1991 C.Y. No. 5928

IN THE COUNTY COURT OF DISTRICT NUMBER THREE

BETWEEN:

LUC TREMPE

APPELLANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

HEARD: At Yarmouth, Nova Scotia, on the 27th day of June, A.D. 1991

BEFORE: The Honourable Judge Charles E. Haliburton, J.C.C.

CHARGE: Section 253(b) of the Criminal Code

DECISION: The 20th day of January, A.D. 1992

COUNSEL: Andrew S. Nickerson, Esq., for the Appellant

Robert M. J. Prince, Esq., for the Respondent

D E C I S I O N O N A P P E A L

HALIBURTON, J.C.C.

The Appellant was convicted after trial before His Honour Judge James D. Reardon, J.P.C., of the offence that he

> ...did unlawfully operate a motor vehicle having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood, contrary to Section 253(b) of the Criminal Code of Canada.

The Accused raised the same issue at the time of trial as is raised on the appeal, being whether the breath samples "were taken as soon as practicable" and/or whether the Learned Trial Judge "erred in law in holding that the peace officers had provided an adequate explanation for delay between the time of driving and the time of taking the breath tests".

The facts are not in dispute. Constable Bouchard, an R.C.M.P. officer, happened upon a Jeep motor vehicle stopping on the side of the road at 1:55 a.m. The Accused was seen getting out and standing beside the vehicle, unsteady on his feet. The constable inquired if he was having vehicle problems and he indicated that he was simply getting out to urinate. There were other indices of impairment observed. The police constable was at all times accompanied by a second officer, Constable Barker, who ultimately became the breathalyzer operator.

At 1:58 a.m., the breathalyzer demand was read and at 1:59 a.m., the Appellant was placed under arrest. The two constables and the Appellant arrived at the R.C.M.P. office at 2:31 a.m. inspite of the fact that the office was located at a distance of only five to seven minutes from the point of arrest.

Constable Bouchard, in his testimony, explained that delay by his testimony that the rear door of the jeep could not be locked. He did not want to leave the vehicle unsecured on the side of the road and he awaited a tow truck to remove it. He himself was apparently concerned about this delay. As his evidence indicates at page 8 of the transcript,

> ...It (the tow truck) was taking too long, so I contacted Constable Leger to come and wait for the tow truck to arrive and when he arrived we left.

At the police detachment, after 2:31 a.m., the Accused was again advised of his right to counsel and was asked seven or eight times by Constable Bouchard whether he wished to call a lawyer. This offer apparently ended when the Appellant indicated he wanted to "get it over with". As a result, Constable Bouchard "turned the Accused over" to Constable Barker at 2:35 a.m. The breathalyzer certificate which was admitted into evidence discloses blood alcohol levels of 110 relating to samples obtained at 3:07 and 3:27.

Finally, at 3:49 a.m., the breathalyzer certificate was served upon the Appellant and explained to him by Constable Bouchard.

Section 258(1) of the Code establishes a convenient and expeditious method for the admission of evidence relating to the tests of breathalyzer samples and creates a presumption as to the blood alcohol level of an Accused person. The result of the section is a derogation of the common law right to "presumption of innocence". As such, the section is to be

strictly interpreted. The portions of s. 258 relevant to this particular prosecution read as follows:

> **258(1)** In any proceedings...under section 253
>
> (c) where samples of the breath of the accused have been taken pursuant to a demand...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**
>
> **evidence of the results of the analyses so made is...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...the concentration determined by the analyses...**

It will be observed that all aspects of the "processing" of the Accused on the night in question were well within the two hour limit. Not only was the first sample taken within that time limit, but he was presumably completely processed and released in approximately five minutes less than two hours.

It could not be argued that the legislative scheme and the principles which prompted the imposition of a two hour limit were in any way offended by the ultimate time lapse which took place in this case. The Accused was dealt with, he was served with the "certificate" and he was released within two hours of his initial apprehension. It could not be argued that any delay with processing him was inordinate, or was prejudicial to him relative to other persons facing similar investigations.

At trial, Defence Counsel argued that there was a "delay in excess of an hour. Probably an hour and ten minutes". And on that basis, his submission was that the breath samples were "not taken in accordance with the requirements of the Statute" and, therefore, that the Crown could not avail itself of the evidentiary advantages and especially the presumption created by s. 258.

The evidence makes it clear that there did pass one hour and ten minutes between the time when the demand was made and the time when the first breath sample was taken. It seems clear from the cases placed before me by Counsel that there is, in each case, an onus upon the authorities to explain any delay. **In the absence of such an explanation satisfactory to the Trial Judge, then the results of the tests are not admissible.**

As the argument of Defence Counsel developed, it is perhaps unfortunate that at the time of trial, he appears to have zeroed in on the "half-hour" that the policemen waited at the scene for a tow truck. The evidence discloses that the wait was, in fact, about 25 minutes, after which ten to twelve minutes lapsed while transporting the Appellant to the police office and furnishing him with an opportunity to contact counsel. He was turned over to the breathalyzer technician at 2:35 a.m. There was no evidence as to what transpired between 2:35 a.m. and 3:07 a.m, a period of 32 minutes. In that respect, Defence Counsel has said only that since Constable Barker, the technician, was in the company of the Accused throughout the entire investigation, it should not have been

necessary to keep him under observation as a breathalyzer technician for any period of time. Crown Counsel has disputed that thesis in his argument.

In dealing with the delay which Defence Counsel properly estimates to be an hour and ten minutes, the Trial Judge concluded:

> ...In this particular instance here we have Constable Bouchard who was able to **explain the complete delay from the time he apprehended the accused until the time that he was passed over to the breathalyzer technician** Constable Barker. He was concerned, reasonably so, that he wasn't going to leave an unattended vehicle on the side of the road until the tow truck arrived. In order to make sure that he had a sample taken from the accused he then called Constable Leger to come and stand by the immobilized vehicle until such time as the tow truck arrived. **The delay has been properly explained** before this Court.
>
> (Emphasis added)

It seems clear from this conclusion that Judge Reardon followed what was the primary thrust of Defence Counsel's argument and addressed himself only to the delay which occurred before the parties arrived at the police office. I find, however, that he did not address his mind to the 32 minute delay which occurred after that point and that in failing to do so, he erred in law.

The Prosecution, in its submission, invites me to treat it as "common knowledge" that the breathalyzer technician must observe the accused person for a period of time to ensure that the mouth of the suspect is empty of foreign objects and that he has not burped or regurgitated materials from his stomach which could affect the results of the test. In other circumstances, that argument would be more persuasive. I think,

perhaps, one could take judicial notice of the fact that there is a practice by breathalyzer technicians to observe an Accused for a period of 15 minutes before obtaining a sample. Even if that were accepted, it would not explain a delay of 32 minutes which we have in this case and, additionally, Constable Bouchard, who presumably has some familiarity with the administering of breath tests even though he was not, in this case, established to be a breathalyzer technician, was asked specifically about this point. He apparently did not share the "common knowledge" alluded to by Crown Counsel. At page 9 of the transcript, he was asked at line 24:

> QUESTION: ...how long does it take to prepare the machine, to warm up the machine?
>
> ANSWER: I don't know, I'm not an operator.

The evidence offers no clue as to what transpired during this 32 minute period.

I accept that Freeman, J.C.C., as he then was, stated the relevant law correctly in deciding R. v. Russell 98 N.S.R. (2d) 33, wherein at paragraph 10 he wrote:

> **[10]** The principle that the Crown must prove the test was given as soon as practicable has been well-recognized by the courts and I have been referred to a number of cases in which acquittals have resulted because time intervals had not been accounted for. The shortest of those periods was, I believe, a little longer than fifteen minutes.
>
> **[11]** I take it to be well-established that when there is no evidence relating to a period of fifteen minutes or more, **an acquittal will result.** When there is some evidence the matter is a question of fact to be determined by the trial judge.

I have been referred to a number of cases by both Counsel as well as some legal writings which discuss the meaning of "as soon as practicable". What is practicable would be a finding of fact for the Trial Judge; assuming always that there was evidence before him which explained the delay. **Since there is no evidence here to explain a 32 minutes delay**, it appears to me that those considerations are without relevance.

In a split decision in R. v. Van Der Veen 11 M.V.R. (2d) 251, the Alberta Court of Appeal determined that a 50 minute delay between arrival at a police detachment and the taking of a test rendered the test admissible. In that case, there was a 40 minute lapse between arrival at the detachment and the turning over of the Accused to the breathalyzer technician. The first breath test was taken 12 minutes later. The majority considered that the 40 minute delay was explained by hearsay evidence that (1) the street was very active at that time; (2) no breathalyzer technician was available at that time; and (3) the breathalyzer technician would arrive shortly. The minority judgment rendered by Harradence J.A., would have excluded the results of the breathalyzer under the provisions of the section because of his view that the hearsay evidence explaining the 40 minute delay was inadmissible.

The British Columbia Court of Appeal was also split in their decision reported as R. v. Cander 59 C.C.C. (2d) 490. In that case, it was argued that the 20 minute "observation period" was "a matter of policy". A formal demand was given to the Accused in that case at 10:05 p.m. and the first breath sample

taken at 10:26. In that case, there was evidence that during the intervening 21 minutes, the Accused was delivered over to the qualified technician. Included in that 21 minutes was a period of approximately 5 minutes during which an "investigational guide for impaired drivers" was filled out or completed. There was testimony that the balance of the time

> prior to the breath testing was spent maintaining an observation of the respondent to ensure that he neither burped nor belched as the witness understood that such actions would affect the breathalyzer reading. **The police officer testified that such observation period is a matter of policy.**
>
> (Emphasis added)

In Cander, the breath test was administered 21 minutes after the demand and 31 minutes after initial contact with the Accused. Lambert, J.A., in his dissenting opinion, concluded that the 20 minute delay for observation of the Accused before taking the breath test could not be countenanced under the admonition contained in the relevant section; that the test was to be administered "as soon as practicable". He concluded that the practice of observing an Accused for 20 minutes was not a sufficient explanation of the delay in the absence of the reasons for establishing such a practice.

I refer to the Cander case because it involved a 20 or 21 minute delay and not because of the manner in which the delay was explained. Whether the 20 minutes was explained on a "subjective" or "objective" basis and/or whether an established "policy" can be accepted as an explanation is not of any consequence on this appeal where the Court was left with no explanation.

In conclusion, it may very well have been that in fact the breath sample was taken from the Accused as soon as practicable, bearing in mind that practicable imports some degree of reasonableness and is not to be equated with as soon as possible. It may well be that the facts were that the actions of both police officers involved were eminently reasonable having regard to all the circumstances. Fortunately or unfortunately, there is no evidence which would permit a finding to that effect.

I am conscious of the fact that in R. v. Payne (1990) 56 C.C.C. (3d) 548, the Ontario Court of Appeal (Griffiths J.A.) reversed the finding of the Trial Judge who found an "'unexplained delay of nine minutes...was fatal to the Crown's case'" and entered a conviction. This would seem to be consistent with the proposition enunciated by Judge Freeman in Russell that an unexplained delay of 15 minutes approaches a threshold. An unexplained delay of 32 minutes is well beyond that threshold.

In the circumstances, I conclude that the unexplained delay of 32 minutes drives me to the conclusion that the breath sample was not taken "as soon as practicable"; that the Crown cannot rely on the provisions of s. 258(1)(c)(ii) and that the Certificate of Analysis is inadmissible as evidence against the Accused. The appeal will, therefore, be allowed and an acquittal entered.

DATED at Digby, Nova Scotia, this 20th day of January, A.D. 1992.

CHARLES E. HALIBURTON
JUDGE OF THE COUNTY COURT
OF DISTRICT NUMBER THREE

TO: Mrs. Diane Hamilton
Clerk of the County Court
P.O. Box 188
Yarmouth, Nova Scotia
B5A 4B2

Mr. Andrew S. Nickerson
Chipman, Fraser, Pink & Nickerson
Barristers and Solicitors
P.O. Drawer 580
Yarmouth, Nova Scotia
B5A 4B4
Solicitor for the Appellant

Mr. Robert M. J. Prince
Senior Crown Attorney
P.O. Box 550
Yarmouth, Nova Scotia
B5A 4B6
Solicitor for the Respondent

CASES AND STATUTES CITED:

Section 258(1) of the Criminal Code

R. v. Russell 98 N.S.R. (2d) 33

R. v. Van Der Veen 11 M.V.R. (2d) 251

R. v. Cander 59 C.C.C. (2d) 490

R. v. Payne (1990) 56 C.C.C. (3d) 548

CANADA

PROVINCE OF NOVA SCOTIA CASE #190342

IN THE COUNTY COURT OF DISTRICT NUMBER THREE

ON APPEAL FROM

PROVINCIAL COURT

BETWEEN:

HER MAJESTY THE QUEEN, RESPONDENT

- and -

LUC TREMPE, APPELLANT

HEARD BEFORE: His Honour Judge James D. Reardon, J. P. C.

PLACE HEARD: Yarmouth, Nova Scotia

DATE HEARD: February 22nd. 1991

CHARGE: That at or near Hardscratch Road, in the County of Yarmouth, Nova Scotia, on or about the 27th. day of October, 1990 did unlawfully operate a motor vehicle having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood, contrary to Section 253 (b) of the Criminal Code of Canada.

COUNSEL: Lloyd Tancock, Crown Attorney

Andrew S. Nickerson, Esq., for Defence

C A S E O N A P P E A L