

Ontario Court of Justice

Her Majesty The Queen

Against

Brian Lai

Reasons for Judgment

Before the Honourable Justice M. Speyer
At Hamilton, Ontario, on August 30, 2012

Appearances:

G. Gambacorta
M. Rombis

Counsel for the Crown
Counsel for the Accused

Reasons for Judgment

THE COURT: Mr. Lai faces the remaining charge of impaired operation of a motor vehicle. The events that led to his arrest are as follows. At approximately two a.m. on November the 13th, 2011, Mr. Lai was driving his car southbound on King Street in Hamilton when he swerved into the northbound lanes and collided with a cement pole on the east side of the street, causing it to break at its base. The collision was observed by a witness, Ms. Catherine Bradley, who called police.

The issue to be determined in this case is whether the Crown has proven beyond a reasonable doubt that the accused's ability to operate a motor vehicle was impaired by alcohol. First, Ms. Bradley's evidence that she saw the accused driving southbound in the center lane, when he suddenly and inexplicably served into the northbound lanes and collided with a pole. Ms. Bradley and Constable Holmes both testified that it was a clear, dry night with little to no traffic on the road. Two, when she spoke to Mr. Lai immediately after the collision, Ms. Bradley noted that he had a distinct smell of alcohol on his breath. She also observed that he was unsteady on his feet, although she conceded that she had not reported this observation in her police statement. She stated she did not do so because she as not asked about it. She also described Mr. Lai as being nervous and scared. Ms. Bradley testified that the accused admitted to her that he had had a few drinks, and that he had fallen asleep at the wheel. He told her he had "screwed up".

Constable Holmes was the investigating and arresting officer. He testified that upon speaking to Mr. Lai at 2:10 a.m., he noted a strong odour of alcohol emanating from his breath, and that his eyes were glassy and his speech was slurred.

Defence counsel argues that the Crown's evidence is not established beyond a reasonable doubt that the accused's ability to operate a motor vehicle was impaired. He points to the following weaknesses in the Crown's evidence. One, Ms. Bradley

was following the accused's car for approximately half a kilometer prior to the collision, and she noted no erratic driving whatsoever. Two, Ms. Bradley did not recall that the accused's speech was slurred, and she made no observation regarding the appearance of his eyes. Her evidence regarding the accused's balance was not included in her statement and was not supported by the evidence of Constable Holmes, who testified he did not observe the accused to have any problems with his balance. Constable Holmes also testified that when he spoke to Mr. Lai at the roadside, he noted that the accused had slurred speech, but thereafter made no observation at all about the accused's speech. Counsel points out that Constable Holmes is a trained investigator and was with the accused from 2:10 a.m. until his release from the police station shortly after 4 a.m. Had there been any indication that the accused was unsteady on his feet or was continuously slurring his speech, he would have noted it. Three, there is evidence from Ms. Bradley that the accused told her he fell asleep at the wheel. Given the time, he argues, it is reasonable to infer that the collision occurred because Mr. Lai fell asleep, and not because his ability to operate the motor vehicle was impaired.

The case law establishes the following general legal principles in impaired driving charges. First, the onus of proof that the accused's ability to drive is impaired to some degree by alcohol is proof beyond a reasonable doubt. Two, there must be impairment of the ability to drive of the individual. Three, the impairment of the ability to drive must be caused by the consumption of alcohol or a drug. Four, the impairment of the ability to drive by alcohol or a drug need not be to a marked degree. Five, observations of the accused's conduct can amount to proof of impairment of the ability to drive if those observations establish a sufficient departure from the conduct of unimpaired or normal individuals. Inference of any degree of impairment of the ability to drive can reasonably be drawn from conduct that exhibits a marked departure from the norm. Six, when the Crown is relying on circumstantial evidence to prove impairment, all evidence must be considered, including physical symptoms, conduct and manner of driving. Items of circumstantial evidence are not to be viewed in isolation. And the entirety of the

evidence must be considered, including evidence of non-impairment in determining whether the Crown has met its onus. Lastly, where circumstantial evidence alone or equivocal evidence is relied on to prove impairment of the ability to operate a motor vehicle, and the totality of that evidence indicates only slight deviation from the normal conduct, it would be dangerous to find proof beyond a reasonable doubt of impairment to drive, slight or otherwise. And these principles were derived from the following cases: Regina v. Tolatto (ph), 1994, SCJ 51; Regina v. Andrews, Alberta Judgment Number 8, Alberta Court of Appeal, leave to appeal to the Supreme Court of Canada refused in 1996; Regina v. Palanacki, 2001 Ontario Judgment Number 5194, Superior Court of Justice.

There is credible and reliable evidence from which I can conclude that Mr. Lai consumed alcohol sometime prior to driving. However, when considering the totality of the evidence, I am not able to say with the required degree of certainty, that his ability to operate a motor vehicle was impaired by the consumption of that alcohol. Mr. Lai exhibited very few if any physical symptoms that would indicate that he was impaired by alcohol. Ms. Bradley's observation that the accused was unsteady on his feet was not reported in her police statement and was contradicted by Constable Holmes. Accordingly, I am unable to conclude that the accused was unsteady on his feet or had any difficulty with his balance. Similarly, Constable Holmes testified that the accused's speech was slurred. However, on cross-examination, he agreed that the only time he made this observation was when he asked Mr. Lai if he had been driving, and the accused responded yes. The officer did not note any other slurring of speech while arresting the accused, booking him, or otherwise dealing with him at the police station. Ms. Bradley, who had spoken to Mr. Lai for some time prior to the police arrival, did not recall any slurring of speech. Accordingly, I am unable to find as a fact that the accused's speech was slurred. Ms. Bradley testified that the accused was nervous and scared. I accept that evidence. However, in the circumstances of this case, it was not persuasive. Mr. Lai had just been involved in a serious collision in which he drove into and toppled a hydro pole. In the circumstances, even a sober person would be nervous and scared. The

manner of driving can be considered by the court as an indication that the accused's ability to drive was impaired. There is no question that Mr. Lai's driving into the pole is a marked departure from conduct that would otherwise be expected of an unimpaired or normal person. In the case before me, I also have evidence from the accused's statement to Ms. Bradley that he's had a few drinks and fell asleep. On the other hand, there is no evidence before me of how much he had to drink, we he drank it or how it impacted on him. Given the brevity of his remarks to Ms. Bradley and the fact that the collision occurred at two in the morning, I am not prepared to conclude that the accused fell asleep because he had had a few drinks. In order to be guilty of the offence of impaired driving, the accused's ability to operate the vehicle must be impaired by the consumption of alcohol, not by fatigue. In this case, the evidence leaves me in doubt as to whether it was the consumption of alcohol that caused the impairment, or it is was fatigue.

On all of the evidence, I am not satisfied beyond a reasonable doubt that the accused's ability to operate a motor vehicle was impaired by alcohol, and Count 1 is dismissed.