

Her Majesty the Queen (appellant) v. Jody Smits (respondent)
(C53404; 2012 ONCA 524)

Indexed As: R. v. Smits (J.)

Ontario Court of Appeal
Laskin and Blair, JJ.A. and Brown, R.S.J.(ad hoc)
August 1, 2012.

Summary:

Smits was found guilty of having care or control of a motor vehicle while impaired and "over 80" contrary to s. 253(1)(a) and s. 253(1)(b) of the Criminal Code, respectively. The trial judge entered a conviction on the impaired charge and stayed the finding of guilt on the "over 80" charge. The summary conviction appeal judge reversed the trial judge on the impaired charge and entered an acquittal. The Crown sought leave to appeal, and if leave was granted, sought to restore the conviction and sentence. The case involved the issue of whether an impaired occupant of a motor vehicle, who was found asleep or passed out in the vehicle, was nevertheless in care or control of that vehicle.

The Ontario Court of Appeal granted leave to appeal, allowed the appeal and restored the conviction and sentence. This was a proper case for leave to appeal on summary conviction proceedings pursuant to s. 839 of the Criminal Code. The summary conviction appeal judge exceeded the ambit of factual review permitted under s. 686(1)(a)(i) and thereby erred in law in overturning the findings of fact of the trial judge on the issue of whether the accused had care or control of the vehicle.

Criminal Law - Topic 1367

Motor vehicles - Impaired driving - Meaning of "care and control" - The Ontario Court of Appeal reviewed the law regarding the care or control of a motor vehicle as it related to the facts of this case - The real issue in the case turned on the actus reus of the offence of care or control - While *R. v. Wren (K.A.)* (2000) (Ont. C.A.) "makes it clear that proof of a risk of danger is a necessary ingredient to establish the actus reus of care or control, the more difficult question is what kind of risk of danger is sufficient for the Crown to establish care or control" - This case dealt with the risk that the individual who had decided not to drive would change his or her mind and drive while impaired - "[W]hat risk of danger must exist to establish actual care or control based on the change of mind ground has been the subject of much debate. The topic has generated considerable judicial attention in the courts below. ... However, since *Wren*, this court has not attempted to modify or qualify in any way the type of risk of danger required to establish care or control of a motor vehicle." - See paragraphs 46 to 59.

Criminal Law - Topic 1367

Motor vehicles - Impaired driving - Meaning of "care and control" - This case dealt with the risk that the individual who had decided not to drive would change his or her mind and drive while impaired - The Ontario Court of Appeal stated that "[a]lthough the courts below have applied different modifiers, what all the authorities, including this court, seem

to be saying is that in order to establish that an accused has created a risk of danger in change of mind cases, the Crown must demonstrate a risk that an accused, while impaired, would change his or her mind and put the vehicle in motion. That risk must be based on more than speculation or conjecture. Saying that any person whose ability to operate a motor vehicle is impaired to any degree might change his or her mind is not sufficient. The trier of fact must examine the facts and determine if there is an evidentiary foundation that such risk of danger exists. ... Whether a risk of danger arises on the facts is determined by assessing circumstantial evidence." - See paragraphs 60 to 63.

Criminal Law - Topic 1368

Motor vehicles - Impaired driving - Care or control or operating - What constitutes - [See both **Criminal Law - Topic 1367**].

Criminal Law - Topic 1369

Motor vehicles - Impaired driving - Care or control - General - [See both **Criminal Law - Topic 1367**].

Criminal Law - Topic 4300

Procedure - Trial judge - Duties and functions of - Respecting credibility of witnesses (incl. accused) - [See **Criminal Law - Topic 5404**].

Criminal Law - Topic 4377

Procedure - Charge or directions - Jury or judge alone - Directions regarding credibility of witnesses - [See **Criminal Law - Topic 5404**].

Criminal Law - Topic 4379

Procedure - Charge or directions - Jury or judge alone - Directions regarding character or credibility of accused - [See **Criminal Law - Topic 5404**].

Criminal Law - Topic 5404

Evidence and witnesses - Witnesses - Credibility - The Ontario Court of Appeal stated that, in light of the court's decision in *R. v. B.D.* (2011), there was now no doubt "that, even if an accused does not testify or call any evidence, where there are credibility findings on a vital issue to be made between conflicting evidence arising out of evidence favourable to the defence in the Crown's case, the trial judge must relate the concept of reasonable doubt to those credibility findings. The trial judge must do so in a way that makes it clear that it is not necessary for the trier of fact to believe the evidence favourable to the defence on that trial issue. Rather, it is sufficient if, viewed in the context of all the evidence, the conflicting evidence leaves the trier of fact in a state of reasonable doubt as to the accused's guilt. In that event, the trier of fact must acquit. ... Trial judges in a judge alone trial do not need to adhere slavishly to the W.(D.) formula. It should, however, be clear from an examination of the reasons that at the end of the day the trial judge has had regard for the basic principles underlying the W.(D.) instruction" - See paragraphs 37 to 39.

Criminal Law - Topic 7544

Summary conviction proceedings - Appeal on record to "Appeal Court" - Scope of appeal

(incl. powers of judge) - [See second **Criminal Law - Topic 7652**].

Criminal Law - Topic 7602

Summary conviction proceedings - Appeal to a court of appeal - Requirement of leave - The accused was found passed out in the rear seat of a minivan - The van, which was not owned by the accused, was parked on the side of a country road - The key was in the ignition, but the engine was not running - The accused provided two breath samples that well exceeded the legal limit - Impairment was conceded at trial - The accused was convicted of having care or control of a motor vehicle while impaired - In overturning the conviction, the summary conviction appeal judge held that the trial judge had erred in concluding the accused had care or control of the motor vehicle - He found that it was mere speculation to say that the accused would still be impaired at the time he awoke in the motor vehicle and decided to drive - The Ontario Court of Appeal granted leave to appeal pursuant to s. 839 of the Criminal Code - The appeal judge erred in holding that the finding of the trial judge that the accused was in care or control of the vehicle was based on speculation - If left uncorrected, that error would have the potential to negatively affect many other care or control cases - The issues raised in the appeal had significance to the administration of justice beyond the facts of the case - "How the courts have interpreted the issue of care or control has generated significant jurisprudence at the lower court level in this province. Not all of this jurisprudence has been consistent when dealing with the situation, as in this case, of an impaired occupant of a motor vehicle" - See paragraphs 27 to 33.

Criminal Law - Topic 7607

Summary conviction proceedings - Appeals to a court of appeal - When available - General - [See **Criminal Law - Topic 7602**].

Criminal Law - Topic 7610

Summary conviction proceedings - Appeal to a court of appeal - Grounds raised for the first time on appeal - The Crown submitted that several factors favoured leave to appeal in this "care or control" case - As an additional issue, the Crown sought leave to argue that there was a fundamental flaw in the reasoning of the trial judge by her failure to analyze the exculpatory statements of the accused in accordance with *R. v. W.(D.)* (1991) (S.C.C.) - That legal argument was not raised at trial, and the issue was not the basis upon which the first level of appeal was granted - The Ontario Court of Appeal exercised the court's discretion in favour of permitting the Crown to raise the supplementary argument - "It appears that this issue was raised in oral argument, at least, at the first level of appeal; there was no tactical reason for not raising it initially; and the trial record is sufficient" - See paragraphs 34 to 35.

Criminal Law - Topic 7652

Summary conviction proceedings - Appeals - Grounds - Error of law - A summary conviction appeal judge reversed the trial judge on the impaired charge and entered an acquittal - The accused did not testify and called no evidence - The Crown was granted leave to appeal to raise the supplementary argument that there was a fundamental flaw in the reasoning of the trial judge by her failure to analyze the exculpatory statements of the

accused in accordance with *R. v. D.W.* (1991) (S.C.C.) - The Ontario Court of Appeal held that the trial judge's reasons did not reveal any errors of law - The judge's "very careful reasons" demonstrated a detailed consideration of all the evidence in the case, including the exculpatory statements of the accused, from which she concluded she was not left in a state of reasonable doubt that the accused had care or control of the motor vehicle - Nor did her reasons support the view that the Crown was in some way relieved of the burden of proving the case against the accused beyond a reasonable doubt - The trial judge's reasons had regard for the principles articulated in *R. v. D.W.* - See paragraphs 36 to 44.

Criminal Law - Topic 7652

Summary conviction proceedings - Appeals - Grounds - Error of law - The accused was convicted pursuant to s. 253(1)(a) of the Criminal Code of having care or control of a motor vehicle while impaired - In overturning the conviction, the summary conviction appeal judge held that the trial judge had erred in concluding the accused had care or control of the vehicle (he was found passed out in the rear seat of a minivan) - The appeal judge held that the findings of the trial judge were based on speculation, namely, that the accused would cease to be passed out and would decide that he was going to move the van - The Ontario Court of Appeal held that, in overturning the findings of the trial judge, the appeal judge erred in law - The appeal judge exceeded the ambit of factual review permitted under s. 686(1)(a)(i) of the Criminal Code - It was open to the trial judge to conclude that the accused's conduct created a risk that the accused, while impaired, would put the vehicle in motion and thereby create a danger - The jurisdiction of the appeal judge to review the finding as to sufficiency of the evidence was limited - There was ample circumstantial evidence to support the trial judge's conclusion that the accused was in care or control of the van - The findings of the trial judge were based on more than mere speculation - "There were a constellation of factors that were relied upon by the trial judge" - See paragraphs 64 to 73.

Cases Noticed:

- R. v. R.R. (2008), 238 O.A.C. 242; 90 O.R.(3d) 641; 2008 ONCA 497, reld to. [para. 27].
- R. v. D.W., [1991] 1 S.C.R. 742; 122 N.R. 277; 46 O.A.C. 352, reld to. [para. 34].
- R. v. Sweeney (2000), 50 O.R.(3d) 321 (C.A.), reld to. [para. 35].
- R. v. B.D. (2011), 273 O.A.C. 241; 2011 ONCA 51, reld to. [para. 37].
- R. v. Minuskin (S.) (2003), 180 O.A.C. 255; 68 O.R.(3d) 577 (C.A.), reld to. [para. 39].
- R. v. Toews, [1985] 2 S.C.R. 119; 61 N.R. 349, reld to. [para. 49].
- R. v. Wren (K.A.) (2000), 130 O.A.C. 302; 144 C.C.C.(3d) 374 (C.A.), reld to. [para. 51].
- R. v. Ford, [1982] 1 S.C.R. 231; 40 N.R. 451; 36 Nfld. & P.E.I.R. 254; 101 A.P.R. 254, reld to. [para. 53].
- R. v. Vansickle, [1990] O.J. No. 3235 (C.A.), affing. [1988] O.J. No. 2935 (Dist. Ct.), reld to. [para. 53].
- R. v. Pelletier (S.), [2000] O.A.C. Uned. 355; 6 M.V.R.(4th) 152 (C.A.), reld to. [para. 53].
- R. v. Price (1978), 21 N.B.R.(2d) 532; 37 A.P.R. 532; 40 C.C.C.(2d) 378 (C.A.), reld to. [para. 55].
- R. v. MacMillan (J.), [2005] O.A.C. Uned. 235 (C.A.), reld to. [para. 56].
- R. v. Szymanski (J.), [2009] O.T.C. Uned. K94; 88 M.V.R.(5th) 182 (Sup. Ct.), reld to. [para. 58].

R. v. Sandhu (N.), [2008] O.T.C. Uned. 003; 76 M.V.R.(5th) 305 (Sup. Ct.), reld to. [para. 58].
R. v. Ferguson (P.A.), [2005] O.T.C. 43; 15 M.V.R.(5th) 74 (Sup. Ct.), reld to. [para. 58].
R. v. Ross (2007), 44 M.V.R.(5th) 275; 2007 ONCJ 59, reld to. [para. 58].
R. v. Quigley, [2000] O.J. No. 3963 (C.A.), reld to. [para. 59].
R. v. Cadieux (G.), [2004] O.A.C. Uned. 33; 47 M.V.R.(4th) 53 (C.A.), reld to. [para. 59].
R. v. Grosse (P.) (1996), 91 O.A.C. 40; 29 O.R.(3d) 785 (C.A.), reld to. [para. 67].

Statutes Noticed:

Criminal Code, R.S.C. 1985, c. C-46, sect. 253(1) [para. 46].

Authors and Works Noticed:

Watt's Manual of Criminal Evidence (2011), p. 43 [para. 62].

Counsel:

Benita Wassenaar, for the appellant;
Diana Lumba, for the respondent.

This appeal was heard on February 16, 2012, before Laskin and Blair, JJ.A., and Brown, R.S.J.(ad hoc). In reasons written by Brown, R.S.J., the Court delivered the following judgment, released on August 1, 2012.

Appeal allowed;
conviction and sentence restored.

Editor: E. Joanne Oley