(50)

1972 S. H. No. 01397

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION — CROWN SIDE

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

JOHN HENRY DICKSON

Respondent

[Oral Opinion]

McKINNON, C.J.N.S.:

This is an appeal by the Crown from a decision of His Honour P. T. J. O Hearn, a Judge of the County Court for District Number One. The respondent was charged that he

> at or near Dartmouth, in the County of Halifax, Nova Scotia, on or about the 27th day of September, 1972, did unlawfully have the control of a motor vehicle having consumed alcohol in such a quantity that the proportion thereof in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood, contrary to section 236 of the Criminal Code.

On October 31, 1972, the respondent was acquitted of the charge following a trial de novo held before the learned County Court Judge.

Leave to appeal is granted.

Briefly, the facts are:

At approximately 3.30 p.m. on September 27, 1972, the respondent was checked for speeding by Cst. John F. Skinner

of the Dartmouth Police Force. While interrogating the respondent, the constable formed the belief that he was impaired, and at approximately 3.35 p.m. gave him a demand to take a breathalyzer test.

At trial the learned Judge found as a fact that the constable had reasonable and probable grounds for his belief that the respondent was impaired.

The respondent consented to take a test and the constable drove him to the Dartmouth Police Station where at 4.13 p.m. and 4.25 p.m. two tests with the aid of a Borkenstein breathalyzer were performed on samples of the respondent's breath by Cst. Sheldon Tipert of the Dartmouth City Police Force, a qualified technician, under section 237 (6) of the Criminal Code.

It was determined that at the time of the first analysis the respondent had in his blood 100 milligrams of alcohol in 100 millilitres of blood and at the time of the second analysis, 110 milligrams of alcohol in 100 millilitres of blood. The learned Judge found that the oral evidence of the qualified technician was sufficient to meet the requirements of section 237 (1) (c) of the Criminal Code.

In his oral judgment the learned trial Judge took judicial notice of a tolerance for error of plus or minus 10 milligrams in the Borkenstein breathalyzer; then took judicial notice that there is an ingestion process or period of absorption after consuming alcohol and that it may reach a peak at a half- or three-quarters of an hour after consumption; and finally decided that since the second reading was higher than the first, the absorption

process was still going on and this in turn constituted evidence to the contrary within the meaning of the legislation, having regard to the relatively low reading.

Where the requirements of section 237 (1) (c) have been fulfilled, then it is provided that "evidence of the result of the chemical analysis so made is, in the absence of any evidence to the contrary proof of the proportion of alcohol in the blood of the accused at the time when the offence was alleged to have been committed". [Emphasis mine.]

It is the unanimous opinion of the Court that it was not open to the learned Judge of the County Court to take judicial notice of the tolerance for error in the Borkenstein breathalyzer because of evidence that may have been adduced in another case or cases: see Phipson, 1970, 11th ed., p. 60; The King v. Savidant, (1945), 19 M.P.R. 448.

In the Savidant case, which dealt with the matter of judicial notice, Campbell, C.J., stated as follows, pp. 452-453:

> "But the point is very impressively decided by the Alberta Appellate Division in Fletcher v. Kondratiuk, [1933] 3 D.L.R. 532. I quote several citations from the judgment of McGillivray, J.A., in which Harvey, C.J.A., Mitchell and Lunney, JJ.A., concurred (the point not being considered in the dissenting judgment of Clarke, J.A.).
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> Page 538:
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> 'In my opinion the learned Judge was quite wrong in coming to a conclusion in whole or in part upon the evidence of experts given in other cases in which other women, other children and

process was still going on and this in turn constituted evidence to the contrary within the meaning of the legislation, having regard to the relatively low reading.

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> 'In my opinion the learned Judge was quite wrong in coming to a conclusion in whole or in part upon the evidence of experts given in other cases in which other women, other children and

other cross-examiners were involved.'

Page 542 (quoting from Roscoe's Criminal Evidence, 15th ed., p. 21):

'If there were any circumstances from which an unusually long or short period of gestation might be inferred, or if it were necessary to ascertain the period with any nicety, it would be desirable to have special medical testimony on the subject.'

Page 543:

'The Court . . . is entitled to take judicial notice of the course of nature only insofar as it is a notorious fact that nature follows a certain course . . . A Judge is not at liberty to found his judgment whether upon his own scientific knowledge or the evidence of experts given before him in other cases.' 'The decision of a court of law would be founded quoad the duration of pregnancy on the opinions of experts selected for the occasion, and each case would be decided on its own merits.'

Page 544:

'This fact must be proved like any other fact, by such evidence as may serve to bring conviction to the mind of the judge trying the case, and that evidence must be given in the particular case that is before the Court.' "

It is also our opinion that judicial notice could not be taken of the ingestion process or period of absorption after consuming alcohol and the time limit in which such ingestion process may reach a peak. Further, and aside from the issue involved here, such a conclusion depends on a number of variables on which there was no evidence before the Court.

A Judge cannot take judicial notice of technical facts founded on his own knowledge and unknown to persons of intelligence generally: see Fletcher v. Kondratiuk, supra.

We are all in agreement that in the case at bar there was no "evidence to the contrary" within the meaning of section 237 (1) (c) of the Criminal Code: see R. v. Gaetz, (1972), 8 C.C.C. (2d) 3.

Accordingly, the appeal should be allowed with the conviction and penalty imposed by the Judge of the Magistrate's Court restored.

DATED at Halifax, Nova Scotia, this 31st day of January, A. D., 1973.

Members of Appeal Division

McKinnon, C.J.N.S.

Coffin, J.A.

Cooper, J.A.

Counsel

Graham W. Stewart, Esq.	Appellant
William H. Kydd, Esq.	Respondent