

Ontario Court of Justice

Her Majesty The Queen

Against

Kwok-Hung Kwong

Reasons for Judgment

Before the Honourable Justice W. W. Bradley
Heard on September 14, 2012
Reasons for Judgment released on October 2, 2012

Appearances:

M Rumble
M. Rombis

Counsel for the Crown
Counsel for the Accused

Reasons for Judgment

[1] Kwok-Hung Kwong is charged with the offence of impaired operation of a motor vehicle on or about January 21, 2012 contrary to Section 253 subsection (1)(a) of the Criminal Code

Testimony of Stephanie Edwards

[2] Stephanie Edwards is a Provincial Offences Officer for the Town of Markham. On January 21, 2012 she was on routine patrol driving a City of Markham Ford Escape SUV.

[3] At 2:55 a.m. she was traveling north on Rodick Road in the curb lane. Rodick Road has two northbound and two southbound lanes.

[4] She was going around a bend, she saw a vehicle coming towards her in her lane. She tried to turn left to avoid the vehicle, but her vehicle was hit on the passenger side.

[5] In that area, there were street lights and it was fairly lit. It had been snowing and the road surface was snow-covered.

[6] She estimated the speed of her vehicle prior to the accident at 40 kilometers per hour, although she had braked and slowed down. She estimated the speed of the oncoming vehicle of the accused, Mr. Kwong, at 20 kilometers.

[7] After the collision both vehicles were stopped, then Mr. Kwong reversed his vehicle. Fearing Mr. Kwong might leave, she reversed her vehicle to the curb so he could not drive away. She then got out of her vehicle and Mr. Kwong got out of his.

[8] She asked him what he was doing in her lane and he said he was looking at house numbers and the sidewalk.

[9] She has no problem understanding him, nor him understanding her, but she felt his explanations to be unusual.

[10] He then asked her what road they were on three or four times and she told him each time.

[11] He used his cell phone to call CAA.

[12] He said he lived close by and asked if they could just exchange insurance and deal with it later. She said she could not because hers was a work vehicle.

[13] She observed an odour of alcohol coming from his breath and because of the way he was acting, his explanation, and her having to repeat herself, she suspected he may be impaired. She called the police within five minutes of the collision.

[14] Ms. Edwards observed that Mr. Kwong had no difficulty getting out of his car, that there was no difficulty understanding each other, although he kept asking the same questions as if he was confused or not understanding.

[15] Standing on the side of the road by their vehicles he had no difficulty with his balance, he was standing fine and was walking around.

[16] His speech appeared normal. She did not recall him slurring words. He did not fumble giving her his driver's licence.

[17] When the officers arrived she saw him standing by his vehicles and he had no difficulty standing, although she did not observe him the entire time.

Testimony of Constable Trevor Burke

[18] Constable Burke arrived at the scene at 3:26 a.m.

[19] As he approached he saw Mr. Kwong exit his vehicle on the driver's side without difficulty.

[20] Constable Burke asked Mr. Kwong what happened and Mr. Kwong said he hit the other vehicle.

[21] At this time, Constable Burke detected a strong odour of alcohol from Mr. Kwong's mouth.

[22] Mr. Kwong said he was going home and was coming from work on 14th Avenue.

[23] Constable Burke asked if he had anything to drink that night and Mr. Kwong said he had a drink at work.

[24] At that point Constable Kissi arrived and began speaking to Mr. Kwong.

[25] Constable Burke noticed Mr. Kwong start to sway back and forth while standing on the snow-covered road. It was a slight sway back and forth with his feet on the same spot on the ground. He was wearing dress shoes.

[26] He observed Mr. Kwong's eyes to be red, although he noted it could be because of the time of day.

[27] Mr. Kwong's speech was not slurred and he spoke normally.

[28] Constable Burke formed the opinion that Mr. Kwong was impaired by alcohol based on: 1) The strong odour of alcohol from the mouth; 2) His unsteadiness on his feet; and 3) The circumstances of the accident.

[29] When Officer Kissi arrived he finished the accident report.

[30] Constable Kissi effected the arrest at 3:32 a.m.

[31] Constable Burke observed the search incident to arrest and PC Kissi escorting Mr. Kwong to his cruiser. Constable Burke did not recall seeing if Mr. Kwong had any difficulty walking to the cruiser, but said if he had observed any difficulty he would have noted it.

Testimony of Officer Kissi

[32] Officer Kissi arrived at the scene at 3:27 a.m.

[33] He briefly spoke to Constable Burke and then approached Mr. Kwong. He detected an obvious odour of alcohol from the area of the mouth region of Mr. Kwong.

[34] When he first approached Mr. Kwong, he noticed Mr. Kwong's movements to be a bit staggered; initially kind of leaning on the vehicle and almost rocking back and forth like he was trying to steady himself on the vehicle.

[35] On proceeding to the back of the vehicle, Mr. Kown's gait was a bit staggered, like he needed support to upright himself.

[36] Constable Kissi asked if Mr. Kwong had anything to drink and he said he was coming back from a work function and was drinking there.

[37] Before he asked this he observed Mr. Kwong trying to steady himself on the back of the vehicle.

[38] He observed Mr. Kwong's eyes to be fairly red, watery in appearance.

[39] After Mr. Kwong said he was drinking, Constable Kissi cautioned him not to say anything more about the incident at 3:27 a.m. Constable Kissi's reasons for the caution were: 1) The involvement in the accident; 2) The odour of alcohol; 3) Swaying; 4) Walking and the motions of trying to steady himself; and 5) His eyes.

[40] After the caution, he was placed under arrest at 3:30 a.m. for impaired operation of a motor vehicle for the reasons above.

[41] Constable Kissi formed the opinion of the accident was the result of him being impaired by alcohol.

[42] After placing Mr. Kwong in the cruiser, Constable Kissi noted the vehicle really smelled of alcohol.

[43] Constable Kissi noted the driving conditions were not that great, it was snowing quite a bit and there were a number of other accidents.

[44] On cross-examination Officer Kissi stated initially when he came up to the car Mr. Kwong was standing okay but he noticed the back- and-forth movement, swaying side to side, but not exaggerated swaying; kind of back-and-forth. The swaying at the driver's side was very brief.

[45] Constable Kissi stated that when Mr. Kwong staggered at one point, he had to grab the side of the vehicle and lost balance. This is not in the notes of Office Kissi.

[46] I find it significant that an observation of this nature is not in the notes of Constable Kissing. Given the passage of time and the lack of a note. I attached no weight to this observation.

[47] When questioned about Officer Kissi stating the focus of Mr. Kwong was not 100 percent, he said he was referring to Mr. Kwong's eyes being red, bloodshot and watery. Constable Kissi agreed there could be a number of reasons for the red/watery eyes.

[48] Apart from the observations at the side of the road by the vehicle of Mr. Kwong and the walk to the back, no other observations of difficulties of balance were noted.

Testimony of Kwok-Hung Kwong

[49] Mr. Kwong's evidence is that he had two drinks at a meal with a friend and around 9:00 p.m. returned to his office to work on a project. He left his office around 2:00 a.m. and first drove to a gas station to fill up the tank on his rented car.

[50] After that he took the route of Rodick Road to go home. While he was going around a curve he observed the lights of another car coming toward him. He slammed on the brakes; skidded and hit the other car.

[51] Both the Crown and the defence counsel agreed that there were no observable physical signs of impairment on the breath room video.

The Law

Impairment- The test of R. v. Stellato (1994), 90 CCC (3rd) 160 (SCC)

[52] Proof of impairment does not require a marked departure from normal behaviour. Any degree of impairment of the ability to operate a motor vehicle caused by alcohol or by drugs is sufficient.

Analysis

[53] Essentially the evidence the Crown is relying on for proof of impairment of Mr. Kwong to operate his motor vehicle are: The circumstances of the accident with Mr. Kwong's vehicle coming towards Ms. Edwards's vehicle while she was in the curb lane; The explanation offered to Ms. Edwards by Mr. Kwong and his repeated requests as to where he was; The odour of alcohol on his breath observed by Mr. Edwards, Constable Burke and Constable Kissi; The slight swaying for a brief period of time at the scene outside the vehicles on snow-covered ground; and The redness and watery eyes of Mr. Kwong, which both Constables Burke and Kissi stated could be due to other factors.

[54] Those observations must be considered in the context of the evidence as a whole.

[55] The slight swaying and possible loss of balance while walking to the rear of the car may also be attributed to the fact it was cold out, the ground was snow-covered and Mr. Kwong was wearing dress shoes.

[56] In addition, he had been on the scene for a lengthy period of time, which involved being outside of his vehicle at times for his conversations with Stephanie Edwards and the police officers.

[57] In those circumstances, Mr. Kwong's explanations for any balance observations at the scene are reasonable.

[58] Mr. Kwong gave a reasonable explanation for repeatedly asking where he was while calling CAA, which was because he wanted to give an exact address on Rodick Road.

[59] Mr. Kwong offered an explanation for the accident, namely that the road was snow-covered and he was avoiding being too close to the curb on his side. That explanation does not adequately explain where the accident occurred.

[60] The circumstances of the accident are concerning.

[61] Ms. Edwards gave her evidence in a clear, concise manner without any inconsistencies. Her evidence is creditable and trustworthy regarding the circumstances of the accident. I accept her evidence that she was in the curb lane of the two northbound lanes on Rodick Road.

[62] I am reluctant to attach significant weight to Mr. Kwong's request to exchange insurance information and report it later. Damage was not extensive, although beyond what one is required to report. It was snowing out, late at night and cold.

[63] Mr. Kwong gave an explanation for getting out of his vehicle and getting snow, which is somewhat unusual.

[64] There were numerous indicia indicative of lack of impairment: 1) Speech was normal, not slurred; 2) Comprehension good; 3) No difficulties observed in balance in walking from Mr. Kwong's vehicle to the cruiser; 4) No difficulties with balance or coordination observed in the breathalyzer room; and 6) Stephanie Edwards observed Mr. Kwong for a lengthy period of time; from the time of the accident to when the police arrived, as well as during the time Mr. Kwong was with the police officers at the scene. It is significant she observed no difficulties by Mr. Kwong with balance or coordination.

[65] In summary, what the Crown is left to rely on is the accident with Mr. Kwong being on the wrong side of the road, the odour of alcohol and a light swaying which could be attributed to his footwear, the snow-covered road and the cold, and his initial remarks to Ms. Edwards as to why he was in her lane.

[66] On the evidence as a whole, I am not satisfied that the Stellato test of any degree of impairment of the ability to operate a motor vehicle caused by alcohol or drugs has been proven beyond a reasonable doubt.

[67] There is a finding of not guilty.