C.A.C. No. 02869

NOVA SCOTIA COURT OF APPEAL

Jones, Chipman and Pugsley, JJ.A.

Cite as: R. v. Chabot, 1993 NSCA 211

BETWEEN:		
GERALD ARTHUR CHABOT		David A. Grant for the Appellant
	Appellant	
- and -		
HER MAJESTY THE QUEEN		Denise C. Smith for the Respondent
	Respondent	
		Appeal Heard: November 24, 1993
		Judgment Delivered: November 29, 1993

THE COURT: Leave to appeal is dismissed as per reasons for judgment of Pugsley, J.A.; Jones and Chipman, JJ.A., concurring.

PUGSLEY, J.A.:

The appellant was convicted by the trial judge of the "breathalyzer charge" contrary to s. 253(b) of the **Criminal Code**.

An appeal to the Supreme Court was dismissed.

The appellant applies for leave to appeal on a question of law and submits his conviction should be set aside on two grounds:

(1) His right to be free from arbitrary detention under s. 9 of the **Charter** was denied.

(2) The Summary Convictions appeal judge erred in law in upholding the trial judge's finding that there was no "evidence to the contrary" to rebut the presumption under s. 258(1)(c) of the **Code**.

FACTUAL BACKGROUND:

Sergeant Matthews of the Dartmouth City Police, dressed in plain clothes, parked his unmarked police car at 9:00 p.m. on June 22, 1991, outside a private residence on Chappell Street, in the City of Dartmouth. He was acting in accordance with instructions received from the Chief of Police, who had "received complaints" concerning the residence.

He testified that he was:

> "trying to gather evidence to either show that there was an after hours club operating at 25 Chappell Street . . . . my purpose that night . . . I was strictly there . . . I was there gathering evidence to see the comings and going from this address on Chappell Street."

This was his first night at this location.

He observed the following:

> "- Through the early evening there were people coming and going to the house.
>
> - 10:34 a car pulled up and the driver a male went in the house, came directly back out.
>
> - 10:35 a person came out, got something out of a car and went back in the house.
>
> - 10:35 a Bob's taxi picked up a male.
>
> - 10:50 another person gets out of a vehicle and goes in.
>
> - 10:55 two males went in.
>
> - 11:15 two cars leave - one had only been there for a few moments and he made no attempt to follow it. He attempted to radio another police car to follow the second vehicle but was unable to

locate a free police vehicle.

- 11:32 vehicle left the premises.

- 11:38 two individuals left the house on foot."

Sergeant Matthews determined they were:

"drinking . . . cause they walked by me.

- 11:40 the appellant's vehicle arrived and the appellant and a woman went into the residence.

- 12:40 "a car left, I tried to follow and I lost it."

- At 1:05 a.m. the appellant and his companion left the residence and returned to their vehicle. The appellant occupied the driver's seat.

Sergeant Matthews followed the appellant' vehicle and radioed Constable Berrigan to "see if he could meet up with me following the car to stop the car and check it."

Sergeant Matthews testified that the reason he wished to stop the appellant's vehicle was:

> "to see if there was any alcohol involved in the driver of the vehicle . . . To get the vehicle stopped to see if there was any indication that maybe there was - he - people that were in the vehicle had been drinking in that or the smell of liquor was there and they had just come from the house . . . I was looking for evidence if I had to eventually go and get a warrant to search the place for . . . under the **Liquor Control Act** that it would be . . . I would have people coming from it that were noticeably drinking." (emphasis added)

According to Sergeant Matthews there was nothing unusual in the manner in which the appellant walked to his vehicle, nor was there anything unusual in the manner in which he drove the vehicle after he left.

Constable Berrigan referred to the telephone request he received from Sergeant Matthews. Constable Berrigan's recollection was that he was "to assist in stopping a vehicle and his intention was to see if the occupants of that vehicle had been drinking."

Constable Berrigan, accompanied by Constable Nixon, pulled over the appellant's vehicle.

Constable Berrigan testified that the appellant's eyes were "very red" and that when he exited the vehicle to go to the police van, the accused "stumbled". In the police van, Constable Berrigan detected a smell of liquor on the appellant's breath. He formed the opinion that the appellant's ability to operate a motor vehicle was impaired.

Constable Nixon advised the appellant that he was under arrest for impaired driving, that he had the right to retain and instruct counsel without delay, that he had the right to apply for legal assistance without charge to the Nova Scotia Legal Aid Program. A breathalyzer demand was also read to him.

The appellant was then taken to the Dartmouth Police Station, was placed in an interview room and shortly thereafter made a phone call to his son-in-law.

Constable Berrigan, at all times, kept watch on the appellant through a glass window in the door of the interview room. He noted that after making the phone call, the appellant

> "popped four breath mints into his mouth. I immediately entered the room and told him to spit them into the garbage can and I saw at that time that there was nothing else in his mouth. From that time on I kept an eye on the (appellant). We had eye contact the entire time. I had a view of the (appellant) the entire time while he was speaking with the male that had entered the room."

At 2:00 a.m. the appellant was taken to the breathalyzer room. Constable Berrigan waited the standard 15 minute period before he took the first sample of breath from the appellant. All indications were the instrument was operating properly and the first reading disclosed 170 milligrams of alcohol in 100 millilitres of blood.

Constable Berrigan then purged the machine, conducted the standard alcohol solution test on the instrument to ensure that it was working correctly and waited a period of 17 minutes before the second test was performed. The second test was received at 2:32 a.m. and disclosed 160 milligrams of alcohol in a 100 millilitres of blood.

The appellant testified that he and his wife had attend the Metro Cultural Centre earlier in the evening and spent approximately four hours there. They each had two drinks of rum. The appellant had a "problem with his leg", accordingly his wife purchased the drinks. He did not

see the drinks being poured but his wife advised him that each of the four drinks were taken from small bottles and that each drink contained an ounce and a half of alcohol.

Mrs. Chabot was not, however, called to give evidence on behalf of the appellant.

The appellant and his wife then went to the residence on Chappell Street "where a lot of people go . . . more or less of a hang out to play some cards." While there he had a pint of beer.

After leaving Chappell Street, his car was stopped by the police who told him that "they had a house under surveillance and that's the reason why they stopped me."

The appellant had Vick's cough drops and Listermint breath mints in his pockets and in addition to the four mints, Constable Berrigan required him to spit in the waste paper basket, he believes he consumed other mints while at the police station and prior to the breathalyzer test.

The defence called a chemist who gave unspecific evidence with respect to the effect of cough drops on the breathalyzer machine.

In rebuttal, the Crown called Beverly Baughan, in charge of the alcohol section of the R.C.M.P. Forensic Laboratory who testified that the alcohol contained in two drinks, each containing one and a half ounce of alcohol, would have dissipated over a period of four to five hours.

ISSUES:

(1) Was the appellant's right to be free from arbitrary detention under s. 9 of the **Charter** denied?

The appellant submits that, once the judge on appeal acknowledged the trial judge's finding of fact, "that Mr. Chabot was stopped as a furtherance of the investigation of the police into the after hours club", that the appeal should have been allowed on the ground that the arrest and detention was arbitrary.

The appellant relies on the decision of the Ontario Court of Appeal in **R. v. Duguay** (1985), 18 C.C.C. (3d) 289 (affirmed); [1989] 1 S.C.R. 93, where MacKinnon, A.C.G.O. speaking for the majority stated at p. 296:

"In my view, on the facts as found by the trial judge, the arrest or

> detention was arbitrary, being for quite an improper purpose - namely to assist in the investigation."

The Ontario Court of Appeal (**Regina v. Simpson** (1993), 79 C.C.C. (3d) 482) has recently considered this issue.

In that case, police Constable Wilkin, after reading an internal police memorandum of unknown age and unknown reliability describing a particular residence as a suspected "crack house" decided to patrol the area around the suspect residence. A woman, leaving her car engine running, entered the residence, leaving shortly thereafter, accompanied by the appellant who drove away with the appellant seated in the front passenger seat.

Constable Wilkin directed the driver to pull over, offering the following reason:

> "Before I pulled him over it was for investigative purposes. I was looking for identification, to see what stories they were going to give, as to who was coming from where, looking for them to trip themselves up to give me more grounds for an arrest.
>
> If I had seen something in full view once pulling them over, that would have given me more grounds. At this time, it was strictly investigative."

Mr. Justice Doherty, on behalf of the court, in concluding that the appellant had been arbitrarily detained, stated at p. 492:

> "Once, as in this case, road safety concerns are removed from a basis for the stop, then powers associated with and predicted upon those particular concerns cannot be relied on to legitimize the stop . . . In my opinion, where an individual is detained by the police in the course of efforts to determine whether that individual is involved in criminal activity being investigated by the police, that detention can only be justified if the detaining officer has some "articulable cause" for the detention."

The court reviewed American jurisprudence dealing with the "articulable cause" doctrine, concluding that it received support in **R. v. Wilson** [1990], 1 S.C.R. 1291 where Cory, J. stated:

> "In a case such as this, where the police offer grounds for stopping a motorist that are reasonable and can be clearly expressed, (the articulable clause referred to in the American authorities), the stop should not be regarded as random. As a result, although the appellant

> was detained, the detention was not arbitrary in this case and the stop did not violate s. 9 of the **Charter**."

Mr. Justice Doherty makes it clear that the inquiry into the "existence of an articulable clause" is only the first step in the determination of whether the detention was justified in the totality of the circumstances.

In concluding that there was no articulable clause justifying the detention, Mr. Justice Doherty was impressed by the fact that:

> "Constable Wilkin had information of unknown age that another police officer had been told that the residence was believed to be a "crack house". Constable Wilkin did not know the primary source of the information and he had no reason to believe that the source in general, for this particular piece of information, was reliable. It is doubtful that this information standing alone could provide a reasonable suspicion that the suspect residence was the scene of criminal activity." (504)

These remarks are to be contrasted with the factual situation in the case at bar.

Sergeant Matthews was instructed by his Chief of Police to conduct the surveillance on the basis of complaints received by the Chief. Sergeant Matthews observed the Chappell Street residence for a period in excess of four hours before he issued instructions to stop the appellant's vehicle. During that period of time, Sergeant Matthews observed a considerable number of people entering and leaving Chappell Street. At least some of those leaving were obviously impaired.

The appellant and his wife remained in the Chappell Street residence for one hour and 25 minutes.

Sergeant Matthews elected only to detain those who had been in attendance at the Chappell Street residence for an extended period of time.

There is support in the evidence for the following conclusions of the trial judge:

> "On the evidence before me is there any evidence to - from which the police could have reasonably suspected that Mr. Chabot had alcohol in his body? It seems to me under the circumstances of this particular case the observations that the police made with respect to this particular residence - a number of individuals who went into the

> residence, came out of the residence. A number of individuals who were observed obviously to have been drinking as they emerged from that residence - it seems to me under those circumstances the police would have had reason to suspect that the defendant had alcohol in his body." (emphasis added)

In our opinion, the detention of the appellant was carried out not only to determine whether or not violations of the **Liquor Control Act** occurred at the Chappell Street residence (see s. 786(1)), but also to determine if the appellant himself had violated the provisions of that **Act** (see s. 78(2)(3), s. 90, s. 116) or indeed whether or not the appellant's own ability to operate a motor vehicle was impaired.

The grounds for the detention offered were reasonable, and clearly expressed (**Husky v. R.** (1988), 40 C.C.C. (3d) 398 (S.C.C.)).

The detention therefore was not arbitrary and the stop did not violate s. 9 of the **Charter**.

(2) The second issue deals with whether the evidence of the amount of alcohol consumed constituted "evidence to the contrary" to rebut s. 258 of the **Criminal Code**".

The appellant submits that the evidence advanced by the accused is the amount he had to drink was proven through the Crown expert to be such that it should result in a reading significantly less than the alcohol concentration forbidden under s. 258.

The trial judge quite rightly pointed out that the expert evidence is only as reliable as the facts upon which it is founded. She stated:

> "Certainly with respect to Mr. Chabot, it is clear that with the exception of his evidence with respect to the consumption of the beer at this address on Chappell Street, there is essentially in my view no admissible evidence with respect to the other consumption that he spoke of. Indeed his evidence on the consumption of this rum was based according to his evidence on his conversations with his wife and what she told him with respect to how that alcohol was served clearly that is evidence which is hearsay evidence . . . if it is not being introduced for the truth of it, that it seems to me that it has no meaning whatsoever because if it is not being used for the truth of it, then it has no meaning in terms of the subsequent opinion of the court . . . certainly had Mr. Chabot called his wife to verify the information

with respect to the amount of alcohol that he had to drink or that alcohol was presented and so on that is the basis on which the expert's evidence would then have some meaning. Under the circumstances there being no admissible evidence upon which the expert could express that opinion, I am not satisfied under the circumstances that there is evidence which is capable in this circumstance of being evidence to the contrary."

In our opinion, the trial judge applied the correct principles of law.

The application for leave to appeal is dismissed.

J.A.

Concurred in:

Jones, J.A.

Chipman, J.A.