Case Name:

R. v. Aulakh

Between
Regina, and
Surinder Pal Singh Aulakh

[2011] B.C.J. No. 1119

2011 BCPC 119

2011 CarswellBC 1486

95 W.C.B. (2d) 44

File No. 82351

Registry: Port Coquitlam

British Columbia Provincial Court
Port Coquitlam, British Columbia

B. Dyer Prov. Ct. J.

Heard: June 17, 2010; May 13, 2011.
Oral judgment: May 13, 2011.

(157 paras.)

Criminal law -- Criminal Code offences -- Offences against person and reputation -- Motor vehicles -- Impaired driving or driving over the legal limit -- Accused convicted of driving with an illegal blood alcohol level -- Accused cab driver rear-ended a pickup truck stopped behind a left-turning police vehicle -- Police officer exited his vehicle to ensure that there were no injuries -- Accused claimed that after the collision he was agitated and feeling faint with a dry throat, and when he discovered that no water was available, he drank a third to a half of a bottle of whiskey he had in his cab -- There was no air of reality to accused's defence.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B,

Criminal Code, R.S.C. 1985, c. C-46, s. 253(1)(b), s. 258(1) (d.1)

Counsel:

Counsel for the Crown: J. Fogel.

Counsel for the Accused: B. Mohan.

ORAL REASONS FOR JUDGMENT

1 **B. DYER PROV. CT. J.** (orally):-- The accused is charged with impaired driving and over .08 and has pleaded not guilty to both charges. I have set out certain of the facts in this matter in a ruling delivered on October 15th, 2010 following the *voir dire*. I do not propose repeating all of them as some are not relevant to the issues now before the Court.

2 At about 7:05 p.m. on March 4th, 2009, the accused, the sole occupant in a white taxi, rear-ended a white pickup truck driven by one Douglas Stephens, striking it in the right rear bumper and quarter panel area and causing approximately $1,000 of visible damage thereto.

3 Stephens was then stopped facing east on Prairie Avenue behind a second east-facing car waiting to make a left turn off Prairie Avenue and facing a long line of westbound traffic on Prairie Avenue.

4 Stephens heard a bang and looked out his passenger side window to see the other driver who hit him beside him, just to his immediate right. Stephens then saw the driver ahead of him, as it turned out an off-duty police officer, one Constable Humphreys, get out of his vehicle.

5 When I say off-duty, I mean simply that Humphreys was as I understand the evidence performing some service work, serving documents which I suppose is police work but was not otherwise engaged in patrolling the streets as I understood his evidence.

6 In any event, Stephens then got out. He saw Humphreys walk to the cab driver who was just getting out and identify himself as a police officer. Humphreys asked both Stephens and the accused for their drivers' licences and they were provided.

7 Stephens then saw Humphreys make a telephone call, he assumed to the police, who arrived shortly and told him and the accused to stand on the sidewalk. He could not recall if he and the accused were both on the sidewalk together when the police arrived, he estimated about eight

minutes after Constable Humphreys called them.

8 Stephens at some point prior to the police arrival reached into his car to get his camera and took a few pictures of the scene, some before the police arrived. The sense of his evidence is that he did this after Constable Humphreys got out and spoke to both him and the accused.

9 He testified that while waiting for the police to arrive he did see the accused reach into his car from the outside. The accused opened the door and leaned in as if getting his insurance papers. The sense of Stephens' evidence is that this was after Constable Humphreys spoke to the accused who according to Stephens, exited his vehicle and was outside his vehicle, clearly after the accused had gotten to where he was.

10 Stephens said that the accused did not sit back down in his car or get completely in. He did not see what the accused took from inside his vehicle. He had no dealings with the accused taxi driver and did not speak to him on anything of consequence.

11 Stephens estimated it was 10 to 12 minutes that elapsed from the moment of collision until the uniformed police arrived. During this time he did not observe the accused eat or drink anything. He estimated he observed him for eight to 10 minutes of this 10 to 12 minute period of time. Therefore, for approximately two minutes he was taking photos and doing other things.

12 Stephens testified that when he got out of his car initially, the accused was still sitting in his car but just for the time I understood it took Stephens to walk around to view the damage.

13 In cross-examination, he agreed it was dark out, not raining, and there were street lights where the collision occurred. He could see into the accused's cab with the light available at the scene. He felt he could identify things within the cab with the light there available. He would not agree with the proposition put to him that the accident location was not well lit.

14 In his dealings with the accused he did not notice him to be impaired, did not see him stagger when he got out of his cab or not have proper balance or be unsteady on his feet when he got up or stood up from his cab. He had no memory of the accused having a flushed face. As he did not recall talking to the accused, Stephens could not say if the accused's speech was slurred at the scene. He only smelled alcohol when on the curb with the accused and when a second individual came over and he could not be sure of the source of this smell of alcohol, that is to say, from which person.

15 He agreed in his police statement he had told them he did not think he, the accused, had time to put anything in his mouth but that he was not continuously observing him. He admitted on cross-examination it was therefore possible that he may have consumed something. He was not asked when it might have been possible for the accused to have consumed something, but the effect of his testimony that if he did, it was only during he times he was not observing the accused that this might have occurred.

16 Stephens recalled that the accused entered the cab and felt this was to grab his insurance papers or maybe his driver's licence and seemed to agree he had to sit on the seat in his cab to do this. Stephens recalled he kneeled on his seat in his car to perform this function. He did not sit down on the seat and close the door. He used his seat to reach across to maybe the centre pocket or glove box; part of his body was still outside.

17 In an answer to a question from the Court, he estimated this leaning in or kneeling lasted some 20 to 30 seconds.

18 He did not agree in cross-examination that he was in his vehicle getting his camera to take photos at the same time the accused knelt in his cab as above. He said he was standing outside his vehicle when the accused leaned in to get something.

19 He agreed at some time during the 10 to 12 minute period of time between the time of the collision and when the uniformed police arrived, there was some part of this that the accused went inside his vehicle and that he did not know what he was then doing. The only time he described the accused doing so was when he, Stephens, was standing outside his vehicle and the accused knelt on his seat as described above. He was not specifically asked when this "leaning in" by the accused event was within the 10 to 12 minute period of time.

20 He did not have a conversation with the accused wherein he told Mr. Stephens he suffered from diabetes and high blood pressure.

21 Constable Humphreys testified that he was stopped facing eastbound on Prairie Avenue at Wellington waiting to make a left turn when he heard a loud bang, a crashing noise, some 10 to 15 seconds after he commenced waiting to turn left. When he looked in his rear view mirror, he saw the Stephens vehicle behind him and to the right of it was a white Belair Taxi driven by the accused as it turned out which was damaged on the right front fender.

22 Humphreys got out and went to the vehicle behind him and as he did so, he observed Stephens getting out therefrom. He had a brief discussion with him just to see if he was injured and then walked to the taxi.

23 It is obvious to me based on the Crown evidence in this case that Constable Humphreys would have discovered very quickly on exiting his vehicle that his vehicle was not damaged by the Stephens vehicle behind him and that Stephens was okay.

24 He could not have failed to see the accused's cab beside the Stephens vehicle, almost immediately on exiting his own vehicle. Very quickly his focus in terms of what had occurred would therefore have clearly been on the driver of the cab.

25 The accused was still seated in the taxi as Humphreys walked toward it and when he got to the taxi, Humphreys saw that the accused was trying to undo his seatbelt. He helped open the taxi door

for the accused so he could speak to him. Humphreys testified he asked him if he was okay and was he injured at all at which time the accused got out of his vehicle. Humphreys then had a discussion with the accused outside his vehicle and then smelled liquor on his breath.

26 Constable Humphreys did not testify as to whether the accused had been wholly or partly outside his vehicle before he first approached the accused and saw him both seated in his cab and trying to undo his seatbelt. However, the clear sense of his evidence is that the accused was not and that the first time after the collision the accused got out of his cab in whole or in part was when Humphreys was first at the driver's side of the cab. As well, my clear sense of Humphreys' evidence is that it was but a very short period of time that elapsed between the bang of the collision and Constable Humphreys being beside the accused's taxicab and first setting his eyes on the accused who was seated in his cab and wearing his seatbelt.

27 Humphreys asked both the accused and Stephens for their driver's licences and once they were provided, asked them to stand on the sidewalk area on the south side of Prairie Avenue which they did.

28 Shortly after this, he returned to his unmarked car to get his cell phone to call the Coquitlam RCMP Detachment to have a uniformed officer attend to conduct an investigation. He stood outside his vehicle when he made the call. He agreed he might have opened his car door to grab the phone off the console of his own vehicle. He estimated this task would have taken two to three seconds. He estimated the telephone call that he made to the police Detachment lasted approximately one minute in total.

29 He said as he went back to his vehicle and the whole time he kept his eye on the accused. He seemed very sure he did not enter his police car save to get the phone as he knew at the time it was important to maintain continuity with the accused which I understood mean to keep him within eye contact and had he entered his car to call the Detachment he would not have been able to do so.

30 He disagreed on cross-examination with the suggestion that he had lost continuity with the accused for a short period of time. In cross-examination defence counsel asked Constable Humphreys the following question:

> Q I put to you Officer that the accused did enter his vehicle. After he initially got out of the vehicle he did enter his vehicle but that you did not notice that. You would disagree with me?
>
> A I disagree. While I had eye contact with him he may have done that after Constable Pirmohamed took over the investigation but while I was there I did not observe Mr. Aulakh go into his vehicle. Okay? I just want to be clear.
>
> Q Okay. I just want to be clear. During your involvement, you did not notice him entering the

vehicle, correct?

A No, I did not.

Q And I put it to you that he did enter the vehicle. You obviously disagree with me, yeah?

A I disagree, yes.

31 Constable Pirmohamed arrived at the scene at 7:21 p.m. or thereabouts. There is a chance he arrived a little bit earlier according to his testimony. He looked at the scene, then immediately went to speak to Constable Humphreys and did so for not very long.

32 He then met with the accused and took him off to the side on the sidewalk to ask him what had happened. In this conversation he detected a not overly-strong odour of liquor coming from his breath which he called a moderate/slight odour on cross-examination. He made this observation when he was standing face-to-face with the accused. He also observed at the scene that the accused's eyes were glossy or slightly so.

33 At 7:23 p.m., he read the ASD demand having first determined that grounds to do so existed and a fail reading was registered at 7:27 p.m. This reading or result is not to be taken into account by me in deciding the issues now before the Court (see ***R. v. Orbanski***, [2005] 2 S.C.R. 3 at para. 58, a judgment of the Supreme Court of Canada).

34 Constable Pirmohamed agreed during his entire investigation with the accused he behaved like a perfect gentleman. He agreed he had no note made at the scene that the accused was unsteady on his feet nor that he had a flushed face, nor with respect to him having slurred speech. He said he did not see him stumble at the scene; however, he did later at the Detachment.

35 In his direct evidence he did not initially state the above indicia were present at the scene, but did not say any were factors in his decision to make the ASD demand. Eventually, he agreed the indicia of impairment he noted at the Detachment which I shall come to shortly were not at the scene but for different reasons.

36 Generally, Constable Pirmohamed's evidence on note taking in his police notebook was that he appreciated time was of the essence at the scene. He made few notes in his police notebook on scene for this reason but later at the Detachment when time permitted he made what he described as "recall notes" for example, the notation "moderate/slight odour coming from him" which note he set down in his notebook apparently at 10:00 p.m. or 2200 hours after taking the accused home.

37 At 7:27 p.m., Constable Pirmohamed formed an opinion that he had reasonable and probable grounds to believe that the accused now before the Court within the preceding three hours had been in care or control of a motor vehicle while his ability to do so was impaired by alcohol and arrested the accused for impaired operation of a motor vehicle.

38 At 7:33 p.m., he read the standard breath demand to the accused and left the scene with the accused in the rear of his vehicle at 7:35 p.m., arriving at the Coquitlam Detachment at 7:45 p.m.

39 At 8:04 to 8:11 p.m. the accused with the aid of a Punjabi interpreter spoke with a lawyer in private at the Detachment. Before doing so, Constable Pirmohamed noted at 7:54 p.m. inside the Detachment that the accused had glossy eyes.

40 At 8:11 p.m., he noted while seated beside the accused that he had a faint odour of liquor on his breath. He was not then face-to-face with the accused as he had been earlier at the scene. He did not agree that the odour was then getting weak. He explained it was faint as he was not then sitting face-to-face with the accused as he had been earlier when standing face-to-face with the accused at roadside when he observed a slight/moderate odour of liquor on his breath.

41 He did not at 8:11 p.m. note that the accused had slurred speech. He did so earlier at 7:49 p.m. At 7:51 p.m. he noted the accused stumbled walking to the counter to access his ringing cell phone which the police had earlier confiscated from him.

42 At 7:54 p.m., again at the Detachment, the accused was noted by Constable Pirmohamed to have difficulty standing on the outline of feet on the Detachment floor where I understand a photo session commenced at the request of a cell guard. As well, he then noted the accused had glossy eyes.

43 Defence counsel asked Constable Pirmohamed (at p. 66 of the transcript) the following questions in cross examination:

> Q So my question to you is all these indicia of impairment were noted at the Detachment, they were not there at the scene?
>
> A Yes for different reasons, yes.
>
> Q So you would agree with me that Mr. Aulakh's level of intoxication was rising as the timing was going -- passing by?

A No, I cannot agree.

Q No?

A No.

44 Defence counsel in cross-examination earlier touched on this same point (at p. 62 of the transcript) as follows:

Q His level of indicia of impairment was going up as the time was passing, correct?

A I can't say that for sure, I mean, I made secondary observations inside the Detachment but I wasn't looking for those specific ones on scene so I can't -- I can't say that for sure.

45 It is unclear exactly when defence counsel is referring to, likely at some time in the Detachment. I understood Constable Pirmohamed's reference to secondary observations was to such things as slurred speech.

46 On cross-examination, Constable Pirmohamed agreed at the time he made the ASD demand at approximately 7:26 p.m. at the scene, the accused was behaving okay. Once he arrived at the scene, he could not remember seeing the accused enter his vehicle to get some information for him.

47 In further cross-examination, he said he believed he got the accused's insurance and registration information by running the plate on the accused's car on his police computer in his police car. He could not recall obtaining any insurance documents directly from the accused. There then followed this exchange in his evidence in cross-examination:

Q I am suggesting to you that after you arrived, he entered his vehicle to get his documents from his glove box. Do you remember him saying that?

A I don't remember.

Q You don't? So you don't remember? You're not saying that it never happened. You don't remember?

A I'm saying don't have -- I don't have any notation to say he did or he didn't. I cannot testify in court that he did or didn't.

Q Okay. So he may have, he may not. You don't know, correct?

A He may have, I don't know.

[Emphasis added]

48 This cross-examination occurred of course before the accused testified.

49 The result of this exchange is that Constable Pirmohamed cannot say what the accused said on the above point at the scene, not what he did at the scene.

50 The accused, as I shall come to, did not say anything at any time on point according to his testimony.

51 At 8:11 p.m. the first observation period commenced and the Datamaster time was then 8:10 p.m. At 8:23 p.m., the breath technician asked the accused the BTA room if he had any health issues. Thereafter, the accused the breath test room and at 8:30 p.m. as per Constable Pirmohamed's watch, gave a first sample of his breath which on analysis gave a reading of 200 milligrams percent or 200 milligrams of alcohol in 100 millilitres of blood.

52 A second observation period started at 8:31 p.m. and at 8:53 p.m., according to Constable Pirmohamed's watch, a second sample was given in the breath test room which on analysis read 210 milligrams percent.

53 I find that the exact times the samples were given in the breath test room are accurately set out in the Certificate of a Qualified Technician filed at trial as an Exhibit and that the discrepancies in times in Constable Pirmohamed's testimony as compared to these times are due to his watch being one to two minutes out of sync with the clock on the breathalyzer machine or in this room.

54 The police then drove the accused home, arriving at his home at 9:42 p.m.

55 In cross-examination, this officer was asked if he had any language barriers in communicating with the accused and said that when he was communicating with the accused he believed the accused understood what he asked him.

56 Constable Pirmohamed said he did not search the accused's vehicle at the scene and I find that he did not.

57 I turn now to the evidence of the accused given at trial with the assistance of a Punjabi

interpreter.

58 The accused is a 46-year-old taxi driver who had been driving a taxi in Canada for some 22 years before the collision on March 4th, 2009. On this day, he held a chauffeur's licence which he later surrendered to the police at their request, perhaps by reason of the charges he now faces before this Court. He said he had never before been involved in a motor vehicle accident.

59 On March 4th, 2009 and for some 15 years beforehand, he said he suffered from high blood pressure and diabetes and on this date, took two different prescribed medications in the morning relating to the management of symptoms with respect to these conditions.

60 The symptoms he then experienced from these two conditions included I believe he said his head went spinning if his blood pressure was too high and when his blood sugar got too low, he felt dizzy and like fainting.

61 He gave no evidence as to how frequently he experienced these symptoms in March 2009 or ever, what he usually did to try to alleviate the effects of these symptoms, if it worked and how long it took for his efforts to cause one or more of these symptoms to abate. He really gave no evidence that he ever consumed straight alcohol from a bottle prior to March 4th, 2009 in an effort to alleviate any symptom said to be caused by these two medical conditions.

62 He did, however, testify in his direct evidence that when he had no water he had ingested liquor straight from the bottle before. He testified in direct evidence that if he experienced these symptoms he kept some sweet pills and/or water or juice in his taxicab, usually one bottle of one or the other, not both liquids. He said in cross-examination he had not been told to not drink alcohol with the medications he took on the morning of March 4th and then said he was told not to drink it at the same time but could do so before or after taking his medications.

63 He recalled on March 4th, 2009 getting up at 5:00 a.m., taking breakfast at Tim Horton's (a coffee and bagel), driving taxi in the morning and having lunch at 12:30 p.m. comprising of chapatti and lentil. He then worked in the afternoon and had no further food until the motor vehicle accident occurred at about 7:05 p.m. He quit work at 6:00 p.m. His last fare was dropped at or near the Esso gas station on Johnson Street near the Coquitlam Centre which he said was a five-minute drive from his home. His plan on quitting work was to return home to have dinner with his family.

64 He testified he had had no alcohol to drink on the evening of March 3rd or during the day on March 4th prior to the motor vehicle accident.

65 He said he did not buy gas at the above Esso station; he just dropped his passenger off there or possibly near there. He did not say why he did not buy gas there. He then went to a video store, according to his testimony, on Shaughnessy Street and rented a movie and then went to a different gas station at about 6:30 p.m. where he filled up. This station was said also to be an Esso station located right behind the Safeway store at 1090 Lougheed Highway.

66 Lastly, he said he went to a liquor store and purchased a 26-ounce bottle of Canadian Club whiskey and that he was the aware its alcohol content was 40 percent. He testified he paid $22.95 for this purchase. No receipts were filed at trial relating to any of the above three transactions.

67 The accused testified as to the state of his supply of liquids in his taxi on March 4th, 2009 prior to the accident. He said normally he kept water in his car. At the time of the accident, he had none. Normally it was in a bottle at the side of his driver's seat.

68 In cross-examination, but not in his direct evidence, he said he recalled he had water in his car earlier but ran out at about 5:30 p.m., about one half hour to 45 minutes before he stopped work on the day in question but said sometimes there was a little bit left in the empty bottle. He felt he did not need to purchase more because he was close to home and he was going home to have dinner with his family.

69 I found the accused's evidence on the known state of his water supply inside his cab at 5:30 p.m. on March 4th confusing. On balance, he seemed to suggest that his water supply had run out. Later in cross-examination he testified that he could have known he had no water closer to 5:05 to 5:10 p.m. on March 4th.

70 I find that all the shopping he testified that he did was at stores or business facilities close to his home; in the order of a five-minute drive away in relation to his home in terms of travel distance.

71 When he left the liquor store that he referred to, and he did not provide an address for it, he testified that his course of travel home took him on Oxford Street and thence he took a right turn onto Prairie Avenue. The road was wet. There was a big line-up of cars on Prairie Avenue. His car slipped as he came up on same and he rear-ended someone on Prairie Avenue.

72 On cross-examination, he said he was doing 40 to 50 kilometres per hour when he first saw the car ahead of him and tried to brake. He saw a big line-up of about 15 cars on Prairie Avenue as soon as he turned right.

73 On cross-examination, he said he did not count these cars; there could have been 13 to 16 cars between the pickup he hit and the first left-turning vehicle ahead of him. Someone was turning left off Prairie Avenue and everyone was backed up behind him. He offered for the first time in cross-examination that the back (or rear) lights of the truck he hit (which I find was operated by Mr. Stephens), were not working. Neither Mr. Stephens nor any police officer who testified at trial were cross-examined on this very important fact that might be an innocent explanation at least in part for why the accused might have struck the rear of the Stephens pickup. There is also no evidence this fact was at any material drawn to anyone's attention by the accused on the evening of March 4th, 2009.

74 In reply, he said the collision occurred just as he turned right off Oxford onto Prairie Avenue,

about 50 yards from the Oxford at Prairie intersection. He gave no evidence that he believed any symptom related to his two medical conditions caused the collision in whole or in part.

75 Following the collision, he got out to check the damage as no one was there. He said he spoke to no one at the front of his car. The next thing that occurred was that he had a feeling he was going to faint or fall down. At this point he had returned to his car. He then got agitated. He was feeling dizzy. He had no energy. His knees were shaking. He testified he then went back to his car. He did not state how long after the collision he had been standing outside.

76 He went back because he was looking for water to drink. He did not state that he sought water to deal with any of the above symptoms he first started to experience upon getting out of his car. Only after he testified that he went back into his car to look for water did he enumerate a further symptom he said he was then experiencing as well, namely, his throat had all of a sudden gone dry and on cross-examination he said he felt thirsty.

77 I note that the accused knew between 5:00 and 5:30 p.m. some one-and-a-half to two hours before the collision according to his evidence given in cross-examination that his water had run out. He had not purchased any thereafter because he was going home. He was close to home and I think anxious to get home to have dinner with his family. In his direct evidence he said he saw on entering his car there was no water there. Only on cross-examination did he state on entering the car he felt maybe there was a little bit of water in his empty bottle. Sometimes there was a bit left.

78 Finding no water, he spotted the whiskey. At this point he was seated somehow in the driver's seat of his taxi he said with one leg inside his car and one leg outside. He testified that he drank some whiskey from the bottle, he estimated a third to one-half of the bottle or 8.6 to 13 ounces of straight whiskey because he thought maybe he would get some energy back by doing so. I note that 13 ounces of whiskey equates to 8.6 one-and-a-half ounce "shots" of whiskey.

79 On cross-examination he explained twice that he grabbed the whiskey bottle and drank as much as he could. When asked why he had not taken just a small swig of whiskey to combat the dryness in his mouth, he testified that he was so shaken up at the time he did not know how much whiskey he was drinking.

80 In his direct evidence he said he had been drinking alcohol for 25 years. It was uncommon for him to drink straight from the bottle but he said that he had done it lots of times before March 4th, 2009. He had not counted the number of times, but recalled these included times when he had had no water. He did not testify as to the number of occasions lacking water he had consumed neat whiskey directly from a bottle to quench his thirst or for any other reason.

81 He testified in cross-examination that three days later when he went to get his car the whiskey bottle was still in it which he kept at home.

82 The accused did not testify as to the time these various above events took, for example: his

getting out of the car, feeling faint, re-entering the car and locating the whiskey (which he said was between the front seats), opening it, and drinking 8.6 to 13 ounces of same and then assumedly capping the bottle and putting it back down. I find assuming (and without finding) his account is true, these various activities would certainly have taken more than one minute.

83 He testified that the next thing that occurred was that the driver ahead of him, the guy from the RCMP or the off-duty RCMP, came to him. He said in cross-examination this occurred at approximately the same time as he drank the whiskey and then changed his testimony indicating that it was approximately ten to 15 seconds after he had finished drinking the whiskey and had put the bottle down between the seats that Constable Humphreys approached him. He was not then in his car. He had just come out of his car as this off-duty police officer had come up to him.

84 He testified in direct that this off-duty police officer showed him his badge, said he was from the RCMP and requested his licence and insurance papers and then called the RCMP who later came.

85 In cross-examination he testified that after taking his papers from him, this off-duty police officer went away and maybe called the police.

86 Six or seven people in nearby houses then came out, including another taxi driver who came to him at the scene.

87 He said he never re-entered his cab again after the off-duty police officer came over as he did not get a chance.

88 After the police came, they gave him what he called a breathalyzer and told him he had failed. He was then taken to the station and gave two breath samples and was later driven home. He did not state in his evidence that at any time after drinking from the whiskey bottle, for example, when he took the ASD test at the scene he told any police officer he had just consumed a third to one-half of a 26-ounce bottle of whiskey. I will deal with this point further below.

89 When asked by defence counsel why he would be involved in an accident and then drink whiskey, he explained his conduct by stating he did so because he became very dizzy, his throat was dry, and he was so shaken up he was ready to fall. There were no other reasons given in his testimony.

90 I turn now to a brief summary of the position of the parties.

The Crown

91 The Crown argued that I ought not to believe the accused as to his version of events on the evening in question and said in his closing submission that this version of events does not have a ring of truth to it. His memory of events was not accurate. I should accept the evidence of the

Crown witnesses where it differs from that of the accused and importantly on the point of whether the accused ever entered his car or sat down in some fashion after the collision so as to be able to drink a third to one-half a 26-ounce bottle of whiskey that he had in the car.

92 Very importantly, I observe that the accused's evidence was that the long swig of whiskey or swigs of whiskey he says he had occurred before the off-duty police officer Humphreys ahead of him first approached his vehicle and not after, and certainly not after Constable Pirmohamed arrived on the scene.

93 Alternatively, Crown argued if I believe the accused, pursuant to s. 258(1)(d.1) of the ***Criminal Code*** there is no evidence in this case to suggest the accused's blood alcohol level was under 80 milligrams percent and therefore was 80 milligrams percent or more.

Position of the Defence

94 Mr. Mohan agreed that the credibility of the accused, was a central issue in this case. He argued the Crown had failed to prove the charges against his client beyond a reasonable doubt.

95 He noted that Stephens said he had seen the accused open his taxi door and lean in after he had initially gotten out and before the police arrived. Stephens was not here referring to Constable Humphreys but rather the uniformed police officer, Constable Pirmohamed. As well, Stephens really noticed no evidence or indicia of impairment initially at the scene because the alcohol the accused had consumed had not yet hit his bloodstream.

96 The two rising readings between 8:29 p.m. and 8:51 p.m. as set out in the Certificate corroborate post-accident ingestion of alcohol.

97 Stephens had told the police it was possible the accused consumed something as he was not watching him the whole time prior to the arrival of the uniformed officers.

98 Mr. Mohan argues that Constable Humphreys first saw the accused after the accused had got out, observed the damage to his car, and then felt shaky and then re-entered his car and drank a third to one-half a bottle of whiskey. I should accept Mr. Stephens' evidence who saw him re-enter his car and not that of Constable Humphreys who said he did not.

99 The accused's evidence as to why he had a dry mouth is corroborated by his own direct evidence that he suffered from diabetes and this was one of the symptoms he experienced including on the night in question.

100 The accused was a credible witness and was not shaken in cross-examination. Even if I did not believe him, I should at least under the ***R. v. W.(D.)***, [1991] 1 S.C.R. 742 decision of our Supreme Court of Canada have a reasonable doubt as to his guilt.

Discussion

101 I intend to deal with the important question of the credibility of witnesses who testified before me first.

102 In ***R. v. Parent***, 2000 BCPC 11 at paras. 4 and 5, Her Honour Judge Ann Rounthwaite sets out seven important considerations for a trial judge in assessing credibility of witnesses at trial as follows:

> [4] In assessing credibility, courts have recognized a number of factors as helpful.
>
> [5] These include:
>
> 1. the witness' ability to observe the events, record them in memory, recall and describe them accurately,
> 2. the external consistency of the evidence. Is the testimony consistent with other, independent evidence, which is accepted?
> 3. its internal consistency. Does the witness' evidence change during direct examination and cross-examination?
> 4. the existence of prior inconsistent statements or previous occasions on which the witness has been untruthful.
> 5. the "sense" of the evidence. When weighed with common sense, does it seem impossible or unlikely? Or does it "make sense"?
> 6. motives to lie or mislead the court: bias, prejudice, or advantage. To consider the obvious possible motive of every accused person to avoid conviction would place an accused at an unfair disadvantage. As a result, I do not consider that possible motive when assessing an accused's testimony.
> 7. the attitude and demeanour of the witness. Are they evasive or forthcoming, belligerent, co-operative, defensive or neutral? In assessing demeanour a judge should consider all possible explanations for the witness' attitude, and be sensitive to individual and cultural factors, which may affect demeanour. Because of the danger of misinterpreting demeanour, I would not rely on this factor alone.

103 In para. 9 of her reasons, Rounthwaite P.C.J. uses the expression "ring of truth" when referring to the sense of a witness' evidence discussed in para. 5 of her reasons. Other judges use a synonym or synonymous term "air of reality".

104 Our Court of Appeal in ***Faryna v. Chorny***, [1952] 2 D.L.R. 354, also deals with credibility findings. This case is relied upon by Mr. Mohan in his helpful written submission which I have

carefully reviewed. This well-known case encourages trial judges not to rely too strongly on the demeanour of a witness or the fact that his or her evidence remains uncontradicted but rather we should be concerned with whether the evidence of the witness is consistent with the probabilities affecting the case as a whole. The test, if you will, at p. 4 of the Quicklaw report of the reasons in this case as follows:

> [11] The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.
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> [12] The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can he tested in the particular case.

105 The ***Faryna***, *supra*, case is a civil case where the burden of proof is lower than in a criminal case where the onus is always on the Crown to prove the guilt of an accused person beyond a reasonable doubt. Nonetheless, this case is frequently cited in criminal cases where credibility, particularly of an accused person, as here, is in issue. I also observe that defence counsel offers this case as one case for the Court to consider in assessing credibility. I take into account all of the above principles in assessing the credibility of witnesses in this case.

106 I will deal first with the credibility of the Crown witnesses.

107 I found each of them to be honest and credible witnesses. There are some minor discrepancies in their evidence, but not caused in my view because any of them was attempting to exaggerate or create evidence of things which had not occurred.

108 Examples of some inconsistencies include, firstly, that Mr. Stephens did not smell any odour of liquor in the vicinity of the accused until he was on the sidewalk with him and another person at Constable Pirmohammed's request, and was then uncertain from whence it originated. Constable Humphreys on the other hand said he smelled it when he had a discussion with the accused outside his car.

109 Secondly, Mr. Stephens felt sure he had seen the accused re-enter his car for perhaps as long as 20 to 30 seconds although he was unclear when in the 12 to 12 minutes that he estimated elapsed between the moment of the collision and the arrival of the uniformed police officer that this occurred. Constable Humphreys said that he had not re-entered his car.

110 Overall, where there are discrepancies in the evidence of these two witnesses, Mr. Stephens and Constable Humphreys, I find I prefer the evidence of Constable Humphreys.

111 Mr. Stephens is not a police officer. His focus on May 4th, 2009 was I think on the accident and the damage to his own car and not on the accused's condition. Constable Humphreys' vehicle was not damaged whereas Stephens' was. Humphreys was then at work albeit not on patrol. He would be more alive I think to impaired driving issues, even if not then currently up to speed on how to properly conduct an investigation into such an alleged event. He no doubt had some relevant police training on point. He knew, for example, not to let the accused out of his eye contact and said that he had not done so.

112 I now turn to the evidence of the accused.

113 I do not find the accused to be a credible witness. I do not agree with Mr. Mohan's written submission that the Crown has presented no evidence, expert or otherwise, that calls into question the accused's evidence.

114 I find that the accused ought not to be believed certainly with respect to his testimony relating to drinking whiskey because for numerous reasons I shall shortly come to, in my opinion his story does not have either an air of reality or a ring of truth to it, nor is it in accordance with the probabilities that surround the currently existing conditions on the evening of March 4th, 2009 at the accident scene on Prairie Avenue.

115 I agree with Crown counsel that his story really stands alone and is not in accordance with other evidence which I accept is truthful and accurate.

116 He offered for the first time in cross-examination as an excuse I think for why he rear-ended Mr. Stephens that Steven's rear lights were out. He did not so testify in his direct testimony. This is

a very important point, not a mere detail in my view. No police officer testified that the accused's view was correct: that Mr. Stephen's tail lights were not functioning. Mr. Stephens was not cross-examined on this important fact and given an opportunity to refute the allegation made by the accused, nor was Constable Humphreys.

117 I find I cannot believe the accused on this point (see the case of ***Browne v. Dunne*** (1893), 6 R. 67 (H.L.)). Nor am I prepared to say the accused is simply mistaken on this point.

118 I find the accused is mistaken in his testimony that there were 13 to 16 cars waiting in a line to turn left off Prairie Avenue when he rear-ended Stephens. I also note neither Stephens nor Constable Humphreys were cross-examined on this point. I find there were only two cars waiting to turn left, that of Constable Humphreys and behind it the vehicle being driven by Mr. Stephens.

119 I find the accused is mistaken when he said following the collision when he was on the sidewalk a group of six or seven people came around. I find there was one only as described by Stephens said to be a cab driver himself.

120 The accused said he was not wearing a seatbelt whereas Constable Humphreys said he was. I reject the accused's evidence on point. Again, Constable Humphreys was not cross-examined on this point. I accept as truthful his evidence on point.

121 I find the accused's story that he drank a third to a half a bottle of whiskey does not have an air of reality to it. It is in my view nonsense.

122 Very importantly, in my assessing the truthfulness of this story are two ingredients in it offered by the accused in his sworn testimony:

1. that Constable Humphreys came to the driver's side of his vehicle 10 to 15 seconds after he drank the whiskey and when he had just come out of his cab; and
2. he never re-entered his cab again after he had then got out as there was no time to do so.

123 I accept as truthful Constable Humphreys' evidence that after the bang or collision, he got out and spoke very briefly to Mr. Stephens to ask if he was okay and was he injured. I do not have Stephens' responses in evidence but surely they would have been very brief: "Yes" and "no", or something close to it.

124 The accused's vehicle was then within a few short feet of where Mr. Stephens' vehicle was located which was directly behind that driven by Constable Humphreys. When Humphreys made these brief enquiries of Stephens, the accused was but a few feet away from him. Humphreys did not delay in getting out of his car and in going back to have firstly a brief chat with Stephens.

125 These events in the context of all the evidence in this case I find happened very quickly after the moment of the collision itself and I find within a few seconds and not minutes therefrom.

126 I find there was not enough time for the accused to do what he said he did before Humphreys first approached him at the side of his vehicle, namely, get out, check his damage, feel faint (and later he said experience a dry throat), think that perhaps he needed some water, re-enter his vehicle, check for water and when none was found then elect to drink neat whiskey, as much as he could, locate the bottle, remove the cap, swallow the whiskey, all eight to 13 ounces of same and then replace the cap and get out within ten to 15 seconds of Constable Humphreys' first attendance at the side of his car.

127 I find these events described by the accused could simply not have occurred in the time it took Constable Humphreys to get out and first approach him. I accept Humphreys' evidence as true and find that when Humphreys first approached the side of the accused's car, the accused was seated inside it and struggling to get out of his seatbelt. I also find that the accused had not earlier and after the moment of impact been outside his car for any reason.

128 I find that insofar as Mr. Stephens believes the accused may have re-entered his car having first gotten out, this could not have occurred until after Constable Humphreys first approached the accused, spoke to him, and the accused first got out of his car.

129 I accept as truthful that Constable Humphreys save for at most a very brief period of time, being a few seconds, when he may have reached in to get his cell phone from his car did keep the accused under continuous observation and that he neither went to get the cell phone or made an approximately one minute call to his detachment until after the accused first got out of his car. It matters not if the accused may have re-entered his car after Humphreys first approached him because the account the accused asks the Court to believe is that he drank a third to a half a bottle of whiskey <u>before</u> Humphreys first approached him. That is his sworn testimony and not something else.

130 This accused's story makes no sense for other reasons. He was a professional driver for 22 years with a chauffeur's licence. He made his living in March 2009 driving a taxicab. The evidence is on March 4th he did so full time. He would know or is taken to know something about Canada's drinking and driving laws. I find he would know not to consume a huge amount of alcohol having just been in a rear-end collision. The reason he says he did so is in my view beyond reasonable belief. In his direct evidence, he said the three main symptoms he could experience as a result of diabetes and low blood sugar were dizziness, feeling like fainting, and the throat gets dry.

131 It is far from clear he had ever, prior to March 4th, 2009 not had water or juice in his car but had whiskey or some other hard liquor and drank the same in his car to alleviate any of the symptoms he said he either could experience or did on March 4th experience as a result of his diabetic or other condition. It is difficult to accept that drinking straight whiskey could either alleviate faintness or dizziness. Frankly, the cure seems worse than the alleged condition.

132 I did not fail to notice as well in his direct evidence when he outlined his roadside symptoms immediately on getting out of his car that he did not initially include that his throat was dry. This came later as I have said above, only after he said he went back into his cab to get some water. His direct testimony that he thought by drinking the whiskey he would get some energy back as well does not make much sense to me.

133 The quantity of whiskey he says he drank, and I have no evidence that it was sufficient to give rise to the level of readings later obtained, and I certainly make no finding that this is so, cannot in my view be seen as a truthful or reasonable response to the various symptoms he alleges he was experiencing at the scene, the main one which gave rise to a desire for some water initially being a dry throat or thirst. Had his evidence been he took a sip of whiskey to alleviate a dry throat his story might have been more reasonable. I cannot find that the quantity he says he drank is a realistic response to any of his then symptoms he says he was experiencing.

134 I was greatly troubled by the accused's story that although he usually kept water or juice in his cab but not both, by 5:00 to 5:30 p.m. on March 4th and despite his being at two gas stations thereafter he did not buy any. He did not state in his direct evidence that when his water ran out, sometimes there was a little bit left in the bottle.

135 His direct evidence was he went into the car to quench his thirst with his water. It seemed only in cross-examination when the clear lack of logic in his story implicit in Crown's questions, in effect, why would he enter his cab for water when he knew earlier he had run out and had not bought any as he was close to home, did he then state sometimes there is a little bit left in the empty water bottle. This would then justify re-entry into his vehicle to look for water and failing finding any only then consuming whiskey as some sort of fallback position. I do not accept this evidence as to the little bit of water in the empty bottle as truthful.

136 I find it is a fabricated excuse on a very small but I think important detail to justify the rest of his story about drinking whiskey which I reject as untrue. There is clearly an inconsistency in his direct evidence on point compared to his cross-examination on this small but important point. Why if he felt there might be a little bit of water left in his otherwise empty water bottle one in which the water had run out would he then finding none drink a prodigious quantity of neat whiskey? Why would he not only drink a little bit of whiskey or the same quantity as the water he says he thought might be in his water bottle? He knew the alcohol content of the whiskey was 40 percent, how could the ingestion of a third to a half a bottle of whiskey help with the investigation of the rear end accident he must have known was to come?

137 I do not accept, contrary to Mr. Mohan's written submission at para. 24, that a practical and informed person could accept and I emphasize in the circumstances of this case that an experienced drinker (and I make no finding the accused was such a drinker on March 4th, 2009) who was in a difficult bind might find solace in the free flow of a third to a half a bottle of whiskey into his body.

138 As well, I question why he would drop his last fare at or near an Esso station close to home

but buy gas later at a second Esso station also close to his home?

139 There is no evidence that the accused told anyone either at the scene or later at the Detachment:

1. that Mr. Stephens' tail lights were not operating; or
2. that he had just consumed a third to a half 26-ounce bottle of whiskey.

140 While one's common sense might suggest that either or both of these ingredients in the accused's story if true might have been discussed or disclosed on the evening in question with someone, because the accused on March 4th, 2009 and indeed at trial is presumed innocent under our ***Charter*** and as well had a right to remain silent, I do not take his silence on the second point or his failure to state at the scene to anyone that Stephens' tail lights were out or his lack of testimony on point to affect either my decision as to his credibility in this case or be relevant to any other issue I must deal with.

141 I have reviewed the recent Ontario Court of Appeal decision in ***R. v. Rivera*** reported at [2011] O.J. No. 1233 on point and in particular para. 114 and for purposes of these reasons, follow that decision. Accordingly, I place no weight on these factors.

142 However, this issue of the accused's silence on March 4th, 2009 is a different issue in my view as compared to defence counsel's failure to confront and cross-examine Crown witnesses on the evidence the accused gave at trial as to the broken Stephens tail lights. ***R. v. Rivera***, *supra*, in my view has nothing whatsoever to do with this latter issue which I have dealt with above.

143 I accept Constable Pirmohamed's evidence as true and accurate that he did not feel the accused's symptoms or indicia of impairment increased over the time he dealt with the accused. His ability to make notes at the scene as compared to later at the Detachment and what he noted or did not note in these two very different environments ought not to be construed as evidence that these symptoms did increase over time.

144 The immediate above point was twice put to Constable Pirmohamed in cross-examination and in my opinion, he answered in a consistent way each time, indicating in essence that he did not believe that the accused's level of intoxication was increasing over time and over the time he dealt with him.

145 The accused said when he discovered his water had run out he did not buy more as he was close to home. The sense of his evidence was that he had finished a long work day and wanted to go home and have dinner with his family and was in the course of doing so when the motor vehicle accident occurred.

146 I think it is highly unlikely that such a person would after the collision do what he said he did, namely, drink a third to a half a bottle of whiskey. I do not accept his evidence that he did so as

truthful and I reject it as I find it is untruthful.

147 I have considered whether I have a reasonable doubt in this case based on all the evidence, including that of the accused notwithstanding the fact that I do not find the accused to be a credible witness and my finding that I do not believe his story about drinking whiskey at the scene prior to the arrival of the uniformed police officers. I find that I am not left in or with a reasonable doubt by it.

148 In accordance with the decision in ***R. v. W.(D.)***, *supra*, I must ask myself whether on the basis of the evidence I do accept I am convinced beyond a reasonable doubt by the evidence of the guilt of the accused with respect to the charges before the Court.

149 I find based on all the evidence in this case and importantly the breathalyzer readings which I accept as accurate that Crown has proven count 2 beyond a reasonable doubt. I find the accused guilty of this charge pursuant to s. 253(1)(b) of the ***Criminal Code of Canada***.

150 I turn to the first count on the Information before the Court. The test to be applied is set out in ***R. v. Stellato***, [1993] O.J. No. 18 (Ont. C.A.) approved by the Supreme Court of Canada at [1994] S.C.J. No. 51. This case establishes that the offence is made out if the evidence establishes beyond a reasonable doubt any degree of impairment of the accused's ability to operate a motor vehicle ranging from slight to great and that this impairment was by alcohol or a drug. I am likewise satisfied that Crown has proven this count beyond a reasonable doubt.

151 The accused drove into the back of Mr. Stephens' vehicle. I have not accepted that a cause of this could have been that Stephens' tail lights were then malfunctioning. The lighting was sufficient for him to have stopped safely just as Stephens and Constable Humphreys had done.

152 There was evidence of indicia of impairment both at the scene and at the Detachment given by the two police officers who testified at trial, which I have accepted as true. I have outlined this evidence above and I will not now repeat it. Finally, there is the evidence of the two readings.

153 In light of the ***R. v. Kienapple***, [1975] 1 S.C.R. 729 case, I believe a conviction should only be registered with respect to one of the counts that is before the Court.

154 Which count does Crown propose the conviction be registered on?

155 CROWN COUNSEL: Count 2, Your Honour.

156 THE COURT: All right. There will be a judicial stay then with respect to count 1.

157 Lastly, I do not propose to deal with Crown's argument as to the effect of s. 258(1)(d.1) of the ***Criminal Code*** which argument as I understood it was premised on my believing the accused's story and I do not believe it.

(ORAL REASONS FOR JUDGMENT CONCLUDED)