Citation: *R.* v. *Lavallee,* 2016 YKTC 57

Date: 20161102
Docket: 15-00382
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

JOHN ARTHUR LAVALLEE

Appearances:
Amy Porteous — Counsel for the Crown
Amy Steele — Counsel for the Defence

RULING ON *CHARTER* APPLICATION

[1] John Lavallee has been charged with having committed offences contrary to ss. 253(1)(a) and 254(5) of the *Criminal Code*.

[2] Counsel for Mr. Lavallee has filed an application in which she asserts infringements of Mr. Lavallee's section 9, 10(a), and 10(b) *Charter* rights. She asks for exclusion of any evidence that flows from the breaches of these *Charter* rights, and specifically for the exclusion of any observations made by the police after Mr. Lavallee's arrest. She also asks that the refusal charge be dismissed on the basis that his arrest was without the requisite grounds and therefore unlawful.

[3] On October 11, 2016, after considering the *Charter* arguments, I acquitted Mr. Lavallee of the charges and indicated I would be issuing written reasons for that determination. These are those reasons.

Evidence

[4] The evidence of Cst. Jury was heard in a *voir dire*. She was the only witness to testify on the *voir dire*. It was agreed that any evidence heard in the *voir dire* would, if admissible, constitute evidence on the trial proper.

[5] I find that Cst. Jury provided her testimony in an honest and professional manner and that the following occurred on August 11, 2015.

[6] Cst. Jury was at the corner of 4th Avenue and Jekyll Street just after 11:00 p.m. The lighting was dusky at the time.

[7] She observed a truck towing a boat and trailer pass by heading south on 4th Avenue. She noticed that it was being operated by a First Nations male. As the vehicle passed by she noted that there were no taillights on the trailer contrary to the requirements of the Yukon *Motor Vehicles Act,* RSY 2002, c. 153. She also noticed that the tarp that was covering the boat was not tied down properly and was therefore flapping in the wind. In her mind this constituted a traffic hazard.

[8] The truck entered into the roundabout and did a complete circle before taking the exit to head up Robert Service Way. Cst. Jury thought that this was strange and followed the truck. She noted it to be driving very slowly, even considering that the

truck was towing a boat and trailer. As a result of her observations, she activated the emergency lights on the police cruiser. She did not activate the siren.

[9] The truck pulled over within 60 to 90 seconds. There was no observable change in speed of the truck prior to it pulling over. In Cst. Jury's experience it was unusual for a vehicle to take such a long period of time before pulling over. In her mind, she thought it likely that the driver of the vehicle had not noticed her behind him. The time of the stop was 11:22 p.m.

[10] Immediately upon stopping, the driver of the truck got out and went back to fasten down the flapping tarp. Cst. Jury left her vehicle, which was parked about five metres behind the boat trailer, and went to where the driver was. She recognized him as Mr. Lavallee, whom she had met before on three occasions, one being when he was sober. He was the same male that she saw drive by her on 4th Avenue.

[11] As she approached the boat trailer she noticed him to be leaning against the boat. She considered him to be steadying himself by doing so in order not to sway. She had also noticed him to be somewhat dishevelled in appearance, with messy hair and pants too large for him that he had to keep pulling up.

[12] She asked him to produce his driver's license. While she was speaking with him, she noted an odour of liquor on his breath. Mr. Lavallee was uncooperative and belligerent. He was unable to produce a driver's licence. He told Cst. Jury that he was not driving. When asked, he stated that he was coming from Lake Laberge and was headed to Carcross. She considered this strange, as the easiest way to get to Carcross

from Lake Laberge was by continuing along the Alaska Highway, and not by going through downtown.

[13] At this time Cst. Jury formed the opinion that Mr. Lavallee was impaired by alcohol and arrested him for impaired operation of a motor vehicle. Her opinion of impairment was formed on her observation of the driving evidence (no taillights, circling twice through the roundabout, slow rate of speed, and immediately exiting the vehicle which in her experience was not common). She also considered that he was swaying when standing and speaking and in her opinion steadying himself against the trailer, and that he had an odour of alcohol coming from his breath when speaking to her. It was her opinion that he was grossly intoxicated.

[14] Cst. Jury stated in her opinion Mr. Lavallee was acting as though he was "inconvenienced by the traffic stop".

[15] She agreed that the truck (and trailer) had not crossed over any lane lines, was not swerving and was not being driven erratically or dangerously.

[16] She also agreed that Mr. Lavallee's speech was normal, his eyes did not appear to be bloodshot or show other similar indicators consistent with impairment, and his walking was fine from the truck to the boat trailer.

[17] I pause here to note that although the police vehicle was equipped with both video and audio-recording capability, the investigation video has been lost. Apparently this was not an isolated loss, and the same was true for recordings made by several other police vehicles. Although defence counsel did not make much of this, I do find it

concerning. The preservation of police audio and video-recordings is of great assistance to a court in determining the actual circumstances of an arrest or the nature of any interaction between an accused person and the police. Here, for example, a video would have been of value in considering Cst. Jury's evidence about Mr. Lavallee's degree of intoxication.

[18] In any event, the arrest occurred at 11:27 p.m., at which time Mr. Lavallee was placed in the back of the police vehicle. He was again advised of his arrest at 11:35 p.m., and at this point was read his *Charter* right to counsel from the card Cst. Jury had in her possession. Mr. Lavallee stated to her after being read his *Charter* right to counsel: "Just take me to jail". When she asked him if he wished to talk to a lawyer, he stated "How can I do that?". Cst. Jury did not believe that Mr. Lavallee was actually asking how he could call a lawyer, noting him to be belligerent and uncooperative. Cst. Jury believed Mr. Lavallee understood what she had read to him.

[19] At 11:37 p.m., Cst. Jury read the breath demand to Mr. Lavallee from the card she had in her possession. He answered "Yes" when he asked him if he understood. She believed that he in fact did understand.

[20] During the interim between the initial arrest at 11:27 p.m. and the time Mr. Lavallee was provided his *Charter* right to counsel, Cst. Jury was involved in matters related to the arrest and investigation of Mr. Lavallee.

[21] Capitol Towing arrived at 11:38 p.m. After spending approximately five minutes with the tow truck driver, Cst. Jury took Mr. Lavallee to the RCMP Detachment. Upon arriving, she left him in the police cruiser in order to deal with an unknown individual on

a bicycle who had followed her into the Detachment Bay, ultimately calling for the Watch Commander to come assist. Mr. Lavallee was brought inside the Detachment at 11:48 p.m.

[22] Once inside the detachment, Cst. Jury again asked Mr. Lavallee if he wanted to contact a lawyer. She did not read him his *Charter* right to counsel from the card she had used in the police cruiser. Mr. Lavallee said "why should I" in an aggressive tone. She interpreted this as him saying he hadn't done anything wrong. She then asked him if he was going to provide breath samples. He said "nope, I am not doing that". She explained the penalty for driving while over .08 and refusal and asked him if he understood that, and he said, "Yes, not doing it".

[23] Cst. Jury never said anything that would discourage Mr. Lavallee from calling a lawyer. She had no concerns about his understanding what she was explaining to him. She believed that Mr. Lavallee was capable of complying.

[24] She further attempted to explain the process and consequences of refusal to give him another opportunity to comply. She asked if he would provide samples and he shook his head and said: "No. I don't want to fucking be here".

[25] She noted Mr. Lavallee as being angry and very irritated with her. He was non-cooperative, in both his mood and demeanour.

[26] Mr. Lavallee gave Cst. Jury no other reason for why he did not wish to provide a breath sample. Cst. Jury advised him that he was being charged for failing to provide a breath sample. She did not offer him another opportunity to speak to a lawyer. She

then took him to Arrest Processing Unit ("APU") to be held until sober. It is unknown at what time he was released from the APU.

[27] In explaining why Mr. Lavallee was held at the APU after he had been arrested, Cst. Jury stated that it was her opinion that Mr. Lavallee was in no condition to understand a promise to appear at that time. She wanted him to be sober enough to understand the paperwork and wanted to ensure that he would not go out and drive again. She stated that this was in accord with her general practice.

[28] Despite her concerns about the release paperwork, Cst. Jury felt that Mr. Lavallee understood his *Charter* right to counsel and the breath demand because he was answering in a way that made her believe he understood.

Analysis

[29] There is no dispute that Cst. Jury had the grounds to pull over the truck and boat trailer due to the lack of operating tail lights.

[30] I find that Mr. Lavallee was clearly the driver of the vehicle at the time Cst. Jury first viewed it and while she was following it up Robert Service Way.

[31] The first issue to be resolved is whether Cst. Jury had reasonable grounds to arrest Mr. Lavallee for impaired operation of a motor vehicle. As stated in ***R. v. Seguin*****,** 2016 ONCJ 441: "To state the obvious, in regard to the refusal charge, if the requisite legal grounds for the AI [Approved Instrument] demand did not exist then Ms. Seguin committed no offence in failing to comply with the demand" (para. 124).

[32] The Crown must establish that Cst. Jury had both a subjective and objective basis for her reasonable grounds to demand that Mr. Lavallee provide breath samples. A mere suspicion is insufficient. At the time of Mr. Lavallee's arrest, Cst. Jury must have had an honest belief that he was driving his vehicle while his ability to do so was impaired (***Seguin,*** para. 125, citing ***R. v. Bush,*** 2010 ONCA 554).

[33] I have no doubt that, based upon her observations and experience and my assessment of her testimony at trial, that Cst. Jury believed that Mr. Lavallee was impaired.

[34] As a general principle, the test for objective reasonableness requires that the officer's belief be supported by objective facts, and that "a reasonable person placed in the position of the officer would be able to conclude that there were indeed reasonable and probable grounds for the arrest" (***Seguin,*** para. 125, again citing ***Bush***).

[35] The indicia and the circumstances must be evaluated in their totality (***Bush*** at para. 54). The possibility of an alternative explanation for some of the indicia observed by the police officer in forming his or her opinion of impairment does not eliminate the indicia or render them unreliable.

[36] It can be difficult at times, I expect, for a police officer to communicate what he or she observes at the scene of an event, such as an impaired driving investigation, in a manner that "brings it to life", so to speak, for the trier of fact. This can be problematic for a court when assessing the objective reasonableness of a police officer's honestly held belief that a driver of a motor vehicle is impaired.

[37] Notwithstanding my otherwise positive assessment of Cst. Jury's testimony, I find that the symptoms of intoxication, as testified to, fall far short of what I almost invariably have placed before me when an individual is stated to be grossly intoxicated. Cst. Jury was never asked to explain what she meant when she used these words to describe Mr. Lavallee. I would generally expect to see more than the driving pattern described here, the odour of liquor from Mr. Lavallee, which was not described as being either strong, moderate or weak, the leaning against the boat trailer and the dishevelled appearance.

[38] Of course, the test for impairment is far below a requirement of gross intoxication; any degree of impairment from slight to great is sufficient in the context of impaired driving offences (***Bush,*** para. 47, citing ***R. v. Stellato*** (1993), 12 O.R. (3d) 90 (C.A.)).

[39] When I consider the grounds that Cst. Jury was relying on in arresting Mr. Lavallee for impaired driving, I am not satisfied that they meet the standard for objective reasonableness, notwithstanding that I am satisfied that Cst. Jury honestly believed that she had sufficient grounds. I find that, at best, on the basis of objectively viewed reasonableness, Cst. Jury would have been in the position to make an Approved Screening Device ("ASD") demand on the basis of a reasonably held suspicion. There were certainly clear and sufficient grounds for this demand. However, a belief that Mr. Lavallee was impaired, event to a slight degree, was not objectively reasonable in the circumstances.

[40] Cst. Jury was not sure whether there was an ASD in her police cruiser. Regardless, she stated that she would not have used one had she had one, as her training is that once she had the grounds for belief it would be improper to use the ASD.

[41] This is certainly consistent with my ruling in ***R. v. Minielly***, 2009 YKTC 9. In that case, I held that once a police officer has the subjective requisite grounds to make a breath demand, there is no longer any basis in law to make an ASD demand. I recognize the dilemma or Catch-22 situation that is created by my reasoning in ***Minielly***.

[42] This dilemma could perhaps be resolved by an amendment to the *Code* that would allow for the ASD to be administered in order to confirm that a police officer's subjective belief is also objectively reasonable. I would think that such an amendment would withstand *Charter* scrutiny for the same reasons an ASD demand generally does. The delay in detention without a *Charter* right to counsel remains minimal. Such an amendment may also result in the release of individuals who would otherwise have been further detained, when the ASD result does not confirm the police officer's subjective belief.

[43] Absent such an amendment, a police officer could engage in a quick assessment at roadside of the objective reasonableness of his or her belief, especially where, as here, the indicia of impairment are relatively few and inconclusive. If the officer has any doubts about the objective reasonableness of his or her belief, then he or she could make the ASD demand to satisfy him or herself that their belief is supported by the circumstances and that it amounts to more than a suspicion, viewed objectively.

[44] Simply stated, the police officer would step back and consider the objective reasonableness of his or her belief that the operator of a motor vehicle was impaired before concluding that he or she has the subjective belief and therefore the reasonable grounds required to make a s. 254(3) demand.

[45] This would likely assist in preventing officers from jumping to conclusions too quickly. It could also assist in preventing unwarranted detentions for the purpose of the driver providing a breath sample pursuant to a s. 254(3) demand.

[46] Regardless, for the purposes of this case, I find that Cst. Jury did not have the requisite grounds for an arrest and s. 254(3) demand. As such, the refusal charge must be dismissed.

[47] Turning to the *Charter* arguments and the impaired charge, based on my finding that there was an unlawful arrest, I find that there has been a breach of Mr. Lavallee's s. 9 *Charter* right not to be arbitrarily detained. I also find, and as is conceded by the Crown, that there was a breach of Mr. Lavallee's s. 10(b) *Charter* right, in that he was not provided his right to counsel for eight minutes after his arrest, despite there being no circumstances that would justify this delay. This said, there was no wrongful intent on the part of Cst. Jury and no attempt by her to gather incriminating evidence against Mr. Lavallee by this delay in providing him his *Charter* right to counsel. [1]

[48] I do not find that there was a breach of Mr. Lavallee's s. 10(b) *Charter* right as a result of Cst. Jury not reading Mr. Lavallee his full *Charter* right to counsel again once

[1] Counsel did not pursue a s. 10(a) argument.

he was back at the Detachment. She read this to him in the police cruiser and I accept her evidence that he understood what his right to counsel was and that he was not asking an honest question when he asked "how" he could do that. He was asked again at the Detachment whether he wanted to speak to counsel and he chose not to do so. He did not inquire again about how legal advice could be sought. This said, for the very brief time it would have taken, it would not have been difficult for Cst. Jury to more fully explain Mr. Lavalle's rights to him again at the Detachment. All doubt would have been removed about his understanding and wish to contact counsel.

[49] Counsel for Mr. Lavallee is seeking a s. 24(2) remedy. Other than some additional observations made by Cst. Jury about Mr. Lavallee's belligerence and uncooperativeness, no incriminating evidence resulted from either the s. 9 or the s.10(b) *Charter* breaches. Crown counsel argues for the admission of these observations for the purposes of my determination of the impaired driving charge.

[50] I am satisfied that the evidence of these observations should be excluded pursuant to the application of the test set out in ***R.*** v. ***Grant***, 2009 SCC 32. While I am satisfied that the *Charter*-infringing conduct was not deliberate in the sense that Cst. Jury was aware of and chose to deny Mr. Lavallee his *Charter* rights, there was nonetheless more than one breach, which makes the conduct more serious in my view (see e.g. ***R.*** v. ***Gaber***, 2016 YKSC 38). The impact on Mr. Lavallee was not fleeting and technical given that, because of the s. 9 breach, his vehicle was impounded and he spent at least some portion of the night in custody. In terms of the third branch of the test, I do not consider the evidence of Mr. Lavallee's demeanour to be particularly reliable evidence in that it is capable of a subjective interpretation in terms of the extent

to which it leads to an inference of impairment. In my view, all three aspects of the ***Grant*** test lean in favour of excluding Cst. Jury's observations.

[51] For the same reasons that I am not satisfied about the objective reasonableness of Cst. Jury's belief that Mr. Lavallee was impaired, I am not satisfied beyond a reasonable doubt that he was impaired. This is so, even if I were to have considered the evidence of belligerence and uncooperativeness that counsel sought to exclude. I am acquitting Mr. Lavallee on the charge of impaired driving.

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COZENS T.C.J.