C.A.C. No. 113892

NOVA SCOTIA COURT OF APPEAL

Roscoe, Pugsley and Bateman, JJ.A.

Cite as: R. v. Carlson, 1995 NSCA 157

BETWEEN:		
RONALD JOSEPH CARLSON		Darlene MacRury for the Appellant
	Appellant	
- and -		
HER MAJESTY THE QUEEN		Kenneth W.F. Fiske, Q.C. for the Respondent
	Respondent	
		Appeal Heard: May 26, 1995
		Judgment Delivered: June 5, 1995

THE COURT: Leave to appeal is granted but the appeal is dismissed as per reasons for judgment of Roscoe, J.A.; Pugsley and Bateman, JJ.A., concurring.

ROSCOE, J.A.:

This is an application for leave and, if granted, an appeal pursuant to s. 839 of the **Criminal Code** from a decision of Justice Edwards of the Supreme Court affirming a conviction entered by Judge Matheson of the Provincial Court for refusal of

a breathalyzer demand, pursuant to s. 254(5) of the **Criminal Code**.

The arresting officer testified that at 2:55 a.m. on March 8, 1993 he observed the appellant drive a van over snow covered streets with excessive speed, fishtail on a turn, stop, reverse, turn in the other direction, continue to swerve back and forth, then drive into a snowbank. A summary of the events that followed as contained in the officer's evidence is set out in the respondent's factum as follows:

> "McDonough observed the driver of the van get out of the driver's side door and fall. The door was left open. The driver was the sole occupant. McDonough jumped out of his cruiser and met the driver at the snowbank. He detected a strong odour of alcohol on the individual and the person appeared confused. His speech was slurred. Having formed the opinion the driver's ability to operate a motor vehicle was impaired by alcohol, McDonough placed him under arrest for impaired driving at 3:05 a.m. The driver, the appellant, struggled with the officer and McDonough subdued and handcuffed him. The officer took the appellant to the cruiser and placed him in the rear seat.
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> McDonough informed the appellant of the reason for his arrest and from a card read to him a demand for a breath sample at 3:09 a.m. McDonough asked the appellant if he understood the demand and received no reply. McDonough repeated the breath sample demand twice but still received no response. McDonough then read (also from a card) the appellant his right to counsel at about 3:11 a.m. He asked the appellant if he understood his right to counsel and received no response. McDonough repeated the advice to counsel twice but the appellant remained unresponsive. To McDonough the appellant appeared intoxicated.
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> McDonough proceeded to drive the appellant to police headquarters. There was no conversation. The journey took about five minutes. They arrived at headquarters shortly after 3:15 a.m. McDonough accompanied the appellant into the building and was walking toward the breathalyzer room when he again told the appellant the reason for his arrest and advised him of his right to counsel. At the doorway to the breathalyzer room the appellant finally responded. He told the officer that he was not submitting to the breathalyzer test, he was not going in the breathalyzer room, and he did not want to call a lawyer (**A.B.** 53). This occurred at 3:25 a.m."

In addition to the evidence of Constable McDonough, the Crown presented

the evidence of Constable Kendall, the breathalyzer technician who testified that the appellant told him he would not enter the breathalyzer room.

No evidence was called by the defence at the trial, other than that of the appellant's wife who testified on a **voir dire** dealing with whether an order preventing discussion of the case by the police witnesses during a break had been respected.

Judge Matheson found on the evidence that Constable McDonough "had reasonable and probable grounds to believe that the accused's ability to operate a motor vehicle was impaired by alcohol." He concluded that three demands for a breath sample were made. He was satisfied beyond a reasonable doubt that the appellant failed to give a sample of his breath and no reasonable excuse was provided for refusing.

On the appeal to Justice Edwards the issues raised were essentially the same as the grounds of appeal to this Court. The appellant submitted that there was insufficient evidence to convict, that there should not have been a finding that the officer had reasonable and probable grounds to make the demand, that the date of the offence as alleged in the information was not proven and that the appellant was not accorded a fair trial as a result of a violation of the exclusion of witness order made at the trial.

The latter two grounds were dismissed summarily by the Summary Conviction Appeal Court judge during the argument. With respect to the exclusion of witness order, he determined that the trial "judge had a discretion to deal with the apparent breach and he did deal with it and he noted that there was no evidence that they were discussing the matter at hand." On the matter of the date of the offence, he noted that the information says "on or about" a particular date. He found after reviewing the transcript that the offence happened "between 2 and 3 a.m. on the night of March 8, morning of March 9 apparently". He found that the appellant was not "misled as to the transaction involved and knew perfectly well what evidence he had to deal with in

his defence."

The conclusion of his decision respecting the other two grounds is as follows:

> "In this case, a review of the record shows that there are objective facts from which Constable McDonough could have formed the reasonable and probable grounds necessary to permit him to give Mr. Carlson the breathalyser demand. In addition to the slurred speech and smell of alcohol, there is evidence of confusion on Mr. Carlson's part and there is also considerable evidence relating to Mr. Carlson's driving on that evening.
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> I am satisfied that there are objective facts from which Constable McDonough formed his grounds. Similarly, I am satisfied on a review of the record that a proper demand was made by Constable McDonough. Any discrepancies between the evidence of Constable McDonough and Constable Kendall are questions of fact and it is clear that Judge Matheson accepted the evidence of Constable McDonough. There is no question in my mind that Mr. Carlson understood that he was being asked to take the breathalyser and that he refused to do so in a clear, unequivocal fashion.
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> I am therefore dismissing the appeal. . ."

The appellant raises the same issues before this Court and submits that the Summary Conviction Appeal Court judge erred in law by not allowing the appeal.

The appeal to this Court is restricted to a question of law pursuant to s. 839(1) of the **Criminal Code**. The error of law necessary to ground jurisdiction must be that of the Summary Conviction Appeal Court judge, not the trial judge. See **R. v. Emery** (1981), 61 C.C.C. (2d) 84 (B.C.C.A.).

On the first issue the appellant submits that the police officer did not have reasonable and probable grounds to make the demand, and relies on **R. v. MacLennan** (1994), 133 N.S.R. (2d) 196. That decision was overturned on appeal to this Court on February 20, 1995, C.A.C. No. 108237, but even if it had not been, it is distinguishable on its facts. In **MacLennan**, the vehicle was stopped because the officer observed the

passenger putting on his seat belt as the vehicle passed her. Here, the officer observed very erratic high speed driving on slippery streets. In any event, the sufficiency of the evidence raised by the first ground of appeal is a question of fact, and therefore this Court should not interfere with the decision of the Summary Conviction Appeal Court judge on this issue. See **R.v. Waite** (1965), 1 C.C.C. 301 (N.B.C.A.) and **Kent v. R.** (1994), 92 C.C.C.(3d) 344 at 352(S.C.C.).

The second ground of appeal involves the question of whether the verdict of the trial judge was reasonable in view of the appellant's contention that there was a conflict in the evidence. The conflict involves the evidence of Constable McDonough that he gave a further demand to the appellant at 3:25 a.m. in the presence of Constable Kendall. Constable Kendall testified that he did not hear a demand given by Constable McDonough but that he gave a demand at 3:25 a.m.. The appellant argues that since there was a conflict and the trial judge did not address or resolve the conflict, then there is no evidence to support the finding that a demand was given and refused. No authority is offered in support of this submission. It is not necessary for the trial judge to explain the reason specific evidence is accepted and it cannot be said to be an error of law for the Summary Conviction Appeal Court judge to have reviewed the evidence and have found as he did that there was evidence to support the finding of fact by the trial judge. In **R. v. Burns**, [1994] 1 S.C.R. 656, McLachlin, J. addressed this issue at p. 664:

> "The Court of Appeal's main concern was not that there was insufficient evidence to support the verdicts of guilty, nor that those verdicts were unreasonable, but that the trial judge's reasons failed to indicate that he had considered certain frailties in the complainant's evidence. Given the brevity of the trial judge's reasons, they could not be sure that he had properly considered all relevant matters.
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> Failure to indicate expressly that all relevant considerations have been taken into account in arriving at a verdict is not a basis for allowing an appeal under s. 686(1)(a). This accords with the general rule that a trial

> judge does not err merely because he or she does not give reasons for deciding one way or the other on problematic points: see **R. v. Smith**, [1990] 1 S.C.R. 991, affirming (1989), 95 A.R. 304, and **Macdonald v. The Queen**, [1977] 2 S.C.R. 665. The judge is not required to demonstrate that he or she knows the law and has considered all aspects of the evidence. Nor is the judge required to explain why he or she does not entertain a reasonable doubt as to the accused's guilt. Failure to do any of these things does not, in itself, permit a court of appeal to set aside the verdict.
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> This rule makes good sense. To require trial judges charged with heavy caseloads of criminal cases to deal in their reasons with every aspect of every case would slow the system of justice immeasurably. Trial judges are presumed to know the law with which they work day in and day out. If they state their conclusions in brief compass, and these conclusions are supported by the evidence, the verdict should not be overturned merely because they fail to discuss collateral aspects of the case. "

After reviewing the transcript and considering the arguments of counsel, it is my opinion that Justice Edwards did not err in dismissing this ground of appeal. The conclusion of Judge Matheson is supported by the evidence.

The third ground of appeal relates to the date of the offence. The information alleges the offence happened "on or about the 9th day of March, 1993". Both police officers refer to the 8th of March in their evidence. The appellant submits, based on this Court's decision in **R. v. C.P**. (1992), 109 N.S.R. (2d) 81, that the trial judge erred in law by failing to address whether the date of the offence was an essential element of the offence. While it is true that there was a variance between the evidence and the date alleged on the information, there is absolutely nothing before the court to suggest that the appellant was somehow prejudiced by the error.

In **C.P**., Hallett, J.A. relied on **R. v. G.B. (No. 2)**, [1990] 2 S.C.R. 30 where Wilson, J., for the court, held that in a case where the evidence of the time of the offence conflicts with the information, if the time of the offence is not crucial to the defence or an essential element of the offence, "a conviction may result even though the time of the offence is not proven, provided the rest of the case is proven beyond a

reasonable doubt." Time is generally not an essential element of an offence unless there is, for example, a limitation period or a situation where "time is of the essence" of the offence. An example of the latter type is a case where the age of the complainant of a sexual offence on a certain date is a required element. In **G.B**., Wilson J.reviewed other specific instances where the date of the offence was found to be an essential element, but also referred with approval to **R. v. Ryan** (1985), 23 C.C.C. (3d) 1 (Ont.C.A.) and **R. v. Fox** (1986), 24 C.C.C. 366 (B.C.C.A.) where it was held that the exact time of an impaired driving offence need not be specified in the information. In **Fox**, Craig, J.A. provided the rationale for that finding as follows:

> ". . . Because these charges [impaired driving and breathalyzer] arise, generally, out of a confrontation between a peace officer and a defendant, the defendant must know precisely when and where the charge, or charges, allegedly arose and the nature of the charges. I am nonplussed, therefore, by the submission that a defendant would not know from the wording of the counts in this case in what period he had allegedly committed the offence, or where he allegedly committed it, or the nature of it. . . . The wording of the charges in this case "reasonably informed" Fox of the transactions alleged against him."

In **R. v. G.B., supra**, Wilson, J. also refers to **R. v. Greene** (1962), 133 C.C.C. 294 (Ont. C.A.), the circumstances of which are similar to the case on appeal. Wilson, J. related the facts of **Greene** as follows:

> ". . . In **Greene**, the accused was appealing his conviction for assault. The indictment charged him with assault on December 16, 1961, but the evidence disclosed that the assault took place on December 17, 1961. The magistrate was of the view that it was unnecessary to amend the information to conform with the evidence and registered a conviction. On appeal the accused argued that the conviction should be quashed on the ground that there was no evidence that the assault took place on the 16th as alleged in the information. McKay J.A., for the court, reviewed the case law . . . He concluded at pp. 300-1:
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> > 'In the present case the appellant does not allege that he was misled or prejudiced in his defence by the wrong date in the information, and while I think it might well have

> been the better course to amend the information when the evidence disclosed the error in the date, the failure to amend does not invalidate the conviction.'"

In this case the appellant has not indicated that he was misled; he did not ask for particulars; he was charged with refusal which obviously involved a conversation with a police officer; and he did not suggest that he wished to establish an alibi. Therefore this was a case where the time element was, to use the words of Wilson, J., at most, "incidental to the offence". In my view, for the reasons given in **Greene**, there was no error of law by either the trial or the appeal judge.

As to the fourth ground of appeal, the appellant submits that (1) the length of time taken to try the case, (2) the violation of the trial judge's order for exclusion of witnesses, (3) a conflict in the testimony of the two police officers, and (4) the variance between the date in the information and the Crown's evidence, adversely affected the appellant's right to a fair hearing in accordance with the principles of fundamental justice. I agree with the respondent's characterization of this ground of appeal as one that centres on ss.7 and 11(b) and (d) of the **Charter** and a s. 24 remedy.

The third and fourth prong of this ground have been disposed of above. The first complaint is that the trial judge or counsel may have forgotten some of the evidence because of the adjournments. The record reveals that all of the Crown evidence was heard on September 29, 1993. Defence counsel then made a series of motions that necessitated an adjournment and the preparation of a transcript of the evidence of the Crown witnesses. On resumption of the case on October 27, 1993 counsel and the trial judge had a copy of the transcript. On that date, defence counsel made another motion respecting the violation of the exclusion of witnesses order. By agreement the matter was adjourned to February 23, 1994 for the purpose of calling evidence on a **voir dire** to establish whether the order had been breached. After hearing that evidence and the submissions of counsel, the trial judge ruled on the

motion. The defence then elected not to call evidence, counsel summed up and the judge provided an oral decision on the merits. It is obvious from the decision that the trial judge did not forget any of the evidence and if he had, he could have refreshed his memory with the transcript. His review of the evidence is lengthy and thorough. There is, in my view, absolutely no merit to the first part of the fourth ground of appeal and it should be dismissed.

The final aspect of the fourth ground relates to the possible violation of the exclusion order by the police witnesses during a break. The violation alleged by the defence was that during a break at trial Constable Kendall entered the courtroom and spoke to Constable McDonough. At that point McDonough had concluded his direct examination. After the break, he returned to the stand, whereupon defence counsel indicated he had no questions on cross examination. Constable Kendall was then called to the stand. He was not cross examined either. On the voir dire the two officers, and a third who was not a witness on the trial, testified that although Constable Kendall did enter the courtroom during the break, Constable McDonough was, at that point, not in the courtroom. The appellant's wife testified that she saw the two officers conversing in the courtroom during the break.

The trial judge found as a fact that the officers had not discussed the case during the break. The Summary Conviction Appeal Court judge found that the trial judge properly exercised his discretion in dealing with the matter. There is no error of law by either of the judges, nor is there any breach of any **Charter** right apparent on the record. The fourth ground of appeal is accordingly dismissed.

While I would grant leave to appeal, I would dismiss the appeal.

Roscoe, J.A.

Concurred in:

Pugsley, J.A.

Bateman, J.A.