R. v. Kalia

Ontario Judgments

Ontario Court of Justice

P. Fraser J.

Heard: July 5-6, 2021.

Judgment: July 9, 2021.

Toronto Court File No.: 19-21243

[2021] O.J. No. 4052 | 2021 ONCJ 395

Between Her Majesty the Queen, and Ashish Kalia

(42 paras.)

Counsel

M. Coristine, counsel for the Crown.

A. Edgar, counsel for the defendant Ashish Kalia.

Reasons for Judgment

P. FRASER J.

1 Ashish Kalia stands charged with impaired operation of a conveyance, contrary to s. 320.14(1)(a) of the *Criminal Code*, and having a blood alcohol concentration equal to or in excess of 80 mg of alcohol in 100 mL of blood within two hours of operating a conveyance, contrary to s. 320.14(1)(b).

2 The defence alleges breaches of Mr. Kalia's rights under sections 8 and 9 of the *Charter* and seeks the exclusion of evidence of his blood alcohol concentration. Specifically, the defence contends that the arresting officer lacked the requisite grounds to make an arrest and demand for samples of the accused's breath into an approved instrument. The trial proceeded by way of a blended *voir dire*.

3 As in any criminal trial, the accused is presumed innocent. The Crown must prove the essential elements of the offence beyond a reasonable doubt. With respect to the trial proper, the burden of proof rests squarely on the Crown throughout the trial and never shifts to the defence.

4 A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence: *R. v. Lifchus*, *[1997] 3 S.C.R. 320*. Even if I believe the accused is probably guilty or likely guilty, that is insufficient. In those circumstances I would be required to give the benefit of the doubt to the accused and acquit.

Facts

5 On November 4, 2019, Mr. Kalia was driving a black Audi sedan southbound on highway 427 near Dixon Road in Toronto. He was involved in a collision with a Canada Post delivery truck that caused extensive damage to the Audi.

6 A civilian witness, Mr. Anthony Puran, stopped to render assistance. He testified that the black Audi was "smashed up." He helped the driver (later identified as Mr. Kalia) out of the car and observed a bad cut over his eye and blood on his hand. The driver "did not look okay" so Mr. Puran called 911.

7 Mr. Puran did not observe any signs of intoxication, but was not paying attention to that issue. He testified that he didn't know if the driver was intoxicated or not. He also reported there was some rain on the night in question and that road conditions were wet.

8 PC Konkle was the first officer on scene. He observed the badly damaged black Audi and found the accused standing by a nearby concrete barrier. He was told by Mr. Puran that the accused was the driver of the black Audi. Following a short investigation, PC Konkle placed the accused under arrest and made a demand for samples of his breath into an approved instrument. He considered making an approved screening device demand, (he had a device with him), but determined that he had the requisite grounds to move straight to an approved instrument demand.

9 Mr. Kalia was taken to hospital and treated for his injuries. He provided two breath samples while in hospital and returned readings of 160 and 150 mg of alcohol per 100 mL of blood respectively.

Section 8

10 Section 8 of the *Charter* provides that everyone has the right to be secure against unreasonable search or seizure. As the seizure of breath in this case was conducted without a warrant, the burden is on the Crown to show, on a balance of probabilities, that the seizure was reasonable: *R. v. Shepherd*, *2009 SCC 35* at para. 16. A search or seizure will be reasonable if it is authorized by law, the law itself is reasonable, and it is conducted in a reasonable manner: *R. v. Grant*, *2009 SCC 32*, at para. 56; *R. v. Fearon*, *2014 SCC 77*, at para. 12.

11 Section 320.28(1) authorizes a police officer to demand samples of a person's breath into an approved instrument. The section reads as follows:

> **320.28 (1)** If a peace officer has reasonable grounds to believe that a person has operated a conveyance while the person's ability to operate it was impaired to any degree by alcohol or has committed an offence under paragraph 320.14(1)(b), the peace officer may, by demand made as soon as practicable,
>
> **(a)** require the person to provide, as soon as practicable,
>
> **(i)** the samples of breath that, in a qualified technician's opinion, are necessary to enable a proper analysis to be made by means of an approved instrument

12 The existence of reasonable grounds to make a demand under s. 320.28 is both a statutory and a constitutional precondition to a lawful seizure of breath: *R. v. Shepherd, supra*, at para. 13. Reasonable grounds has both a subjective and an objective component. Where a court is satisfied that the officer had the requisite subjective belief, the sole remaining issue is whether that belief was reasonable in the circumstances. The test is not an overly onerous one. A *prima facie* case need not be established: *R. v. Bush*, *2010 ONCA 554* at para. 46; *R. v. Wang*, *2010 ONCA 435* at para. 17.

13 The Court of Appeal for Ontario has cautioned against treating the examination of the arresting officer's grounds as a critique of the investigation itself. For example, in *R. v. Notaro*, *2018 ONCA 449* at para. 34, Justice Paciocco observed the following:

> The reasonable and probable grounds test is not about the quality of the investigation or the range of the questions the officer asks herself. It turns on whether an arresting officer's honest, subjective belief that an offence has been committed is supported by the objective facts that the officer was aware of: *R. v. Bush, 2010 ONCA 554*, *101 O.R. (3d) 641*, at paras. 71-72. As Durno J. (sitting *ad hoc*) noted in *Bush*, at para. 70, "the issue is not whether the officer could have conducted a more thorough investigation. The issue is whether, when the officer made the breath demand, he subjectively and objectively had reasonable and probable grounds to do so."

14 It is now well understood that the court must consider the combined effect of the grounds for a demand, rather than conducting a piecemeal examination of each individual factor. Moreover, the presence of alternate explanations for individual indicia of impairment do not serve to strip those indicia of all evidentiary value. The presence of an alternate explanation is but one factor to consider. For example, the Court of Appeal stated the following in *R. v. Bush, supra*, at para. 57:

> Consideration of the totality of the circumstances includes the existence of an accident. However, that the accident could have caused some of the indicia relied upon when they could also have been caused by the consumption of alcohol does not mean the officer has to totally eliminate those indicia from consideration: *R. v. Duris*, *[2009] O.J. No. 4403*, *2009 ONCA 740*, at para. 2. They have to be considered along with all the other indicia in light of the fact there may be another explanation.

15 Additionally, the fact that some of the traditional indicators of impairment, such as slurred speech, are not present does not render the officer's belief objectively unreasonable: *R. v. Wang, supra*, at para. 21

16 In the instant case, the defence submits that PC Konkle lacked the requisite grounds to make the demand for samples of the accused's breath under section 320.28. The defence further submits that he was not credible with respect to some of the grounds testified to and that I should not accept his evidence on those points. The Crown argues that PC Konkle was a credible witness and that the grounds were sufficient in law to authorize an approved instrument demand.

17 PC Konkle testified that he believed the accused had operated his vehicle while his ability to do so was impaired by alcohol. He identified the following grounds as the basis for his belief:

* There was a serious motor vehicle collision
    * There was a strong odour of an alcoholic beverage coming from Mr. Kalia's breath
* Mr. Kalia had glossy, red eyes
    * He was leaning against the concrete barrier and swaying when he walked.
    * He produced a health card in response to a request for his driver's licence.

18 Counsel for Mr. Kalia asks me to reject PC Konkle's evidence that the accused was unsteady on his feet, because that point was not noted in the officer's memo book. In some circumstances, an omission of this kind regarding an important point, can lead to the rejection of a police officer's evidence: see, for example, *R. v. Zack*, *[1999] O.J. No. 5747* (OCJ). However, in this case PC Konkle testified that he told the breath technician about the accused's unsteadiness when he relayed the grounds for the breath demand to that officer on November 4, 2019. Prior to trial, PC Konkle reviewed the alcohol influence report, which had been prepared by the breath technician and confirmed that the observation was recorded there.

19 Defence counsel submits that the content of the report is hearsay and is not admissible to prove that PC Konkle previously stated the accused was unsteady. In my view, the officer's statement to the breath technician is a prior consistent statement: it is admissible to rebut the defence suggestion of recent fabrication. The evidence of the prior statement does not come from the document, but from PC Konkle himself. As such, it is not hearsay. Normally, a witness's unconfirmed assertion as to his own prior consistent statement has little, if any, evidentiary value. However, in this case PC Konkle's claim that the statement was recorded by another officer provided an easy way for counsel to verify the assertion. The document in question would have been disclosed to the defence and if the notation PC Konke referred to was absent, I would have expected the officer to have been confronted with that fact. Instead, the assertion went unchallenged.

20 I accept that PC Konkle told the breath technician the accused was unsteady on his feet on November 4, 2019. This tends to rebut the suggestion of recent fabrication. I also find that Mr. Puran's evidence provides some confirmation of the officer's testimony on this point. Mr. Puran testified that he helped the accused out of his car and "put him against the barrier." He further testified that he called 911 and told the accused to "just stay back and lean against the barrier until they get here." This testimony corresponds with PC Konkle's claim that the accused was leaning against the barrier to steady himself.

21 This factor can fairly be said to be equivocal as between impairment and the innocent explanation that Mr. Kalia was shaken up by the collision. The same could be said for the fact that he produced the wrong identification document. The same could be said again of the accused's glossy red eyes, which the officer acknowledged could have resulted from irritation caused by the powder in the vehicle's air bag. The equivocal nature of these observations attenuates their value, but does not remove them from consideration altogether. It is the cumulative effect of all the grounds which must be considered, in view of any alternate explanations.

22 The defence argues that PC Konkle's testimony with respect to the odour of alcohol is undermined by the evidence of Mr. Puran, who was close to the accused and did not smell alcohol. In my view, proximity is but one factor affecting the observation of an odour. Mr. Puran was not a trained investigator tasked with detecting impaired drivers. He testified that he was not focussed on the question of the accused's sobriety as he was focussed on rendering aid. After doing so, was mainly concerned with getting to work. Mr. Puran didn't know if the accused was intoxicated or not. I do not consider his failure to observe an odour of alcohol to undermine the officer's evidence, which I accept.

23 PC Konkle relied heavily on the collision in formulating his grounds. There is appellate authority for the proposition that an unexplained collision can be a compelling indicator of impairment and, together with evidence of alcohol consumption, may afford grounds for a demand under s. 320.28: see *R. v. Bush, supra*, at para. 54. However, I agree with defence counsel that this line of reasoning is more compelling in the case of a single car collision. Where two cars collide with each other, it does not so obviously follow that the accused's ability to drive was compromised.

24 Significantly, PC Konkle made no inquiries of anyone as to how this collision occurred. He spoke to the drivers of both cars and never asked what had happened. It was clear that he made up his mind about the cause of the collision very quickly, and on the basis of very little information. He testified that, because of the extensive damage to the car, the collision had to have been the result of impaired driving. He rejected the possibility that the collision could have resulted from any other cause, such as excessive speed. Though he ultimately resiled from this position in cross-examination, his testimony on this point was revealing of his reasoning process on the night in question.

25 In my view, it was not reasonable to conclude, without *any* inquiry of the participants, that impaired driving was the only possible cause of this collision. Nor was it reasonable to conclude that it was the driver of the Audi who was impaired, rather than the driver of the Canada Post truck. I am mindful of the jurisprudence which cautions against evaluating the quality of the investigation instead of the grounds. However, in this case there was an absence of information about the cause of the crash. Properly construed, the crash was one factor to be taken into account among the other pieces of information available to the officer in this case. It spoke to the possibility of impairment, but admitted of many other possibilities too. In these circumstances, it was a weak indicator of impairment.

26 In my view, the totality of the circumstances supported a reasonable suspicion that the accused had alcohol in his body and had committed the offence of impaired operation. These grounds properly supported an investigative detention and would have served as a proper foundation for an approved screening device demand under section 320.27. The grounds fell short of what was required for an approved instrument demand under section 320.28.

27 I find the officer had a subjective belief that the accused operated his vehicle while his ability to do so was impaired by alcohol. In my view that belief was not objectively reasonable. I find the seizure of Mr. Kalia's breath was a breach of his rights under section 8 of the *Charter*.

Section 9

28 Section 9 of the *Charter* guarantees everyone the right not to be arbitrarily detained. The burden of proving an alleged breach of this right is on the applicant. The standard of proof is on a balance of probabilities.

29 Section 495(1)(a) of the *Criminal Code* authorizes a police officer to arrest a person without a warrant. The officer must subjectively believe, on reasonable and probable grounds, that a person has committed or is about to commit an indictable offence. Those grounds must be justifiable from an objective point of view: *R. v. Storrey*, *[1990] 1 SCR 241* at para. 17.

30 Reasonable and probable grounds to arrest means a credibly based *probability* of the suspect's involvement in a crime. This is distinct from a reasonable suspicion to detain, which is a credibly based *possibility* that the individual is involved in a crime. Courts must be cautious to avoid conflating these different standards: *R. v. Ahmad*, *2020 SCC 11* at paras. 45-49; *R. v. MacKenzie*, *2013 SCC 50* at paras. 84-86.

31 In this case, the section 9 analysis mirrors the section 8 analysis. As I have found the seizure of Mr. Kalia's breath samples amounted to a breach of his rights under section 8 of the *Charter*, I correspondingly find that the arrest and continued detention constituted a breach of his rights under section 9. In my view, the *Charter*-infringing conduct for these separate breaches was essentially the same, as the detention in this case was no more than what was occasioned by the seizure of the breath samples.

Remedy

32 Section 24(2) of the *Charter* directs that evidence obtained in a manner that infringes a *Charter* right shall be excluded if its admission would bring the administration of justice into disrepute. This question requires a consideration of three areas of inquiry: (1) the seriousness of the *Charter*-infringing conduct; (2) the impact on the *Charter*-protected rights of the accused; and (3) society's interest in adjudicating criminal charges on their merits. A trial judge must balance these assessments in deciding whether a reasonable person, informed of all the relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute. The *onus* rests with the applicant on a balance of probabilities: see *R. v. Grant, supra*.

Seriousness of the Charter-Infringing Conduct

33 The first line of inquiry focuses on the conduct of the state actor involved in the breach. I find that the *Charter*-infringing conduct here falls at the less serious end of the spectrum. While the grounds were not sufficient to justify an approved instrument demand, it was a close call. And though the arresting officer's consideration of the collision was myopic, I find that he acted in good faith. This branch of the analysis favours admission of the evidence.

Impact of the Breach on the Charter-Protected Interests of the Accused

34 The second line of inquiry requires the court to evaluate the impact of the state conduct on the accused's rights. I find the impact of the breach to be at the low end of the spectrum in this case. As the Supreme Court observed in *R. v. Grant, supra*, at para. 111, the taking of breath samples is relatively non-intrusive. Mr. Kalia was never taken to a police station, was never handcuffed, and never put into a cell.

35 Relying on *R. v. Fleming*, *2018 ONCJ 843*, the defence argues that the combined effect of the section 8 and 9 breaches amplifies the impact upon the accused. However, in *Fleming* the detention was unlawful right from the beginning of the encounter. It constituted a further breach, separate and apart from the section 8 breach arising out of the seizure of the accused's breath. In the instant case, the initial detention would have been lawful, if there was one at all, and I have found that the conduct underlying the section 8 and 9 breaches was essentially one and the same.

36 I would also observe that if the arresting officer had made an approved screening device demand, as he contemplated doing, Mr. Kalia would almost certainly have registered a fail reading. This would have lead to an approved instrument demand and the end result would have been the same. While the discoverability of the evidence is no longer a decisive factor in the s. 24(2) analysis, the Supreme Court has asserted the continued relevance of the doctrine of discoverability in *R. v. Grant, supra*, at para. 122:

> Discoverability retains a useful role, however, in assessing the actual impact of the breach on the protected interests of the accused. It allows the court to assess the strength of the causal connection between the *Charter*-infringing self-incrimination and the resultant evidence.

37 The Court concluded at para. 125 that, "If the derivative evidence was independently discoverable, the impact of the breach on the accused is lessened and admission is more likely." See also, *R. v. Cote*, *2011 SCC 46* paras. 69-70. For all these reasons, the impact of the breaches upon the accused was substantially attenuated.

Society's Interest in the Adjudication of the Case on its Merits

38 The defence acknowledges that the third branch of the *Grant* analysis favours admission, as it almost invariably will. In *R. v. Blake*, *2010 ONCA 1* at para. 31, the Court of Appeal remarked that, "Society's interest in an adjudication on the merits is seriously undercut where highly

reliable and important evidence is excluded." This is particularly so where the evidence effectively guts the prosecution's case.

Balancing

39 The sum of these various lines of inquiry favours the admission of the evidence in this case. And as the Supreme Court observed in *R. v. Grant, supra*, at para. 111:

> [W]here the violation is less egregious and the intrusion is less severe in terms of privacy, bodily integrity and dignity, reliable evidence obtained from the accused's body may be admitted. For example, this will often be the case with breath sample evidence, whose method of collection is relatively non-intrusive.

40 In all the circumstances, I find that the admission of the evidence would not bring the administration of justice into disrepute. I therefore decline to exclude the evidence of the accused's blood-alcohol concentration pursuant to section 24(2) of the *Charter*.

Conclusion

41 With the admission of the breath sample readings, there is no dispute that the Crown has proven Mr. Kalia had a blood-alcohol concentration in excess of the legal limit within 2 hours of driving. I find Mr. Kalia guilty of that offence.

42 The Crown properly concedes that the charge of impaired operation has not been proved to the criminal standard in this case. Accordingly, that charge will be dismissed.

P. FRASER J.
