Citation: *R. v. Joe*, 2015 YKTC 55

Date: 20151030
Docket: 14-00459
Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**
Before His Honour Judge Luther

REGINA

v.

ARTHUR FRANKIE JOE

Appearances:
Eric Marcoux — Counsel for the Crown
Lynn MacDiarmid — Counsel for the Defence

**REASONS FOR JUDGMENT**

[1] LUTHER J. (Oral): Arthur Frankie Joe is charged with impaired driving and a breathalyser offence from October 10, 2014. It is a care and control case. On October 11, 2014, he blew 150 mg% and 140 mg% at 00:51 and 01:40 hours, respectively.

[2] Constable MacLean and an auxiliary pulled up behind a stopped truck just before midnight. It was on Fourth Avenue, one of the busiest thoroughfares in all of the north of Canada. It was parked at a slight angle, not even close to the 45° angle suggested by Constable MacLean. That was an over exaggeration.

[3] The defendant exited the truck and went to the front, with a view of switching over the gas tanks manually. Joanne O'Brien was sitting in the passenger seat. She is considerably shorter than the police officer and the defendant. The defendant got back

in the truck and then got out. Next the Constable went in and then he exited. At that point, he got in the face of the defendant, really up close, and noticed a smell of alcohol, flushed face, and a strong odour of alcoholic beverages on his breath. The defendant admitted freely to consuming alcohol. The defendant was cuffed and placed in the patrol car. He was arrested for drinking and driving.

[4] The defendant adamantly, from the start, denied driving the truck, "I just started up the vehicle...I wasn't going home." In addition to vulgar name-calling and less than discreet threats, "That's why you guys get shot in the back of the head sometimes" and "I'm going to see you one of these days." The defendant also unnecessarily raised the issue of racial discrimination.

[5] I do understand the defendant holds a very strong view about what happened to his first wife, and we don't want to discredit that in any way; nonetheless, there was no need for him to get on as he did with the constable at the time.

[6] Later, the defendant asked, "Why am I getting charged?" Referring to Ms. O'Brien, he said some unkindly words about her as well, "When that fucking bitch will walk away with that," referring to her statement to the police that she wasn't driving. Ms. O'Brien and the defendant were related, and she has known him her whole life.

[7] When the constable told him that she had not been driving, the defendant said, "Shit", in a tone recognizing that the game was over. It wasn't a defiant "Shit. Hell, no, she was driving." In my mind, it was an acknowledgment that he was done.

[8] In terms of the evidence raised by the defence, there were a number of significant errors:

1. The supposed sober driver being sought out by the defendant and Ms. O'Brien - the defendant said it was Nelson Johnny and Ms. O'Brien said it was Carl Sam.

2. The defendant only proceeded to walk from the vehicle briefly south on Fourth and then across to Tags, after the RCMP had been there for several minutes, and not as she had stated about standing outside before she left and heading for the crosswalk and being called back to talk to the police. Ms. O'Brien did not come back when they were talking to him because she was in the vehicle, that is, the truck.

3. Ms. O'Brien claims that the police didn't ask who was driving. The police indicated clearly they did, and it only stands to reason that they would.

4. The state of sobriety of Ms. O'Brien, who claimed that she hadn't been drinking. Constable MacLean indicated that she was intoxicated and her speech was slurred. The observation on the video would clearly show that when she left the truck and headed south on Fourth, she was unsteady and uncertain on her feet.

5. Ms. O'Brien said, "The vehicle was not started while I was there", but the defendant had told the police, "I just started up my vehicle and I was going home" — and plus, the constable's evidence was that he started up the

vehicle. The video clearly shows that Cst. MacLean entered the truck with the keys in his hand and he returned from the truck shortly thereafter, again, with the keys in his hand.

6. The defence indicated — their two main witnesses — that they were looking for Nelson Johnny but yet the defendant, himself, told the police that he was going home.

[9] The Court notes that the defendant and Ms. O'Brien and the third witness, Richard Tulk, all have convictions for drinking and driving.

[10] The Court is guided in great measure by the Supreme Court of Canada decisions in *R. v. Lifchus*, [1997] 3 S.C.R. 320; *R. v. Starr*, 2002 SCC 40; and *R. v. J.M.H.*, 2011 SCC 45.

[11] As to credibility, *R. v. W.(D.)*, [1991] 1 S.C.R. 742, a 1991 decision of the Supreme Court of Canada, in this particular case, based on my close analysis:

1. I do not believe the evidence of the defendant;

2. The Defendant’s evidence and that of Ms. O'Brien does not cause me to have a reasonable doubt concerning his guilt; and

3. The totality of the evidence clearly leads to the defendant's guilt.

[12] In arriving at my decision, I am not entering the world of a credibility contest (*R. v. S.T.,* 2015 MBCA 36 and *R. v. M.D.R.*, 2015 ONCA 323).

[13] The only rational inference that can be drawn from the circumstantial evidence is that the defendant is guilty (*R. v. Griffin*, 2009 SCC 28).

[14] There is no persuasive piece or pieces of exculpatory evidence that raises a reasonable doubt (*R. v Lewis*, 2015 ABCA 292).

[15] This assessment of evidence is not based on demeanour alone (*R. v. Sandhu*, 2012 BCCA 500).

[16] The stories put forward by the defence witnesses do not make sense. They really do not have an air of reality. The vehicle was an old 4x4 truck; standard transmission, I believe; two gas tanks, which should be able to be switched over easily from the inside. Ms. O'Brien was unable to do so even with the defendant's coaching.

[17] I believe that the defendant drove the vehicle and at no time was Ms. O'Brien the driver that night. The truck stalled out on Fourth Avenue moments before the police arrived. Ms. O'Brien was still sitting in the passenger seat; the defendant was behind the wheel. It was the defendant's truck and the keys were available. It was the defendant's intention to start the vehicle and presumably continue looking for a sober Mr. Nelson Johnny. The defendant drove the vehicle very shortly before the police arrived and the defendant was in the driver seat when the police arrived. Therefore, the defendant had care and control even without the presumption.

[18] Even if I am wrong in that assessment of the evidence, then the presumption clearly applies under s. 255(1)(a) of the *Criminal Code*.

[19] The defendant occupied the driver seat for the purpose of setting the truck in motion. The idea that he would have done his utmost to switch tanks and turn the vehicle over to an intoxicated female is implausible. The truck was on a major avenue. The purpose was to set it in motion. The purpose was not to leave the truck where it was. Ms. O'Brien did not know how to do this. There was the potential of considerable danger to the public.

[20] In *R. v. Boudreault*, 2012 SCC 56, at para. 33:

> In this light, I think it helpful to set out once again the essential elements of "care or control" under s. 253(1) of the *Criminal Code* in this way:
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> (1) an intentional course of conduct associated with a motor vehicle;
>
> (2) by a person whose ability to drive is impaired, or whose blood alcohol level exceeds the legal limit;
>
> (3) in circumstances that create a *realistic* risk of danger to persons or property.

[21] Whether the vehicle was fully functional at the time is not important. Obviously the defendant thought it was, otherwise he would not have attempted to do so, and if he were successful, there would be a considerable risk to the public. Trace the development of the Supreme Court of Canada (*R. v. Saunders*, [1967] S.C.R. 284; *R. v. Toews*, [1985] 2 S.C.R. 119; and *R. v. Penno*, [1990] 2 S.C.R. 865). It is abundantly clear to me that the defendant's intention was to set the vehicle in motion.

[22] Furthermore, the defendant believed that the vehicle could be started because he was opposed to the towing charges, and said, "Just leave it here and my wife will get

it." Ms. O'Brien was incapable of doing so. Therefore, there was clearly a realistic risk of danger in the facts of this case because it was the Defendant's full intention to set this vehicle in motion.

[23] Ms. MacDiarmid cited *R. v. Mahar*, 2004 BCPC 28. That case can easily be distinguished. There was no evidence of any risk of the defendant putting the vehicle in motion in that case. The defendant was not the driver. The defendant, in fact, was awaiting the driver. The vehicle was inoperable. Here, the action of connecting the second tank was not completed. Also, it being on a busy thoroughfare, chances are there was a gas station in the vicinity for which a jerry can could have been obtained and the vehicle set in motion. It is not within the air of reality that the Defendant was going to leave the vehicle parked as it was.

[24] If we take a look at the *R. v. Wren*, 2000 CanLII 5674 (ON CA) case:

> [26] The trial judge noted five circumstances arising from the evidence:
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> 1) The vehicle was inoperable;
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> 2) The accused had sought help, unsuccessfully, to move the same;
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> 3) To his mind, the tow truck was on the way;
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> 4) When found, he was awaiting the arrival of the truck;
>
> 5) There was no risk that acts of the accused at the point in time when he was found in the vehicle in the state he was in, of putting [sic] the car in motion.

[25] Again, that case is clearly distinguishable. There was no evidence of the defendant in any way seeking out a tow truck or awaiting the arrival of a tow truck, and he had not sought help to move the vehicle. There is a very real issue as to the vehicle, in fact, being operable, especially if gas were added or if they were successful in changing over from one tank to the other.

[26] In this case, I want to indicate that defence counsel, Ms. MacDiarmid, pursued this case very diligently with very commendable work in arguing the case. The facts are not with the Defendant and a conviction is registered under s. 253(1)(b) of the *Criminal Code*.

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LUTHER T.C.J.