NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Spinney, 2010 NSCA 4

Date: 20100121
Docket: CAC 311297
Registry: Halifax

Between:

Cecil Lorne Spinney

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Roscoe, Saunders, Beveridge, JJ.A.
Appeal Heard:	December 2, 2009, in Halifax, Nova Scotia
Held:	Leave to appeal granted. Appeal allowed and acquittal reinstated, per reasons for judgment of Beveridge, J.A.; Roscoe and Saunders, JJ.A. concurring.
Counsel:	Donald C. Murray, Q.C., for the appellant William D. Delaney, for the respondent

Reasons for judgment:

OVERVIEW

[1] The appellant was acquitted at trial of a charge that he had the care or control of a motor vehicle while his ability to operate a motor vehicle was impaired by alcohol. The Crown appealed to the Summary Conviction Appeal Court, alleging a number of errors. That court concluded the trial judge had erred in law in his ruling that the appellant had not waived solicitor-client privilege, which was said to have unduly restricted the scope of the Crown's cross- examination of the appellant. A new trial was ordered. For reasons that follow, I conclude that there is no need to resolve the issue of the correctness of the ruling by the trial judge. Even if it was an error, it was one that did not have a material bearing on the acquittal. I would therefore allow the appeal and restore the acquittal.

FACTUAL BACKGROUND

[2] Since the impact of the impugned ruling is key to my proposed disposition of the appeal, some detail of the proceedings and evidence is necessary. The trial was held on June 26, 2007 before Prince J.P.C., a very experienced trial judge. Counsel at trial were also very experienced and knowledgeable. The Crown was Pierre L. Muise, now a member of the Provincial Court. Counsel for Mr. Spinney was Philip J. Starr, Q.C..

[3] The case for the Crown was straightforward. Police officers found Mr. Spinney in the driver's seat of a motor vehicle. The vehicle was stuck in a ditch, apparently unmoveable on its own. The defence admitted identity, jurisdiction and that Mr. Spinney's ability to operate a motor vehicle was impaired by alcohol. The only live issue was whether the Crown could establish that the defendant was in care or control of the motor vehicle at the relevant time.

[4] The Crown called two witnesses, Csts. Mary Beth Dunphy and Michelle Merrill. Their evidence was heard during the trial proper and in the context of a *voir dire* to determine the admissibility of an utterance alleged to have been made by Mr. Spinney. The evidence on the *voir dire* was admitted at trial without the necessity of repetition.

[5] Cst. Dunphy testified she found Mr. Spinney in a late 90's Volkswagen Jetta. He was in the driver's seat with the engine running, but lights off. She said both officers specifically checked the area looking for signs of anyone else having been there or left. She testified there was no such indication. She described Mr. Spinney as extremely intoxicated. He was not making sense to the questions posed to him, he was too drunk to sign for his effects at the police station, and while there, urinated on the floor of the station.

[6] Cst. Merrill testified that Mr. Spinney's vehicle was an older model Toyota Corolla. It had sunk into the ditch. At first she said it was difficult for them to open the door because of the grass and how low the vehicle had sunk. This changed on cross-examination to the effect that it took a slight degree of force to open the driver's door. There were no signs of anyone having entered or exited the vehicle. If there had been any footsteps in or around the car, they would have seen them. Cst. Merrill made no notes about these details.

[7] At the conclusion of the *voir dire*, Prince J.P.C. ruled the utterance alleged to have been made by Mr. Spinney to be inadmissible on the basis that he was not satisfied that the Crown had proven that the defendant had an operating mind due to his advanced state of intoxication.

[8] The defence initially called two witnesses, Michael Maillet and Ken Gillieo. Mr. Gillieo was a tow truck operator who was called by the RCMP to tow the Spinney vehicle. He happened to have been familiar with Mr. Spinney's vehicle from having towed it on earlier occasions. He testified that there was something wrong with the front wheels, in particular the left side control arm. It was his opinion the vehicle was not driveable due to the condition of the left front wheel. In addition, anyone trying to drive it out of the ditch, would have simply spun the back wheels – the car would not have moved.

[9] Mr. Maillet was a friend of the defendant's. Mr. Spinney had called him and arranged for him to be his designated driver. He was to drive Spinney home. Maillet testified that he met up with the defendant around 2:00 a.m. but Spinney insisted that he be driven in his own car due to the presence of tools in the trunk. Maillet agreed and did start to drive him home. He found the steering on the Spinney vehicle to be funny – there was a lot of play in the steering. He also described Spinney grabbing at the wheel, and they ended up in the ditch.

[10] Maillet said he got out of the vehicle, and saw that the wheel was cocked at an angle. It could not be driven. Spinney was in the passenger's seat slumped down and half passed out, mumbling. A passer-by stopped and Maillet left to get a friend with a four wheel drive to try to tow Spinney's car out of the ditch. When Maillet eventually returned, Spinney and his car were gone.

[11] Submissions were made immediately following the closing of the defence case. The defence argued that Mr. Maillet had been in care or control of the vehicle when it was driven into the ditch, and thereafter the vehicle was no longer operable. There was no danger of it being put in motion, and therefore the defendant could not be found to be in care or control of a motor vehicle within the meaning of s. 253(a) of the *Criminal Code*.

[12] The Crown argued that the presumption of care or control arising from the defendant occupying the driver's seat had not been rebutted, and in any event, the defendant was nonetheless in care or control as there was still a danger posed by the accused since the tires could still spin if he chose to try to extricate the vehicle from the ditch. The Crown also suggested that the evidence of the defendant grabbing at the wheel showed acts of driving or care or control. The parties agreed to look further into the authorities. A return date of August 7, 2007 was set.

[13] Apparently later on June 26, 2007, defence counsel sent a letter to the trial judge, copied to the Crown, advising of the possibility of an application by the defence to re-open its case for the purpose of calling additional evidence. On August 7 the defence confirmed its intention to bring such an application. The Crown requested details of the name of the witness and the proposed evidence to be elicited before taking a position. Thereafter the continuation of the trial was adjourned from time to time to permit the filing of briefs and for oral argument. No evidence was called on the application to re-open.

[14] On October 22, 2007 Prince J.P.C. gave an oral decision allowing the defence application to re-open its case to permit the defence to call the defendant to give evidence about the circumstances under which he had occupied the driver's seat. Mr. Spinney then testified. His evidence in direct was very brief. He said he could recall bits and pieces of the events of the early morning hours of May 13, 2006. He confirmed the evidence of Mr. Maillet. He testified that he was sitting in

the passenger's seat and it was getting cold. He was dressed for inside only. He explained he tried to crawl over to the driver's seat, but found it hard due to the presence of the stick shift. Instead he got out, walked around and got in the driver's seat and started the engine and put the heater on.

[15] During cross-examination the defendant was asked if he had, before the end of the evidence on June 26, ever told his counsel why he had sat in the driver's seat. The defence objected that the Crown could not get into privileged communications. The trial judge was reluctant to permit the questioning. The Crown argued it was important in terms of assessing Spinney's credibility to know why he had not given this information to his lawyer beforehand. The trial was adjourned to permit authorities to be gathered and for written submissions. This occurred.

[16] On January 14, 2008 the trial judge ruled that after reviewing of the application to re-open and submissions, there was no explicit or implied waiver of solicitor-client privilege. Cross-examination of Mr. Spinney then resumed. The defendant admitted that it was not necessary for him to get into the driver's seat to start the vehicle, although he usually had to pump the accelerator to start the car, unless the vehicle was really warm. In any event, he says he recalled that he had to 'use the facilities' and so took the opportunity to get into the driver's seat. With respect to when and how he remembered, his evidence was (pp. 192-94):

> **Q.** Is that something you only remember after the crown - the case has been closed and the crown made it's submissions?
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> **A.** I don't - I don't really know about that what you're referring to there.
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> **Q.** At what point did you remember it?
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> **A.** Phil and I had some discussions and said maybe you should talk about that, whatever. That's why he re-opened.
>
> **Q.** No, my question to you is at what point did you remember it?
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> **A.** Oh, I don't know, like this has been a long process here, it's - it's getting kind of ...

Q. Well can you try?

A. I just did.

Q. So you don't remember when you remembered it?

A. No. No.

Q. So if I suggest to you that you remembered it after you heard the crown argue to the court that you hadn't said anything about why you got into the car - into the seat, driver's seat, that that's when you remembered it you wouldn't be able to dispute that?

A. I don't know.

Q. Now when you say you and Phil had some discussions, which Phil are you referring to?

A. My lawyer, my solicitor.

Q. And in what capacity did you have those discussions with him about the reason that you entered the driver's seat?

THE COURT: I don't know if I understand the question. Capacity.

Q. Well was it in your relationship with him as a solicitor/client relationship that you had those discussions?

A. That's pretty well our only relationship. I don't know - I know when - when all the evidence was given on the main day there, when the two officer's[sic] testified and my two witnesses testified that there was some question as to where - whether I was going to testified[sic] or not and then the next few days Phil and I had conversations and ...

MR. STAR: As long as he doesn't go into the nature of these discussions, Your Honour.

[17] Further submissions followed. The trial judge reserved his decision. He released a written decision on February 12, 2008. After reviewing the evidence, Prince J.P.C. found Maillet to be an honest witness, and found as a fact that he was the driver of the Spinney vehicle when it left the highway. He also accepted the

evidence of the defendant that he was the passenger and moved to the driver's seat to start the car and activate the heater to keep warm. He ruled the presumption of care and control had been rebutted, and without the presumption there was insufficient evidence to prove the element of care or control beyond a reasonable doubt.

PROCEEDINGS BEFORE THE SUMMARY CONVICTION APPEAL COURT

[18] The Crown appeal to the Nova Scotia Supreme Court alleged a number of errors. Principally, it contended that the trial judge erred in allowing the defence application to re-open its case, in finding that the defendant had not waived solicitor client privilege, and in refusing to allow the Crown to cross-examine the defendant in relation to the timing of the disclosure to his lawyer of the information.

[19] The appeal was heard by LeBlanc J. He found no error by the trial judge in articulating and applying the appropriate legal test on the application to reopen the trial. Since the decision by a trial judge to re-open is a discretionary one, he correctly concluded that it could only be set aside if the trial judge did not exercise his discretion judicially. On this issue he wrote (2009 NSSC 127):

> [27] On this point, I agree with the trial judge's conclusion that the high probative value of the evidence and the availability of cross-examination, rebuttal evidence, and assessments of credibility outweigh the potential prejudicial effects of tailored evidence, and the fact that this application may have been based on the reversal of a tactical decision. As such, I am satisfied that the trial judge [did] not err on the first issue. He exercised his discretion judicially.

[20] The correctness of the trial judge's decision to re-open the trial is no longer in issue.

[21] With respect to the claim of error regarding waiver of privilege and consequent restriction on the Crown's cross-examination of the defendant on the timing of disclosure, LeBlanc J. afforded no deference to the decision of the trial judge. He held that the defendant's counsel had waived solicitor-client privilege for the purpose of the application to reopen the trial. His analysis and conclusion is expressed as follows:

> [37] I believe counsel waived Mr. Spinney's solicitor-client privilege for the purpose of reopening the trial. Mr. Spinney was not examined or cross-examined on the relevant discussion. The Crown intended to cross-examine Mr. Spinney on the circumstances surrounding the late emergence of this evidence, so that it could be considered when assessing Mr. Spinney's credibility and guilt. During the *voir dire*, the Crown attempted to elicit information respecting the discussions Mr. Spinney had with his counsel surrounding the evidence of his move from one seat to the other.
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> [38] Depending on the information that would have emerged from such questioning, it would have been open to the Crown to put these answers to Mr. Spinney in the trial proper. In *R. v. Darrach*, 2000 SCC 46, the Supreme Court of Canada held that *voir dire* and the trial are separate proceedings for the purposes of analysis of s. 5 of the *Canada Evidence Act* and s. 13 of the *Charter*. Further, depending on the results of the cross-examination of Mr. Spinney, the trial judge could consider this evidence in determining credibility and guilt. This is an approach which would have the effect of balancing any tactical advantage that Mr. Spinney may have been[sic] by hearing the summation of the other side before leading additional evidence.
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> CONCLUSION
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> [39] It is my view that Crown counsel ought to have been permitted to cross-examine Mr. Spinney on the question of the discussions with his counsel surrounding his move from the passenger seat to the driver's seat. I therefore order a new trial pursuant to s. 686(4)(b)(i) of the *Criminal Code.*

ANALYSIS

[22] The Crown appeal to the Nova Scotia Supreme Court was pursuant to the right granted by s. 813 of the *Criminal Code*. Section 822 of the *Code* provides that on such appeals sections 683 to 689 (except 683(3) and 686(5)) apply with such modifications as the circumstances require.

[23] The appellant comes to this court by virtue of s. 839(1) of the *Code*:

> **839.** (1) Subject to subsection (1.1), an appeal to the court of appeal, as defined in section 673 may, with leave of that court or a judge thereof, be taken on any ground that involves a question of law alone, against
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> (*a*) a decision of a court in respect of an appeal under section 822; or

> (*b*) a decision of an appeal court under section 834, except where that court is the court of appeal.

[24] The appellant argues that LeBlanc J. erred in law in concluding that there had been a waiver of solicitor-client privilege and therefore no error in restricting the Crown's cross-examination with respect to the appellant's discussions with his counsel, and that these issues raise questions of law alone. Although the Crown suggested that the issues raised by the appellant concerning waiver and cross-examination were ones of mixed fact and law, it did not object to this court's jurisdiction to hear the appeal.

[25] There may well be circumstances where the issue of waiver of privilege has a factual component. If it does, some deference may be owed to the trial judge. In others, the question may revolve around the issue of the identification of the appropriate legal principles and the correct application of those principles to the underlying facts, which would constitute questions of law (see *R. v. Shepherd*, 2009 SCC 35 at para. 20; *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 26-27). The standard of review will be correctness. In any event, the determination by LeBlanc J., in my opinion, raises a question of law alone.

[26] In the proceedings before LeBlanc J., the Crown does not appear to have had clearly identified the specific error said to have been committed by the trial judge – simply that he was wrong in his ultimate conclusion that there had been no implied waiver of privilege. It is somewhat puzzling that LeBlanc J. referred to there having been a *voir dire* during which the Crown attempted to elicit evidence from the defendant, and that had this been permitted, the Crown could have put these answers to the defendant on the trial proper. From my review of the record, there was in fact only one *voir dire* – one during the Crown's case to determine the admissibility of an alleged utterance by the defendant to the police.

[27] I need not consider further if the Summary Conviction Appeal Court was correct in its analysis and determination that the trial judge erred. This is due to the view I take of the impact that the impugned error of law had on the proceedings.

[28] For the purposes of my analysis, I will therefore assume that LeBlanc J. was correct in his conclusion that the trial judge had erred in law in his ruling that there

had been no waiver of solicitor-client privilege. In my opinion, having found such an error, it then fell to LeBlanc J. to consider the effect of the error. This he failed to do and consequently erred in law.

[29] As noted above, most of the *Code* provisions dealing with the powers of an appeal court in indictable matters are made applicable to appeals heard by the Summary Conviction Appeal Court. Included are the powers to make appropriate orders on appeals from a conviction or an acquittal. On an appeal from conviction, the powers of the court are set out in s. 686(1):

> **686.** (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
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> (*a*) may allow the appeal where it is of the opinion that
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> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
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> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
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> (iii) on any ground there was a miscarriage of justice;
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> (*b*) may dismiss the appeal where
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> (i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,
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> (ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (*a*),
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> (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (*a*)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred; or
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> (iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the

> appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;
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> (*c*) may refuse to allow the appeal where it is of the opinion that the trial court arrived at a wrong conclusion respecting the effect of a special verdict, may order the conclusion to be recorded that appears to the court to be required by the verdict, and may pass a sentence that is warranted in law in substitution for the sentence passed by the trial judge; or
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> (*d*) may set aside a conviction and find the appellant unfit to stand trial or not criminally responsible on account of mental disorder and may exercise any of the powers of the trial court conferred by or referred to in section 672.45 in any manner deemed appropriate to the court of appeal in the circumstances.

[30] In a general way, s. 686(1)(b)(iii) permits an appeal court to uphold a conviction despite the existence of one or more errors of law. To conclude that there has been a harmless error, the Crown must establish that the errors did not result in a substantial wrong or miscarriage of justice. This requires that the appeal court be satisfied that there is no reasonable possibility that the verdict would have been different had the error in law not been made (see *R. v. Merz* (1999), 46 O.R. (3d) 161 (C.A.). Furthermore, the application of the proviso raises a question of law alone (*R. v. Mahoney*, [1982] 1 S.C.R. 834).

[31] The general power of an appeal court on an appeal from an acquittal is set out in s. 686(4):

> **686.** (4) If an appeal is from an acquittal or verdict that the appellant or respondent was unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal may
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> (*a*) dismiss the appeal; or
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> (*b*) allow the appeal, set aside the verdict and
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> (i) order a new trial, or
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> (ii) except where the verdict is that of a court composed of a judge and jury, enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law, and pass a sentence that is warranted in

> law, or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.

[32] Despite the absence of a 'no substantial wrong or miscarriage of justice' proviso, it is beyond dispute that ever since the inception of a Crown right of appeal, an appeal court is required to apply an analogous test on Crown appeals from acquittals. McLachlin J., as she then was, in *R. v. Livermore*, [1995] 4 S.C.R. 123 referred to the onus on the Crown as a heavy one. Major J., dissenting in result, set out a detailed historical review of the power of an appeal court to overturn an acquittal based on an error of law. He agreed that the onus on the Crown is a heavy one. He wrote:

> [41] The 1954 revision of the *Criminal Code* set out the current provisions regarding appeals from acquittal by the Attorney General. The explicit reference that the Crown would have the same rights as the accused on an appeal, *mutatis mutandis*, was removed. In subsequent cases appellate courts generally maintained that it was the Crown's onus to establish that, not only had error or misdirection occurred, but the verdict was affected: *R. v. Savoie* (1956), 117 C.C.C. 327 (N.B.C.A.); *R. v. Forgeron* (1958), 121 C.C.C. 310 (N.S.S.C.); *R. v. Paquette* (1974), 19 C.C.C. (2d) 154 (Ont. C.A.).
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> [42] The Supreme Court of Canada confirmed this view in *Vézeau v. The Queen*, [1977] 2 S.C.R. 277. Martland J. held that the sections of the *Code* dealing with appeals by the Crown did not contain any provision equivalent to s. 613(1)*(b)*(iii) (now s. 686(1)*(b)*(iii)). Martland J. observed that the provisions of the *Criminal Code* had changed since *White* and *Cullen*, but concluded that the onus on the Crown remained the same (at p. 292):
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> > In the present case, therefore, it was the duty of the Crown, in order to obtain a new trial, to satisfy the Court that the verdict would not necessarily have been the same if the trial judge had properly directed the jury.
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> [43] In more recent years, this Court has emphasized that the onus on the Crown is a heavy one. In *R. v. Morin*, [1988] 2 S.C.R. 345, Sopinka J. stated (at p. 374):
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> > The onus resting on the Crown when it appeals an acquittal was settled in *Vézeau v. The Queen*, [1977] 2 S.C.R. 277. It is the duty of the Crown to satisfy the court that the verdict would not necessarily have been the same if the jury had been properly instructed.

> I am prepared to accept that the onus is a heavy one and that the Crown must satisfy the court with a reasonable degree of certainty. An accused who has been acquitted once should not be sent back to be tried again unless it appears that the error at the first trial was such that there is a reasonable degree of certainty that the outcome may well have been affected by it. Any more stringent test would require an appellate court to predict with certainty what happened in the jury room. That it cannot do. [Emphasis added.]

[33] Similar expressions of this requirement were echoed by Fish J., writing for the majority in *R. v. Graveline*, 2006 SCC 16:

> [14] It has been long established, however, that an appeal by the Attorney General cannot succeed on an abstract or purely hypothetical possibility that the accused would have been convicted but for the error of law. Something more must be shown. It is the duty of the Crown in order to obtain a new trial to satisfy the appellate court that the error (or errors) of the trial judge might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal. The Attorney General is not required, however, to persuade us that the verdict would necessarily have been different.
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> [15] This burden on the Crown, unchanged for more than half a century (see *Cullen v. The King*, [1949] S.C.R. 658), was explained this way by Sopinka J., for the majority, in *R. v. Morin*, [1988] 2 S.C.R. 345:
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> > I am prepared to accept that the onus is a heavy one and that the Crown must satisfy the court with a reasonable degree of certainty. An accused who has been acquitted once should not be sent back to be tried again unless it appears that the error at the first trial was such that there is a reasonable degree of certainty that the outcome may well have been affected by it. Any more stringent test would require an appellate court to predict with certainty what happened in the jury room. That it cannot do. [p. 374]
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> [16] Speaking more recently for a unanimous court in *R. v. Sutton*, [2000] 2 S.C.R. 595, 2000 SCC 50, the Chief Justice stated:
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> > The parties agree that acquittals are not lightly overturned. The test as set out in *Vézeau v. The Queen*, [1977] 2 S.C.R. 277, requires the Crown to satisfy the court that the verdict would not necessarily have been the same had the errors not occurred. In R. v. Morin, 1988 CanLII 8

> (S.C.C.), [1988] 2 S.C.R. 345, this Court emphasized that —the onus is a heavy one and that the Crown must satisfy the court with a reasonable degree of certainty— (p. 374). [para. 2]

[34] This approach is equally warranted where the error involves a ruling that is said to have restricted the ability of the Crown to examine a witness. In *R. v. Evans*, [1993] 2 S.C.R. 629, the appellant was acquitted of murder at trial. The British Columbia Court of Appeal ordered a new trial on the basis of an impugned direction on how to assess circumstantial evidence and on the refusal to permit the Crown to conduct a re-examination of a key Crown witness. Cory J. wrote the majority reasons for judgment. He found no error in the charge on circumstantial evidence.

[35] Cory J. agreed that the trial judge had erred in refusing to permit the Crown to ask questions concerning a witness's prior consistent statement to the police. After referring to the heavy onus on the Crown to demonstrate with a reasonable degree of certainty that the verdict would not necessarily have been the same, he observed that the very evidence that the Crown sought to introduce on re-examination was brought out in the testimony of the police officer who took her statement. This led Cory J. to conclude (p. 648):

> The error on the question of re-examination did not, in any real way, deprive the jury of decisive evidence. It is thus apparent that the Crown has not met the heavy onus which lies upon it to establish that the verdict would not necessarily have been the same.

[36] In the case here, it is obvious that the credibility of the defendant was a crucial issue. To attack his credibility, the Crown sought to establish that the defendant was too intoxicated to be able to clearly remember what he did and why he did it. It was the Crown theory that this recall was either a fabrication or a created false memory that occurred after he had heard the Crown submissions on June 26, 2007.

[37] In my view, the Crown ably elicited the essential facts that it wanted to establish to support its theory about the problems with the evidence of the defendant. First of all, it was abundantly clear that the defendant was heavily intoxicated. The trial judge refused to admit an alleged utterance on the basis that

he was not satisfied that he had an operating mind due to his advanced state of intoxication.

[38] The degree of the defendant's intoxicated condition was reinforced by the evidence from Ken Maillet, including the bizarre and dangerous behaviour of grabbing at the steering wheel during the drive. Mr. Maillet gave up any notion of trying to get him out of the car as he described the defendant as combative. He left him half passed out, mumbling.

[39] During cross-examination of the defendant, the Crown established the following:

- he could only remember bits and pieces of what went on due to his high level of intoxication;
- he only remembered when he and his lawyer had some discussions;
- he could not really "remember when he remembered";
- the discussions he had with his lawyer about getting in the driver's seat occurred after he had heard all of the evidence and Crown argument;
- and finally "The long and short of it is that you don't know when you remembered, I guess ? A. No, I don't."

[40] It is obvious from the cross-examination of the defendant that he could not really say when or why he remembered getting of the vehicle and getting into the driver's seat, but his discussions with his lawyer about it did occur after he had heard the Crown evidence and initial argument. All of these points were made in the Crown's final argument to the trial judge. It was then up to the trial judge to assess the credibility and reliability of the defendant's evidence when assessed against all of the evidence led at trial. The Crown has never argued that the trial judge committed any error in his analysis or conclusion with respect to these aspects of his decision.

[41] In my opinion, assuming that the Summary Conviction Appeal Court was correct in its conclusion that the trial judge erred in his ruling that there had been no implied waiver of privilege, it was an error in law to then order a new trial. The Crown has not met its heavy burden that there is a reasonable degree of certainty, in the concrete reality of this case, that the outcome may well have been affected by the ruling.

[42] In fairness to the Summary Conviction Appeal Court judge, the parties seem to have suggested to LeBlanc J. that if he found the trial judge erred in allowing the re-opening, or in limiting the Crown's cross-examination, the appropriate remedy was a new trial. A new trial may well be the appropriate remedy for either or both of these impugned errors, but only after the appeal court is satisfied that the verdict would not necessarily have been the same. Ordinarily, an improper limit on cross-examination would constitute a serious error, but here the Crown did cross-examine the defendant about when he first had discussions with his counsel about his reasons for assuming the driver's seat and the lack of any logical or plausible explanation for his recall. These points were made to the very experienced trial judge, who nonetheless accepted the defendant's evidence. This he was fully entitled to do.

[43] I would therefore grant leave to appeal, allow the appeal and reinstate the acquittal.

Beveridge, J.A.

Concurred in:

Roscoe, J.A.

Saunders, J.A.