

*Case Name:*  
**R. v. Jitnikovitch**

**Between**  
**Her Majesty the Queen, and**  
**Vasilli Jitnikovitch**

[2010] O.J. No. 5818

Ontario Court of Justice  
Toronto, Ontario

**D.A. Fairgrieve J.**

Oral judgment: March 31, 2010.

(15 paras.)

**Counsel:**

A. Samberg, Counsel for the Crown.

Ms. D. Brown, Esq. Counsel for the Accused.

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**JUDGMENT**

**1 D.A. FAIRGRIEVE J.** (orally):-- The remaining charge against Mr. Jitnikovitch is that he was operating a motor vehicle while his ability to do so was impaired by alcohol. The date of the alleged offence is August the 18th, 2007. The fact that so many months have elapsed since the event, I think, probably accounts for some of the difficulties that the witnesses have had with respect to specific details of what occurred.

**2** With respect to this impaired driving charge, it is clear that the burden is on the Crown to prove all of the elements of the offence beyond a reasonable doubt. The accused is presumed to be innocent of the charge, and that presumption is displaced only when the evidence on which the Crown relies, which is accepted by the court, proves all of the essential elements. In this case, there is no issue with respect to the fact that Mr. Jitnikovitch was driving at the time he was stopped by Constable Simpson. It is the element of impairment by alcohol that is in issue here.

**3** The accused testified, giving evidence that he had consumed four beers between 6:30 and one o'clock when he left this gathering. He testified that he had his last beer at about eleven o'clock. It was not quite clear when he finished it or whether he indeed did finish this fourth beer, but he testified that he wasn't impaired as a result of this consumption of beer in those circumstances.

**4** I think it's clear that the principles from W.D. apply. The gist of the accused's evidence is a denial that he committed the offence. He is asserting that while he did have something to drink earlier in the evening, it did not affect him at the time that he was driving. In those circumstances, it is important to say that because of the presumption of innocence, if the accused's evidence denying the offence is believed or leaves a reasonable doubt, then he's clearly entitled to have the charge dismissed. Even if his evidence is completely rejected, it is still a question of whether or not, in this case, the officers' testimony concerning the observations they made of the condition of the accused is sufficient to prove beyond a reasonable doubt that the accused's ability to drive was impaired at the time.

**5** In this case, the Crown is relying on the observations made by Constable Simpson as well as by Constable Bennoch, and they focus on the observations of the accused after he got out of his vehicle leading up to his arrest by Constable Simpson, as well as Constable Simpson's evidence as to the accused's handling of the documents that the officer was demanding from him.

**6** Constable Simpson testified that after demanding his driver's licence and the other usual documents, the accused handed over some documents that did not include his driver's licence. The officer repeated the demand for his driver's licence. At that point the accused, according to the officer, was fumbling with his wallet and had some difficulty extracting his licence and, in fact, dropped the wallet in his lap at one point.

**7** In addition to that evidence, which Mr. Jitnikovitch conceded to some extent, he acknowledged that he was nervous and that he did in fact drop his driver's licence, but in addition to that evidence, Constable Simpson pointed to the odour of alcohol on his breath, the fact that he had bloodshot eyes and that once outside the vehicle he appeared to be unsteady on his feet - that he was off balance, according to the officer. Although it wasn't specifically recorded in his notes, he said the accused had to put his hand out against the car to steady himself at one point.

**8** Constable Bennoch gave similar evidence that the accused stumbled and was unsteady on his feet and didn't appear to have his balance. That is the evidence on which the Crown relies.

**9** The accused denies that he was stumbling or that he had trouble standing. Constable Simpson testified that the condition of the accused that he observed at the scene was similar to the condition of the accused back at the police station, which is depicted on the video that was made.

**10** Ms. Samberg has conceded that the DVD that was actually obtained and became an exhibit doesn't show the accused to have any noticeable signs of impairment when he was back at the station during the booking process and, I assume, during the breath test.

The Crown is conceding that it doesn't, in the end, provide any evidence of assistance to the Crown.

**11** I'm satisfied, based on the credible evidence of the police officers that the observations they made were honestly made, and I'm also satisfied that on a balance of probabilities, certainly, that the accused was probably impaired at the time. The officer, in his evidence, didn't assign any weight, to this improper right turn in terms of supporting any belief in impairment. The evidence of the accused was that he was going to this address, that he wasn't exactly sure where it was located, and he ended up having to make a right turn at Annette rather than the left turn that he had initially intended. I don't think that the right turn ultimately indicated anything about whether he was impaired or not. The officer didn't appear to dispute that. While it didn't sound like a very safe manoeuvre in the circumstances, it sounded as though he started to turn right, albeit without signalling, before the van had pulled up to stop at the red light, and that turning in this way didn't indicate anything about the condition of the driver.

**12** I'm satisfied that if the applicable standard of proof in this trial were the balance of probabilities, given the accused's evidence that he had been drinking and given the credible evidence of the officers that they made these observations, a finding could be made that he probably was impaired. I have to say, however, that given the evidence led by the defence concerning the, not minimal drinking, but the number of beers that were consumed a number of hours before the accused was stopped, the denial that he stumbled, the fact that the officers' evidence in that regard isn't supported by the video made at the station, and the accused's denial that he was impaired, as well as his friend's evidence that she didn't make any observations that led her to be concerned - she testified that she didn't observe any indicia of impairment at all - in all of those circumstances, I am left in a state of reasonable doubt. I am obliged, of course, to give the benefit of that reasonable doubt to the accused, and the charge is dismissed.

**13** Having said that, I do not think it is necessary to deal with the *Charter* issue. There may be an argument that could be made that the apparent breach of the accused's 10(a) rights ought not to have led to the exclusion of any evidence, specifically, the evidence of the observations of impairment made by the officers at the scene. I think, though, that it is still of some significance that Constable Simpson seemed unaware of his obligations when detaining a person to explain the reason for it to the accused, and even though it ends up not having any particular impact on the evidence in this case, I think it's an issue that he probably would want to instruct himself about.

**14** All right. So the Crown has withdrawn the over 80 charge. The impaired driving charge is marked dismissed. Thanks.

**15** MR. BROWN: Thank you, Your Honour.

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