

Ontario Court of Justice

Her Majesty The Queen

Against

Benjamin Hill

Reasons for Judgment

Before the Honourable Justice J. Nadel
At Cayuga, Ontario

Appearances:

Peters
M. Rombis

Counsel for the Crown
Counsel for the Accused

Reasons for Judgment

THE COURT: So, I find you not guilty of both counts. These are the reasons why I have a reasonable doubt. I'm going to take some time because although you have no interest in them Mr. Peters might, and I need to be able to explain to him, on behalf of this community, why I'm acquitting you of both of these counts.

I think you were likely intoxicated, and it's likely your ability to drive a motor vehicle was impaired on that occasion. I come to that conclusion. Certainly, I think the preponderance of evidence is to that effect. You were with a friend and both of you were apparently intoxicated. I accept Ms. Arthurs' opinion in that regard. It's confirmed by most of the police officers, and Marath and Laign who attended. Officer Murphy, who is the more senior of the officers, perhaps because he was basically an observer, was not taking an active part in the investigation. Perhaps he did not take the time to observe as closely and maybe his opinion would have differed if he thought that he was going to be the one who was going to have to bear the brunt of the load. But, I look at the opinion of three individuals who say, because of the smell, and because of the behaviour, and in some cases because of the motor control problems, "my opinion is that you were impaired." That's likely the case.

To the contrary, we have the fact that you were not combative, at least initially; that you were able, according to Officer Murphy, to withdraw your native identification card without difficulty. Your friend motor control seemed to be okay. Your friend apparently stumbled going to the, to the bathroom. You didn't get up. And, while you were loud and obnoxious, that's the extent of her evidence, and you had a smell of alcohol. The officers say other things as well; that you needed help walking from the car, from the police vehicle into custody. So it's likely you were impaired.

And not that I'm allowed to do this, because I'm not an expert, but the fact that you had a blood alcohol concentration well in excess of the legal limits back at six o'clock doesn't allow me to rely upon that for the finding I've made, but it's certainly consistent with that other evidence. So that's not an issue for the Crown. I think that if they could show you were the driver, I would have likely found you guilty of driving while impaired.

I dismissed the over 80 count simply because while your blood alcohol concentration was well over the legal limit at, at the two tests at six o'clock and 6:20- and I'm not going to be very exact here because I'm dismissing the count and the actual times are in the certificate which is an exhibit- the Crown was obliged to demonstrate that those test were taken within two hours of your last care and control. They couldn't do that because they couldn't pinpoint two hours of your last care and control, which is why they called Ms. Solbeck from the CFS, who did her best using the science and her expertise to determine what your BAC would be at a certain time, and that's the best that she could do. That certain time was, I think it was 3:25. But the point is that you may have been last in care and control if you were the driver- I don't say that you are, in fact, I have a doubt that you were- at three o'clock. So the expert opinion of the CFS witness doesn't allow for the read-back to determine your blood alcohol concentration at the time when you may last have been in care and control. So the Crown can't traverse that lapse of time through Ms. Solbeck, simply because the Crown can't prove beyond a reasonable doubt when you, if you were the driver, were last in care and control of the ATV. It's no fault of Mr. Peters. He would with the clay that he's provided.

And just as an aside, Mr. Peters, I've always said that being a prosecutor is the hardest job in the criminal justice system because you can't choose your actors, or your script, or your critics for that matter. So, I hope that's some solace to you.

Now, the real issue here is identification. Ms. Arthur is the only witness who says you were the driver. Perhaps she's right. But I have to be satisfied she was right to

the exclusion of any reasonable doubt. So what are the factors she looks to? She says that I have the opportunity over about 15 seconds- the time period is not exact- at a distance 30 feet, in the middle of the afternoon, to see two men driving by my restaurant windows going- I think it's south to the north- into town- and then park around back. And moments later both individuals walk into my restaurant, and I recognize, she says, that the person driving that motor vehicle was you because the driver, as she saw it, was wearing a plaid coat and also rubber boots.

But you are a stranger to her. She's never seen you before. I don't know what Mr. Fowler- I think that's what his is- looks like. She says one person was native one person was white. And I have to say that there aren't any pictures in the transcript, and you may well be native Canadian, I , I resume that you are, people say that you are. You had a native identification card. But your skin is no darker than many who are not native. And I don't know if you look particularly native. I mean no disrespect nor am I giving you an accolade. I'm simply saying as a matter of course. So I don't take much from the fact that she distinguishes Mr. Hill, the defendant before me, as being native-looking and Mr. Fowler not, particularly because I haven't seen Mr. Fowler.

The other problem is I haven't heard what Fowler was wearing in terms of his coat. I note that she says the other man was wearing glasses, and the driver, Mr. Hill wasn't. But I note today that Mr. Hill wears glasses. My problem is simply this, the dock ID when she said, "you, Mr. Hill are the driver" is of no evidentiary value. There was no photo line up, and you are strangers. I have no comparative. I can't assess how reliable her evidence is. I'm not questioning her credibility. I accept when she says that you were the driver, that she believes it honestly.

But there's no other indicia to corroborate what is basically an identification of a coat. No comparative with the outerwear of the other man. No keys to show that you were the driver. No admission to confirm that you were the driver. I just think it's too dangerous for me to register a conviction of your base upon the identification,

particularly where I infer, from what I've heard, she said other things to the officer who the driver was. I come to that conclusions, or at least I'm anxious about that conclusion, because Officer Marath gave as his grounds, albeit through the auspices of Officer Laing, that Laing was told by Arthur that the driver was the man eating the meal, and she says you were not the man eating the meal. That's a matter of real concern. And I understand that it's hearsay in the sense that it's transferred from, from officer to officer, to Officer Maxwell. But it's not, it was never tendered for the truth of its content. It was tendered because it was said, and the fact that it was said causes me concern, so I simply am not satisfied then, beyond a reasonable doubt, about the identification of Mr. Hill, the defendant before me, as the driver.

If he was the driver, I would have found him not guilty of over 80 count on the basis of the inability to determine the last time of care and control. If he was the driver, I would have convicted on the impaired count based upon the cumulative effect of the evidence of the people who saw how he behaved. But, as I've already indicated, I dismiss both counts. I've rambled on as I have to allow Mr. Peters, on behalf of the community, to know my reasoning process in case he wants to take issues with it in front of some other court. Thank you very much.