C.A.C. No. 110300

NOVA SCOTIA COURT OF APPEAL

Clarke, C.J.N.S., Freeman and Flinn, JJ.A.

Cite as: R. v. Chisholm, 1995 NSCA 152

BETWEEN:

DAVID R. CHISHOLM Appellant	Curtis C. Palmer, Esq. for the Appellant
- and -	
HER MAJESTY THE QUEEN Respondent	Denise Smith for the Respondent
	Appeal Heard: May 25, 1995
	Judgment Delivered: June 6, 1995

THE COURT: Leave to appeal is granted but the appeal is dismissed per reasons of Freeman, J.A., Clarke, C.J.N.S. and Flinn, J.A. concurring.

Freeman, J.A.:

This is an appeal, subject to leave, from the decision of Justice Carver of the Supreme Court of Nova Scotia, sitting as a summary conviction appeal court judge, upholding the appellant's conviction before Judge Crowell of the Provincial Court on a charge of operating a motor vehicle with an unlawful blood alcohol level contrary to s. 253(b) of the **Criminal Code** R.S.C. 1985, c. C-46.

The appellant was stopped by police who observed him driving at 90 kilometres per hour in a 70 kilometre speed zone in Kentville, N.S. at 1:50 a.m. on January 9, 1992. The vehicle was braked hard and came to a "jerky stop." Indicia of impairment included a strong smell of alcohol on his breath, slightly slurred speech, bloodshot eyes, and he was "red in the face". He failed a test on an A.L.E.R.T. screening device. He was given the breathalyzer demand and his readings were .100 and .110 millilitres of alcohol in 100 millilitres of blood, in excess of the legal limit of .080.

At his trial before Judge Crowell of the Provincial Court the following was included in a statement of fact agreed to by the Crown and the defence and admitted into evidence:

> (d) That all six A.L.E.R.T. J3A units employed by the New Minas R.C.M.P. on January 9th, 1992 were found to contain unauthorized modifications when examined by Elizabeth Dittman at the R.C.M.P. Forensic Crime Lab in Halifax on January 10th, 1994. It cannot be determined when these modifications were made so some, all or none of them may have been present on January 9th, 1992.

(e) That the unauthorized modifications found in the said six A.L.E.R.T. units may or may not have resulted in an inaccurate reading by the A.L.E.R.T. unit when used to test Mr. Chisholm on January 9, 1992.

Use of all A.L.E.R.T. J3A screening devices, which are the only screening devices bearing the A.L.E.R.T. trade mark approved by federal order in council, was suspended as of August 24, 1994.

In accepting the certificate of the breathalyzer results and in finding the appellant guilty under s. 253(b) Judge Crowell made two key findings, firstly:

> I am satisfied that without the fail as registered on the A.L.E.R.T. instrument, the officer still believed he had reasonable and probable grounds to make the Breathalyzer demand. The same I find was based upon credibly based probability.

And secondly:

> I am satisfied that his (the appellant's) recollection of the drinking scenario is incorrect given his total involvement during a very long day plus the consumption of drugs and alcohol, and thus his reciting of the facts is inaccurate. I accept the readings on the certificate as set forth before the court in exhibit 1...

In an addendum to his decision he stated results obtained from a modified A.L.E.R.T. J3A were "unreliable" and should not be used as the sole basis to form the belief necessary to make a breathalyzer demand. To use them in the absence of other indicia of impairment would be a breach of s. 8 of the **Charter** and would result in exclusion of the breathalyzer certificate. The addendum had no bearing on the result because of the finding there were other indicia of impairment.

An appeal to the Supreme Court of Nova Scotia as summary conviction appeal court lies under s. 830 of the **Code** on the ground that the decision appealed from is erroneous in point of law, in excess of jurisdiction or constitutes a refusal or failure to exercise jurisdiction. Section 834 gives the summary conviction appeal court power to affirm, reverse or modify the conviction. A further appeal to this court lies under s. 839(1)(b) which provides:

> An appeal to the court of appeal as defined in s. 673 may, with leave of that court or a judge thereof, be taken on any ground that involves a question of law alone, against
>
> (b) a decision of an appeal court under s. 834. . .

The first ground of appeal is that, in the absence of a notice of contention by the Crown with respect to the trial judge's finding as to the admissibility of the A.L.E.R.T. J3A, that matter was not properly before the summary conviction appeal court. The second ground is as follows:

> That the learned summary conviction appeal court judge erred in rendering a decision on the propriety of the learned trial judge's finding on the admissibility of the A.L.E.R.T. J3A test results without first allowing the appellant to present argument on this issue despite the appellant's request of the learned summary conviction appeal court judge to be permitted to do so, and despite the respondent's agreement that the appellant be allowed to do so.

While occasionally helpful in criminal matters, a notice of contention is a civil law device that does not affect the duty of the appeal court to review the trial judge's finding in light of all of the evidence. The issue was properly before Justice Carver. The respondent points to passages in the evidence in which Justice Carver invited

the appellant's counsel to file a brief on the question, and in which appellant's counsel, while urging that the admissibility of the breathalyzer results was not an issue, acknowledged that Justice Carver would deal with that issue. I am not persuaded that defence counsel did not have opportunity to make full answer and defence.

In the alternative to the second ground the appellant made its argument to this court that the police officer should not have been able to base a breathalyzer demand on results of the modified A.L.E.R.T. J3A test because they would be unreliable.

Section 254 (3) of the **Criminal Code** provides:

> Where a peace officer believes on reasonable and probable grounds that a person is committing, or at any time within the preceding two hours has committed, as a result of the consumption of alcohol, an offence under s. 253, the peace officer may, by demand made to that person forthwith or as soon as practicable, require that person to provide then or as soon thereafter as is practicable
>
> (a) such samples of the person's breath as in the opinion of a qualified technician,
>
> . . .
>
> are necessary to enable proper analysis to be made in order to determine the concentration, if any, of alcohol in the person's blood, and to accompany the peace officer for the purpose of enabling such samples to be taken.

Justice Carver said he agreed with Judge Crowell's ultimate conclusion that there were reasonable and probable grounds upon which to make a breathalyzer demand, and held:

> On January 9, 1992, the officer had the right to rely solely upon the A.L.E.R.T. he was using which at the time was an approved instrument to determine whether there were reasonable and probable grounds upon which to make a breathalyzer demand. The officer at the time believed the device was approved and that he was authorized to proceed to request a sample. This belief came from s. 254(2) and the **Approved Screening Devices Order**. Even if these facts upon which he relied were incorrect under the circumstances he could rely upon the law and the facts before him at the time to formulate reasonable and probable grounds to make the demand. **R. v. Taraschuk**, 25 C.C.C. (2d) 108.

I agree with Justice Carver's analysis.

It has been held repeatedly that failure to pass a screening device test alone is sufficient to provide an officer with reasonable and probable grounds for making a breathalyzer demand under s. 254(3). In the absence of evidence that the police officer had knowledge that the A.L.E.R.T. J3A had been modified and might no longer be an approved screening device, or that its results might not be reliable, he was entitled to consider those results in arriving at reasonable and probable grounds for a breathalyzer demand.

I would dismiss the first two grounds of appeal.

The third, acknowledged to be relevant only if the A.L.E.R.T. result was found to be inadmissible, was whether there were reasonable and probable grounds for a breathalyzer demand. Even excluding the A.L.E.R.T. result Judge Crowell

found there were sufficient indicia of impairment to provide grounds for a demand: "The officer still believed he had reasonable and probable grounds to make the breathalyzer demand." While it is questionable on the evidence that the officer would have held that belief subjectively in the absence of the A.L.E.R.T. failure, the indicia of impairment was evidence before Judge Crowell supporting an objective finding that the officer had reasonable and probable grounds for his belief quite apart from the A.L.E.R.T. results. It was evidence upon which a properly instructed jury, acting judicially, could reasonably have reached that conclusion. With the A.L.E.R.T. result in evidence, there can be no doubt the officer had sufficient grounds. I would dismiss the third ground of appeal.

The fourth ground of appeal was that both the trial judge and the summary conviction appeal court judge erred in ruling that there was insufficient evidence to the contrary to rebut the presumption under s. 258(1)(c) of the **Criminal Code**. That section provides that when samples are taken within prescribed guidelines:

> ...evidence of the results of the analyses so made is, in the absence of **evidence to the contrary**, proof that the concentration of alcohol in the blood of the accused at the time when the offence was alleged to have been committed was, where the results of the analyses are the same, the concentration determined by the analyses and, where the results of the analyses are different, the lowest of the concentrations determined by the analyses; (emphasis added)

The appellant sought to establish "evidence to the contrary" through expert evidence to the effect that the appellant could not have had blood alcohol readings as high as 100 and 110 from the four beers he admitted consuming during the

course of the evening. He submitted that he had only to establish evidence to the contrary sufficient to raise a reasonable doubt, and the trial judge's reasons did not show that he correctly applied that standard. It is clear from Judge Crowell's second finding however that he simply did not believe the appellant drank as little as he said he did. In my view, contrary to the appellant's submission, the finding as to credibility is unequivocal and removes the evidentiary basis for the appellant's efforts to establish evidence to the contrary through expert testimony.

The appellant filed a supplementary factum based on the recent Supreme Court of Canada decision of **S. Pierre v. R.** (March 2, 1995--unreported), which considered evidence to the contrary resulting from two small bottles of vodka consumed after the alleged driving offence and before the breathalyzer test. Iacobucci J., writing for the majority of the Court, held that "evidence to the contrary" in s. 258(1)(c) means evidence which shows that the accused's blood alcohol level at the time of driving was different from his or her blood level at the time of testing. It need not show that the accused's blood alcohol level at the time of the driving was below .08. The appellant relied on that case to argue:

> Because the breathalyzer expert indicated that some of the last of the 4+ beer consumed by the appellant might not all have been absorbed by the time he was stopped by the police, and because this would mean that his blood alcohol level would be lower than that shown on the breathalyzer, the presumption in s. 258(1)(c) can not be relied on by the Crown and since there was no other evidence establishing the Appellant's blood alcohol level at the time of the offence, the appellant should be acquitted.

Evidence of natural absorption was dealt with by Iacobucci J. in **St. Pierre** as follows:

> The effect of normal biological processes of absorption and elimination of alcohol cannot of and by itself constitute "evidence to the contrary", because Parliament can be assumed to have known that blood alcohol levels constantly change, yet it saw fit to implement the presumption.
>
> . . .
>
> Therefore, as Arbour J.A. states, to permit this to become "evidence to the contrary" would, in effect, be nothing more than an attack on the presumption itself by showing that it is a legal fiction and therefore should never be applied. In my view, such an attack on the presumption should not be allowed.

I would grant leave to appeal but dismiss the appeal.

Freeman, J.A.

Concurred in:

Clarke, C.J.N.S.

Flinn, J.A.

C.A.C. No. 110300

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

DAVID R. CHISHOLM Appellant	
- and -	REASONS FOR JUDGMENT BY:
HER MAJESTY THE QUEEN Respondent	FREEMAN, J.A.