Cite as: R. v. Lacey, 1992 NSCO 14

CANADA C.P. No. 14,209

PROVINCE OF NOVA SCOTIA

COUNTY OF PICTOU

IN THE COUNTY COURT JUDGE'S CRIMINAL COURT

OF DISTRICT NUMBER FIVE

HER MAJESTY THE QUEEN

- and -

JOHN KEVIN LACEY

HEARD: At New Glasgow, Nova Scotia, before the Honourable Judge H. J. Macdonnell, a Judge of the County Court of District Number Five

DECISION: February 11, 1992

COUNSEL: Peter P. Rosinski, Esq., of Counsel for the Appellant

Milton J. Veniot, Q.C., of Counsel for the Respondent

D E C I S I O N

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New Glasgow, Nova Scotia

D E C I S I O N

1992, February 11, MacDonnell, H. J., J.C.C.:

This is an Appeal by the Crown from a decision of His Honour Judge Clyde F. Macdonald, a Judge of the Provincial Court of Nova Scotia, acquitting John Kevin Lacey of the following charge:

> Did operate a motor vehicle having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded eighty milligrams of alcohol in one hundred millilitres of blood, contrary to Section 253(b) of the Criminal Code.

The sole ground of appeal is:

1. The Learned Trial Judge failed to direct himself to the appropriate and applicable law with respect to the burden of proof upon the Crown, and/or failed to apply the applicable and appropriate law to the evidence.

The facts as summarized in the Appellant's memorandum, and accepted by the Respondent are as follows:

1. Cst. Cathy Brown, a peace officer, had reasonable and probable grounds to believe Mr. Lacey had been operating a motor vehicle within the preceding two hours and his ability to operate a motor vehicle was impaired by alcohol. She properly arrested him, gave him a breathalyzer demand and his constitutional rights advisement, which he understood.

2. The last time of driving is 12:50 to 12:55 a.m., May 5th, 1991. Mr. Lacey was turned over to the qualified breathalyzer technician, Cpl. Cougle, at approximately 1:26 a.m. and two readings were obtained of 140 milligrams of alcohol in 100 millilitres of blood at 1:33 a.m., and 130 milligrams of alcohol in 100 millilitres of blood at 1:47 a.m. Mr. Lacey was served with a certificate of a qualified technician and a notice of intention to produce the certificate. The admissibility of the certificate per se was not questioned at trial but it did not comply with Section 258(1)c of the Criminal Code in that the readings were taken less than 15 minutes apart.

3. William Westenbrink was qualified to give expert opinion evidence regarding the absorption, distribution and elimination of alcohol in the body of human beings.

4. Mr. Westenbrink opined that based on the last time of driving and the readings in his certificate of analysis, Mr. Lacey would have had 135 to 150 milligrams of alcohol in 100 millilitres of his blood at the time he was operating the motor vehicle. Mr. Westenbrink indicated this conclusion would not be valid if Mr. Lacey had consumed a large quantity of alcohol just prior to being stopped by the police as this alcohol would remain in his stomach and not be absorbed by the body at that time, but would appear on breathalyzer analysis later and overstate his blood alcohol concentration at the time of driving.

5. There was no evidence of the pattern, and extent of drinking by Mr. Lacey prior to apprehension by the police, except that prior consumption of alcohol was confirmed by the officer's observations of Mr. Lacey's physical person, and smell of alcohol, and the fail on the alert/approved screening device.

The relevant sections of the Criminal Code are Section 253(b) and Section 258(1)(c)(ii)(iii)(iv), which read:

> 253. Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not,
>
> > (b) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.
>
> 258(1) In any proceedings under subsection 255(1) in respect of an offence committed under section 253 or in any proceedings under subsection 255(2) or (3),
>
> > (c) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), if
> >
> > (ii) each sample was taken as soon as practicable after the time when the offence was alleged to have been committed and, in the case of the first sample, not later than two hours after that time, with an interval of at least fifteen minutes between the times when the samples were taken,
> >
> > (iii) each sample was received from the accused directly into an approved container or into an approved instrument operated by a qualified technician, and

> (iv) an analysis of each sample was made by means of an approved instrument operated by a qualified technician,
>
> evidence of the results of the analyses so made is, in the absence of evidence to the contrary, proof that the concentration of alcohol in the blood of the accused at the time when the offence was alleged to have been committed was, where the results of the analyses are the same, the concentration determined by the analyses and, where the results of the analyses are different, the lowest of the concentrations determined by the analyses;

The learned Trial Judge in delivering his decision said in conclusion as follows:

> " In summary, Section 258(1)(c)(ii) of the Code requires that there be "an interval of at least 15 minutes between the time when the samples were taken..." with this fact, together with all the others mentioned therein, if the interval is at least 15 minutes between these tests, the Crown can rely on the presumption mentioned to prove the concentration of alcohol in the blood of Mr. Lacey at the time when the offence is alleged to have been committed. This presumption is there to assist the Crown in a pretty heavy burden of proof.
>
> The interval between the times when the breath samples were taken from Mr. Lacey was <u>not</u> at least 15 minutes and in fact, was 14 minutes. Therefore, the Crown can not rely on the above presumption in Section 258.
>
> The Crown has produced the expert opinion evidence of Mr. Westenbrink to rectify Corp. Cougle's error. And Mr. Veniot in his summation stated that this is a case where Corp. Cougle fouled up. He has made an error respecting the taking of these breath samples, and I agree. So the Crown has produced Mr. Westenbrink to rectify this error or to attempt to rectify the error; however, Mr. Westenbrink does not know one very important fact..how much did Mr. Lacey have to drink and when prior to 12:50 a.m. or 12:55 a.m. Mr. Westenbrink frankly admits that to produce his opin-

> ions respecting a range of readings, he has to know if the subject had a significant amount of alcohol up to 1/2 hour, one half an hour, prior to the time of driving...that is up to 1/2 hour prior to 12:50 a.m. or 12:55 a.m.
>
> I am of the opinion that Mr. Westenbrink did not have sufficient facts before him to make an accurate opinion of the alcohol level in Mr. Lacey's blood at the time when the R.C.M.P. constables observed Mr. Lacey driving his truck or motor vehicle. The Crown has to prove the charge beyond a reasonable doubt. The Crown has made a valiant effort to do so; however, in my opinion the Crown has missed the mark.
>
> I do have a reasonable doubt about the opinion evidence of Mr. Westenbrink as presented to this Court for the above reasons. There is a reasonable doubt in my mind that Mr. Lacey drove his motor vehicle at a time when the concentration of alcohol in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood. I have to give that benefit of the doubt to the accused, which I do and I therefore find John Kevin Lacey not guilty of the charge under Section 253(b) of the Criminal Code of Canada.

Crown Counsel submits that the Crown had proved a prima facie case, and that the Defence must rebut the case on a balance of probabilities. He submits that once the blood alcohol concentration at the time of driving is proved by a breathalyzer test or by expert opinion evidence that Section 258(1)(c) of the Criminal Code applies, and it is incumbent upon the Defence to present evidence to the contrary. In support of his submissions, he cites the Supreme Court of Canada decisions in **R. v. Moreau** (1978) 42 C.C.C. (2d) 525, and **R. v. Crosthwait** (1980) 52 C.C.C. (2d) 129. Also in support of his submissions he refers to **R. v. Batley** (1985) 19 C.C.C. (3d) 382; **R. v. Phillips** (1988) 42 C.C.C. (3d) 150; **R. v. Pye** (1984) 62 N.S.R. (2d) 10, and **R. Young** (1979) 30 N.S.R. (2d) 381.

Counsel for Lacey submits that the Trial Judge made no error in his finding of fact, and came to the proper verdict. In support of this submission, he cites **R. v. Billard** (1984) 53 N.S.R. (2d) 53 and **R. v. Yebes** (1987) 36 C.C.C. (2d) 417. Lacey's Counsel points out that the expert witness, Westenbrink based his conclusions on two assumptions rather than facts, namely:

1. That the breathalyzer reading was accurate, and;

2. That Lacey did not drink any alcohol one half hour prior to the time of driving.

He refers to the cross-examination of William Westenbrink, where at page 48/49 of the transcript the following appears:

> Q. Thank you, and your assuming that there was consumption of alcoholic beverages one half hour prior to the time of driving, is that correct?
>
> A. For that very first calculation, yes.
>
> Q. And what is the significance of that assumption?
>
> A. Well, the significance of that assumption is that an individual may well consume alcohol within a half an hour period prior to that time of an incident. And if they consume alcohol during that time period, some of the alcohol, if it was a large enough quantity, some of that alcohol is not in the blood stream at the time of the incident but gets there and is absorbed and gets to the blood between the time of the incident and the time of the breath test. Now the length of time, maximum length of time to absorb any alcohol...
>
> Q. I could just stop you there, and we will come back to that, but, that has an affect on the level of blood alcohol, correct? In terms of time and measurement?
>
> A. Yes.
>
> Q. And that affect is what?

A. The affect is that at the time of the breath test, the reading could be higher.. would have been higher than they would have been at the time of the incident because there was some unabsorbed alcohol left in the person's stomach.

Q. And I have heard nothing in this courtroom today that tells me in any way what Kevin Lacey had to drink and when he drank it. Do you agree? You have been here all day.

A. I missed the very beginning of it, but while I was in here, I did not hear any of that.

Q. No, and when you have no factual underpinning for an assumption, it remains just that, doesn't it, an assumption?

A. That's correct.

Q. An unproven given that will produce a certain result if it is otherwise established to be the case, is that a fair statement?

A. Correct.

Q. And you can see that there are other possibilities which would affect the accuracy... which would affect your calculations relating back to the alleged time of driving, and we have just dealt with one of them, the consumption of alcohol a half hour prior to driving.

A. That's correct.

Counsel on behalf of Lacey further submits that the Crown cannot rely on the presumptions in Section 258, and must prove each essential element of the offence by admissible evidence. The evidence of the expert witness, William Westenbrink was not relevant to the facts of the case because there was no evidence of the accused, Lacey's, actual alcohol consumption.

In **R. v. Moreau; R. v. Crosthwait,** and **R. v. Batley,** cited by Crown Counsel in support of his submissions, one very relevant fact distinguishes all these cases from the factual situa-

tion in this appeal, namely that a certificate of analysis was admitted and that all the pre-conditions listed in Criminal Code Section 258(1)(c) had been met.

In the present case, it is clear from the evidence and is not questioned by either party, that the interval between the time the samples were taken was less than 15 minutes, and thus did not meet at least one of the conditions set out in Section 258(1)(c)(ii) of the Criminal Code. I find no merit whatsoever in the submission by Crown Counsel that the Defence has an evidentiary burden to raise a reasonable doubt, or present evidence to the contrary in the factual circumstances of the case under consideration in this Appeal. The results of the analyses is not proof sufficient to require the Defence to present evidence to the contrary.

The evidence is conclusive that the expert witness, William Westenbrink, had no knowledge of the accused, Lacey's, actual alcohol consumption in the time frame prior to the driving of the vehicle and the subsequent breathalyzer test.

The Trial Judge found that the witness, Westenbrink, did not have sufficient facts for him to make an accurate opinion of the alcohol level in Lacey's blood at the time when the R.C.M.P. constables observed Lacey driving his motor vehicle.

The Trial Judge in thus finding that the opinion evidence of the expert witness, Westenbrink, was not based on sufficient evidence was making a finding of fact.

Findings of fact must not be disturbed on Appeal, unless it can be established that the Trial Judge made some palpable

and overriding error. In Stein v. The Ship Kathy "K" (1976) 2 S.C.R. 802, at p.808, it states:

> "These authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that they are not to be reversed unless it can be established that the learned trial judge made some palpable and overriding error which affected his assessment of the facts. While the Court of Appeal is seized with the duty of re-examining the evidence in order to be satisfied that no such error occurred, it is not, in my view part of its function to substitute its assessment of the balance of probability for the findings of the Judge who presided at the trial."

I am satisfied after reviewing the record and considering the submissions of Counsel for both parties that the Trial Judge made no palpable or overriding error in his assessment of the facts, or his application of the law in finding that the Crown had not discharged it's burden of proof and that he had a reasonable doubt of the guilt of the accused, Lacey.

The Appeal of the Crown is dismissed, with costs to the Respondent, which I fix at seven hundred and fifty dollars ($750.00).

H. J. MacDonnell,
Judge of the County Court
of District Number Five