S.C.C. No. 02717

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Clarke, C.J.N.S.; Hart and Freeman, JJ.A.
Cite as: R. v. Mosher, 1992 NSCA 31

BETWEEN:

BERNARD ROY MOSHER	)	Edmund R. Saunders
	)	for the Appellant
Appellant	)	
- and -	)	
	)	Kenneth W. Fiske, Q.C.
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Appeal Heard:
	)	December 8, 1992
	)	
	)	
	)	Judgment Delivered:
	)	December 8, 1992
	)	

THE COURT: Appeal dismissed from conviction for offence contrary to s. 253(b) of the **Criminal Code**, per oral reasons for judgment of Clarke, C.J.N.S.; Hart and Freeman, JJ.A. concurring.

The reasons for judgment of the Court were delivered orally by:

CLARKE, C.J.N.S.:

The appellant seeks leave to appeal and, if granted, appeals from a

decision of The Honourable Judge Carver who, on May 19, 1992, in the County Court, on appeal, confirmed the conviction of the appellant by His Honour Judge Bremner of the Provincial Court. Judge Bremner found the appellant guilty of the offence of operating a motor vehicle in the Town of Lunenburg on August 20, 1991, while the concentration of alcohol in his blood exceeded 80 milligrams in 100 millilitres, contrary to s. 253(b) of the **Criminal Code**.

Combined, there are two principal grounds of appeal.

The first is that the advice given the appellant by the police constable did not comply with s. 10(2) of the **Charter** by failing to meet the requirements stated by the Supreme Court of Canada in **R. v. Brydges** (1990), 53 C.C.C. (3d) 330; [1990] 1 S.C.R. 190.

The evidence accepted by the trial judge and confirmed on appeal is that, after the motor vehicle being operated by the appellant was stopped and indications of impairment were evident, the constable gave the appellant a breathalyzer demand in the regular form. He then gave the appellant his **Charter** rights as follows:

> " You have the right to retain and instruct counsel without delay, you may call any lawyer you wish, you have the right to apply for legal assistance without charge through the Provincial Legal Aid Program. Do you understand?"

When asked if he understood the appellant nodded his head in the affirmative. The constable asked him if he wished to call a lawyer and the appellant said he wanted to speak to Mr. Saunders who is a lawyer in Lunenburg and the appellant's counsel at trial and on appeal. The appellant was taken to the police station, placed in an interview room, used the telephone in private and then informed the constables that Mr. Saunders was on his way. He talked with Mr. Saunders in private. Thereafter, in the presence of Mr. Saunders, two tests of specimens of the appellant's breath were conducted by a qualified technician,

each, according to his certificate, providing a reading of a concentration of 180 milligrams of alcohol in 100 millilitres of blood.

The appellant argues the police officer did not fully inform him of the availability of legal aid in keeping with **Brydges**. There, then Mr. Justice Lamer wrote at pp. 349-350 (53 C.C.C. (3d)):

> " All of this [referring to the *Canadian Bill of Rights*, the *Charter* and the *International Covenant on Civil and Political Rights*] is to reinforce the view that the right to retain and instruct counsel, in modern Canadian society, has come to mean more than the right to retain a lawyer privately. It now also means the right to have access to counsel free of charge where the accused meets certain financial criteria set up by the provincial Legal Aid plan, and the right to have access to immediate, although temporary, advice from duty counsel irrespective of financial status. These considerations, therefore, lead me to the conclusion that as part of the information component of s. 10(b) of the Charter, a detainee should be informed of the existence and availability of the applicable systems of duty counsel and Legal Aid in the jurisdiction, in order to give the detainee a full understanding of the right to retain and instruct counsel."

It is our unanimous opinion that in the circumstances that here exist, neither the trial judge or the judge on appeal erred when they concluded that the general requirements of **Brydges** had been met. After informing the appellant that he had the right to apply for free legal assistance through the provincial Legal Aid program, the appellant chose instead to consult the lawyer of his choice, who is not with Legal Aid. He got him within a reasonable time, presumably obtained his advice and had him present to observe the taking of the tests. In these circumstances there is no **Charter** violation of s. 10(b).

The second ground is that the trial judge unduly restricted the scope of Mr. Saunders' cross-examination of Constable Rhodenizer. While pursuing a line of questions whether the appellant had remained in the breathalyzer room during the entire period the specimens of breath were taken and tested and also

whether the appellant had burped during the course of these events, Mr. Saunders asked the question (Case on Appeal, pp. 37-38):

> " Q. So you likewise would say that if I should say that I was particularly standing between this accused and yourself and Constable Bragg in that interval between the taking of those two tests to determine whether or not you're observing, you would say that I was not ..."

The record reveals the following ensued:

> " THE COURT: Mr. Saunders are you planning on taking the witness stand?
>
> MR. SAUNDERS: No it is not my intention to take the witness stand if Your Honour pleases, but I think that I ...
>
> THE COURT: Well you're an Officer of the Court and I'm not going to allow testimony in by way of statements ah - - if you want to re-phrase your question please.
>
> MR. SAUNDERS: Well I was trying to -- to phrase it in such a way that ah -- that ah --...
>
> THE COURT: I think--I think the Officers already answered, hasn't he?
>
> MR. SAUNDERS: No I don't think he has.
>
> THE COURT: Proceed.
>
> MR. SAUNDERS: Putting -- putting a hypothetical question to him. If --if I should state that I was in the outer room office there and particularly standing between this accused and yourself and Constable Bragg for the soul purpose of determining whether or not you were observing him.
>
> THE COURT: Officer I'm going to ask you to ignore that question, Mr. Saunders, I'm going to rule that you can't ask that question. You're either going to take the witness stand and be off the record as solicitor in this matter or you're going to proceed to ask this Officer questions that don't include yourself. What are your wishes?
>
> MR. SAUNDERS: Well perhaps I might just ah--ah--re-phrase it by leaving out myself then.
>
> THE COURT: All right.

> MR. SAUNDERS: And ah ...
>
> THE COURT: You might wish to do so.
>
> MR. SAUNDERS: And ask you whether or not you recall anybody standing between this accused and yourself and Constable Bragg in that interval between the taking of the two tests?
>
> A. No I do not recall.
>
> Q. You--can you say that there was nobody?
>
> A. I would say according to my notes that there--Mr. Mosher stayed in the breathalyzer room the whole time between the two tests."

It is difficult to conclude from this rather lengthy extract that Mr. Saunders was unduly restricted by the trial judge in his cross-examination of the witness. Considering the way the question was initially framed, and recognizing that Mr. Saunders, during his earlier cross-examination of Constable Bragg, had informed the Court he did not intend to testify, it was not improper for the trial judge to inquire whether Mr. Saunders intended to give evidence at the trial of his client. It is important to note that after this matter was resolved at least to the satisfaction of the court, Mr. Saunders ultimately asked the police officer the question he intended to ask him in the first place and received an answer to it.

We agree with the judge on appeal that the trial judge did not unduly interfere with Mr. Saunders' cross-examination of witnesses in a manner that would cause reversible error.

While we grant leave to appeal, we find no errors in law. Accordingly, the appeal against conviction is dismissed.

C.J.N.S.

Concurred in:

Hart, J.A.

Freeman, J.A.