NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Gibson , 2006 NSCA 51

Date: 20060428
Docket: CAC 237840
Registry: Halifax

Between: Her Majesty The Queen

Appellant

v.

Robert Albert Gibson

Respondent

Judges: Saunders, Oland and Fichaud, JJ.A.

Appeal Heard: April 11, 2006, in Halifax, Nova Scotia

Held: Appeal allowed, acquittal set aside and new trial ordered to be commenced at discretion of Crown per reasons for judgment of Fichaud, J.A.; Saunders and Oland, JJ.A. concurring.

Counsel: William Delaney and Lloyd Lombard, for the appellant
Robert Albert Gibson, representing himself

Reasons for judgment:

[1] Mr. Gibson's breathalyzer readings exceeded 80 milligrams of alcohol per 100 millilitres of blood. He was charged with driving having higher than the legal limit of blood alcohol contrary to s. 253(b) of the *Criminal Code*. The defence expert testified that based on alcohol absorption rates of the general population, Mr. Gibson's blood alcohol range straddled the legal limit. The trial judge accepted the expert evidence to rebut the presumption from the breathalyzer readings under s. 258(1)(d.1) of the *Code*. The Summary Conviction Appeal Court agreed. The Crown appeals. The principal issue is whether an expert opinion based on alcohol absorption rates of the general population - not the accused - may rebut the statutory presumption under s. 258(1)(d.1).

Background

[2] Mr. Gibson was charged that on July 13, 2003, near Harbourville, Nova Scotia, he operated a vehicle while having over 80 milligrams of alcohol per 100 millilitres of blood, contrary to s. 253(b) of the *Criminal Code*. He was tried on March 11, 2004 before Provincial Court Judge Alan Tufts.

[3] At the trial, Cst. Lutz of the RCMP testified that he saw Mr. Gibson driving his all terrain vehicle on the highway, that he stopped Mr. Gibson at 8:59 p.m. on July 13, 2003, and that Mr. Gibson's breath smelled of alcohol and he had slurred speech. Cst. Lutz took Mr. Gibson to the RCMP detachment and administered two breathalyzer tests. Mr. Gibson's readings were 120 milligrams of alcohol per 100 millilitres of blood at 10:12 p.m. and 100 milligrams of alcohol per 100 millilitres of blood at 10:21 p.m.

[4] Mr. Gibson testified that on July 13, he had one 341 millilitre bottle of beer at about 2 p.m., three 355 millilitre cans of beer and one 341 millilitre bottle of beer throughout the afternoon, and five bottled pints of beer between 8:30 p.m. and his apprehension by Cst. Lutz at 8:59 p.m. This evidence was corroborated by another witness.

[5] Dr. Peter Mullen testified for the defence as an expert in the absorption and elimination of alcohol. Dr. Mullen had not tested Mr. Gibson. Dr. Mullen's opinion was based on the alcohol absorption and elimination rates of the general

population. He testified that someone of Mr. Gibson's weight, who had consumed the quantities of alcohol at the times stated by Mr. Gibson, would have between 40 and 105 milligrams of alcohol per 100 millilitres of blood at 8:59 p.m., when Mr. Gibson was stopped by Cst. Lutz.

[6] The trial judge found that Mr. Gibson was credible and accepted Mr. Gibson's evidence of his drinking pattern on that day. He accepted Dr. Mullen's opinion that Mr. Gibson would have between 40 and 105 milligrams per 100 millilitres of blood when he last operated the vehicle. The trial judge considered this to be "evidence tending to show that the concentration of alcohol in the blood of the accused at the time when the offence was alleged to have been committed did not exceed" the statutory limit, under s. 258(1)(d.1) of the *Code*. He said he had a reasonable doubt that Mr. Gibson's blood alcohol exceeded the legal limit when he was driving, and acquitted Mr. Gibson.

[7] The Crown appealed the acquittal to the Nova Scotia Supreme Court, sitting as the Summary Conviction Appeal Court ("SCAC"). Justice Warner issued a decision on November 18, 2004 (2004 NSSC 228) dismissing the appeal.

[8] The SCAC agreed that Dr. Mullen's testimony was admissible and probative, notwithstanding that it was based on absorption rates of the average population, instead of Mr. Gibson's rate. The SCAC referred to other decided cases and said:

> [26] It is clear, based on the nature of the expert evidence in these cases, that it is, for all practical purposes, impossible for an accused to obtain a determination of his or her individual absorption/elimination rate at the time of the offence.
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> [27] If evidence given by toxicologists to rebut the presumption of identity, which includes the application of a range of absorptions/elimination rates of an average person, was not admissible to rebut the presumption, and because it appears impossible, for all practical purposes, to measure the exact absorption/elimination rate at the time of the offence, then the presumption of identity ceases to be a rebuttable presumption and becomes an irrebuttable fact. This could lead to the conviction of persons whose BAC at the time of the offence was below 80.

[9] Dr. Mullen's findings presented upper and lower limits which straddled the legal limit of 80 milligrams of alcohol per 100 millilitres of blood. The question

was whether this rebutted the statutory presumption from the breathalyzer reading. The SCAC referred to several lines of authority on this "straddle" issue, rejected the approach of the Ontario Court of Appeal in *R. v. Heideman*, [2002] O.J. No. 3461 and preferred the approaches of *R. v. Gaynor*, [2000] A.J. No. 840 (P.C.) or *R. v. Clarke*, [2003] A.J. No. 914 (P.C.). The SCAC concluded that Dr. Mullen's range tended to show that Mr. Gibson's blood alcohol did not exceed the statutory limit when he was last operating the vehicle, and dismissed the Crown's appeal.

Issues

[10] The Crown applies for leave to appeal and, if granted, appeals to this Court under s. 839(1) of the *Criminal Code*. The Crown applies to add fresh evidence under s. 683(1) of the *Code*, and says that Dr. Mullen's opinion was without foundation and that the SCAC applied the wrong test on the "straddle" issue.

Fresh Evidence

[11] The Crown applies to add as fresh evidence an affidavit of Mr. D'Arcy Smith, a toxicologist employed by the RCMP. Mr. Smith's affidavit says that it is possible to conduct an alcohol tolerance test of an individual which would provide meaningful information to narrow the range for an individual and to provide results "which should be correct within a range of plus or minus 2-3 mgs.of alcohol per 100 mls. of blood per hour."

[12] The Crown says that the SCAC's statement (paras. 26 -27) quoted earlier - that it is impossible to obtain a determination of an individual absorption/elimination rate - was not based on any evidence in this record. Rather, it was based on the SCAC's interpretation of findings in other decisions. Accordingly, the Crown says that it is appropriate to adduce fresh evidence to rebut the extraneous finding by the SCAC judge.

[13] Section 683(1)(d) of the *Code* permits the court to receive fresh evidence from a witness "in the interests of justice". In *R. v. Palmer*, [1980] 1 S.C.R. 759, at 775 the Supreme Court stated that the "interests of justice" are governed by four factors:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal as in civil cases ...

> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue at the trial.
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> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and,
>
> (4) It must be such that if believed it could reasonable, when taken with the other evidence adduced at trial, be expected to have affected the result.

[14] In my view, the Crown has not satisfied the first criterion. With due diligence, the Crown could have adduced the substance of Mr. Smith's evidence at trial. The issue was triggered well before the SCAC's comment, cited by the Crown to justify the fresh evidence. At the trial, Dr. Mullen's opinion and the defence theory were expressly based on average population tendencies. The Crown could have rebutted with evidence that individual testing of the accused was probative and preferable. That is the point of Mr. Smith's affidavit tendered as fresh evidence here. At trial, the Crown chose to neither object to Dr. Mullen's evidence, nor offer rebuttal expert evidence. It may be impractical for the Crown to rebut a defence expert opinion on short notice. But at trial the Crown did not request an adjournment even to consider rebuttal evidence. Section 683(1) is not an avenue for Crown rebuttal evidence in the Court of Appeal.

[15] The "due diligence" factor in *Palmer* may be relaxed under the overriding statutory standard of "the interests of justice": *R. v. Warsing*, [1998] 3 S.C.R. 579, at ¶ 56; *R. v. G.D.B.* [2000] 1 S.C.R. 520, at ¶ 19; *R. v. Owen*, [2003] 1 S.C.R. 779, at ¶ 52-53; *R. v. 1275729 Ontario Inc.*, [2005] O.J. No. 5515 (C.A.), at ¶ 28-29; *R. v. Assoun*, 2006 NSCA 47 at ¶ 300. There is no overriding "interest of justice" here. As will be discussed, I would allow the Crown's appeal even without the fresh evidence, and order a new trial, at which the Crown can present all its relevant evidence.

Admissibility of the Expert Opinion

[16] I now consider the principal ground of appeal. Section 258(1)(d.1) states that readings of over 80 milligrams of alcohol per 100 millilitres of blood is "proof" that the blood alcohol concentration exceeds the legal limit unless there is "evidence tending to show that the concentration of alcohol in the blood of the accused at the time when the offence was alleged to have been committed did not exceed 80 milligrams of alcohol in 100 millilitres of blood." The issue is: what is "evidence tending to show "?

[17] The decision of the SCAC reviews the appellate caselaw on the point, particularly the differing lines of authority stemming from the decisions of the Ontario Court of Appeal in *R. v. Heideman* and the Quebec Court of Appeal in *R. v. Dèry*, [2001] J.Q. No. 3205.

[18] Since the decision of the SCAC, the Supreme Court of Canada has issued its decision in *R. v. Boucher*, 2005 SCC 72. The defence expert gave an opinion based on average alcohol tolerance of the general population, applied to a person of Mr. Boucher's physical characteristics. He did not assess Mr. Boucher's alcohol tolerance or his rates of absorption and elimination (see ¶ 3 and 31). Justice Deschamps for the majority said:

> [34] The expert who testified in this case ***has not enlightened the Court about Mr. Boucher's alcohol tolerance. He relied on statistical averages.*** By definition, the reason there are averages is that not everyone who consumes alcohol reacts in the same way. ***The level of alcohol tolerance is not a matter for judicial notice***, particularly when the case does not involve extremely high levels. The difference of opinion between two judges of the Court of Appeal on this point is certainly indicative of a need to rely on the usual methods of proof in this regard. Like Forget J.A., ***I agree with the following statement*** by Charron J.A., as she then was, in Latour (at para. 14):
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> > ***Second, and more importantly, this evidence is not capable of constituting "evidence to the contrary".*** Even accepting as a fact that a "normal, average" person with the same breathalyser readings should exhibit stronger indicia of impairment than that observed in the respondent, ***this fact is of no consequence in the absence of evidence on the respondent's tolerance to alcohol.*** This opinion evidence, as presented, without any connection to the respondent, is merely speculative and of no evidentiary value.

. . .

> [39] In light of this passage from St. Pierre, ***the evidence regarding absorption time presented by the expert in the case at bar was inadmissible. The expert's evidence was based not on the accused's personal reaction to alcohol but rather on the absorption process in general*** and the fictional nature of the presumption itself. [emphasis added]

[19] In *Boucher* the trial judge, whose decision was restored by the Supreme Court of Canada, disbelieved the accused's testimony of his drinking pattern. So that factual assumption of the expert was not proven. This differs from the present case, where the trial judge accepted Mr. Boucher's testimony. But Justice Deschamps' comments, which I have italicized, support another principle that does apply to Mr. Gibson's case. An expert opinion, based only on average tendencies of the population instead of the accused's rates of alcohol absorption or elimination, is without foundation. As stated in *Boucher*, it is not "evidence to the contrary" under s. 258(1)(c). Neither, in my view, can it be "evidence tending to show" the accused's lower blood alcohol concentration under s. 258(1)(d.1).

[20] These italicized passages from *Boucher* echo the Ontario Court of Appeal's view in *Heideman*:

> 15 The appellant seeks to say that he is an average person but cannot establish that fact. Absorption and elimination rates vary not only from person to person but also from time to time with each individual. Thus this element of fact cannot be established. Yet it is as essential to the opinion as the number of drinks consumed, as evidenced by the range from 71 to 95 milligrams within the group of slow eliminators. To put it another way, the opinion is not supported by the evidence any more than if the appellant had said that he's not sure how many drinks he had consumed but on average it was five and sometimes seven. The only probative opinion would have to relate to seven drinks.
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> 16 In my view, moving from the average to a particular person is impermissible speculation in the context of the purpose and functioning of s. 258.

[21] Dr. Mullen's opinion was based on general population averages applied to a hypothetical person of Mr. Gibson's weight. There was no evidence of Mr. Gibson's alcohol tolerance, absorption and elimination rates. In this respect, the italicized passages from the majority ruling in *Boucher* apply. The SCAC erred in law by ruling that Dr. Mullen's evidence was a basis for the acquittal.

"Straddle" Issue

[22] The Crown asks this court to deal with the "straddle" issue. Had there been admissible evidence of a range of blood alcohol levels straddling the legal limit, what principle determines whether this evidence "tends to show" a rebuttal under s. 258 (1)(d.1)? In my view, that issue should be left for a case where there is admissible evidence to establish a straddling range. That evidence would, as discussed, connect to the accused. The probative value of that connection might affect the court's determination of the "straddle" issue. Here there is no expert evidence based on Mr. Gibson's alcohol absorption rate. So it is not even clear that Mr. Gibson's range would straddle the legal limit.

Disposition

[23] The Crown asks that this court substitute a conviction for the acquittal. In my view, it is more appropriate to order a new trial. The trial judge accepted Mr. Gibson's credibility and his testimony that he had consumed five pints of beer within one half hour before he was apprehended. The trial judge noted:

> Finally, I am left with a reasonable doubt that the defendant's blood alcohol level exceeded the legal limit at the time he was driving.
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> In *Boucher*, decided after the trial and SCAC decisions, the court clarified the principles to define the type of expert evidence that may rebut the presumption. I cannot speculate whether, under those principles, there could be such rebutting evidence in Mr. Gibson's case. Neither can I just substitute my view of reasonable doubt for the trial judge's view on this fact laden issue.

[24] I would grant leave to appeal, allow the appeal, set aside the acquittal, and order a new trial to be initiated at the discretion of the Crown.

Fichaud, J.A.

Concurred in:

Saunders, J.A.

Oland, J.A.