R. v. De Jesus, [2021] O.J. No. 2155

Ontario Judgments

Ontario Superior Court of Justice

M.D. Forestell J.

Heard: February 25, 2021.

Judgment: March 3, 2021.

Court File No.: CR-19-000001-0000AP

[2021] O.J. No. 2155

Between Her Majesty the Queen, Appellant, and Andrew ***De Jesus***, Respondent

(30 paras.)

Counsel

Mr. Aaron Del Rizzo, for the Appellant.

Mr. Michael *Engel*, for the Respondent.

REASONS FOR DECISION

M.D. FORESTELL J.

Overview and Issues

1 The Respondent was charged with impaired driving and Over 80 on May 22, 2018. His trial was conducted before Ray J. on November 18 and 19, 2019. He was arraigned only on the charge of Over 80.

2 The evidence at trial was that the Respondent was the driver of a car that collided with the back of a stopped streetcar at 5:30 a.m. Police Constable Ferreira arrived at around 5:50 a.m. He determined that the driver of the car was seated in the passenger seat of a tow truck. PC Ferreira had no information that alcohol was a concern. He testified that he approached the Respondent, who had been identified as the driver, with the intention of inquiring as to how the accident occurred and confirming that the two drivers had the correct documentation and were aware of their reporting obligations.

3 The Respondent told PC Ferreira that he had been out all night and had slept or taken a nap in his car. PC Ferreira saw that the Respondent was wearing a wristband from a club. The officer smelled "a little bit of

alcohol" coming from the Respondent. PC Ferreira then asked the Respondent whether he had consumed alcohol and when and how much he had consumed. The Respondent confirmed that he had been drinking. He told the officer that he had consumed three to four drinks and also when he had consumed his last drink. PC Ferreira left the Respondent at 5:54 a.m. to briefly to speak to a witness. The officer testified that after he confirmed with the witness that the Respondent was the driver of the vehicle, he returned to the Respondent at 5:56 a.m. and made a demand for the Respondent to provide a sample of his breath into an approved screening device ("ASD"). He testified that at that point, he had formed the suspicion that the Respondent had consumed alcohol.

4 The officer was asked at trial: "And that suspicion was based on?" He replied: "It was initially admitted by him, advising me that he had consumed alcohol. As well as during the point of the conversation I was able to smell alcohol coming from him - or coming from his breath while I was speaking to him."

5 The officer was then asked by the Crown whether the observation that the Respondent was wearing a bracelet from a club formed part his grounds. The officer agreed that it did. He was asked whether the nature of the accident "play[ed] in at all" and the said that this was a "concern".

6 Under cross-examination, the officer testified that it was during his initial conversation with the Respondent that he smelled alcohol and asked him about his consumption of alcohol. He agreed that at that point he was interested in "developing grounds for the purpose of an approved screening device".

7 The officer agreed that when he began speaking to the Respondent, he smelled alcohol and saw the wristband, but he did not know what the Respondent had to drink or when he had last consumed alcohol. He agreed that these matters were of "some importance' in terms of making the demand. He agreed that the admission of consumption alone was sufficient to make the demand.

8 The breath technician testified that he spoke to PC Ferreira before administering the breath test at the station. PC Ferreira told the technician that there was an accident, an odour of an alcoholic beverage and an admission by the Respondent that he had consumed alcohol before the ASD was administered and he was arrested. The results of both of the breath tests were 110 milligrams of alcohol in 100 millilitres of blood.

9 The Respondent applied for the exclusion of the evidence of the breathalyzer readings pursuant to s.24(2) of the *Charter* because of a violation of ss.7 and 10(a) of the *Charter*.

10 The trial judge granted the Respondent's application for the exclusion of the evidence as a result of the violation of s. 10(a) of the *Charter* and the Respondent was acquitted. In her s. 24(2) analysis, the trial judge found that the utterances of the Respondent were the main factor that influenced the officer's decision to make the ASD demand. She concluded that the violation was medium to serious and that the impact on the *Charter* protected right of the Respondent not to incriminate himself was high.

11 The Crown appeals the acquittal.

12 The Notice of Appeal and factum of the Appellant allege that the trial judge erred in finding the s. 10(a) violation and also allege that the trial judge misapprehended the evidence and erred in her s. 24(2) analysis.

13 At the hearing of this appeal, the Appellant abandoned the ground of appeal relating to the violation of

s. 10(a). The Appellant conceded that there was a violation. The remaining issues on appeal are:

1. Did the trial judge misapprehend the evidence of the arresting officer when the trial judge found that the officer's grounds for the ASD demand were primarily based on the utterances of the Respondent?
2. Did the trial judge err in her s. 24(2) analysis by conflating the first two lines of inquiry and by basing her assessment of the impact of the breach on her misapprehension of the evidence?

14 For the reasons set out below, I find that the trial judge did not misapprehend the evidence and that she did not err in her s. 24(2) analysis.

Legal Principles

Misapprehension of evidence

15 As the Court of Appeal explained in *R. v. Doodnaught*, *2017 ONCA 781* at paragraphs 71 and 76:

> A misapprehension of evidence may involve a failure to consider relevant evidence; a mistake about the substance of evidence; a failure to give proper effect to evidence or some combination of these failings: *R. v.Morrissey (1995), 97 C.C.C. (3d) 193* (Ont. C.A.), at p. 218. To succeed before an appellate court on a claim of misapprehension of evidence, an appellant must demonstrate not only a misapprehension of the evidence, but also a link or nexus between the misapprehension and the adverse result reached at trial.
>
> ...
>
> Absent palpable and overriding errors by a trial judge in his perception of the facts, his or her findings are to be respected. We must ask whether the reasons, considered with the evidentiary record, the submissions of counsel and the live issues at trial, reveal the basis for the verdict rendered. We look at the reasons in their entire context to see whether the trial judge appears to have seized the substance of the matter: *R.E.M.*, at para. 55.

Exclusion of Evidence: s.24(2)

16 A determination of the admissibility of evidence under s. 24(2) requires the examination of the seriousness of the *Charter*-infringing state conduct, the impact of the breach on the *Charter*-protected interests of the accused and society's interest in an adjudication on the merits. (*R. v. Grant*, *2009 SCC 32*)

17 As Doherty J.A. wrote in *R. v. McGuffie*, *[2016] O.J. No. 2504* (C.A.) at paragraph 64:

> The three inquiries identified in Grant require both fact-finding and the weighing of various, often competing interests. Appellate review of either task on a correctness standard is neither practical, nor beneficial to the overall administration of justice. A trial judge's decision to admit or exclude evidence under s. 24(2) is entitled to deference on appeal, absent an error in principle, palpable and overriding factual error, or an unreasonable determination: see *Grant*, at paras. 86, 127; *Côté*,

at para. 44; *R. v. Cole*, *2012 SCC 53*, *[2012] 3 S.C.R. 34*, at para. 82; *Jones*, at para. 79; *R. v. Ansari*, *2015 ONCA 575*, *330 C.C.C. (3d) 105*, at para. 72.

Application of the Principles

Misapprehension of Evidence

18 The Appellant argues that the trial judge misapprehended the evidence of the officer in reaching her conclusion that "...the officer was quite clear in his evidence that his grounds were primarily based on what Mr. ***De Jesus*** has said and that is the main factor that influences his decision. He was asked a lot of questions about what else influenced his decision but in his own evidence, that was the main factor."

19 In assessing whether the trial judge misapprehended the evidence of the officer, I have considered the whole of the evidence of the officer. When first asked the basis for his suspicion he testified: "It was initially admitted by him, advising me that he had consumed alcohol. As well as during the point of the conversation I was able to smell alcohol coming from him - or coming from his breath while I was speaking to him."

20 In cross-examination this was pursued and the following exchange occurred:

> Q. Okay. I think you agreed with me that during the course of the conversation you had with him when he became a suspect that he incriminated himself, right?
>
> A: As far as operating the vehicle, yes.
>
> Q. And in terms of what he had to drink and the particulars you needed to make the demand, grounds which came at 5:56.
>
> A. No, because I was also able to smell alcohol coming from his breath, so it wasn't only the fact that he admitted to me what he had to drink or how much he had.
>
> Q. But you say you didn't form the suspicion until 5:56, which would've been two minutes after the questions with respect to what he had to drink. It would've been some two minutes afterwards.
>
> A. So, I would've formed the suspicion while I was speaking to him. And I likely spoke to our witness to confirm that he had actually seen him operating the vehicle, And looking back at it now it likely was because at that point I'd know that he wasn't cautioned originally at the beginning of my conversation with him. Again, I'll indicate that I thought I was just saying hello and checking for documents and so on.
>
> Q. Right, but as I understand it you've told us that during the course of the conversation you were simply able to smell some alcohol.
>
> A. I did smell alcohol coming from his breath, yes.
>
> Q. Right, but you don't know what he had to drink or when he had to drink it, or where he'd been. You didn't know any of that.
>
> A. No.
>
> Q. Which is of some importance in terms of making a demand you'd agree, right?
>
> A. Yes.

21 The Appellant points to the re-examination of the officer:

> Q. So, just picking up where my friend left off there about the admission of alcohol consumption. In this narrative let's eliminate that factor entirely. Let's say he denied any consumption of alcohol but everything was the same, would you have still had grounds to make that ASD demand?
>
> A: Based on my smelling alcohol from him, yes.

22 Reading the record and the reasons of the trial judge as a whole, I cannot conclude that the trial judge misapprehended the evidence in finding that the arresting officer based his ASD demand primarily on the utterances of the Respondent. It is clear from her reasons that the trial judge acknowledged that there were other factors taken into account by the officer. She did not fail to consider that evidence, nor did she fail to give proper effect to the evidence. She weighed and considered the evidence and made a finding of fact that was open to her to make. The trial judge was entitled to accept some all or none of the evidence of the officer. The initial answer given by the officer was capable of supporting the finding of the trial judge.

23 I would not give effect to this ground of appeal.

Section 24(2) Error

24 The argument advanced by the Appellant with respect to s. 24(2) is two-fold: (i) that the trial judge's finding that the impact on the *Charter*-protected interests of the Respondent was high, was tainted by her misapprehension of the evidence; and, (ii) that the trial judge's assessment of the seriousness of the *Charter*-infringing state conduct was flawed because she took into account that the Respondent answered questions posed by the officer. It is argued that this evidence should only have been considered in assessing the second branch of the inquiry -- the impact of the conduct on the Respondent's *Charter*-protected interests.

25 I have already concluded that there was no misapprehension of the evidence and therefore, the assessment of the impact of the breach was not flawed.

26 I also reject the argument that the trial judge erred in her assessment of the seriousness of the breach.

27 In her consideration of the first branch of the *Grant* analysis, the trial judge considered that the police acted in good faith. She found, as submitted by the Respondent, that the breach was not deliberate or flagrant but was more of a 'training issue'. She concluded that the breach was "medium to serious".

28 A training issue that has the effect of interfering with the right of an accused not to incriminate themselves can be fairly assessed as a 'medium to serious' breach. it was not wrong to consider the specific conduct in context in order to assess seriousness. When the trial judge referred to the nature and

circumstances of the questioning, she was doing so in order to assess seriousness. I do not find that she conflated seriousness of the conduct and the impact on the Charter protected rights of the accused.

29 There is no error in principle and the finding of the trial judge is not unreasonable. I would not interfere with the conclusion of the trial judge.

Conclusion

30 The appeal is dismissed.

M.D. FORESTELL J.
