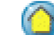

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This document: 2003 CanLII 26776 (ON S.C.)
Citation: *R. v. Proulx*, 2003 CanLII 26776 (ON S.C.)
Date: *2003-01-20*
Docket: *62/02*

[Cited Decisions and Legislation]

COURT FILE NO.: 62/02

DATE: 2003/01/20

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
HER MAJESTY THE QUEEN	)	Alexander David Kurke, for the Respondent
	)	
	)	
	)	
Respondent	)	
	)	
- and -	)	
	)	
	)	
DENIS PROULX	)	Edward J. Conroy, Q.C. for the Appellant
	)	
	)	
	)	
Appellant	)	
	)	
	)	
	)	**HEARD:** Click here - type date

ROBERT G. S. DEL FRATE, S.C.J.

[1] Mr. Proulx appeals his conviction of impaired driving on the following grounds:

(a) the trial Judge erred in not making an adverse inference to the Crown for its failure not to call all the evidence that was available to it;

(b) the trial Judge misapprehended or failed to appreciate the relevant evidence; and

(c) the trial Judge misinterpreted or misapplied the "*Stellato* test".

[2] For the following reasons, the appeal is dismissed.

Background

[3] On October 5th, 1991, Mr. Proulx was operating his motor vehicle in a generally northerly direction on Highway 144 when he was stopped by Conservation Officer Koskala and OPP Officer Depatie.

[4] Officer Depatie formed reasonable and probable grounds from the following observations:

(a) the vehicle was stopped and parked in an unusual fashion.

(b) he detected an odour of alcohol.

(c) he observed red rimmed eyes.

(d) Mr. Proulx spoke in a slurred fashion.

(e) Mr. Proulx walked in an unsteady manner.

[5] He placed Mr. Proulx under arrest and then drove him to South Porcupine for breathalyzer testing. Following the testing, he escorted Mr. Proulx to his vehicle with the warning that he not drive until the next day.

[6] At trial, the Crown relied only on the evidence of Cst. Depatie.

[7] Mr. Proulx and his witness, Mr. Whalen, testified at trial and explained that there was nothing unusual with the manner in which he drove and parked his vehicle. The odour of alcohol was explained in that Mr. Proulx had consumed some beer earlier in the day. His unsteadiness when walking was attributed to a medical condition for which he was being treated. His slurred speech was normal for him since he was speaking in English while his native language is French. Lastly, his eyes are red-rimmed even when he does not drink.

[8] Justice Lavoie convicted.

Discussion

Issues

1. Failure to call all of the Crown's witnesses

[9] Mr. Proulx contends that the failure to call the breathalyzer operator and the conservation officer was prejudicial to his defence since it was not until the morning of the trial that he was informed that these witnesses would not be testifying. There is no doubt that in certain situations the defence case may be prejudiced by the Crown's failure to call certain evidence. There is no doubt, as well, that the Crown has unfettered discretion in deciding what witnesses will be called to prove its case. By not calling all of the evidence, the Crown may run inherent risks in not proving its case beyond a reasonable doubt and thus, an acquittal will result. Still, the decision of the determining what evidence to call rests with the Crown[1].

[10] In this case, the defence acknowledges full disclosure of the Crown's case. If it felt that the breathalyzer operator or the conservation officer were helpful and necessary to its case, then it could have subpoenaed both of these witnesses. Alternatively, upon discovering that the officers were not going to be present, then an application for an adjournment could have been made. Neither of these actions was undertaken.

[11] It should be mentioned that this argument was not raised at trial and only at the appeal level.

[12] Accordingly, that ground of appeal fails.

2. Failure to appreciate or misapprehend the relevant evidence

[13] The defence contends that the trial Judge did not give any or sufficient reasons in dismissing the defence testimony especially when the defence evidence contradicted that of the investigating officer. Mr. Proulx argues that it would have been incumbent on the trial Judge to give reasons.

[14] In *R. v. Sheppard* 2002 SCC 26 (CanLII), (2002), 162 C.C.C. (3d) 298 (S.C.C.), the Supreme Court of Canada outlines the role of the appellate Court in reviewing decisions of the lower court when it states:

At Para 28, p.309:

"The threshold is clearly reached, as here, where the appeal court considers itself unable to determine whether the decision is vitiated by error".

[15] As stated by Doherty J.A. in *R. v. Morrisey* [1995] O.J. No. 639 (Ont.C.A.):

"Appellate Courts must resist the invitation to microscopically examine reasons for judgment, lest the trial judges decide that silence is indeed golden".

[16] Although the reasons could have been more extensive and detailed, and even though another trial Judge may have arrived at a different conclusion, the trial Judge addresses the issues sufficiently. It is clear that he accepted the evidence of the investigating officer over the evidence of Mr. Proulx on his state of sobriety by stating that:

"...it is quite trite to say that one is always the worst judge of one's condition after having consumed alcohol, and certainly in these circumstances I do find that the ability of Mr. Proulx was impaired by alcohol to a certain degree..." (Page 24 Lines 15 to 21).

[17] Likewise, he dismisses the evidence of Mr. Proulx and Mr. Whalen on the slurred speech by concluding that:

"The observations today certainly do not indicate whatsoever any difficulty in his speaking English..." (Page 23 Lines 23 to 26).

[18] That is an observation and conclusion that the trial Judge can and should make.

[19] Accordingly, I conclude that his reasons do not disclose "a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence [2]". There was sufficient evidence to reasonably support the trial judge's conclusion.

[20] That ground of appeal fails.

The "*Stellato* Test"

[21] Prior to *R. v. Stellato* reflex, (1993), 78 C.C.C. (3d) 380 (Ont.C.A.) affirmed 1994 CanLII 94 (S.C.C.), (1994) 90 C.C.C. (3d) 160 (S.C.C.), the discussion of impaired driving centered around "the marked departure from the norm" test enunciated in *R. v. McKenzie* (1995), 111 C.C.C. (3d) 317 (Alta.D.C.)

[22] In *Stellato*, at p.384, Labrosse J.A. dismissed that reasoning and stated:

"In all criminal cases, the trial judge must be satisfied as to the accused's guilt beyond a reasonable doubt before a conviction can be registered. Accordingly, before convicting an accused of impaired driving, the trial judge must be satisfied that the accused's ability to operate a motor vehicle was impaired by alcohol or a drug. If the evidence of impairment is so frail as to leave the trial judge with a reasonable doubt as to impairment, the accused must be acquitted. If the evidence of impairment establishes any degree of impairment ranging from slight to great, the offence has been made out."

[23] In this case, the trial judge did consider *Stellato* and correctly interpreted it

when he writes:

"...one does not need to show a marked departure, even the slightest indicia of impairment are sufficient to make out the offence, and I do find in this case that the indicia that were present, although Mr. Proulx did not feel that his ability to drive was impaired by alcohol, it is quite trite to say that one is always the worst judge of one's condition after having consumed alcohol, and certainly in these circumstances I do find that the ability of Mr. Proulx was impaired by alcohol to a certain degree and that that follows within the Stillato (sic) ambit..." (Page 24 Lines 9 to 21)

[24] The trial judge accepted the evidence of the investigating officer and concluded that Mr. Proulx was impaired. He did not have to consider the degree of impairment provided he was convinced that Mr. Proulx was impaired. Obviously, he had that conviction.

[25] That ground of appeal fails as well.

Conclusion

[26] The appeal is therefore dismissed.

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Robert G. S. Del Frate

Superior Court Justice

Released: January 20th, 2003

COURT FILE NO.: 62/02

DATE: 2003/01/20

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

- **and -**

DENIS PROULX

Appellant

REASONS FOR JUDGMENT

Robert G. S. Del Frate, S.C.J.

Released: January 20th, 2003

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[1] *R. v. Cook*, 114 C.C.C. (3d) 481 (S.C.C.)

[2] *R. v. Harper* (1982), 65 C.C.C. (2d) 193, at p.210 as quoted in *R. v. Burns*, 89 C.C.C. (3d) (S.C.C.) at p.200.

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