On appeal from a summary conviction in the Provincial Court on April 15, 2019.

Date: 20201211
Docket: CR 19-01-37691
(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

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	)	
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	)	for the respondent
- and -	)	
	)	MARTIN S. MINUK
DAVID TRUTHWAITE,	)	MADISON SUTHERLAND
	)	for the appellant
(accused) appellant.	)	
	)	JUDGMENT DELIVERED:
	)	DECEMBER 11, 2020

BOND J.

INTRODUCTION

[1] David Truthwaite was found in the driver's seat of his vehicle, just off the highway close to an intersection, stuck in snow. His blood alcohol concentration was determined to be 130 milligrams per cent.

[2] After a trial, Mr. Truthwaite was found guilty of having had the care or control of a motor vehicle while his blood alcohol ratio exceeded 80 milligrams per cent. He appeals his conviction. Although he set out a number of grounds of appeal in his notice of appeal, he pursued only one. He argued that the verdict was unreasonable. The blood alcohol

readings are not in issue. The only issue is the trial judge's conclusion that Mr. Truthwaite had the care or control of the vehicle.

STANDARD OF REVIEW

[3] The standard of review where it is claimed that a verdict is unreasonable was summarized by the Manitoba Court of Appeal in ***R. v. Mikolajczyk***, 2014 MBCA 3 (CanLII):

> [4] The test for appellate intervention on the basis of an unreasonable verdict is whether, on the whole of the evidence, the verdict is one that a properly instructed trier of fact, acting judicially, could reasonably have rendered. Appellate intervention on the basis of unreasonable verdict may be necessary when the reasons of a trial judge, sitting alone, demonstrate that "he or she was not alive to an applicable legal principle, or entered a verdict inconsistent with the factual conclusions reached" (***R. v. Biniaris***, 2000 SCC 15 at para. 37, [2000] 1 S.C.R. 381). These defects may disclose an error of law, supporting the conclusion that the verdict is unreasonable. See also ***R. v. Flores (R.B.)***, 2013 MBCA 4 at para. 21, 288 Man.R. (2d) 173.

[4] Was the verdict unreasonable?

[5] To answer this question, it will be helpful to set out the law regarding the offence of which Mr. Truthwaite was convicted, summarize the evidence, and review the trial judge's reasons for conviction.

THE LAW - CARE OR CONTROL OFFENCE

[6] The ***Criminal Code*** provided at section 258 (as it appeared on 22 December 2016) for a rebuttable presumption: if the Crown proves that Mr. Truthwaite occupied the driver's seat of a vehicle, Mr. Truthwaite shall be deemed to have had the care or control of the vehicle, unless he establishes that he did not occupy that seat for the purpose of setting the vehicle in motion.

[7] Evidence to rebut the presumption may be found in the testimony of the accused, or it may be found in the Crown's evidence, as elicited either on direct examination or on cross-examination: ***R. v. MacAulay***, 2002 PESCAD 24 (CanLII) at para. 18; ***R. v. Flight***, 2012 ABQB 285 (CanLII) at para. 14; ***R. v. Sandhu***, 2009 CanLII 55712 at para. 9 (ON SC).

[8] The evidentiary threshold for rebutting the presumption is on a balance of probabilities: ***R. v. Ganda et al.***, 2014 MBQB 173 (CanLII) at para. 50; ***R. v. Bell***, 2018 ONSC 2255 (CanLII) at para. 36.

[9] Where the presumption is rebutted, the Crown may still obtain a conviction if it proves beyond a reasonable doubt that there was a realistic risk of danger to persons or property: ***Ganda*** at para. 49; ***R. v. Boudreault***, 2012 SCC 56, [2012] 3 S.C.R. 157 at paras. 39–42.

[10] Where the Crown has established that the accused occupied the driver's seat and the statutory presumption of care or control has not been rebutted, then the Crown is not required to prove a realistic risk of danger as an additional element. The realistic risk of danger is "embedded in the presumption": ***R. v. Garfield Blair***, 2014 ONSC 5327 (CanLII) at para. 15. See also ***Ganda***; ***R. v. Burbella***, 2002 MBCA 106 (CanLII) at para. 22; ***R. v. Mackenzie***, 2013 ABQB 446 (CanLII).

THE EVIDENCE

[11] Constable Anthony Cooper of the Royal Canadian Mounted Police testified that, on December 22, 2016, he was patrolling on Highway 44 in Manitoba when at approximately

2 a.m. he came upon a vehicle that appeared to be stuck in some snow just off the driving lane of the highway. In direct examination (*voir dire*), Cst. Cooper stated that the vehicle was turned on, the lights were on, and the tires were spinning as if the occupant was trying to dislodge the vehicle. Constable Cooper was cross-examined extensively regarding the tires spinning, and as the defence pointed out, he had not documented this observation in his notes. The trial judge did not rely on this evidence.

[12] Constable Cooper testified that Mr. Truthwaite was in the driver's seat when he approached the vehicle. He testified that as he did so, Mr. Truthwaite got out of the vehicle and, pointing back towards the vehicle, said he was "spinning out here", indicating that he was stuck and was trying to get unstuck from the snow. He testified that Mr. Truthwaite was "polite, affable, basically indicating that he was in this predicament", and that Mr. Truthwaite said at one point his vehicle probably had to be towed or his vehicle was getting towed. In cross-examination, Cst. Cooper confirmed that Mr. Truthwaite had said that he was "spinning out here", and said that he had been "backing up, going forward, trying to get unstuck."

[13] The defence called no evidence.

THE TRIAL JUDGE'S REASONS

[14] The trial judge concluded that the statutory presumption of care or control applied and had not been rebutted. Although he was not required to do so, he went on to find that the evidence established a realistic risk of danger to persons or property.

[15] The trial judge began with the following findings of fact: "[T]he accused was found in a vehicle, which was running, he was seated in the driver's seat, the lights were on, and he was stuck on a median/pile of snow in what appeared to be a non-residential area." The trial judge concluded that "the presumption does apply". Read in the context of his reasons, it is clear the trial judge meant that the presumption of care or control had not been rebutted.

[16] The trial judge held there was no requirement that the Crown go on to prove there was a "realistic risk of danger". However, he went on to say that in case he was in error in that regard, in his view, the facts did establish a realistic risk of danger. He referred to the situation in which Mr. Truthwaite was found, including the following: Mr. Truthwaite was in the driver's seat; the vehicle was running; Mr. Truthwaite gestured to the vehicle and said that he was spinning out; Mr. Truthwaite said the vehicle either had to be towed or was being towed. From these facts, the trial judge drew the inference that Mr. Truthwaite was stuck and was trying to get himself unstuck.

[17] The trial judge recognized that he was required to consider Mr. Truthwaite's intention at the time when police arrived and found him in the driver's seat, rather than what his intention may have been prior to their arrival. Recognizing this, he stated that he was nevertheless entitled to consider Mr. Truthwaite's comments regarding prior attempts to get the vehicle unstuck, and that "while not spinning his wheels as the officer was there, he had been doing that." This evidence was relevant to Mr. Truthwaite's intention vis-à-vis the vehicle.

[18] The trial judge found that Mr. Truthwaite's reference to a tow truck suggested an ongoing intention to continue on his way. The defence had argued that the Court could not infer that Mr. Truthwaite's comment about the vehicle being towed indicated that he intended to have it extricated and then drive. The trial judge rejected that argument. He held that Mr. Truthwaite's comment to the police officer about the vehicle being towed "simply lends support to the, in my view, very reasonable conclusion that Mr. Truthwaite was, when he was found by police, an individual who still very much had an intention to drive and to be on his way. All of the circumstances in my view point to that fact."

[19] The trial judge rejected the defence's argument that the vehicle was immovable and that this was equivalent to inoperable. He found that, on the evidence, there was no suggestion that the vehicle could not be extricated, either by Mr. Truthwaite or by a tow truck that could simply pull it off the median or pile of snow upon which it was stuck. He noted that the vehicle was running and the wheels had been spinning.

[20] The trial judge concluded that there was a realistic risk of danger, and that Mr. Truthwaite was in care or control of the vehicle when the police attended and found him behind the wheel in the driver's seat. He found Mr. Truthwaite guilty of care or control over .08.

ANALYSIS

[21] The appellant's counsel pointed to what he says were two important findings of fact made by the trial judge. First, the trial judge found that Mr. Truthwaite had not been spinning his tires when the police arrived. He had clearly rejected the police officer's

evidence in that regard. Second, the trial judge found that when the police arrived, Mr. Truthwaite had said words to the effect that the vehicle had to be towed or was being towed. The appellant's counsel argued that having made those findings of fact, it was unreasonable for the trial judge to conclude that the presumption of care or control had not been rebutted. He argued that a reasonable inference available on the evidence was that Mr. Truthwaite had abandoned the intention to drive, and was waiting for a tow truck. He went on to argue that with that inference available, the presumption of care or control had been rebutted, and the Crown must then establish a realistic risk of danger. He argued that this could not be established because again, the evidence supported an inference other than that Mr. Truthwaite's being in the driver's seat of the vehicle posed a realistic risk of danger. Again, he argued that an inference available on the evidence was that Mr. Truthwaite was simply waiting for the tow truck, and the vehicle would be towed away.

[22] I agree that an appellate court may find a verdict unreasonable if the trial judge has drawn an inference that (1) is plainly contradicted by the evidence relied on by the trial judge in support of that inference, or (2) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge: ***R. v. R.P.***, 2012 SCC 22, [2012] 1 S.C.R. 746 at para. 9. However, I do not agree that this is what occurred in this case.

[23] The trial judge considered all of the evidence and circumstances in coming to the conclusion that the presumption had not been rebutted. It is appropriate that he did so. See ***Boudreault*** at para. 50. The trial judge was entitled to consider that Mr. Truthwaite

had been attempting to move the vehicle before the police arrived, and that the vehicle was still running with its lights on when they did arrive with Mr. Truthwaite in the driver's seat. The trial judge's inference—that Mr. Truthwaite's comment about the need for a tow truck was in reference to getting the vehicle unstuck so he could drive it—was not contradicted by or incompatible with the evidence. It was not unreasonable, therefore, for the trial judge to conclude that the presumption had not been rebutted.

[24] In making his argument, the appellant's counsel relied on ***Burbella***, where Mr. Burbella had driven his vehicle into a snow-filled ditch, and a tow truck had been called. Mr. Burbella was found in the driver's seat attempting to assist the tow truck driver by disengaging the steering mechanism. His conviction was overturned on appeal. In that case, however, the vehicle was not only stuck in snow but also extensively damaged, and it was conceded by the Crown that the vehicle was "wholly inoperable" and "not capable of constituting a danger to the public" (at para. 3). In the case before me, there is no evidence that the vehicle was inoperable.

[25] The appellant's counsel also argued that the facts in ***Boudreault*** were analogous. In that case, Mr. Boudreault was too drunk to drive when he was asked to leave the apartment of a woman whom he had earlier met at a bar. He asked her to call for a taxi, which she did. The taxi service she called would not only pick him up but also provide a driver to take his vehicle home. Mr. Boudreault went outside to wait for the taxi, but because it was cold, he got into his vehicle, started the engine, turned on the heat, and fell asleep in the driver's seat. It was the taxi driver who found him there and called the police. The trial judge was satisfied that Mr. Boudreault would not have set his vehicle

in motion, and that the presumption, therefore, had been rebutted. In my view, the factual circumstances of that case are distinguishable in that Mr. Boudreault had clearly made an "alternate plan" to get home and had taken steps to implement it (see paras. 50–52). Moreover, it is not insignificant that the Supreme Court of Canada's decision in ***Boudreault*** was on a Crown appeal in relation to a question of law alone. As Fish J. noted, the Court was bound to accept the trial judge's conclusion on the facts that Mr. Boudreault would not have set the vehicle in motion "however surprising or unreasonable it may appear to another court" (at paras. 13–15).

[26] In this case, the appellant's counsel argued that Mr. Truthwaite's comment to the police to the effect that his vehicle probably had to be towed or it was getting towed was sufficient to rebut the presumption of care or control. The trial judge considered that comment in the context of the other evidence, including the circumstances of Mr. Truthwaite and the vehicle as observed by the police, and Mr. Truthwaite's earlier efforts to get his vehicle unstuck. He concluded that the presumption of care or control had not been rebutted. This was a conclusion he was entitled to reach on the evidence.

CONCLUSION

[27] The verdict of the trial judge in this case was one that a properly instructed trier of fact acting judicially could reasonably render. The appeal is dismissed.

_____J.