NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Cave, 2006 NSCA 52

Date: 20060428
Docket: CAC 251332
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Julian Anuella Cave

Respondent

Judge(s): Saunders, Oland, 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
Julian Anuella Cave, representing himself

Reasons for judgment:

[1] This appeal involves similar issues to *R. v. Gibson*, 2006 NSCA 51, released concurrently with this decision, and was argued as a companion to *Gibson*. Mr. Cave was charged with driving a vehicle with over the legal limit of blood alcohol and with impaired driving under s. 253 of the *Criminal Code*. At the trial a toxicologist testified for the defence that Mr. Cave's blood alcohol was in a range that straddled the legal limit. The expert's opinion was based on alcohol absorption and elimination rates of the average population, not of Mr. Cave. Relying on this expert opinion the trial judge acquitted Mr. Cave. The Crown appeals the acquittal of the breathalyzer charge. The principal issue is whether expert opinion based on tendencies of the average population - not of the accused - may rebut the presumption from the breathalyzer reading under s. 258(1) of the *Code*.

Background

[2] Mr. Cave was charged that on July 21, 2003 near Kentville, Nova Scotia he operated a motor vehicle with over 80 milligrams of alcohol per 100 millilitres of blood contrary to s. 253(b), and with impaired driving contrary to s. 253(a) of the *Code*.

[3] He was tried in Provincial Court before Judge Claudine MacDonald.

[4] Kentville Police Cst. Smith testified that on July 21, 2003 he saw Mr. Cave operating a motorcycle on the highway. He stopped Mr. Cave at 8:30 p.m. Mr. Cave smelled of alcohol. Cst. Smith took Mr. Cave to the Kentville Police Office and administered two breathalyzer tests at 9:14 p.m. and 9:32 p.m., both registering 100 milligrams of alcohol per 100 millilitres of blood.

[5] Mr. Cave testified that between 12:20 p.m. and 6 p.m. he consumed six cans of beer and later he had a glass of wine.

[6] The defence called Dr. Peter Mullen as an expert toxicologist. Dr. Mullen had not performed an alcohol tolerance test on Mr. Cave. Dr. Mullen testified that, based on average rates of absorption and elimination in the population, an individual of Mr. Cave's weight with the drinking pattern stated by Mr. Cave for that day, would have between 32 and 112 milligrams of alcohol per 100 millilitres of blood when Cst. Smith intercepted Mr. Cave on the motorcycle.

[7] The trial judge followed the ruling of the Nova Scotia Supreme Court in *R. v. Gibson*, 2004 NSSC 228. Based on *Gibson*, the trial judge accepted Dr. Mullen's expert evidence as tending to show that Mr. Cave's blood alcohol level was beneath the legal limit under s. 258(1)(d.1) of the *Code*. Dr. Mullen's range straddled the legal limit of 80 milligrams per 100 millilitres of blood. On the "straddle" issue the trial judge stated:

> I am bound by the decision of our Supreme Court as set out in *Gibson* and I think that *Gibson* and the factual basis is not very dissimilar from this case today involving Mr. Cave and that Mr. Cave's blood alcohol concentration at the time that the offence was alleged to have been committed would have been or very well could have been below the legal limit and, that being so, that Mr. Cave comes within D.1 of 258, or alternatively, I think one can say it is evidence to the contrary in 258 and then the question becomes whether the Crown has proven the charge beyond a reasonable doubt.
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> . . . And when I consider all of the evidence and, in particular, as I said, when I follow the law as I understand it to be as set out in the *Gibson* from our Supreme Court, I am left with a reasonable doubt with respect to this matter, and that being so, I find Mr. Cave not guilty of failing the breathalyzer charge and so far as the impaired operation charge is concerned, I find him not guilty of that offence as well.

Issues

[8] Under s. 830 of the *Code*, the Crown appeals the acquittal of the s. 253(b) breathalyzer charge. The Crown applies to add fresh evidence and says that Dr. Mullen's opinion is without foundation.

Fresh Evidence

[9] The Crown applies to add fresh evidence under s. 683(1) of the *Code*. The fresh evidence is an affidavit of Mr. D'Arcy Smith, a toxicologist with the RCMP. The Crown's submission is this. The trial judge expressly adopted a passage from the decision of the Supreme Court in *Gibson*, to the effect that there was a "practical impossibility" of determining a reliable blood/alcohol level of an individual by means of an alcohol tolerance test. The Crown says that this conclusion is erroneous, and was without basis in evidence in both *Gibson* and in

Cave. The Crown tenders the affidavit of Mr. Smith, to the effect that an individual alcohol tolerance test can provide meaningful results which "should be correct within a range of plus or minus 2 - 3 mgs. of alcohol per 100 mls. of blood per hour."

[10] In the Court of Appeal in *Gibson*, the Crown made the same motion under s. 683(1) to add Mr. D'Arcy Smith's affidavit as fresh evidence. In *Gibson*, ¶ 14-15, this court dismissed that application. I would dismiss the application under s. 683(1) here for the same reasons.

[11] Section 683(1)(d) permits the appeal court to receive a fresh affidavit 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 ...
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> (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,
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> (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.

[12] In this case, as in *Gibson*, the Crown's application to adduce Mr. Smith's affidavit fails to satisfy the first criterion from *Palmer* - due diligence. Dr. Mullen's testimony and the defence theory were based on the elimination and absorption rates of the general population, not on any alcohol tolerance tests of Mr. Cave. The Crown could have rebutted with an expert opinion, such as that in the tendered affidavit of Mr. Smith, that blood alcohol levels could be calculated more reliably from alcohol tolerance testing of the accused than from population averages. If the Crown had insufficient time to rebut the defence expert opinion, the Crown could have requested an adjournment. The Crown neither objected to Dr. Mullen's opinion, nor sought to tender rebuttal evidence, nor requested an adjournment. It is not open to the Crown, on appeal, to patch the record by

supplementing the trial evidence on this point. I would dismiss the Crown's application under 683(1).

[13] As discussed in this court's decision in *Gibson* ¶ 15, the "due diligence" criterion is subject to the overall "interests of justice" in s. 683(1). That is not a factor here. As I will discuss, I would allow the Crown's appeal even without the fresh evidence, and order a new trial. So the Crown will have the opportunity to tender all its relevant evidence.

Admissibility of Expert Opinion

[14] In *Gibson* ¶ 16-21, this Court reversed the decision of the Nova Scotia Supreme Court upon which trial judge here relied. Our decision was based on the ruling of the Supreme Court of Canada in *R. v. Boucher*, 2005 SCC 72. *Boucher* was released after the decision of the Supreme Court in *Gibson* and after the decision of the trial judge here. In *Boucher*, the defence expert's opinion was based on alcohol tolerance rates of the average population applied to an individual of Mr. Boucher's physical characteristics (¶ 3, 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.
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> . . .

> [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]

[15] Dr. Mullen's opinion was not based on any test of Mr. Cave. It was not based on Mr. Cave's alcohol tolerance, or his rates of absorption and elimination. It was based on population averages, applied to a hypothetical individual of Mr. Cave's weight who drank alcohol in the amounts and times stated by Mr. Cave. In my view, Dr. Mullen's testimony is without foundation and cannot rebut the statutory presumption for the same reasons as stated in the italicized passages from the majority decision in *Boucher*.

[16] The trial judge erred in law by admitting and relying on Dr. Mullen's opinion. I would allow the appeal.

Disposition

[17] There were other defences of a factual nature raised at the trial. Because of the acquittal based on Dr. Mullen's opinion, the trial judge did not deal with the other defences. It is not possible for this court to resolve those factual issues. I would order that there be a new trial, to be initiated at the discretion of the Crown.

Fichaud, J.A.

Concurred in:

Saunders, J.A.

Oland, J.A.