

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

ROSCOE, J.A.:

The appellant seeks leave to appeal and, if granted, appeals from a decision of Justice Edward Scanlan of the Supreme Court who, on appeal, confirmed the conviction of the appellant by Judge David Cole of the Provincial Court. Judge Cole found the appellant guilty of the offence of operating a motor vehicle on July 15, 1995, while the concentration of alcohol in his blood exceeded 80 milligrams in 100 millilitres, contrary to s. 253(b) of the **Criminal Code**.

The police officer who arrested the appellant testified that he noticed erratic driving, stopped the appellant, smelled alcohol coming from the vehicle, noticed that the appellant had difficulty in retrieving his licence from his wallet, asked him to leave the vehicle, that he was unsteady on his feet as he exited the vehicle, that he had glassy eyes and slurred speech, that he cried while being transported to the police station, and that he had difficulty hitting the correct numbers on the telephone while calling his lawyer. The breathalyzer readings were both 210 milligrams.

The appellant testified that in the hour before driving he consumed two bottles of beer and two double drinks of rum and coke. He also took two Hismanal tablets for his allergies that afternoon. He said that the difficulty with the licence and the phone were caused by not wearing his glasses at the relevant times. He also testified that the officer tapped on the breathalyzer machine during the test. An expert toxicologist called by the appellant offered the opinion that based on the appellant's testimony respecting his weight and alcohol consumption, the breathalyzer readings should have been between 50 and 60 milligrams.

The trial judge did not accept the submissions of counsel that the defence had raised a reasonable doubt that the breathalyzer machine produced an accurate reading of the appellant's blood alcohol level. Nor did the trial judge believe the appellant's evidence respecting the amount of alcohol he had consumed.

On appeal to the Supreme Court, Justice Scanlan held that the trial judge had not

improperly shifted the burden of proof to the appellant and he accepted the conclusion of the trial judge that the appellant had not presented evidence to the contrary to rebut the presumption of accuracy contained in s. 258(1)(g).

It is submitted to this Court that the summary conviction appeal justice “erred in law in not correctly applying the rebuttable presumption of accuracy.”

The appellant appears to argue that since evidence was presented that was capable of rebutting the presumption of accuracy, it must have raised a reasonable doubt. The difficulty is that the evidence of the appellant regarding the amount of alcohol he consumed was not believed, and therefore the evidence of the expert is without any foundation and incapable of being accepted as evidence to the contrary.

While we grant leave to appeal, we find no errors in law made by the summary conviction appeal justice. Accordingly, the appeal against conviction is dismissed.

Roscoe, J.A.

Concurred in:

Clarke, C.J.N.S.

Freeman, J.A.