

**ONTARIO COURT OF JUSTICE**

**B E T W E E N :**

**HER MAJESTY THE QUEEN**

**— AND —**

**P** [REDACTED] **P** [REDACTED]

---

Before Justice Peter N. Bourque  
Heard on September 28, 2010  
Reason for Judgment – September 28, 2010

---

**J. Halajian** ..... **for the Crown**  
**S. Montes** ..... **for the accused P** [REDACTED] **P** [REDACTED]

---

**Bourque J.:**

[1] In the early morning hours of October 10, 2009, the defendant was proceeding northbound on Bathurst Street in York Region. As a result of observations made by an O.P. P. constable and further investigation P [REDACTED] P [REDACTED] was charged with impaired driving.

**Overview of Analysis**

[2] The defendant is presumed innocent.

[3] What this means is that the most fundamental rule guiding these proceedings is that the burden of proving guilt of impaired driving and driving over 80 mg is upon the prosecution.

---

[4] Before an accused can be convicted of an offence, the trier of fact must be satisfied beyond a reasonable doubt with the evidence of all the essential elements of the offence.

[5] *R. v. Lifchus* states the following:

“A reasonable doubt is not an imaginary or frivolous doubt, nor is it based upon sympathy or prejudice. A reasonable doubt is a doubt based on reason and common sense which must logically be derived from the evidence or absence of evidence.”

**O.P.P. Constable Michael Di Pasquale**

[6] Constable De Pasquale was on Bathurst St. and noticed a vehicle, which was in the left lane, move in front of him into the right lane without signalling. The vehicle came to a stop, at a stop light, in front of the officer’s car.

[7] When the light turned green the vehicle sped up and Constable De Pasquale was of the opinion the vehicle went (at least momentarily) faster than the 70 kilometres per hour limit, but it then slowed down and the officer was able to clock it at 75 kilometres per hour before it then slowed further to under 70 kilometres per hour. The officer said it was swerving in the lane but did not leave the lane and did not strike the curb. It was not revealed how long this weaving went on, so I will assume it was not for a long period of time.

[8] The officer pulled the vehicle over and the car pulled into a private parking lot. The officer did not remark about anything unusual in the way the person stopped the car.

[9] The officer spoke to the driver who was identified as the defendant by an O.H.I.P. card. The defendant produced that card and other documents without any noticeable difficulty.

[10] The officer smelled alcohol and asked the defendant to step out of the car. He stated that on the defendant's second step out of the car he "staggered" but then stood up straight. There was no evidence that he was leaning on the car or that he was swaying or showing any signs of poor balance. The officer said the defendant crossed his arms and the officer thought he was doing this for reasons of balance, although there was no evidence of any swaying to support that view.

[11] The officer arrested him for impaired driving and the defendant walked to the police car. The officer did not notice anything remarkable about how the defendant walked to the car or how he got into the car. The officer noted that the defendant put up his hand to shield his eyes from the bright lights on the police cruiser.

[12] The defendant was placed under arrest and was given his rights. The officer said the defendant asked some questions and then understood what had been read to him. While in the cruiser the defendant sat upright and did not slump. At one point the defendant was allowed to leave the cruiser to go to his car to retrieve some things and "jogged in tight

steps for about 14 feet”.

[13] There was no evidence led by the Crown of any other observations made by this officer, who was obviously with the defendant for a period of time afterwards to process him at the detachment and conduct breath tests, as to any other physical signs or observations which may tend to show impairment.

[14] In my opinion, the following are the things which have a bearing on my deliberations, both for and against a finding of impairment:

- Lane change without signalling;
- some speeding for a short period of time;
- driving at the speed limit for most of the time;
- some weaving in lane, but without any known distance;
- pulling over when requested;
- parking without difficulty;
- smell of alcohol;
- retrieved his documents without difficulty;
- no observations of glassy eyes or redness or wet eyes;
- no observations of lack of focus or perception;
- a “stagger” on his second step out of the car;
- standing straight and not swaying in front of the officer;
- I do not by itself accept the crossing of the arms as a sign of a loss of balance or impairment – it can be a very normal posture and is therefore too equivocal to come to any conclusions about its purpose;
- walked to the police cruiser without difficulty;
- got into the cruiser and interacted with the officer normally;

- returned to his car without any reference to any difficulty in his movements;
- jogging with “tight steps” is not something that really can have any effect, at least in a negative way, on sobriety. There is no indication that it was performed with difficulty with any loss of balance. There could be an inference that it was a specific sign of good balance. I find it to be ultimately neutral; and,
- there was no evidence led that there were any other observations made during the rest of the time that the officer dealt with the defendant that there were any other signs of impairment whatsoever. I believe that if there were some such observations then the Crown would have led that evidence.

### **ANAYLSIS**

[15] The case of *R. v. Stellato* (1993 43 M.V.R. (2d) 120 (Ont. C.A.)) sets out the test for determining impaired driving. The *Criminal Code* does not prescribe any specific test for determining impairment. Impairment is an issue of fact which a trial judge must decide on the evidence. The standard of proof is neither more nor less than that required for any other element of a criminal offence. Before convicting an accused of impaired driving, a trial judge must be satisfied, beyond a reasonable doubt, that the accused’s ability to operate a motor vehicle was impaired by alcohol or a drug. If the evidence establishes beyond a reasonable doubt any degree of impairment, the offence has been made out. The Crown is not required to prove that the accused’s conduct demonstrated a marked departure from that

of a normal person. 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, beyond a reasonable doubt, any degree of impairment ranging from slight to great, the offence has been made out.

[16] In assessing the evidence of impairment and applying the test enumerated in *Stellato*, and *R. v. Andrews* [1996] A.J. No. 8 (Alta. C.A.), and other cases, the Judge should not just look at each item of evidence in isolation, but must look at the totality of the evidence, to determine whether the Crown has proved the impairment alleged. It may be that certain features of the evidence have possible explanations other than impairment, but the trial judge must still determine whether, on the whole of the evidence, all of those factors present in the same case, along with any unexplained observations, still leave a reasonable doubt as to whether the accused's ability to operate a motor vehicle was impaired as alleged. (“Impaired Driving in Canada – 2006 – Justice Joseph F. Kenkel)

[17] If I was assessing this evidence for the purpose of deciding whether the officer had reasonable and probable grounds to arrest and make a breath demand, I would rely upon the words of Justice Hill in *R. v. Censoni* and say “it is not an onerous threshold” and “the constellation of objectively discernible facts”, could lead the officer to have such reasonable and probable grounds.

[18] However, I must assess guilt or innocence based on the presumption of innocence noted above. I find that the weaving of the car and the “staggered” steps are the

most telling objective facts to show some impairment. I also find that the lack of any other real unequivocal evidence tending to show impairment, and the fact that the defendant appeared to be functioning quite normally, leaves me with a reasonable doubt as to whether the Crown has been able to satisfy their burden of proof.

### **CONCLUSION**

[19] Based on all of the evidence noted above, and being left with a reasonable doubt, I find the defendant not guilty and acquit him of the charge of impaired driving.

Note: The official version of these reasons for judgments is the transcript in the court file. In the event that there is a question about the content, the original in the court file takes precedence. The reasons may have undergone editing changes.