

ONTARIO COURT OF JUSTICE

DATE: 2017 08 16

COURT FILE No.: Central East - Newmarket 4911-998-16-02620-00

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

LIU LIU

Before Justice M.E. Misener
Heard on July 20 and 21, 2017
Oral Judgment given on July 21, 2017
Written Reasons for Judgment released on August 16, 2017

Vanessa Szirmak.....counsel for the Crown
Joe Neuberger counsel for the defendant Liu Liu

MISENER J.:

[1] On July 21st, 2017 I acquitted Mr. Liu of operating a motor vehicle when the concentration of alcohol in his body exceeded the legal limit. These are my reasons for doing so.

[2] Mr. Liu was stopped by PC Ouyang at 2:03 a.m., very shortly after he left a karaoke bar where he consumed enough alcohol that the breath samples he ultimately provided at 3:17 and 3:38 a.m. resulted in readings of 148 and 149 mg of alcohol in 100 ml of blood.

[3] PC Ouyang described Mr. Liu's condition at the roadside. He testified that there was some slowness in Mr. Liu's responses when the two spoke in English and said there was some minor swaying, which he did not note at the time but was able to recall. At the station the officer observed swaying, which he did note.

[4] The defence called Mr. Liu, who testified about a pattern of drinking which included consuming two beers in the first two hours and then downing four 1.5 ounce shots of whiskey shortly before he drove. He testified that when he indicated to his friend that he had to leave at 1:30 a.m. his friend urged him to stay and immediately ordered 8 shots for them to share. He said he was noting the time because he had promised to pick up a girl at the Scarborough Town Centre and was already late. The shots were ordered at 1:30, and were consumed before Mr. Liu left at 1:50.

[5] Mr. Liu's friend, who was drinking and singing with him at the karaoke bar, also testified and, although their times were inconsistent as to when they arrived at the bar, when they each consumed the two beers and how long it took to drink the shots, the friend corroborated Mr. Liu's account of his pattern of drinking.

[6] The defence also called an expert witness who was qualified on consent to provide opinion evidence concerning the absorption and elimination of alcohol in the human body. The expert testified that in his opinion, given the speed of consumption and the percentage content of the alcohol, it was unsafe to assume that any of the alcohol consumed in the 30 minutes prior to the time of the police stop was absorbed in Mr. Liu's system. Accordingly he opined that the concentration of alcohol at the time of driving was in the range of 21 to 46 mg of alcohol in 100 ml of blood. He was also of the opinion that the test results were accurate given that pattern of consumption.

[7] In cross-examination the expert agreed that the Centre of Forensic Sciences takes the position that it is safe to include alcohol consumed more than 15 minutes before the time of driving. The expert also provided calculations of BAC at the time of driving based on a number of scenarios including one where the only alcohol excluded from the calculation was that consumed in the 15 minute window. That calculation resulted in a BAC at the time of driving over the legal limit.

[8] The defence relies on Section 258(1)(d.1) and submits that Mr. Liu comes within the very narrow strike zone left standing, at least for the time being, by Parliament when the drinking and driving provisions of the *Criminal Code* were last amended.

[9] Turning to Mr. Liu's evidence concerning his pattern of consumption, the Crown is entitled to the benefit of the common sense proposition that, particularly in this day and age where there is a high awareness of the dangers of drinking and driving, a person who responsibly consumes only two beers over a period of two hours is not likely to down 4 shots of hard liquor right before getting behind the wheel. Ms. Szirmak pointed out that, in addition to this common sense inference, I should consider that both Mr. Liu and his friend described Mr. Liu as an infrequent drinker who favours beer. I think it is notorious that drinking 4 consecutive generous shots of Johnnie Walker Black Label is no easy feat for an infrequent beer drinker. On the other hand, I also heard that the food and room at the karaoke bar are free if the bar bill is high enough. I was inclined to disbelieve Mr. Liu when I heard about his strange pattern of drinking. However after reflecting on his testimony and considering that there is an explanation for what he did, that by and large his friend corroborated his account, I cannot say that I disbelieve him. I also considered the evidence of the arresting officer concerning the state Mr. Liu was in at the roadside. I agree with Mr. Neuberger's submissions that the slowness in responses likely was affected by the language barrier and that the swaying was not significant enough to note so that a consideration of Mr. Liu's testimony in the context of all the evidence which I accept does not change my view that I cannot reject his account of how he consumed alcohol that night.

[10] Turning to the expert evidence, had the Crown called its own expert from the Centre of Forensic Sciences, the outcome of this case might be different. I say this not to fault Ms. Szirmak who would have called that evidence if she could have. Limited by institutional resources and the pressure of Section 11(b) in this busy jurisdiction, she

was not able to call evidence in reply. She did an outstanding job in eliciting the basis for an expert opinion in which only the alcohol consumed in the 15 minutes preceding the driving is excluded. However she was unable to obtain that opinion because the only expert available to her, the defence expert, made it clear that he would not endorse it given the speed of consumption and the potency of the alcohol consumed.

[11] In the end then the defence has met the requirements of Section 258(1)(d.1). Mr. Liu is entitled to be acquitted only because he was stopped before a time at which I can be satisfied that the concentration of alcohol in his blood exceeded the legal limit.

Released: August 16, 2017

Signed: Justice M.E. Misener