

Ontario Court of Justice

Her Majesty The Queen

Against

Ernesto Izzi

Reasons for Judgment

Before the Honourable Justice P. Tetley
At Newmarket, Ontario, on January 15, 2009

Appearances:

P. Tait
M. Rombis

Counsel for the Crown
Counsel for the Accused

Reasons for Judgment

THE COURT: Ernesto Izzi is charged with the offence of impaired operation. The charge arises from an incident on January 25th 2007. The incident occurred in the Township of King within the Regional Municipality of York. The investigation was prompted by observations of a civilian witness, Gregory Louth, who was operating his motor vehicle northbound on Highway 400 in the vicinity of Major MacKenzie Drive at approximately 2:00 a.m. on the 25th of January, 2007. Mr. Louth's attention was directed to the motor vehicle operated by Mr. Izzi as a consequence of the Louth vehicle being passed on the right by a vehicle operated by Mr. Izzi. There was an abrupt manoeuvre, I gather, that placed Ms. Izzi's motor vehicle within close proximity to the Louth vehicle that was travelling in the center lane of northbound 400 at the time. Mr. Louth then observed the Izzi vehicle to proceed into the passing lane of the northbound 400 where it was observed to come in close proximity to the center guard rail dividing the northbound from the southbound lanes of Highway 400. Traffic on the evening in question, or the early morning in questions, was described as being very light. The weather was clear and cold, and the roads were noted by, or recollected by, Mr. Louth to be dry. The Louth vehicle was alternatively noted to weave from lane to lane and to speed up and slow down. This prompted Mr. Louth to have concerns that the operator of that motor vehicle might well be impaired by alcohol. As a consequence he called the police emergency number, 911. The observations that were related by Mr. Louth took place over a period of approximately 10 minutes. During that time both vehicles travelled northbound on 400 Highway to the King Road. At King Road the accused's motor vehicle was noted to move abruptly onto the off ramp leading to King Road. Thereafter it was noted to proceed eastbound to King Road to the village of King. It was followed by the vehicle operated by Mr. Louth. By this point he was in contact with police dispatch and was relating the observations he had made of the driving as the driving ensued. Speed along King Road was- recollection varied between 80 kilometers to 140 kilometers an hour. At Kind Road Mr. Louth recollected that the motor vehicle operated by the

defendant made a left turn and proceeded through a red traffic signal northbound on Keele Street. The observations continued as the motor vehicle made its way north on Keele Street, speed again varied. On several occasions the motor vehicle was noted to both speed up and slow down. It was also noted to traverse the entirety of northbound Keele from shoulder to shoulder across both lanes of travel. There were no reported obstructions on the roadway. The actions of the motor vehicle operated by the accused prompted Mr. Louth to offer the opinion on several occasions he thought the accused might lose control of the motor vehicle he was operating. By the time Mr. Izzi had reached his residence a number of police officers were on the scene. One of those officers, Constable Chanovich effected the arrest of the defendant. In the course of his testimony Constable Chanovich indicated that he attended at the defendant's automobile which he recollected, unlike Mr. Louth, as being properly positioned in the driveway of the defendant's residence. On speaking to the defendant the officer observed the defendant to display, red, watery or bloodshot eyes. This is perhaps not surprising giving the fact that this incident was being investigated at 3:47 a.m. in the morning. On being asked if he had had anything to drink Mr. Izzi reportedly initially responded "no". Thereafter Mr. Izzi indicated that he had had one drink. The arresting officer advised that he could detect what was determined, or what he assessed to be, a strong odour of an alcoholic beverage on the defendant's breath. On the basis of those observations, the admission of the consumption and information conveyed through police dispatch, that I gather entailed a reciting of the observations as related by Mr. Louth of the driving that I have reviewed, grounds were formed by the officer and an arrest effected. On exiting the motor vehicle Mr. Izzi was noted to be briefly unsteady on his feet although the officer fairly concede that the area in which the motor vehicle was parked and the area in which the defendant exited his motor vehicle was icy and there was snow build up in the area. The arresting officer noted that the accused had to in effect grab into the car to steady himself when exiting his automobile. Thereafter there was a brief period of, I wont call an altercation, but some unpleasantness when the defendant refused to initially comply with the arresting officer's request that some form of breath test be administered on scene.

With the assistance, I gather, of the arresting officer the defendant was placed in the rear of the police cruiser and transported to 1 Division of the York Regional Police Service, whereupon he was placed in the custody of qualified technician Constable Higho. Constable Higho was in the company of the defendant for a period of almost half an hour, 29 minutes. He indicated in his testimony that he did not detect an odour of alcohol on the defendant's breath. He confirmed that he defendant's face was flushed. His eyes were noted to be watery, bloodshot and red-rimmed. He described the defendant's attitude as both cocky and arrogant. He noted the speech exhibited by the defendant to be good and advised the defendant was responsive to all the questions put. Coordination was described as being good. Nevertheless, in spite of the fact that there seems to be a total absence of any indicia that would be consistent with impairment by alcohol, the officer concluded the effects of alcohol were nevertheless "slight". Based on the testimony offered by the qualified technician one might have thought the appropriate conclusion would be affects of alcohol are noted as being "absent". The driving in this particular case, as I indicated in my discussion with Mr. Rombis is horrific. Had Mr. Izzi been charged with dangerous operation of a motor vehicle, I don't think there would have been much difficulty with convicting him of that particular offence. There is no apparent rational for operating a motor vehicle in the manner that it was being operated. No external cause can explain the driving that was observed by Mr. Louth. Mr. Louth, who struck me as a forthright individual, was sufficiently distressed by what he was observing that he not only called 911, but he made a point to follow the defendant motor vehicle northbound on 400 as it exited onto King Road, and then northbound to Mr. Izzi's residence. He certainly concluded that something was amiss in the manner in which the motor vehicle was being operated. I have reviewed the case of *R v Stellato*, (1993), 78, CCC (3rd) 380, and the Alberta Court of Appeal decision that follows, *R v Andrews*, (2002) CanLII 35328 (MB P C). I am mindful that the totality of evidence has to be considered here. As Mr. Tait has suggested there is no single test or set of indicators for determining impairment. The determination of impairment is an issue of fact that must be established by the Crown on the basis of the criminal standard of proof, that is proof beyond a reasonable doubt, or proof to

the point if “near certainty.” Accordingly, I have to be satisfied in assessing this case, that Mr. Izzi was in fact operating his motor vehicle while his ability to operate that motor vehicle was impaired as a consequence of his consumption of alcohol. In *R v Stellato*, as counsel properly know by rote, the Court directs that if the evidence of impairment is so frail as to leave the trial judge with a reasonable doubt as to the impairment the accused must be acquitted. If the evidence of impairment establishes any degree of impairment ranging from slight to great the offence had been made out. In *R v Stellato*, Justice Conrad for the majority of the Alberta Court of Appeal notes that the ratio in the *R v Stellato* case is that it is not necessary for the Crown to establish a marked degree of impairment of that ability if proved beyond a reasonable doubt will sustain a conviction. Proof of impairment, as I have indicated, and as Mr. Tait has submitted, can be proven in different ways. It is most frequently constituted by observations of conduct. Applying the general principles in the *R v Andrews* decision, which is a helpful decision because it interprets in a practical way the directives on *R v Stellato*, the following considerations apply: The onus of proof that the ability to drive is impaired to some degree by alcohol or drug is proof beyond a reasonable doubt; there must be impairment of the ability to drive of the defendant; the impairment of the ability to drive must be caused by the consumption of alcohol, and that had to be established on the basis of proof beyond a reasonable doubt; the impairment of the ability to drive by alcohol or drug need not be to a marked degree. This is why in *R v Stellato* the Court references any variation from slight to great as sufficient to form the basis of a conviction. Proof of this offence, as reflected by the comments of Chief Justice Lesage in *R v Singh*, [1997] 0J No 1164, a case that has been presented by Mr. Rombis, can take many forms. Occasionally this offence can be established by observations of the accused and his conduct. That is the most common form of proof in an impaired driving case. Those observations must indicate behavior that deviates from normal to a degree that the standard of proof is met. One often considers the accused’s conduct and the referenced variation within the context of observed driving. This is a difficult circumstance because in this particular case Mr. Izzi’s driving is horrific. There is no apparent cause and no explanation for the observed driving. There is no apparent

external cause such as the influence of other automobiles, a defective automobile, the fact Mr. Izzi may have been failing asleep or that he may have been suffering from some kind of health related difficulty. There is no explanation from the defendant, or in the facts themselves, to account for the driving. Mr. Rombis has in effect suggested that while Mr. Izzi may be a terrible driver and guilty of a number of Highway Traffic Act offences that were not charged, that does not necessarily constitute the offence. There is some evidence offered by the arresting officer that may well be consistent with impairment of the ability to drive including bloodshot eyes, admission of drinking, and strong odour of an alcoholic beverage on the defendant's breath. There is also contradictors in the arresting officer's evidence that may suggest that perhaps the observed driving may have been motivated by factors other than an impairment of the ability to drive. There was no slurring of words. The defendant was responsive. He was not particularly cooperative but he seemed to comprehend what is being said to him. There was no observed problems with respect to locomotion other than a brief unsteadiness as he exited his car, an observation that the officer concedes may have been occasioned by external causes. There is no difficulty observed at the station in terms of his ability to stand or walk or move. He is responsive to questions both at the scene and during the 29 minutes he spent with the qualified technician. He was entirely coherent. He was assertive to the point that it might border on him being obnoxious, but he is responsive, coherent and aware. The difficulty with the Crown's case is that there is some conflict between observations of the arresting officer and that of the qualified technician who deals with the accused within a half and hour, or so, of the arrest. Constable Higho, apart from confirming that he defendant's eyes were watery and bloodshot and red-rimmed, that I conclude might be a characterization of the eyes of most individuals at – well this was 4:21 a.m. by this point, indicates that the effects of alcohol are slight. As indicated earlier in this judgment it is difficult, based on the evidence that Constable Higho presented, to understand the basis upon which he reached that conclusion. This case essentially comes down to this. Is the indicia that were observed by the arresting officer and confirmed in some modest respect by the qualified technician when combined with the driving which I have described, and it

may be an understatement to describe it as horrific, sufficient to constitute a slight variation from normal? The Crown is not obliged to establish a marked degree of impairment of the accused's ability to drive, any degree of impairment to drive if proven beyond a reasonable doubt will sustain a conviction. It would be tempting, and I think Mr. Izzi should know this, and I hope he understands this, to found a conviction on the basis of the driving alone. That is not what the law dictates. There is an inconsistency here in terms of the evidence offered by the two police officers that has to be resolved in favor of the defendant. It may well be that Ernesto Izzi was operating under the influence of something other than alcohol that night, I do not know, but that has not been established on the facts that have been adduced before me. He certainly is a horrible driver if there was not some external influence effecting the manner in which he was operating his motor vehicle on the date in question. I do not think it would be safe to conclude, on a criminal standard of proof, that the Crown has met the test in *R v Stellato*, given the inconsistencies that exist, and the very modest observations that suggest impairment of the ability to drive as a consequence of the consumption of alcohol. In the absence of supportive evidence that might have been offered by breath test results for instance, I conclude the Crown had failed to meet the criminal standard of proof as referenced in *R v Stellato* and further defined by the Alberta Court of Appeal in *R v Andrews*

Quite frankly, by the narrowest of margins Mr. Izzi, you will be found not guilty of this offence and the charge is dismissed.