NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Delorey, 2004 NSCA 95

Date: 20040803
Docket: CAC 209338
Registry: Halifax

Between:

Jeffrey Leo Delorey

Appellant

v.

Her Majesty the Queen — Respondent

Judge(s):	Roscoe, Cromwell and Fichaud, JJ.A.
Appeal Heard:	June 16, 2004, in Halifax, Nova Scotia
Held:	Leave to appeal is granted and the appeal is dismissed per reasons for judgment of Fichaud, J.A.; Roscoe and Cromwell, JJ.A. concurring.
Counsel:	Lawrence O'Neil, for the appellant Kenneth W. F. Fiske, Q.C., for the respondent

Reasons for judgment:

[1] Jeffrey Delorey was charged with having care and control of a motor vehicle while having blood alcohol exceeding 80 milligrams per 100 millilitres contrary to s. 253 (b) of the *Criminal Code*. After a trial in Provincial Court, Judge John Embree acquitted Mr. Delorey. Justice Douglas MacLellan of the Nova Scotia Supreme Court, sitting as the Summary Conviction Appeal Court ("SCAC"), allowed the Crown's appeal and substituted a conviction. Mr. Delorey applies for leave and, if granted, appeals to this Court under s. 839 (1) of the *Code* based on error of law.

[2] Mr. Delorey says that the conviction was erroneous because (1) the Crown did not establish the reliability of the instrument which analyzed his blood alcohol, (2) the hospital evidence of blood alcohol should be excluded under s. 24(2) of the *Charter* and (3) the Crown did not prove one of the assumptions for its expert's opinion of blood alcohol.

Background

[3] At approximately 6 a.m. on March 21, 1999 Mr. Delorey, while alone in his vehicle, drove off the highway. Being injured, he was taken to the hospital where, at 7:30 a.m., staff drew blood for medical purposes.

[4] RCMP Constable Shannon Fear went to the hospital at 7:23 a.m. and decided that, due to Mr. Delorey's medical condition, Mr. Delorey could not respond to a demand for blood. Constable Fear obtained a warrant to compel Mr. Delorey to provide blood for analysis, returned to the hospital, and at 9:30 a.m. on March 21, retrieved blood from Mr. Delorey under the warrant.

[5] On September 16, 1999 Constable Fear obtained another search warrant which required the hospital to surrender evidence relevant to Mr. Delorey's attendance on March 21, 1999. This warrant did not, on its face, state the offence to which the evidence was relevant. The hospital provided evidence of the blood work from Mr. Delorey's sample taken at 7:30 a.m. on March 21.

[6] At the trial the Crown did not rely on the results of the 9:30 a.m. blood sample. Rather, the Crown relied on the subpoenaed testimony of Darren Brown, a

hospital technician, who had tested Mr. Delorey's blood from the 7:30 a.m. sample.

[7] The defence challenged the September 16, 1999 search warrant to the hospital. The trial judge found that the information to obtain the search warrant for hospital records was sufficient, but that the failure to specify the offence invalidated the warrant. The trial judge ruled that the evidence from the hospital was based on a warrantless search which violated s. 8 of the *Charter*.

[8] The trial judge held, nonetheless, that the admission of the blood work evidence from the hospital would not bring the administration of justice into disrepute under s. 24(2) of the *Charter*. The trial judge noted that the blood sample was taken without any state compulsion, independently of, and months before any breach of the *Charter*. The trial judge admitted the evidence and the testimony of Mr. Brown based on that evidence.

[9] The Crown advanced Mr. Brown as an expert in the analysis of blood for alcohol. The trial judge ruled that Mr. Brown was a qualified medical laboratory technologist, trained and able to operate the Beckman CX-7 instrument which analyzed the alcohol content in Mr. Delorey's blood, and that Mr. Brown was "qualified to give opinion evidence about the operation of this instrument and about ... the results of tests performed by this instrument." The trial judge ruled, however, that Mr. Brown was not an expert "in the analysis of blood for alcohol".

[10] Mr. Brown testified that he used the Beckman CX-7 instrument to test Mr. Delorey's blood from the sample taken at 7:30 a.m. on March 21.

[11] The Crown then called Mr. Jean Claude Landry from the RCMP Crime Lab to interpret the readings provided by Mr. Brown and convert those readings to the terminology used in the *Criminal Code*. Mr. Landry testified that, based on certain assumptions, the results of the testing of the 7:30 a.m. blood sample meant that at 6 a.m. (when Mr. Delorey last drove the vehicle), Mr. Delorey had between 189 and 236 milligrams of alcohol per 100 millilitres of blood. One of Mr. Landry's assumptions for his opinion was that Mr. Delorey had consumed no alcohol between 5:30 a.m. and 6:00 a.m. on March 21.

Trial Judgment

[12] The trial judge acquitted Mr. Delorey because the Crown had offered no expert evidence on the reliability of the Beckman CX-7 to determine blood alcohol levels. Because the trial judge's comments are relevant to several issues in this Court, I reproduce the essential passages of his reasons:

> I accept the testimony here of the witnesses whose names I have just recited. I am satisfied and accept what those witnesses told me in terms of what each saw and did. I am satisfied that they were here testifying honestly and to the best of their abilities and recollections. As it relates to Mr. Brown and his evidence, and his recollections in Court, I accept those. I do not consider that issues raised in submissions by Defence Counsel, which I have considered, cause me to question Mr. Brown's evidence with regard to alcohol levels that he was involved in the testing of the blood, and his evidence about those levels, I am satisfied is reliable.
>
> I also accept the opinions expressed by Mr. Landry.
>
> It is my conclusion that all of the elements of the offence charged here have been proven beyond a reasonable doubt, except for the blood alcohol level of the defendant. I have to conclude that a reasonable doubt exists about that element of the evidence about the accuracy of the results of the analysis of the defendant's blood performed by Mr. Brown.
>
> The *Criminal Code* provides for various approved means of determining blood alcohol level. Section 254 and 258 of the *Criminal Code* creates a statutory structure and means by which, if the Crown chooses to, or if it is available, can, properly complied with, lead to certain proper evidentiary conclusions about blood alcohol level. As examples of some of those provisions, section 258(1)(e) allows for a Certificate of an Analyst stating that the analyst has made an analysis of a sample of blood, for example, and that is what I am dealing with in the circumstances here; and stating the result of the analysis and that that is evidence of the facts alleged in the certificate. An analyst is defined in the *Criminal Code* under section 254 as follows:
>
> > Analyst means a person designated by the Attorney General as an analyst for the purposes of section 258;
>
> The *Code* provisions here are not what was utilized and are not applicable in those circumstances. I am not dealing with an analysis of blood performed by an analyst qualified under the *Criminal Code*. Mr. Brown testified that he performed

> a blood alcohol analysis by means of a Beckman CX7 Auto Analyzer. This is not an approved instrument. Mr. Brown is not an analyst under the *Criminal Code*. In those circumstances, in my view, I require expert evidence about the capability and reliability of that instrument and the process utilized by Mr. Brown. That process needs to be properly explained step by step; and, the Court needs to have evidence that that process will produce a result that the Crown could have confidence in before I could accept blood alcohol level results, potentially beyond a reasonable doubt.
>
> The Court did conclude that Mr. Brown was an expert for the purpose of the operation of that instrument, and I think I made that clear at the time of the Court's ruling on that subject when Mr. Brown's qualifications were put before the Court. However, that is something different from him being an expert in the inner workings, and operation, and processes of a Beckman CX7.
>
> Mr. Landry was asked some questions on cross-examination about the CX7 and what it is. However, in my view, I would need more information from someone qualified to give it before I can be satisfied here about the blood alcohol level of Mr. Delorey.
>
> For those reasons, I have a reasonable doubt that the blood alcohol level of Mr. Delorey here exceeded 80 milligrams of alcohol in 100 millilitres of blood at the relevant time and Mr. Delorey is consequently acquitted.

SCAC Judgment

[13] The Crown appealed under s. 813(b)(i) of the *Code*. The SCAC determined that the trial judge erred by stating that the Crown was obliged to adduce expert evidence on the reliability of the Beckman CX-7 analyzer.

[14] The SCAC concluded that, as the trial judge had found all the essential ingredients of the offence, the SCAC should substitute a conviction instead of ordering a new trial.

Issues

[15] In this Court, Mr. Delorey argued three points:

> 1. The SCAC erred by overturning the trial judge's finding that the Crown had not established the reliability of the blood alcohol readings.

2. The SCAC and the trial court erred in the application of s. 24(2) of the *Charter* by admitting the blood alcohol readings based on hospital evidence which was obtained contrary to s. 8 of the *Charter*.

3. The SCAC erred by concluding that the Crown had proven the assumption (that Mr. Delorey had consumed no alcohol between 5:30 and 6:00 a.m.) which was the basis of the expert evidence of the toxicologist, Mr. Landry.

[16] There was a further issue, raised by this Court at the hearing of the appeal, and which was addressed in written submissions from counsel after the hearing. If the SCAC was correct in ruling that the trial judge erred, should the SCAC have ordered a new trial instead of entering a conviction?

First Issue - Reliability of blood alcohol evidence

[17] The trial judge accepted Mr. Brown's testimony and his reliability as a witness. The trial judge noted that, as the Beckman CX-7 was not an "approved instrument" and Mr. Brown was not an "analyst" under s. 254(1) of the *Code*, there was no statutory presumption of reliability. The trial judge acquitted because in his view, without expert evidence on the reliability of the inner workings of the instrument, there was no proof that the instrument accurately measured blood alcohol.

[18] If the trial judge had found the blood alcohol measurements to be unreliable because the trial judge had discounted the testimony of the Crown witnesses, the issue would turn on weight of evidence, to which SCAC should have deferred. But the trial judge's decision was not based on the weighing of evidence. The trial judge accepted Mr. Brown's testimony and his reliability. The acquittal resulted from the trial judge's conclusion that, as a matter of law, before the test results may be given any weight, expert evidence must establish the reliability of the Beckman CX-7 instrument. I refer to the following passage from the trial judge's reasons:

> That is not an approved instrument. Mr. Brown is not an analyst under the *Criminal Code*. In those circumstances, in my view, I require expert evidence about the capability and reliability of that instrument and the process utilized by Mr. Brown. That process needs to be properly explained step by step; and, the

> Court needs to have evidence that that process will produce a result that the Court could have confidence in before I could accept blood alcohol level results, potentially beyond a reasonable doubt.

[19] The SCAC concluded that the trial judge had erred in law. In my view, the SCAC was correct. There is no legal requirement that, before weight may be ascribed to these test results, expert evidence must explain precisely how the Beckman CX-7 operates.

[20] The trial judge did not refer to the decision of the Ontario Court of Appeal in *R. v. Redmond* (1990), 54 C.C.C. (3rd) 273 . In *Redmond*, on a charge of impaired driving, the Crown relied upon blood analysis by hospital equipment and the testimony of the technicians who operated that equipment. There was no expert evidence of the inner workings of the equipment or its reliability. Justice Blair (pp. 281-2) adopted the principles stated in *R. v. Grainger* (1958) 120 C.C.C. 321 (OCA) which concluded:

> . . . it was not necessary for scientific evidence to be given to explain precisely how the machine operated or to prove its capability and accuracy. It is sufficient if the expert operating the machine establishes that the machine is capable of making required measurements or producing the required data, that the machine was in good working order at the relevant time, and that it was properly used. If these conditions are met, the evidence is admissible and the only question left to the trier of fact is the weight to be given to such evidence.

I accept this passage as an accurate statement of the law. In *R. v. Vancrey* (2000), 147 C.C.C. (3d) 546 at pp. 553-54 the Ontario Court of Appeal reached a similar conclusion respecting a laser instrument to measure speed.

[21] In *Canadian Pacific Railway Co. v. Jackson* (1915), 52 S.C.R. 281 at pp. 291-2, Justice Anglin applied a similar principle:

> If a witness called can verify a mortuary table produced in evidence as one in actual use by a company dealing in that class of business I do not understand it to be the law that he must possess knowledge sufficient to enable him to explain the basis on which the table was prepared or to give an opinion worth something as to its reliability of correctness in order to render his evidence, quantum valeat, admissible.

[22] The following comments from the dissenting decision of Wakeling, J.A. in *R. v. Bird* (1989), 71 C.R. (3d) 52 (SCA) at 65, which I endorse, buttress the principle:

> I am further influenced by my knowledge that many experts give testimony which involves the application of information made available through the use of specialized instruments. Some examples which come to mind include the chartered accountant's use of computers, and the medical profession's use of an x-ray machine. These experts would not likely be able to confirm their expertise in the technical functioning of these instruments as it would obviously take a much different form of training and background to explain the intricacies of the instrument and the chemical, electronic or other concepts which it utilizes in its function. I accept it is not asking too much to have the expert say the instrument is in general use and generally accepted as being accurate, but I also see no problem in a trial judge reaching that conclusion where the facts clearly support that result. If by so doing the trial judge is engaged in an act of faith, it is one firmly based on the reality that experts are not likely to utilize ineffective and inaccurate instruments to make scientific analyses of critical importance within their field of expertise.

[23] Mr. Brown testified that he was trained to operate the Beckman CX-7 analyzer, that this instrument was used by the hospital since 1996 or 1997 to determine blood alcohol content and, and that he had used the instrument regularly. He explained the accuracy control procedures which accompany each test. He testified that the test result is never reported if the control result falls outside the appropriate range. The trial judge accepted Mr. Brown's evidence, including his testimony on these points.

[24] The SCAC concluded that this satisfied the evidentiary requirements of the test in *Redmond* and *Grainger* (above para. 20). I agree. The SCAC correctly determined that the trial judge had erred by requiring expert evidence to explain the inner workings of the Beckman CX-7. I would dismiss this ground of appeal.

Second Issue - Admission of Hospital Evidence

[25] Mr. Brown based his opinion on the hospital evidence. The SCAC affirmed the trial judge's admission of the hospital evidence. Mr. Delorey says that the Crown obtained the hospital evidence as a result of several breaches of the *Charter*, its admission would bring the administration of justice into disrepute, and it should be excluded under s. 24(2).

[26] There were not multiple *Charter* breaches. There was an omission to specify the offence on the face of the warrant. The trial judge found that this resulted in a warrantless search, which violated s. 8 of the *Charter*. Even if the search violated s. 8, in my view the trial judge and the SCAC correctly ruled that the evidence should not be excluded under s. 24(2) of the *Charter*.

[27] The trial judge reviewed the seminal test from *R. v. Collins*, [1987] 1 S.C.R. 265 and its application to the use of bodily substances as discussed in *R. v. Stillman*, [1997] 1 S.C.R. 607. Under the test the trial judge should consider (1) the effect of admitting the evidence on the fairness of the trial, (2) the seriousness of the *Charter* breach and (3) the effect on the administration of justice of excluding the evidence.

[28] Conscriptive or derivative evidence usually is excluded because its admission would impair the fairness of the trial. Mr. Delorey's 7:30 a.m. blood sample was taken for medical purposes. It was not taken as a result of a warrant or compulsion by the state. The blood sample is not conscriptive evidence, and the blood work analysis is not derivative from conscriptive evidence.

[29] The trial judge found that the accidental omission of the reference to the offence in the warrant did not mislead the hospital or affect the search. The blood work evidence was reliable and necessary to prove the charge. These factors govern the application to this case of the second and third branches of the *Collins* test.

[30] The trial judge concluded that the admission of the evidence would not bring the administration of justice into disrepute. The SCAC affirmed the trial judge's analysis of the test. I see no error in the reasoning of either court.

[31] The appellant refers to *R. v. Dersch*, [1993] 3 S.C.R. 768. In *Dersch* the accused specifically instructed the physician not to take his blood. Then, after the accused became unconscious, the physician took a blood sample. The physician then reported to the police the results of the blood alcohol test from the sample. Based on this report the police obtained a search warrant for the blood sample. Justice Major for seven of nine justices stated, at p. 779:

Section 24(2) of the Charter

> The blood sample and the blood-alcohol test results were the product of improper conduct by the appellant's doctor. While this conduct is not directly subject to the *Charter*, in the context of a subsequent *Charter* breach by police, the doctor's conduct becomes relevant in considering the effects of admitting the evidence.
>
> The net result of the *Charter* violation by police, in the particular circumstances of this case, was to take advantage of the improper conduct by his doctors in taking the blood sample contrary to the specific instructions of the patient. When this factor is considered together with the seriousness of the *Charter* violation by the police and the importance of guarding against a free exchange of information between health care professionals and police, in my view the impugned evidence should be excluded by application of s. 24(2) of the *Charter*.

[32] In this case, Mr. Delorey did not instruct hospital staff to refrain from drawing blood. There was no improper conduct by the hospital staff, and the police did not take advantage of improper conduct.

[33] This case is closer to *R. v. Colarusso*, [1994] 1 S.C.R. 20. The court admitted evidence of blood and urine samples taken in violation of s. 8 of the *Charter*. Justice LaForest found that the hospital acted in good faith in taking the samples for medical purposes only, and that the police acted in good faith and did not wilfully circumvent any required procedural steps of which they were aware. Justice LaForest stated (p. 76-77):

> Throughout the process, I believe, the actions that contributed to the s. 8 violation were inadvertent, and all parties reasonably believed they were acting within areas of ostensible authority. In this regard, the actions of the police are in direct contrast to those of the police officers in *Dersch, supra,* where the police wilfully attempted to circumvent appropriate procedures.

[34] A trial judge’s decision whether admission of evidence would bring the administration of justice into disrepute is entitled to significant deference from both the SCAC and this Court. In *R. v. Buhay*, [2003] 1 S.C.R. 631 at paras. 42-48, Justice Arbour for the Court discussed the rationale for deference. Justice Arbour stated that an appeal court should defer to the trial judge’s assessment of the factors under s. 24(2) unless the trial judge’s decision was unreasonable or based on an error in principle or misapprehension of law.

[35] The trial judge's conclusions were neither unreasonable nor based upon an error in principle or misapprehension of law. The SCAC did not err in law by affirming the trial judge's conclusion. I would dismiss this ground of appeal.

Third Issue - Proof of Assumption for Expert Evidence

[36] Mr. Landry based his opinion of blood alcohol content on the assumption that Mr. Delorey had consumed no alcohol in the half-hour before the accident at 6:00 a.m. Mr. Delorey submitted that the Crown had not proven this assumption.

[37] The SCAC rejected this argument for the following reasons:

> At the trial here the Crown introduced against the accused a statement he gave to the R.C.M.P. some time after the accident. In that statement which was admitted into evidence after a *voir dire* he said that the only liquor he had that evening was one beer at home and four at a licensed lounge which closed at 2:00 a.m. I therefore conclude that it was reasonable for the trial judge to assume that he had nothing to drink at least one-half hour prior to the accident which occurred at 6:00 a.m. There was no evidence before the Court that he did have something to drink in the half hour period prior to the accident.

[38] To this Mr. Delorey's counsel says that Mr. Delorey's testimony was "meaningless" because, according to the Crown's theory, Mr. Delorey must have consumed more alcohol than acknowledged in Mr. Delorey's testimony. That may be so. But the trial judge was entitled to accept Mr. Delorey's testimony as to the timing of his last drink, without accepting his evidence as to the number of drinks. That timing is not inconsistent with Mr. Landry's opinions of the blood alcohol level or the number of drinks needed to attain it. The SCAC did not err in law by upholding the trial judge's conclusion.

[39] I would dismiss this ground of appeal.

Fourth Issue - Conviction or New Trial?

[40] The Crown appealed from the acquittal to the SCAC under s. 813(b)(i) of the *Code*. Section 822(1) incorporates for such an appeal the powers of a court of appeal stated in s. 686(4): if the SCAC allows the appeal, the SCAC may either

order a new trial or, if "in its opinion, the accused should have been found guilty but for the error in law", enter a conviction.

[41] An appeal court may substitute a conviction, instead of ordering a new trial, when the trial judge has made, explicitly or implicitly, all the findings necessary to support a guilty verdict: *R. v. Cassidy*, [1989] 2 S.C.R. 345 at 354-5; *R. v. Audet*, [1996] 2 S.C.R. 171 at para. 48.

[42] The trial judge stated:

> It is my conclusion that all of the elements of the offence charged here have been proven beyond a reasonable doubt, except for the blood alcohol level of the defendant. I have to conclude that a reasonable doubt exists about that element of the offence. The reasonable doubt here, in my opinion, arises from the lack of reliable evidence about the accuracy of the results of the analysis of the defendant's blood performed by Mr. Brown.

[43] The trial judge accepted the testimony of Mr. Brown and of Mr. Landry. The trial judge's concern about the accuracy of the results of the analysis was based solely on the trial judge's conclusion that expert evidence was legally required to explain the inner workings and reliability of the Beckman CX-7 instrument. As discussed earlier, that conclusion was an error of law.

[44] Mr. Brown testified about the performance and control procedures of the Beckman CX-7 (above para. 23). The trial judge accepted Mr. Brown's evidence:

> As it relates to Mr. Brown and his evidence, and his recollections in court, I accept those. I do not consider that issues raised in submissions by Defence Counsel, which I have considered, cause me to question Mr. Brown's evidence with regard to alcohol levels that he was involved in the testing of the blood, and his evidence about those levels, I am satisfied is reliable.

As the SCAC concluded, this satisfies the requirements of *Redmond* and *Grainger* (above para. 20).

[45] But for the error of law, the appellant would have been convicted. After the correction is made for the trial judge's error of law, the trial judgment either explicitly or implicitly contains all the findings necessary to support a conviction.

[46] I agree with the SCAC's decision to enter a conviction instead of ordering a new trial.

[47] I would grant leave to appeal but dismiss the appeal.

Fichaud, J.A.

Concurring:

Roscoe, J.A.

Cromwell, J.A.