See paras. 443, 49

Case Name:

R. v. Lapensee

Between
Her Majesty the Queen, Respondent, and
Clayton Richard Lapensee, Appellant

[2009] O.J. No. 3745

2009 ONCA 646

85 M.V.R. (5th) 189

197 C.R.R. (2d) 357

254 O.A.C. 154

247 C.C.C. (3d) 21

99 O.R. (3d) 501

70 C.R. (6th) 165

2009 CarswellOnt 5275

Docket: C48491

Ontario Court of Appeal
Toronto, Ontario

D.R. O'Connor A.C.J.O., R.J. Sharpe and P.S. Rouleau JJ.A.

Heard: May 28, 2009.
Judgment: September 11, 2009.

(60 paras.)

Criminal law -- Criminal Code offences -- Offences against person and reputation -- Motor vehicles -- Impaired driving or driving over the legal limit -- Impaired driving causing bodily harm -- Impaired driving causing death -- Appeal by accused from conviction of impaired driving causing

death and impaired driving causing bodily harm allowed -- New trial ordered -- Appellant collided with a van and fled scene -- Appellant found impaired three hours later -- Trial judge rejected appellant's evidence that he only started drinking heavily after accident -- Trial judge misapprehended evidence respecting appellant's conversation at a bar and the evidence as to the smell of alcohol on his breath noted by the officers -- Trial judge erred in drawing adverse inferences against appellant for failing to call evidence to confirm parts of his testimony.

Criminal law -- Appeals -- Grounds -- Misapprehension of or failure to consider evidence -- Appeal by accused from conviction of impaired driving causing death and impaired driving causing bodily harm allowed -- New trial ordered -- Appellant collided with a van and fled scene -- Appellant found impaired three hours later -- Trial judge rejected appellant's evidence that he only started drinking heavily after accident -- Trial judge misapprehended evidence respecting appellant's conversation at a bar and the evidence as to the smell of alcohol on his breath noted by the officers -- Trial judge erred in drawing adverse inferences against appellant for failing to call evidence to confirm parts of his testimony.

Appeal by the accused from conviction of impaired driving causing death and impaired driving causing bodily harm. The appellant's truck crossed the centre line and collided with a van, killing the driver and injuring one of the passengers. The appellant fled the scene and went home. He had testified that, prior to the accident, he had consumed three beers. He stopped at a store before returning home. The store clerk testified that the appellant smelled of alcohol and that his eyes were rolling. The appellant then left home again and went to another bar. The accident occurred on his way home. The bar manager testified the appellant did not seem intoxicated in any way. The appellant argued that he started drinking heavily at home. He was found to be impaired three hours after the accident. The trial judge rejected the appellant's evidence in its entirety.

HELD: Appeal allowed. A new trial was ordered. The trial judge misapprehended evidence and erred in drawing adverse inferences against the appellant for failing to call evidence to confirm various aspects of his testimony. These errors resulted in a miscarriage of justice. The trial judge erred in finding that the appellant lied when he testified about a conversation he had with a female friend at the last bar he visited. The appellant was not asked about his thoughts about the friend in his examination in chief. The evidence did not establish that he lied to the court when indicating that he asked for her telephone number to go snowmobiling with her boyfriend. By agreeing in his cross-examination that he might have been trying to hit on the friend, he did not admit that he had no interest in contacting her boyfriend to go snowmobiling. The trial judge also erred in concluding that the appellant's evidence respecting his drinking was not credible since the police did not notice a strong odour of alcohol. The police were never asked if there was a strong odour. The police noted a strong odour of alcohol at the station. Since the appellant had not consumed alcohol between his discussion with the officers and his arrival at the station, the logical inference was that there was a strong smell of alcohol on the appellant's breath both at the house and at the station. The trial judge erred in drawing an adverse inference from the appellant's failure to call his mother to testify to the

smell of alcohol on his breath and in failing to produce receipts from the places that he said he had gone during the day of the accident. This evidence would have added nothing to the evidence already adduced and would not have assisted the appellant in showing that he was not impaired before the accident.

Appeal From:

On appeal from the conviction entered by Justice G.W. Tranmer of the Superior Court of Justice dated January 17, 2008 and the sentence imposed on February 12, 2008.

Counsel:

Jonathan Dawe and Andrew Furgiuele, for the appellant.

Craig Harper, for the respondent.

The judgment of the Court was delivered by

D.R. O'CONNOR A.C.J.O.:--

OVERVIEW

1 On November 25, 2005, the appellant's truck crossed the centre line of Second Line, a major road in Sault Ste. Marie and collided with a van, killing the driver and injuring one of the passengers. The appellant fled the scene, went home and reported his truck stolen that evening.

2 The appellant pled guilty to charges of leaving the scene of the accident and public mischief for falsely reporting his vehicle stolen. Following a trial by a judge, sitting without a jury, he was convicted of impaired driving causing death, "over 80" and impaired driving causing bodily harm.[1] The appellant appeals from his convictions on the impaired driving charges.

3 At trial, there was no issue that the appellant was driving the truck that caused the accident. The sole issue was whether the appellant was impaired at the time of the accident. That issue turned on an assessment of his credibility.

4 The appellant testified that after the accident, he panicked, fled the scene and went home and started drinking heavily. Approximately three hours after the accident he was found to be impaired. The trial judge rejected the appellant's evidence in its entirety, citing several reasons for

disbelieving him.

5 While several of the trial judge's reasons for rejecting the appellant's testimony were available to him on the evidence, in my view he committed two errors in assessing the appellant's credibility. First, he misapprehended two separate pieces of evidence. Second, he erred in drawing adverse inferences against the appellant for failing to call evidence to confirm various aspects of his testimony.

6 In my view, the errors, considered together, resulted in a miscarriage of justice. Accordingly, I would not apply the curative proviso. I would set aside the convictions and order a new trial.

7 Given that I would order a new trial on this basis, it is not necessary to deal with the appellant's submission that the trial judge erred in admitting breath samples obtained pursuant to s. 24(2) of the *Charter*.[2]

8 Finally, the appellant appeals against his sentence totaling one year for failing to remain at the scene and for public mischief. In my view, the sentence is fit. Accordingly, I would dismiss the sentence appeal.

FACTS

9 The appellant testified that on the day of the accident, he was feeling ill. He drove to work, but decided to return home before work started. When he returned home, he went to bed. He got up in the afternoon and cleared his driveway of snow at about 3:00 p.m.

10 The appellant said that he then went to a bar called Misty's Fifties where he stayed for about fifteen minutes and drank one beer. Before returning home, he went to a drug store to get some cold medicine, then to the dry cleaners, and to a video store to buy cigarettes. A receipt was entered into evidence showing that he purchased a carton of cigarettes at about 3:40 p.m.

11 The video store clerk testified for the Crown. She said that the appellant came into the store and bought the cigarettes. She recalled smelling alcohol on the appellant's breath and said, "I knew that he had been drinking", since his eyes were rolling and he was looking up at the ceiling. She did not think that the appellant should have been driving.

12 The appellant testified that around 4:30 p.m., he left his house again and went to the Roosevelt Hotel bar, which is located on Korah Road, near the scene of the accident. There, he drank a light beer and ordered a second, which he may or may not have finished. At the bar, he ran into Amanda Morissette, who was dating one of his friends from work. He ordered Ms. Morissette a beer, chatted with her and wrote her phone number down on a cigarette package.

13 The Crown called the two bartenders at the Roosevelt Hotel who served the appellant. They testified that they served the appellant two light beers. The bar manager, who knew the appellant as

a regular customer, testified that the appellant was talking straight and that "[h]e didn't seem like he was intoxicated, by any means".

14 The appellant said that he left the Roosevelt Hotel and drove north onto Korah Road. From Korah Road, he turned left onto Second Line. After turning onto Second Line, a truck in front of him put on its brakes. The appellant tried to avoid the truck and his vehicle went sideways into the oncoming lane. He struck a van head-on, killing the driver and injuring one of the passengers.

15 The accident occurred at 5:25 p.m.

16 The appellant testified that after the accident, he got out of his truck, panicked and fled the scene. His explanation for fleeing was that he had two previous convictions for drinking and driving and two for driving under suspension and that since he had just left the bar, it was not "going to look good" for him. He said that he was not impaired at the time of the accident.

17 The appellant left his truck and went home on foot through parking lots, over fences and through backyards. He went between his house and the house next door through a laneway so as not to leave footprints on the snow in his yard. He went in the rear door, because he expected the police to come and he wanted to get out of sight.

18 Shortly after the accident, Constable MacKnight was informed that the appellant was the owner of the truck involved in the collision. He went to the appellant's house at 5:47 p.m. The house was dark. Constable MacKnight knocked on the front door and then on the side door. The appellant assumed it was the police and did not respond.

19 The appellant testified that after the officer left, he began to drink "to calm his nerves down". He said that he drank over six beers and about a quarter of a bottle of Yukon Jack. Unexpectedly, his mother came to the house. When she told him that his truck wasn't in the yard, he told her that somebody must have stolen it. He then phoned the police and reported it stolen. He said that he had nothing more to drink after his mother arrived. Shortly afterwards, a friend of the appellant, Shane Burt, arrived and told the appellant that his truck had been involved in an accident.

20 About five minutes later, at 7:40 p.m., Constable MacKnight returned to the appellant's house with another officer, Constable Burrows. The appellant invited the officers in. His mother and Mr. Burt were at the house at the time. Constable McKnight testified that the appellant told them that he had gone to work that day, but had returned home. He told the officers that after clearing his driveway in the afternoon, he went to sleep because he was feeling sick. He said that he left his truck on the roadway with the keys in it. When his mother arrived, he realized that the truck was missing. The appellant told the officers that he had not been drinking. Both officers noticed an open case of beer in the living room. Constable Burrows testified that he smelled alcohol on the appellant's breath at the house.

21 At trial, the appellant admitted that he lied to his mother and Mr. Burt about the truck being

stolen. He also admitted that he lied to the police when he told them that he had not been drinking.

22 The officers invited the appellant to go to the police station to give a statement regarding his stolen truck. Mr. Burt drove the appellant to the station. There, the officers formed the opinion that the appellant's ability to drive a motor vehicle was impaired and arrested him. The appellant refused to make any further statements about the events that day. He did, however, agree to take a breathalyzer test. The readings taken at 8:54 p.m. and 9:14 p.m. were 163 and 159 mg of alcohol per 100 ml of blood, respectively.

23 At trial, the Crown called a toxicologist in reply to give evidence in response to the appellant's account at trial of his drinking on the day of the accident. The toxicologist testified that based on the appellant's evidence regarding the quantity of alcohol he consumed and the time at which he consumed it, his blood alcohol content at 9:14 p.m. would have been between 215 and 270 mg of alcohol per 100 millilitres of blood.

THE TRIAL JUDGE'S REASONS

24 The trial judge said that the issue was whether the appellant's ability to operate a motor vehicle was impaired at 5:25 p.m. on November 25, 2005. He stated that "both [C]rown and the defence agree that the central issue in this trial turns on the credibility of [the appellant]".

25 After reviewing the principles in *R. v. S.(W.D.)*, [1994] 3 S.C.R. 521, the trial judge said he had no hesitation in disbelieving the appellant and was not left in a reasonable doubt by his evidence. He said that he was satisfied beyond a reasonable doubt that the appellant's testimony was untrue and rejected it in its entirety. He gave several reasons for doing so. His reasons, in the order he gave them, may be summarized as follows:

* in answering questions as to why he fled the scene, the appellant's demeanour changed, "it was an evasion or unwillingness or inability to explain the true facts";
* the appellant's story that he would flee the scene if he was telling the truth and was not impaired at the time of the accident was incredible;
* there was "significant evidence that should have been available to support [the appellant's] testimony" if it was truthful;
* the appellant "demonstrated clearly to this court the ease with which he was willing to lie to his mother, to Mr. Burt and to the police";
* the appellant lied in court in sworn testimony regarding his conversation with Amanda Morissette at the Roosevelt Hotel;
* it was incredible that if the appellant had consumed the beer and Yukon Jack at his house as he testified, that the officers would not have detected a strong odour of alcohol on his breath at his house; and
* the reply evidence of the toxicologist relating to the breathalyzer readings taken at the police station was inconsistent with the appellant's testimony.

ANALYSIS

1. Misapprehension of Evidence

26 The appellant submits that the trial judge misapprehended two separate pieces of evidence. I agree.

(a) *Conversation with Ms. Morissette*

27 During his examination-in-chief, the appellant recounted his conversation with Amanda Morissette, with whom he chatted at the Roosevelt Hotel. He said that he discussed with her the possibility of going snowmobiling with his friend from work, Brad Wilson, who was Ms. Morissette's boyfriend at the time. The appellant asked Ms. Morissette for her phone number "[i]n order to get a hold of Brad" because "if he stays at her place, it's easier to get a hold of him by calling her number." Ms. Morissette, a Crown witness, gave substantially the same account of the conversation.

28 In cross-examination, the Crown asked the appellant whether he had been trying to "hit on" Ms. Morissette. The following exchange took place:

Q. Yeah, okay. And you're sitting there and you're talking with Amanda.

A. Yes.

Q. Are you trying to hit on her there?

A. Maybe.

Q. Yeah. You know, because I sort of got that impression because I see when you wrote the name, right?

A. Yes.

Q. You wrote the name and the number. You didn't write Brad's name and his number right? You wrote Amanda's name and her number.

A. That's right.

Q. And that's you writing it on there [a cigarette package], right?

A. Yes.

29 In his reasons, the trial judge addressed this exchange in two different places. The first was during his summary of the evidence, where he stated:

> I note it is significant that in his sworn testimony in-chief, [the appellant] lied to this court concerning his thoughts relative to Amanda. He admitted in cross-examination that he was not talking to her and writing down her name and telephone number so as to permit him to contact her boyfriend to arrange to ride snow machines, which is what he testified to in-chief. In cross-examination, he admitted that he did this because he was "hitting on Amanda."

30 Second, as stated above, in setting out his reasons for rejecting the appellant's evidence, the trial judge said:

> Furthermore, [the appellant] lied to this court in regard to his intentions with respect to his conversation with Amanda Morissette. This was sworn testimony in this court.

31 With respect, I am of the view that the trial judge misapprehended the appellant's evidence regarding his conversation with Ms. Morissette in two ways.

32 First, he erred in saying that the appellant lied about his thoughts relative to Ms. Morissette in his examination-in-chief. The appellant was not asked about and did not comment on his thoughts about Ms. Morissette in his examination-in-chief.

33 Second, the evidence falls short of establishing that the appellant lied to the court. In cross-examination, he agreed that he may have been trying to "hit on" Ms. Morissette, nothing more. He did *not* admit that he had no interest in contacting Brad to go snowmobiling as the trial judge said. In my view, this evidence does not establish that the appellant lied to the court, especially since the Crown did not put the appellant's earlier evidence to him in cross-examination. Indeed, the appellant may have had more than one reason for talking to Ms. Morissette and asking for her phone number.

(b) *Evidence of the Police Officers Regarding Smell of Alcohol*

34 The trial judge also said that if the appellant's evidence was true, the police would have smelled a strong odour of alcohol when they came to his house around 7:40 p.m. He said:

> I find it incredible that if he had consumed all of the beer and the Yukon Jack, to which he testified, the two trained police officers who attended at his residence very shortly after he claims to have stopped drinking and who already had suspicions that he was a driver who had been drinking, would not have detected a very strong odour of alcohol on his breath at that time.

35 With respect, this was not a fair conclusion based on all the evidence.

36 Constable Burrows testified that he smelled alcohol on the appellant's breath at the house. He was not asked if it was a strong odour or not. It may well have been.

37 While Constable MacKnight did not testify to smelling alcohol on the appellant's breath at the house, he did testify that he detected a strong odour of alcohol from the appellant at the police station. It was undisputed that the appellant had nothing to drink between his discussion with the officers at his house and the time he arrived at the station. The logical inference is that there was a strong smell of alcohol on the appellant's breath both at the house and at the station.

38 The fact that the officers did not testify directly to observing a strong smell of alcohol at the appellant's house does not provide a logical basis for rejecting his evidence that he had drunk heavily after the accident.

2. Failure to Call Evidence

39 After reviewing defence counsel's submissions as to why the appellant should be believed, the trial judge instructed himself on the presumption of innocence and the criminal standard of proof. He then stated:

> I note, however, there is significant evidence that should have been available to support [the appellant's] testimony if [his] evidence was truthful.

40 In effect, the trial judge used the appellant's failure to call certain evidence as a reason for rejecting his evidence. The trial judge proceeded to review the evidence that, in his view, could have supported the appellant's testimony. I agree with the appellant's submission that the trial judge erred in drawing adverse inferences from the appellant's failure to call the evidence.

41 In certain circumstances, a trier of fact may draw an adverse inference from the failure of a party to call evidence. In *R. v. Jolivet*, [2000] 1 S.C.R. 751, at para. 25, Binnie J. cited the ancient rule from *Blatch v. Archer* (1774), 1 Cowp. 63, at p. 65:

> It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.

42 However, this principle is subject to several qualifications. Since the inference is one of

"ordinary logic and experience", it may only be drawn where there is not a plausible reason for nonproduction, i.e. where it would be natural for the party to produce the evidence if the facts exposable by the witness had been favourable: *Jolivet* at para. 24; *R. v. Solomon*, [2002] O.J. No. 5128, 2002 CanLII 8965 (On. S.C.), per Hill J., at para. 32; *R. v. Rooke* (1988), 40 C.C.C. (3d) 484 (B.C.C.A.), at pp. 512-13. As Binnie J. explained in *Jolivet* at para. 28, there are many reasons for not calling certain evidence that are unrelated to the truth of the witness' testimony:

> The circumstances in which trial counsel decide not to call a particular witness may restrict the nature of the appropriate "adverse inference". Experienced trial lawyers will often decide against calling an available witness because the point has been adequately covered by another witness, or an honest witness has a poor demeanour, or other factors unrelated to the truth of the testimony.

43 In addition, evidence may not be called if it would be unimportant to the case, cumulative, or inferior to the evidence already available on the relevant point: see *Solomon* at para. 32; *Rooke* at p. 518; *R. v. C.R.S.* (1998), 133 C.C.C. (3d) 559 (N.S.C.A.), at p. 571.

44 Further, the inference is stronger where the "missing proof" lies in the "peculiar power" of the party against whom the adverse inference is sought to be drawn: *Jolivet* at para. 27.

45 Importantly, however, in a criminal case, the principle must be applied "with due regard to the division of responsibilities between the Crown and the defence": *Jolivet* at para. 26. Drawing an adverse inference against an accused in a criminal trial raises the danger of placing a burden of adducing evidence on the defence: *Rooke* at p. 518; *R. v. Ruiz* (1991), 68 C.C.C. (3d) 500 (N.B.C.A.), at p. 505 per Angers J.A. (dissenting, but not on this point), aff'd on other grounds [1993] 3 S.C.R. 649. It is for these reasons that "[a] trial judge should draw an adverse inference in a criminal case from the failure of one of the parties to call a witness, only with the greatest of caution": *R. v. Charette* (1982), 67 C.C.C. (2d) 357 (Ont. C.A.), at p. 359. (See also *R. v. Zehr* (1980), 54 C.C.C. (2d) 65 (Ont. C.A.), at p. 68; *R. v. Koffman and Hirschler* (1985), 20 C.C.C. (3d) 232 (Ont. C.A.), at p. 237; *R. v. Dupuis* (1995), 98 C.C.C. (3d) 496 (Ont. C.A.), at p. 508; *R. v. Witter* (1996), 105 C.C.C. (3d) 44 (Ont. C.A.), at p. 55; *R. v. Marshall* (2005), 77 O.R. (3d) 81 (C.A.), at para. 47.)

46 I turn now to the evidence that the trial judge said could have supported the appellant's testimony.

47 The trial judge placed significance on the fact that the appellant did not call his mother to testify at the trial, although she was present in the courtroom throughout the trial. He said that "she would have smelled the stench of alcohol on his breath if his description of his drinking ... were true." He stated that it was "incredible that she would not have known" since "[s]he is his mother." He went on to state that Mr. Burt also did not testify. He too could "have noticed a strong odour of alcohol" on the appellant if the appellant's account of his drinking were truthful.

48 As I have stated, the issue at trial was whether the appellant was impaired at the time of the accident. On both the Crown and defence theories, the appellant had consumed a substantial quantity of alcohol by the time that his mother and Mr. Burt arrived at the house. I do not think that the appellant's mother or Mr. Burt's evidence about the smell of alcohol would have added any real support to the appellant's testimony that he was sober at the time of the accident. Assuming they smelled alcohol on the appellant's breath, it seems most unlikely that they could give credible opinions as to when the appellant drank the alcohol giving rise to the smell.

49 In any event, calling these witnesses to testify to an odour of alcohol would not likely have added anything beyond what had already been established in evidence. Constable Burrows testified that he smelled alcohol on the appellant's breath at the house and Constable MacKnight testified that he detected a strong smell of alcohol on the appellant's breath at the police station. As discussed above, it was undisputed that the appellant had nothing to drink between the interview at his house and his arrival at the police station.

50 The trial judge also said that the appellant's mother could have testified to the presence of beer bottles and the Yukon Jack bottle in the house, and noted that the bottles could have been introduced by the defence as exhibits. However, Constables Burrows and MacKnight had already testified that they saw a case of beer and several empty bottles in the house. In addition, introducing empty bottles at trial would not have added any independent support for the appellant's testimony. The value of such evidence would have depended entirely on the appellant being able to establish that the bottles being introduced were the same bottles from which he drank on the day in question.

51 The trial judge also attached weight to the appellant's failure to produce receipts from the cleaners and the pharmacy, places that he said he had gone during the afternoon on the day of the accident. Those receipts, at best, would have confirmed a relatively minor aspect of the appellant's narrative and would have accounted for only limited periods of time. Introducing the receipts would not have assisted the appellant in showing that he was not impaired before the accident.

52 Accordingly, I agree with the appellant that the trial judge erred in drawing inferences adverse to the appellant for his failure to call evidence to confirm parts of his testimony.

3. Should a New Trial Be Ordered?

53 The Crown submits that if the trial judge erred in assessing the appellant's credibility, the *curative proviso* can be applied as the errors did not amount to a miscarriage of justice or a substantial wrong. I disagree.

54 In my view, the cumulative effect of the errors resulted in the convictions being a miscarriage of justice. Significantly, the errors related to the trial judge's assessment of the appellant's credibility which was the central issue at trial. On reading the trial judge's reasons as a whole, I am not able to say that he would have reached the same conclusion had he not made the errors I refer to above.

55 I recognize that several of the trial judge's reasons for disbelieving the appellant were available to him on the record. It may be that those reasons standing alone would have been sufficient for the trial judge to have disbelieved the appellant's testimony. However, the trial judge's reasons that contain the errors form an integral part of his overall assessment of the appellant's credibility. It seems that the trial judge attached considerable weight to the erroneous reasons.

56 The trial judge emphasized what he characterized as the appellant's "lie to this court" about the Amanda Morissette conversation. He mentioned it twice in his reasons and said that it was significant. He also referred to the evidence that the appellant failed to call as "significant" and went to some length to point out the specifics of what evidence he concluded the appellant should have called. I do not think it is possible to disentangle the trial judge's erroneous reasons from the remainder of his analysis of the appellant's credibility and to conclude that he would necessarily have reached the same conclusion.

57 In the result, I would allow the appeal, set aside the convictions and order a new trial.

3. Sentence Appeal

58 The trial judge sentenced the appellant to three and one-half years concurrent for the two impaired driving charges. He also sentenced the appellant to one year, consecutive, on the failure to remain charge and 6 months concurrent on the public mischief charge. The appellant argues that if a new trial is ordered on the impaired driving charges, that the one year sentence on the other two charges is excessive and outside the range for those offences.

59 I disagree. The appellant has a record for drinking and driving. He attempted to evade detection and misled the police about his truck being stolen. In my view, a total sentence of one year is within the range for these serious offences.

DISPOSITION

60 I would, therefore, allow the conviction appeal and order a new trial. I would dismiss the sentence appeal.

D.R. O'CONNOR A.C.J.O.
R.J. SHARPE J.A.:-- I agree.
P.S. ROULEAU J.A.:-- I agree.

1 The "over 80" charge was stayed pursuant to the *Kienapple* principle.

2 At the time this appeal was argued, the Supreme Court of Canada decision in *R. v. Shepherd*, [2007] S.J. No. 119 was pending. The appellant did not pursue the s. 24(2) argument in oral argument asking instead that if the appeal were allowed, the s. 24(2) argument be left to the new trial. I would accede to that request.

---- End of Request ----
Email Request: Current Document: 1
Time Of Request: Sunday, June 12, 2016 14:49:27