

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Mr. Justice Christopher J. Mainella
Madam Justice Janice L. leMaistre

BETWEEN:

<i>HER MAJESTY THE QUEEN</i>	)	<i>W. G. Marks</i>
	)	<i>for the Appellant</i>
)	
<i>Respondent</i>	)	<i>C. R. Savage and</i>
	)	<i>J. N. Myskiw</i>
	)	<i>for the Respondent</i>
<i>- and -</i>	)	<i>(via videoconference)</i>
)	
	)	<i>Appeal heard and</i>
<i>RANDOLPH TODD COURCHENE</i>	)	<i>Decision pronounced:</i>
	)	<i>June 17, 2020</i>
<i>(Accused) Appellant</i>)	
	)	<i>Written reasons:</i>
	)	<i>June 25, 2020</i>

COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the Manitoba, Court of Appeal Rules, Man Reg 555/88R, all appeals are heard remotely by videoconferencing until further notice.

MAINELLA JA (for the Court):

[1] After a trial in the Provincial Court, the accused was convicted of dangerous operation of a motor vehicle causing bodily harm and impaired driving causing bodily harm. He appealed against his convictions on three grounds: (1) the judge misapprehended evidence as to his impairment and manner of driving; (2) the judge failed to apply section 320.31(4) of the *Criminal Code* in assessing the toxicology evidence; and (3) the verdicts were

unreasonable. At the end of the hearing, we announced that the appeal would be dismissed with reasons to follow, which are the following.

[2] The offences arise from the accused racing another driver on a highway in rural Manitoba. It is uncontested that he had been drinking that evening and was speeding and driving erratically. When he attempted to pass the other vehicle, he lost control and his sports car went into a ditch and rolled over resulting in serious injuries to his passenger. Two facts were in dispute at the trial: impairment and the manner of the accused's driving at the time of the crash. The judge found that proof of these two issues depended "heavily" on two expert witnesses called by the Crown, an accident reconstructionist and a toxicologist.

[3] In terms of the claim of a misapprehension of the evidence, we have not been persuaded that the judge made a readily obvious error that goes to the substance of the material parts of the evidence. The judge gave comprehensive reasons explaining why he accepted the toxicologist's opinion that, based on blood samples taken from the accused just over two hours after the crash, his blood alcohol concentration at the time of the crash would have been between 106 and 140 milligrams of alcohol per 100 millilitres of blood. He also accepted, based on "compelling physical evidence" in the form of scuff marks on the shoulder of the highway, the expert evidence of the accident reconstructionist and the observations of the other driver, that the accused attempted to pass the other driver illegally on the shoulder of the highway while speeding and under less than ideal conditions, and in doing so lost control. The findings on impairment and the manner of driving were reasonably open to the judge, particularly as the accused did not testify. Much of the accused's submission was that the judge should have interpreted the

evidence of the civilian and expert witnesses differently which is not a basis for an appellate court to come to a conclusion that a trial judge misapprehended evidence (see *R v Jovel*, 2019 MBCA 116 at paras 31-34).

[4] There is no merit to the accused's next submission regarding the applicability of section 320.31(4). This is a new argument raised on appeal and thus is only permitted in exceptional circumstances (see *R v EGM*, 2004 MBCA 43 at para 11). The section came into force a few days before the trial was completed and was not raised by prior counsel in closing argument. The section creates a statutory presumption allowing the trier of fact to calculate blood alcohol concentration after a motorist has ceased driving using accepted alcohol elimination rates without expert toxicology evidence being called. This is not an appropriate case to interpret this section other than to say that here the issue was impairment by alcohol at the time the accused was driving, not after he ceased driving which is the focus of section 320.31(4) given the new drinking and driving offences created in section 320.14(1)(b) and (d). Nothing improper occurred in this trial as the toxicology expert was unshaken in her testimony as to an extrapolation of the accused's blood alcohol level at the time of the crash and that "a hundred percent of the population is intoxicated at a concentration of a hundred milligrams percent."

[5] Finally, based on our view of the entire record, we are satisfied that the judge did not reach his verdicts by illogical or irrational reasons and they are not unreasonable within the meaning of section 686(1)(a)(i) of the *Criminal Code*. It was open to him to convict the accused based on the direct evidence of the accused's driving from the other driver which was confirmed by other evidence such as the scuff marks on the highway and expert evidence from the accident reconstruction and toxicology experts.

[6] In the result, the appeal was dismissed.

“Mainella JA”

“Monnin JA”

“leMaistre JA”