in s. 320.31(4) means Ms. Soosay's blood alcohol level at 9 p.m. is conclusively presumed to be 175 mg % of alcohol (160 mg + (3 x 5mg) per 100 ml of blood). If she operated the vehicle at 10 pm, the lowest breath sample was taken approximately thirty minutes outside of the two-hour window. This means Ms. Soosay's blood alcohol level is conclusively presumed to be 165 mg% (160 mg + 1 x 5mg) per 100 mL of blood. (see *R. v. Brake*, [2025] NJ No. 1).

[39] Neither counsel raised s. 320.31(4) at trial. However, the presumption applies regardless because it is a rule of substantive law, not a provision only operable if expressly invoked. It has been found to be an error of law for a trial judge not to apply the presumption (*R. v. Tweedie*, 2023 NSCA 11, para 24, leave to appeal to SCC dismissed).

c. Conclusion – s. 320.14(1)(b)

[40] I find Ms. Kaur Chohal's evidence was credible and that she provided reliable eyewitness evidence. I accept her evidence that she observed an intoxicated Ms. Soosay leave the Casa Loma Motel, step into the driver's side of a vehicle, and drive away alone. Having considered all defence evidence, I do not accept that Ms. Soosay was driven home that night by Kaylee, nor does the evidence of the defence witnesses raise a reasonable doubt.

[41] Relying on the presumption in s. 320.31(4), I find that Ms. Soosay was operating her vehicle while her blood alcohol context exceeded 80 mg%. I find her guilty of the charge contrary to 320.14(1)(b).

ii. s. 270(1)(a)

a. Has the Crown proven beyond a reasonable doubt that Ms. Soosay assaulted Cst. Verstegen?

I. Evidence

[42] Cst. Verstegen's involvement arose as follows. After receiving a call from dispatch, she attended at the Wann Rd. address she had been provided at 23:18. Wylee, Ms. Soosay's teenaged son, answered the door when she knocked and, when asked, indicated that Ms. Soosay was home. Cst. Verstegen waited on the doorstep but was able to see into the residence. Ms. Soosay came to the door. At 23:20, after making the ASD demand, Cst. Verstegen administered the ASD outside, which resulted in a Fail. Upon being arrested, Cst. Verstegen said that Ms. Soosay asked to be able to call for a babysitter. Cst. Verstegen agreed to allow this and went back to

the residence with Ms. Soosay, waiting at the porch while Ms. Soosay made the arrangements. Cst. Verstegen also asked Ms. Soosay to provide her driver's licence and car keys. There was some discussion about why the keys were required, in response to which Cst. Verstegen explained that the vehicle would be impounded and towed. As later became clear, Wylee removed the car key from Ms. Soosay's key ring and tossed it at Cst. Verstegen. The driver's licence was also thrown, by Wylee, at Cst. Verstegen.

[43] Cst. Verstegen testified that, at that point, Ms. Soosay became angry and tried to shove her out of the house. Cst. Verstegen testified that she told Ms. Soosay to stop touching her and that she placed Ms. Soosay in handcuffs for Cst. Verstegen's safety. She described Ms. Soosay as taking a "postured up stance", shoving and pushing her four to five times. Ms. Soosay denies assaulting Cst. Verstegen.

[44] Some of the interaction between Ms. Soosay and Cst. Verstegen is shown on the video made by Wylee. Ms. Soosay's upper body cannot clearly be seen in the video. Wylee said he started videoing because Cst. Verstegen was aggressive and it seemed wrong.

[45] A review of the video reveals that, after Wylee tossed the car keys, causing them to hit Cst. Verstegen, Cst. Verstegen's tone immediately became loud, angry and aggressive. Cst. Verstegen can be heard on the video telling Wylee not to throw things at her and that he could be arrested if he did that again. At one point during their interaction, Ms. Soosay is seen to step back at the door. This movement is consistent with stumbling or being pushed. Cst. Verstegen testified that Ms. Soosay stumbled.

Wylee testified that Cst. Verstegen shoved his mom. I note that Wylee's recorded response on the video is consistent with Cst. Verstegen using force on Ms. Soosay, not with Ms. Soosay stumbling. I accept that Cst. Verstegen shoved Ms. Soosay.

[46] Once on the porch, Cst. Verstegen is heard on video loudly and aggressively telling Ms. Soosay to stop touching her and to stop resisting arrest; however, the video does not show Ms. Soosay doing anything of the sort. When handcuffing Ms. Soosay, Cst. Verstegen is heard on video saying that she is using handcuffs since Ms. Soosay cannot stop pushing her around – again, on video, Ms. Soosay appears to being doing nothing of the sort.

[47] Overall, Cst. Verstegen's testimony is not supported by the video evidence. There was nothing in the video – either audibly or visually – that demonstrates Ms. Soosay being aggressive, angry, taking a "postured stance", or pushing and shoving Cst. Verstegen. What Cst. Verstegen is heard saying on the video - that Ms. Soosay is resisting arrest or pushing Cst. Verstegen around – is inconsistent with what can be seen on the video. Despite not being able to clearly see what is happening with Ms. Soosay's upper body, I have a reasonable doubt that she was touching, pushing, or shoving Cst. Verstegen.

b. Conclusion – s. 270

[48] Cst. Verstegen's evidence was not credible. Where Cst. Verstegen's evidence conflicts with the evidence of Ms. Soosay and Wylee, I prefer their evidence. I have also carefully considered the video recording made by Wylee. Although the video does not show every detail of the interaction between Ms. Soosay and Cst. Verstegen, what

can be seen does not accord with Cst. Verstegen's evidence. The video evidence, along with the evidence of Ms. Soosay and Wylee, raises a reasonable doubt that Ms. Soosay assaulted Cst. Verstegen.

[49] I acquit Ms. Soosay of this charge.

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CAIRNS T.C.J.