

CITATION: R. v. Mulimbwa, 2024 ONSC 1820
COURT FILE NO.: CR-21-A-10663
DATE: 2024/03/27

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
HIS MAJESTY THE KING)	Carl Lem, for the Crown
)	
– and –)	
)	
Augustine Mulimbwa)	Paul Lewandowski, for the Appellant
)	
Appellant)	
)	
)	
)	HEARD: February 28, 2024

REASONS FOR DECISION ON SUMMARY CONVICTION APPEAL

PARFETT J.

[1] The Appellant was convicted after trial of impaired care and control of a conveyance.

Evidence at trial

[2] Mr. Mulimbwa was self-represented at trial.

[3] Ottawa Police Constable Ryan McEachran was off duty and walking to the park with his young son on 16 July 2021 at about 10:00am. Mr. Mulimbwa was walking towards them and appeared to Cst McEachran to be in some sort of distress: shuffling slowly and having trouble maintaining his balance. Cst McEachran asked the appellant if he was okay, but he received no response.¹ As the Appellant walked past, he dropped his water bottle several times; he had

¹ Trial transcript, March 1, 2023, p. 54.

trouble picking it up, losing his balance as he attempted to do so. Cst McEachran thought he “mirrored somebody who might be under the influence”.²

[4] Cst. McEachran continued to observe Mr. Mulimbwa and followed him at a distance. He became further concerned when he saw Mr. Mulimbwa enter a car parked on the side of the road. At that point, Cst. McEachran called 911 and requested police attend.³

[5] Cst. Jonathan Plue arrived on scene. He knocked on the driver’s side window of the car. Mr. Mulimbwa appeared to be sleeping. Mr. Mulimbwa did not respond so Cst. Plue opened the driver’s door. There was a strong smell of cannabis. Cst. Plue shook Mr. Mulimbwa’s shoulder, and he woke up. He was arrested for public intoxication at that time.⁴

[6] Cst. Plue observed that Mr. Mulimbwa had poor balance while walking to his cruiser. Mr. Mulimbwa was searched incident to arrest and the key to the car was found in his pocket. Given the smell of cannabis and Mr. Mulimbwa’s “incredibly disoriented, confused state as well as his poor balance” the officer read a standard field sobriety test and based on Mr. Mulimbwa’s performance of that test, he was arrested for care and control of a conveyance while impaired.⁵

[7] A search of the car turned up cannabis and drug paraphernalia. Mr. Mulimbwa was read the standard right to counsel, cautions and a drug recognition evaluation demand.⁶ He was transported to the station. Ultimately, a urine sample was obtained.

[8] The results of the urine sample revealed that Mr. Mulimbwa had the metabolite for cannabis and traces of cocaine in his system.⁷

² Trial transcript, March 1, 2023, p. 54-55.

³ Trial transcript, March 1, 2023, p. 59.

⁴ Trial transcript, March 2, 2023, pp. 11-12.

⁵ Trial transcript, March 2, 2023 at pp. 14-16.

⁶ Trial transcript, March 1, 2023, p. 78.

⁷ Trial transcript, March 1, 2023 at pp. 32-33.

[9] As noted earlier, Mr. Mulimbwa was self-represented at trial. Before the trial started, the trial judge ascertained Mr. Mulimbwa's age, education level and occupation and then explained the trial process to Mr. Mulimbwa. He also ensured that Mr. Mulimbwa had a hard copy of the disclosure. As the trial proceeded, the trial judge explained specific aspects of the trial process such as cross-examination, the elements of the offence, the law relating to care and control⁸, the role of an expert witness⁹, the rule in *Browne v. Dunn*¹⁰, the presumption of innocence, and the accused's right to remain silent.¹¹

[10] It became clear from Mr. Mulimbwa's questions and interjections, primarily during the toxicologist's evidence, that he was adamant he had not ingested any cocaine. On the other hand, he did not deny ingesting cannabis.¹²

[11] The toxicologist outlined the effect that both cannabis and cocaine could have on a person who had ingested these substances as well as the effect on their driving ability.¹³ The trial judge asked questions about whether and how a person could accidentally ingest a drug. The toxicologist explained that passive inhalation in certain circumstances could result in accidental ingestion of a drug.¹⁴

[12] At the end of the first day of trial, there were the following exchanges between the trial judge and Mr. Mulimbwa:

Court: So, Mr. Mulimbwa just a couple of questions, you don't have to tell me what your defence is although I'm able to frankly gather part of it, right? Like, I've heard you tell us quite clearly that you had no intention to drive and that would be, that's evidence which would relate directly to guilt or innocence on this charge. Part of the charge relates to whether or not your ability to drive a motor vehicle was in fact impaired at the

⁸ Trial transcript, March 1, 2023, p. 68, Trial transcript, March 2, 2023 at pp. 4-5.

⁹ Trial transcript, March 1, 2023, p. 24-26.

¹⁰ Trial transcript, March 1, 2023 at p. 8.

¹¹ Trial transcript, March 1, 2023 at p. 6-10, 12.

¹² Trial transcript, March 1, 2023 at p. 35-36, 43.

¹³ Trial transcript, March 1, 2023 at pp. 35-38.

¹⁴ Trial transcript, March 1, 2023 at pp. 44-45.

time, is that part of the case you're contesting as well? Is your defence simply, like, I just wasn't going to drive anywhere?

Mr. Mulimbwa: I wasn't going to drive anywhere, but I was impaired.

Court: You was, you were or were not impaired?

Mr. Mulimbwa: I was impaired.

Court: You were impaired. Okay...¹⁵

(...)

Court: Sounds to me like you're admitting that you were impaired in which case we can just kind of focus on the main issue.

Mr. Mulimbwa: Yeah, so....¹⁶

(...)

Court: So, you're prepared to make the admission that you were in fact impaired. I think that admission is limited to cannabis so you're not, the cocaine you seem to be disputing that part of it, but you're not disputing that you were impaired by drug on the occasion. Correct?

Mr. Mulimbwa: Occasionally?

Court: On, oh no, the day that we're talking about.

Mr. Mulimbwa: No.

Court: Right, that morning you would agree that you were impaired by drugs that day?

Mr. Mulimbwa: Yeah, I was impaired.¹⁷

[13] Mr. Mulimbwa testified in his own defence. Unfortunately, he was unable to recall much of what happened that morning.¹⁸ He was adamant he had no intention of driving.¹⁹ He believed

¹⁵ Trial transcript, March 1, 2023, p. 79-80.

¹⁶ Trial transcript, March 1, 2023, p. 82.

¹⁷ Trial transcript, March 1, 2023, p. 84.

¹⁸ Trial transcript, March 2, 2023 at pp. 45-46.

¹⁹ Trial transcript, March 2, 2023 at p. 38.

the events had occurred at night and that he had come directly from his house to his car to retrieve his cellphone charger so he would be able to set his alarm for the next morning. He stated that as soon as he got into his car, he fell asleep. The car was parked across the street from his home.²⁰

[14] In cross-examination, he stated that he had parked across the street from his home because the driveway was full. He also stated that it was his usual practice to move his car into the driveway as soon as a spot became available.²¹

[15] Mr. Mulimbwa denied walking on the street where he was observed by Cst. McEachran and stated he could not recall any interaction with the constable. He had no recollection of doing anything other than coming from his house directly to the car.²²

[16] Mr. Mulimbwa did not dispute the fact he had consumed cannabis on that day.²³ However, he was adamant he had not consumed cocaine.²⁴

Reasons for decision

[17] The trial judge found that Mr. Mulimbwa had conceded that he was impaired by cannabis, but that his testimony was that he had not had any intention to drive when he got into his car.²⁵

[18] The trial judge also found that a search of Mr. Mulimbwa revealed that he had the key fob to the car in his pocket.²⁶

²⁰ Trial transcript, March 2, 2023 at pp. 31-32, 51.

²¹ Trial transcript, March 2, 2023 at p. 34.

²² Trial transcript, March 2, 2023 at p. 36.

²³ Trial transcript, March 2, 2023 at p. 40.

²⁴ Trial transcript, March 2, 2023 at pp. 41-43.

²⁵ Trial transcript, March 2, 2023 at p. 58.

²⁶ Trial transcript, March 2, 2023 at p. 60.

[19] He identified that the first issue to be determined was whether the presumption in relation to care and control had been rebutted by the evidence. The trial judge reviewed Mr. Mulimbwa's testimony, particularly as it contrasted with the evidence of the police officers. The trial judge noted that Mr. Mulimbwa was an honest witness.

[20] However, he indicated he accepted the evidence of the officers. He noted the areas where Mr. Mulimbwa's evidence diverged from that of the police officers, specifically, that the events occurred in the morning and not at night as alleged by Mr. Mulimbwa and the fact Mr. Mulimbwa had no recollection of walking down the street, dropping a water bottle several times or interacting with another driver attempting to back out onto the street.²⁷

[21] The trial judge then noted,

And so, it is against the backdrop of these reliability concerns with respect to your evidence that I have to measure your memory that you were just going to get your charger for your phone, and you didn't plan to drive anywhere.²⁸

[22] He goes on to conclude,

[The inconsistency relating to time of day], along with the fact that you were walking along a path that was inconsistent with your stated intention in court of just getting a phone from across the street, does not permit me to accept your evidence that that in fact was your purpose, that you were going to get your charger and you weren't planning on driving.²⁹

(...)

And so, I look at your evidence in its totality and unfortunately, it leaves me with evidence that is completely unreliable despite the fact that you were doing your best to give reliable evidence. This evidence is not capable of overturning the

²⁷ Trial transcript, March 2, 2023 at pp. 60-62.

²⁸ Trial transcript, March 2, 2023 at p. 63.

²⁹ Trial transcript, March 2, 2023 at p. 63.

presumption of care and control that arises on the evidence of Constable Plue and Mr. McEachran.³⁰

[23] The trial judge then went on to determine that the circumstances of the situation were such that there was a significant risk that Mr. Mulimbwa would set his car in motion.³¹

[24] Consequently, Mr. Mulimbwa was found guilty.

Positions of the parties

[25] Defence argues that the fairness of the trial was negatively impacted by the fact the trial judge ‘streamlined the trial into a *one* issue trial focusing on “care and control”’³². Defence asserts that the trial judge incorrectly explained the law in relation to impairment and consequently, the admission of impairment made by the Appellant was not valid.³³

[26] In oral argument, Defence counsel stated that because the trial judge focused exclusively on the issue of care and control and did not explore the effect the involuntary ingestion of cocaine had on the *mens rea* of the offence and on the issue of care and control, the resulting conviction was a miscarriage of justice.

[27] The Crown argues that given the Appellant readily admitted that he was impaired by drugs and the trial judge found he was in care and control both based on the presumption in s. 320.35 of the *Criminal Code*³⁴ and on the specific facts of the case, there was no obligation on the trial judge to explore the impact of the involuntary ingestion of cocaine.

Analysis

[28] The key issue in the present case is whether the conduct of the trial was fair.

³⁰ Trial transcript, March 2, 2023 at p. 64

³¹ Trial transcript, March 2, 2023 at p. 64-65.

³² Appellant’s factum at p. 16 [emphasis in original].

³³ Ibid.

³⁴ R.S.C. 1985, C. C-46.

[29] The parties agree on the law relating to standard of review in the circumstances of the present case.

[30] A self-represented accused is entitled to the assistance of the trial judge. The duty of trial judges to assist a self-represented accused will vary depending on the specific circumstances. As noted in *R. v. Chemama*,

How far the trial judge should go in assisting the accused is a matter of discretion, varying with each trial and depending upon the sophistication of the accused, the seriousness of the offence, the nature of the defence, and many other factors individual to each case.³⁵

[31] Importantly, the goal of the trial judge in these circumstances is to ensure a fair trial. Nothing more. As stated in *R. v. Harrer*,

At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community. A fair trial must not be confused with the most advantageous trial possible from the accused's point of view. Nor must it be conflated with the perfect trial; in the real world, perfection is seldom attained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused.³⁶

[32] In *R. v. Richards*, the Ontario Court of Appeal outlined details of the duty owed by a trial judge to a self-represented accused. It indicated,

Where an accused is self-represented, a trial judge has a duty to ensure that the accused has a fair trial. To fulfill this duty, the trial judge must provide guidance to the accused to the extent the circumstances of the case and accused may require. Within reason, the trial judge must provide assistance to aid the accused in the proper conduct of his defence and to guide him as the trial unfolds in such a way that the defence is brought out with its full force and effect....

The duty owed by trial judges to self-represented litigants is circumscribed by a standard of reasonableness. The trial judge is not, and must not become, counsel

³⁵ 2016 ONCA 579 at para. 13.

³⁶ [1995] 3 SCR 562 at para. 45 [case citations omitted].

for the accused. The judge is not entitled, indeed prohibited, from providing the assistance of the kind counsel would furnish when retained to do so.... A standard of reasonableness accommodates a range of options to ensure the necessary degree of assistance and eschews a single exclusive response. The onus on the trial judge to assist the self-represented accused is a heavy one. This characterization means that it is not enough that the verdict at the end of the trial is or appears correct. What matters is whether the trial has been fair to the self-represented accused...

The onus extends, at least can extend, to an obligation on the trial judge to raise *Charter* issues on the judge's own motion where the accused is self-represented.... This is not to say, however, that this specific obligation becomes engaged on the mere scent or intimation of a possible *Charter* infringement.... But where there is admissible uncontradicted evidence of a relevant *Charter* breach, the trial judge has an obligation to raise the issue, invite submissions and enter upon an inquiry into the infringement and its consequences....³⁷

[33] Ultimately, the test on appellate review is whether on a review of the complete trial record, the trial judge's conduct of the trial was reasonable and fair to all parties.

[34] In the present case, the parties agree that the evidence at trial indicated that the Appellant was impaired. They also agree that the Appellant's ingestion of cannabis was voluntary and that of cocaine, involuntary.

[35] Where the parties differ is;

- Was the admission by the Appellant that he was impaired by cannabis valid;
- Should the trial judge have considered a *mens rea* defence based on the accidental ingestion of cocaine;
- Should the trial judge have considered the impact that the accidental ingestion of cocaine had on the issue of care and control?

[36] There was no evidence at trial that the Appellant accidentally ingested cocaine. However, the evidence that the Appellant had cocaine in his system was incontrovertible and to

³⁷ *R. v. Richards*, 2017 ONCA 424 at paras. 110-113 [case citations omitted].

the extent that cocaine was considered in the trial, it was on the basis that the Appellant accidentally ingested it.

[37] On appeal, both parties also assumed that the cocaine was accidentally ingested.

[38] As noted earlier in this decision, the evidence that the Appellant was impaired by a drug was overwhelming. In my view, the admission elicited by the Appellant that he was impaired by cannabis was entirely consistent with all the evidence and served to focus the trial on the live issue – care and control. While it might have been better had the trial judge not elicited the admission of impairment, the admission did not and could not have changed the focus of the trial.

[39] Defence, in his oral argument, tried to compartmentalize the effects of cannabis and those of cocaine and suggested that the impairment observed by the witnesses was solely due to cocaine and not cannabis. Additionally, Defence argued that if the impairment was due exclusively to cocaine and the cocaine was accidentally ingested then, based on caselaw involving accidental intoxication, the Appellant could have raised the defence that he did not have the necessary *mens rea* for the offence.³⁸

[40] I cannot accept that proposition. There was no evidence at trial that the impairment observed was solely due to cocaine and no evidence on this appeal that it is possible to isolate the effects of cocaine from those of cannabis. The only evidence at trial was that cocaine would have exacerbated the effect of the cannabis.

³⁸ *R. v. McGrath*, 2013 ONCJ 528.

[41] Additionally, the Crown's obligation with respect to *mens rea* is to prove that the accused voluntarily consumed a drug knowing it could impair his ability to drive.³⁹ It does not extend further. As stated by the Supreme Court of Canada in *R. v. Brown*,

The cases say that intoxication is “self-induced” where the accused voluntarily ingests a substance that they know or ought to know is an intoxicant, in circumstances where the risk of becoming intoxicated is or should be within their contemplation.⁴⁰

[42] In *R. v. Scerbo*, the accused testified that he had voluntarily ingested cannabis but not alprazolam. Both these substances were found in his urine. The trial judge in that case accepted that the accused had involuntarily consumed alprazolam. However, the trial judge found that this fact did not deprive the accused of *mens rea*.⁴¹

[43] In the present case, the evidence from the Appellant was that he had voluntarily ingested cannabis. Consequently, there was no reason for the trial judge to consider the *mens rea* issue.

[44] The remaining issue is whether the trial judge should have considered the impact that the accidental ingestion of the cocaine had on the issue of care and control. The evidence of the toxicologist was that the combination of the two drugs would exacerbate impairment.

[45] Defence asserted that cocaine in the ‘crash phase’ would have brought on sudden, extreme fatigue making it much less likely that Mr. Mulimbwa would have driven the car. The trial judge did not consider this possibility in his assessment of the care and control issue.

³⁹ *R v King*, [1962] SCR 746; *R v MacCannell* (1980), 54 CCC (2d) 188 (OCA); *R v Murray* (1985), 22 CCC (3d) 502 (OCA); *R v McGrath*, 2013 ONCJ 528 at para 8; *R v Imrie*, 2017 ONCJ 383 at para 342.

⁴⁰ *R v Brown*, 2022 SCC 18 at para 82.

⁴¹ *R v Scerbo*, 2018 ONCJ 422 at paras 7-10.

[46] The Crown responded that the prosecution is not required to prove what drug caused the impairment,⁴² nor is it necessary that the drug be the sole cause of the impairment. The drug only needs to be a contributing factor.⁴³

[47] The trial judge, correctly in my view, considered the whole of the evidence of impairment in determining the care and control issue. The fact that he did not allude specifically to the presence of cocaine as a contributing factor – even a major contributing factor – does not alter the fact Mr. Mulimbwa was impaired by a drug and was in care and control of a conveyance.

Conclusion

[48] In the present case, the trial judge conducted himself properly and provided ample explanations, instructions, and assistance to Mr. Mulimbwa within the confines of his judicial role. The *mens rea* defence asserted by counsel on appeal has no air of reality, the admission elicited from the Appellant did not negatively impact the fairness of the trial and the trial judge properly considered the whole of the evidence in concluding that the Crown had proven the case beyond a reasonable doubt.

[49] The appeal is dismissed.

Released: March 27, 2024

Parfett J.

⁴² *R. v. Greenwood*, 2010 ONSC 912 at para. 36.

⁴³ *R. v. Bartello*, [1997] O.J. No. 2226 (CA).

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