C.A.C. No. 112639

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Smith, 1995 NSCA 87
Clarke, C.J.N.S., Matthews and Pugsley, JJ.A.

BETWEEN:

DAREN MAURICE BROOKSFIELD SMITH	)	the appellant appeared in person
Appellant	)	
- and -	)	
	)	Kenneth W.F. Fiske,Q.C. for the Respondent
HER MAJESTY THE QUEEN	)	
Respondent	)	Appeal Heard: April 13, 1995
	)	Judgment Delivered: April 18, 1995

THE COURT: Appeal dismissed per reasons for judgment of Matthews, J.A.; Clarke, C.J.N.S. and Pugsley, J.A. concurring.

E R R A T U M

Counsel for the respondent should be **Robert C. Hagell**
P. 3 - **R. v. Manorinen** should be **R. v. Manninen**

MATTHEWS, J.A.:

The appellant was charged with refusal of a breathalyzer demand, s. 254(5) of the **Code** and operating his vehicle while impaired, s. 253(a). On July 26, 1994, a provincial court judge, after trial, found him guilty of the first count and stayed the second. The appellant appealed to the Supreme Court, where the conviction was upheld. He now appeals to this Court.

He wishes us to consider:

> l. The amount of time allowed an accused to contact counsel.
>
> 2. Privacy - for which to execute the right to contact & instruct counsel.

In doing so, he urges that his **Charter** rights under s. 10(b) have been violated and seeks to have s. 24(2) applied in his favour.

The factual back drop of this case demonstrates, as the trial judge remarked, that the R.C.M.Police constable in stopping the appellant's motor vehicle at 01:12 on December 3, 1993, had reasonable and probable grounds for the breathalyzer demand to be given. After giving that demand, the appellant's **Charter** rights were read to him. The appellant said he understood those rights and, the constable testified, "indicated he would call a lawyer". They went to the R.C.M.P. detachment where the appellant was shown a telephone, a telephone book and a list of legal aid lawyers. He was again asked if he wished to exercise his rights to counsel. The constable testified that he then said "... he didn't wish to exercise his right to counsel and just wanted to get everything over with and at that time he consented to taking the breathalyzer test". Prior to giving the first sample the constable informed the appellant "... if he changed his mind at any time during the testing he could contact counsel". The first breath sample reading was 210 milligrams per 100 millilitres of blood. The appellant then indicated that he wished to contact counsel.

Several attempts were then made by the appellant, with the help of the police, to contact both legal aid counsel and independent practitioners. The first call was made at 01:57 hours. The constable testified that it was with the consent of the appellant that these

calls were made. She dialled the numbers but succeeded in reaching only one. The appellant spoke briefly to this lawyer "...at which time I stepped out of the room but the conversation was very short and my understanding was that he was not receptive to speaking to the accused at that point in time." They continued to try to contact counsel. The appellant refused to permit the constable to contact a certain named counsel. The constable informed the appellant that they would continue trying to contact a lawyer whom they previously attempted to reach but without success "...as long as we could". The constable continued:

> ...Ah, the accused indicated to me though, he said 'he's not home'. Basically, 'you can't get ahold of any lawyer, ah, therefore give me the ticket and we'll fight it out in Court'. As I said I explained numerous, numerous times that we would wait and try to get his counsel if he arrived at home and he said 'I'm not going to wait here all night'.

The appellant then indicated to the constable that he was not going to take the second test. He was subsequently charged.

The appellant testified. He disagreed with some of the constable's testimony. In particular he asserted that he asked the constable to leave the room where the telephone was located, but she did not.

In his decision, the trial judge commented to the appellant:

> You were advised of your right, clearly, and I am satisfied that the officer, both officers in fact, gave you opportunity to make the calls, if you wanted to do so.

He then made this important finding in respect to credibility:

> Although you say in your own evidence that you told them to get out the room and that you wanted to make the calls, I do not accept that as actually happening on the evening.

It is apparent from the decision that the trial judge did not believe the appellant, but did accept the testimony of the constable.

The relevant section of the **Charter** is s. 10(b):

> Everyone has the right on arrest or detention
>
> ...
>
> (b) to retain and instruct counsel without delay and to be informed of that right;

The law is clear, the police must give the accused or detained person who so wishes a reasonable opportunity to exercise the right to retain and instruct counsel without delay. See among others **R. v. Manorinen**, [1987] 1 S.C.R. 1233; **R. v. Smith**, [1989] 2 S.C.R. 368 and **R. v. Brydges**, [1990] 1 S.C.R. 190.

This aspect of the law led the trial judge to remark, in dicta, that if the appellant did ask the constable to leave the room then the **Charter** "...should not be invoked to exclude the evidence because the police did in fact go to extraordinary lengths to help you find a lawyer that evening". He held that they made "...every effort to fulfil the law".

The Supreme Court justice remarked that the constable "...went far beyond the call of duty in attempting to assist Mr. Smith to make contact with a lawyer". He noted that the appellant "became frustrated after these various calls and simply refused to make any further efforts to call a lawyer". The justice held that there was indeed a right to consult with counsel in private but that does not entail a telephone call to contact counsel prior to the consultation.

Those issues which the appellant wishes us to consider were both argued before the trial judge and on appeal to the Supreme Court. The Supreme Court of Canada set out the test for the reasonableness of a verdict in **Yebes v. R.** [1987] 2 S.C.R. 168. An appellate court must determine whether a properly instructed trier of fact, acting judicially could reasonably have convicted. In doing so the appellate court must examine and to some extent weigh and consider the effect of the evidence. This jurisdiction extends to findings of credibility.

McLachlan, J. in **R. v. W.(R)**, [1992] 2 S.C.R. 122 after setting out the test at

131-2 commented:

> That said, in applying the test the court of appeal should show great deference to findings of credibility made at trial. This Court has repeatedly affirmed the importance of taking into account the special position of the trier of fact on matters of credibility: **White v. The King**, [1947] S.C.R. 268, at p. 272, **R. v. M (S.H.)**, [1989] 2 S.C.R. 446, at pp. 465-66. The trial judge has the advantage, denied to the appellate court, of seeing and hearing the evidence of witnesses. However, as a mater of law it remains open to an appellate court to overturn a verdict based on findings of credibility where, after considering all the evidence and having due regard to the advantages afforded to the trial judge, it concludes that the verdict is unreasonable.

In order for the appellant to succeed this Court would have to set aside findings of fact and credibility determined by the trial judge and relied upon by the Supreme Court judge. This, an appellate court will not do absent palpable and overriding error which affected the trial judge's assessment of the facts. A difference of opinion is not sufficient. **Stein v. The Ship "Kathy K"**, [1976] 2 S.C.R. 802. The rule is all the stronger in the face of findings of credibility and concurrent findings of both courts below. **Lapointe v. Hôpital Le Gardener**, [1992] 1 S.C.R. 351; **Bank of Montreal v. Bail Ltée**, [1992] 2 S.C.R. 554 and **Pax Management Ltd. v. CIBC**, [1992] 2 S.C.R. 998.

The appellant has failed to demonstrate such error. There were ample reasons for the trial judge reaching his conclusions which were supported by the Supreme Court judge.

We dismiss the appeal.

J.A.

Concurred in:

Clarke, C.J.N.S.

Pugsley, J.A.

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DAREN MAURICE BROOKSFIELD SMITH appellant - and - HER MAJESTY THE QUEEN respondent	) REASONS FOR JUDGMENT BY:) MATTHEWS, J.A.