C.A.C. No. 130620

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Fox, 1997 NSCA 57

Hallett, Jones and Matthews, JJ.A.

BETWEEN:

RONALD ALBERT FOX	)	
	)	H. Edward Patterson
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Kenneth W.F. Fiske, Q.C.
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
	)	
Respondent	)	Appeal Heard:
	)	January 8, 1997
	)	
	)	
	)	Judgment Delivered:
	)	January 8, 1997
	)	

THE COURT: Leave to appeal is granted, the appeal is allowed and a new trial ordered per oral reasons for judgment of Jones, J.A.; Hallett and Matthews, JJ.A. concurring.

The reasons for judgment of the Court were delivered orally by:

JONES, J.A.:

This is an application for leave to appeal from a decision of Mr. Justice MacLellan in the Supreme Court dismissing an appeal from the appellant's conviction under s. 253(b) of the **Criminal Code**.

The Crown adduced evidence before Judge Clyde F. MacDonald in Provincial Court of breathalyzer readings of 110 and 120 milligrams. The appellant testified that he had consumed five pints of beer during the course of the afternoon, the last shortly before being stopped by the police. The main issue on this appeal is the application of the decision of the Supreme Court of Canada in **St. Pierre v. The Queen** (1995), 96 C.C.C. (3d) 385 (S.C.C.). In addition to the evidence of the appellant an expert employed by the R.C.M. Police was called by the appellant to show what effect the alcohol consumed by the appellant would have on the appellant's ability to drive when stopped by the police. In cross-examination the expert was asked to relate the readings shown by the tests to the alcohol consumed by the appellant. He stated that the readings were not consistent with the evidence of consumption given by the accused. He testified that the test results indicated a blood alcohol concentration between 95 and 115 milligrams per cent. The trial judge concluded on the evidence that the blood alcohol level at the time of the test was different from the time of the offence. Based on **St. Pierre** he concluded that the Crown could not rely on the presumption of identity. The trial judge then stated:

> ...So, therefore, after looking at all the evidence with a view as a whole, I find that the Crown is entitled to rely on the presumption of accuracy. I've made a ruling that the Crown cannot rely on the presumption of identity, but indeed, that's not the end of the matter. I then have to look at all of the evidence with a view as a whole to determine whether or not the accused has raised a reasonable doubt.

He then reviewed the evidence of the expert and stated:

> I can only come to the inescapable conclusion that

> Mr. Fox consumed more of a quantity of alcohol than he's indicated in his sworn evidence here today. After looking at all the evidence, with a view as a whole, including the certificate as well, and indeed the evidence of Mr. Westenbrink, I find that a reasonable doubt has not been raised in the mind of this Court by the accused, looking at all the evidence with a view as a whole. I am satisfied that, beyond a reasonable (sic) that Mr. Fox's reading at the time of the driving, 1650 hours, was indeed over point zero eight and I accept the opinion of Mr. Westenbrink in this regard, that blood-alcohol concentration at 1650 hours would be between 95 and 115 milligrams percent. Taking the lower of those readings, which is 95 milligrams percent, is a reading indeed over point zero eight. For those reasons, I find Mr. Fox guilty as charged.

On appeal to the Supreme Court the appeal was dismissed on the ground that the trial judge had committed no error in law. There are three grounds of appeal in the present appeal. It is only necessary to consider the second ground of appeal which is that the trial judge placed an onus on the appellant to raise a reasonable doubt. Based on the decisions prior to **St. Pierre v. The Queen** it was clear that where the presumption under s. 258(1) applied there was an evidentiary burden on an accused to raise a reasonable doubt.

Based on **St. Pierre** where the presumption of identity does not apply then the Crown may rely on the remaining evidence including the certificate of analysis to prove beyond a reasonable doubt that the accused was over .08 at the time of driving. The burden remains on the Crown. Iacobucci, J. in delivering the judgment for the majority in **St. Pierre** stated at p. 406:

> I should emphasize at this point that it is important to recall the essential difference between a *presumption* and *evidence*. Section 258(1)(c) establishes a presumption that the blood-alcohol level at the time of driving was the same as at the time of testing, but it does not provide evidence of this fact. It is simply a short-cut for the Crown. If the accused is able to rebut the presumption by showing that the blood-alcohol level at the two times was different, then the Crown will have to call evidence to prove its case. The presumption simply establishes that the blood-

> alcohol level at the two times was the same. The evidence called would go to establishing what the accused's blood-alcohol level at the time of driving actually was.
>
> There is another aspect of the approach of the majority of the Court of Appeal in this case that merits comment. Essentially, the adoption of the line of reasoning advanced by the majority would place the onus on the accused to establish his or her own innocence. Specifically, if an accused were required to rebut the s. 258(1)(c) presumption in the manner put forward by the majority, the accused would necessarily have to *prove* that his or her blood-alcohol content was less than .08. If this position is accepted, and the materiality of the evidence of the accused depends upon reference to the legal limit, a grey area exists between the breathalyzer result and the legal limit, and the burden of clarifying this will be placed on the accused when, in fact, the burden should rest with the Crown to prove its case.
>
> If the accused chooses not to call evidence, as is his or her right, and the Crown does not present additional evidence, the burden is in effect switched to the accused to establish that his or her blood-alcohol level was below .08 at the time of the offence, despite the fact that the Crown has not proved its case. If the Crown cannot establish beyond a reasonable doubt that the accused's blood-alcohol level exceeded .08 this should not be sufficient to ground a conviction. If the Crown in this appeal is correct, the accused must raise a doubt as to his guilt despite the fact that the Crown may have introduced no evidence. Put another way, an accused may be able to meet the test as elaborated by Arbour J.A., but he may still not be able to pass the test proposal by the Crown without basically bearing the burden of proving his innocence. This position arguable raises concerns under the **Canadian Charter of Rights and Freedoms** and, accordingly, it should not be accepted, especially when there is another interpretation that does not raise such concerns.

While the trial judge may have been referring to the evidentiary burden he went further and stated that the appellant had not raised a reasonable doubt on the whole of the evidence. With respect that was a fundamental error of law and therefore leave to appeal is granted, the appeal is allowed and a new trial ordered.

Jones, J.A.

Concurred in:

Hallett, J.A.

Matthews, J.A.

C.A.C. No.130620

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

RONALD ALBERT FOX	)	
Appellant	)	
- and -	)	REASONS FOR
	)	JUDGMENT BY:
HER MAJESTY THE QUEEN)		
	)	JONES,
	)	J.A.
Respondent	)	
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