Cite as: R. v. Tupper, 1992 NSCO 25

1991 C.AR. No. 02647

IN THE COUNTY COURT OF DISTRICT NUMBER THREE

BETWEEN:

MICHAEL MORGAN TUPPER

APPELLANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

HEARD: At Annapolis Royal, Nova Scotia, on the 21st day of January, A.D. 1992

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

CHARGE: Section 254(5) of the Criminal Code

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

COUNSEL: W. Bruce Gillis, Q.C., Esq., for the Appellant

David E. Acker, Esq., for the Respondent

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

HALIBURTON, J.C.C.

This is an appeal from a conviction entered by Phillip R. Woolaver, J.P.C., on the charge that Mr. Tupper

> did without reasonable excuse, refuse to comply with a breathalyzer demand made to him by Constable William Douglas Shields, a peace officer, to provide...samples of his breath...to enable a proper analysis to be made in order to determine the concentration, if any, of alcohol in his blood, contrary to Section 254(5) of the Criminal Code.

The appeal was argued by Counsel at Annapolis Royal on the 21st day of January, A.D. 1992.

A decision was reserved pending the receipt of further written submissions from Counsel with respect to the primary issue raised on the appeal which was:

> Was Constable Shield's evidence regarding statements made to him by Tammy Hall admissible without the holding of a **voir dire**?

Briefly, the facts are that on the night in question, after having returned from a dance and at approximately 2:30 in the morning, the Accused and his commonlaw spouse, Tammy Hall, became embroiled in an argument. Their dispute attracted the attention of a neighbour, Peter MacNeil, who saw the couple eventually drive away from their place of residence in their automobile, with the Accused driving and Tammy Hall in the passenger seat. At some point during the altercation, Mr. MacNeil telephoned the R.C.M.P.

The Accused had driven half a mile down the road when Ms. Hall was able to get the keys out of the ignition and throw

them out the window. She subsequently got out and recovered the keys and left the scene. The Accused, who was very drunk, staggered up the road where he was picked up by Constable Shields of the R.C.M.P. who was arriving in response to the neighbour's complaint. Constable Shields, who testified he was looking for the motor vehicle, continued on down the road until he found the vehicle abandoned, parked improperly in the middle of the roadway.

Shortly after locating this car, Tammy Hall arrived with other friends. She was talking very loud or "screaming", in the course of which she communicated the following information to Constable Shields, according to his evidence:

> (Page 51, Line 24)
> ...she stated that her and Michael had been fighting and **that Michael had drove the car out to here** and that she'd been fighting with him all the way out and finally had shoved the car up into park, grabbed the keys and thrown them out. She then got out of the vehicle, Michael did too, they were searching for the keys, she found them and ran and got into a car with Mr. Marty Conrad and left.
>
> (Emphasis added)

Constable Shields testified that on more than one occasion during the succeeding minutes or hours, the Accused "said that he hadn't been driving that evening".

All the above recited information reflects the findings of fact made by the Trial Judge with the exception of the quotation from Constable Shields' evidence. The essence of what was to be decided on the trial is the question considered by Judge Woolaver at page 90, line 9:

> ...did Shields have reasonable and probable grounds for making that demand?

He answered that question by saying:

> It's my view that the evidence was overwhelming, that he did have reasonable and probable grounds for making that demand.

While the testimony of Constable Shields quoted above is the clearest evidence that he did have reasonable and probable grounds at the time of making the demand, it was not the only evidence in that regard. The following points are made by his testimony:

- He was investigating a complaint from the telecoms operator.

  He says, at page 44:

  > ...as a result of a call from our telecoms in Yarmouth indicating a disturbance, two people a blue vehicle...on Queen Street..

- In the course of looking for this blue vehicle, he, of course, located Mr. Tupper, the Accused, who was very drunk and whom he arrested for being drunk in a public place.
- He subsequently located the vehicle he was looking for parked in the manner already described.

It is arguable that he might have drawn the necessary inference from just those circumstances, although it is not in evidence that the "two people" were Ms. Hall and the Accused. It seems apparent that Judge Woolaver, in reaching his decision, relied partly on the evidence of Constable Shields, including those words "screamed" at him by Ms. Hall.

On the trial, Defence Counsel objected to the

admission of Ms. Hall's comments to Constable Shields and sought to have a **voir dire** as to the admissibility of that evidence.

THE ISSUE

The question to be answered on this appeal, then, is whether or not the evidence of Tammy Hall was properly admitted and/or whether failure to hold a **voir dire** was an omission fatal to the proceedings.

When is a **voir dire** required? At the trial, Tammy Hall, when asked about the alleged statement to Constable Shields, said:

> (Page 40, Line 12)
> QUESTION: ...Did you say anything to Constable Shields that would lead him to believe that Michael had been driving?
>
> ANSWER: No I don't recall no.
>
> QUESTION: I'm sorry?
>
> ANSWER: I don't recall for anything in that indication no.
>
> QUESTION: Did you say, give any indication whether you were driving?
>
> ANSWER: I didn't refer to who was driving at all.
>
> QUESTION: At all. All right. At any later time, did you..you say you discussed this with Constable Shields the next day, did you give any indication at that time about who was driving?
>
> ANSWER: That I was driving, I..
>
> QUESTION: Sorry?
>
> ANSWER: I was driving, but at the same time he was asking me a lot of questions and stuff and I could have said yes to something I didn't realize I was saying yes to.

Defence Counsel has interpreted this as saying:

> ...she said nothing to the Police Officer to indicate that the accused was, at any time, driving her vehicle.

A second point he makes is that Constable Shields' evidence is "hearsay..and not admissible" because it was not established that the alleged comments "took place within hearing of the Accused". And thirdly, that by eliciting this evidence from Constable Shields, "the Crown purported to contradict the evidence of its own witness" which is not allowed.

Counsel has cited the text "Criminal Pleadings and Practice in Canada", Ewaschuk, 17:2170, for the following proposition:

> Where an accused does not waive the voluntariness of the statement, a **voir dire** is necessary, as it generally is when the accused objects to the admissibility of evidence...

One of the authorities for this proposition is R. v. Leaney and Rawlinson, [1989] 2 S.C.R. 393. In that case, the trial judge admitted evidence from five police officers who testified as to the identity of the accused based on having viewed a videotape of a break and enter. Only one of the policemen had any knowledge of the accused prior to seeing the videotape. The videotape itself was apparently evidence before the Court. Leaney's conviction was upheld on the basis that the Provincial Court Judge himself had found that he could identify the Accused without the evidence of the police officers by viewing the

videotape. Therefore, the Appeal Court held that no miscarriage of justice had resulted.

In the Court of Appeal, Harradence, J.A., had decided that the conviction must be quashed and a new trial ordered, putting

> (Page 404)
> emphasis on the fact that the trial judge refused a defence request for a **voir dire** on the admissibility of police testimony identifying Leaney as the taller person in the videotape.

Mr. Justice Lamer, in his dissenting judgment, makes the following observation:

> I agree with Harradence J.A. that a **voir dire** should have been held. But, Sergeant Cessford, **after having been heard, was fully cross-examined;** furthermore, Leaney did not raise the matter in the Court of Appeal, and, in this Court, did not seek through affidavit evidence to indicate **in what way he was prejudiced** in his defence by that omission....
>
> (My emphasis)

Ewaschuk continues with the following comment:

> Moreover, where an accused objects to the admissibility of Crown evidence against him, a **voir dire** should generally be held, but need not be where a statement of counsel as to the nature and purpose of the evidence will suffice to permit the trial judge to rule on the matter. Obviously, in this regard delay and inconvenience to the jury are important considerations in expediting a **voir dire.**
>
> (My emphasis)

Counsel makes the point that in this case against Mr. Tupper, there was neither a **voir dire** held nor any explanation by Counsel on which the Judge could determine the nature and purpose of the evidence and make a ruling as to its

admissibility before the evidence was, in fact, heard. He argues that:

> ...it is procedurally wrong to proceed without holding a **voir dire**, or at least an inquiry as to the nature and purpose of the evidence...**the sole evidence on the question of reasonable and probable grounds** before the Court, which favoured the Crown's case, **was the precise evidence that was challenged** and on which a **voir dire** was requested. All of the other evidence before the Court was contrary to the Crown's case.
> (My emphasis)

I consider the last sentence to be an overstatement. It is, nonetheless, clear that the evidence which was challenged was important material evidence to the Crown's case.

In the text "Canadian Criminal Evidence", Third Edition, P.K. McWilliams, the following comments appear under topic 15:13010, entitled "Necessity of Voir Dire":

> In England a **voir dire** is not held unless counsel raises the issue...However, in Canada it has long been the law that a **voir dire** is necessary, it being the responsibility of the trial **judge to satisfy himself that a statement is voluntary...**
> (My emphasis)

> Now in Erven v. The Queen (1978), 44 C.C.C. (2d) 76 S.C.C., Dickson J. has rejected the view that a **voir dire** is necessary only where special circumstances cast doubt on voluntariness and that it is unnecessary where a confession is obviously voluntary or volunteered...."Unusual prescience would be required to determine that a statement is obviously voluntary before the accused has had a chance to call witnesses, testify, and present argument, and where all the persons involved have not been called...". He also considered the unsatisfactory consequence if the defence could not call evidence on the **voir dire** and had to wait until after the satement was admitted in evidence..."Once the confession was read to the jury it was hopeless for the accused to call witnesses to show it was not a voluntary statement. The damage was done and could not be undone."

Obviously, the subject matter of the foregoing analysis is confessions by an accused. The observations with respect to the futility of attempting to countermand inadmissible evidence after it has been heard, however, is relevant to our considerations.

I should, I think, digress to point out that the Crown takes the position that while there was no **voir dire**, "there certainly was a reasonable opportunity to canvass..through examination of witnesses" the question of whether or not the comments of Tammy Hall would/could have been heard by Mr. Tupper, the Accused, and that in any event, the evidence of what she said to Constable Shields "was admissible without a **voir dire**" (and indeed) without "her being a witness".

Reflecting the observations of the Court in R. v. Leaney, the Defence having requested a **voir dire**, the Trial Judge was virtually obliged to grant that request or, at least, to inquire about the nature and purpose of the evidence about to be tendered.

My reference to the texts persuades me that the Trial Judge ought to have required a **voir dire** before proceeding to hear the out of court statement. At the very least, he should have heard representations as to the nature of the evidence, its purpose and admissibility. To paraphrase Dickson, J. in Erven, rules of evidence must be such as are easily applied, requiring a **voir dire** only after involuntariness or inadmissibility appears likely, would create a rule neither "clear nor easily applied".

The relevancy and materiality of this evidence in question are undoubted. The evidence relates to the very essence of the determination which Judge Woolaver had to make which was whether or not the police constable had "reasonable and probable grounds" for making the s. 254 demand.

The object of a **voir dire** would have been to determine the nature of the evidence which was to be tendered and the purpose for which it was to be received. In other words, to determine its relevance and admissibility. The primary purpose for which the evidence was tendered was to establish that the police constable had an objective basis upon which he might reasonably form the opinion that the Accused had been driving this motor vehicle within the previous two hours. Whether or not the statement was made, the manner in which it was made, the apparent relationship between the declarant and the Accused, and other surrounding circumstances were the proper subject matter for a **voir dire**.

Accepting however that Ms. Hall did make a statement to the effect described by Constable Shields, her words could form a proper basis on both an objective and subjective sense to underpin the necessary belief of the police officer.

The Crown has referred the Court to several cases, including R. v. Chetwynd 25 N.S.R. (2d) 452 and R. v. MacLean (unreported - Freeman, J.C.C.) C.LP. No. 3349, May 17, 1990, where second-hand information received by a police constable was found to be adequate foundation for the requisite belief.

Notwithstanding the fact that there was no **voir dire**, there was ample opportunity for Defence Counsel to cross-examine both Tammy Hall and the two police officers with respect to the alleged statement and whether or not it was made. Whether or not a **voir dire** had been held, I am satisfied the statement would have been before the Court because it was clearly admissible for the purpose for which it was tendered. I have discovered no exclusionary rule which would apply in the circumstances.

The Defence has put forward no basis for the exclusion of the evidence.

- It is not hearsay
- Voluntariness is not in issue because it is not a statement made by the Accused.
- Whether the statement was made in the presence of the Accused or not is of no consequence.

The essence of the evidence before the Court is summed up by Defence Counsel in cross-examining Constable Shields at page 60:

> QUESTION: So the only inference that you had from anybody that Michael might have been driving, was the hysterical screaming statement from Tammy which Michael had denied?
>
> ANSWER: Correct.

Whether or not he heard the statement, the Accused denied that he was the driver. If he had heard the statement, he could have done nothing more. If Constable Shields had heard him make that denial immediately, in the face of the allegation, would that have disqualified Shields from making the demand? At page 59 of

the transcript, Constable Shields testified that the Accused denied he was the driver, both at the scene and afterwards, and specifically, at the time of refusing the breathalyzer.

On the trial, Ms. Hall, who was called as a witness for the Crown, testified that she was the driver of the motor vehicle at the relevant time. The Accused , in his defence, testified to the same effect. Judge Woolaver, having heard all of the evidence, including the full cross-examination as to the manner and circumstances of the impugned statement, made certain findings of fact at page 86:

> I accepted (the evidence of Mr. MacNeil) at face value and got the distinct impression of a young man of high character and believable. (Mr. MacNeil said) he got in the driver's seat..the accused drove away...with Tammy Hall in the passenger seat.

At page 87:

> (Ms. Hall) says...she drove away...and she describes the accused as being "very drunk".

And at page 88:

> I didn't believe her at all...she was not telling the truth about who was driving the vehicle on that occasion.
>
> (Her description of the manner in which they changed seats was) bizarre, incredible and unbelievable.

It is clear that Judge Woolaver rejected her evidence that she was, in fact, the driver, as he implicitly rejected her evidence that she had given no indication to the police officer that the Accused was the driver, except possibly when confused by a rain of questions from the policeman. The holding of a **voir dire** would not have affected the findings of Judge Woolaver, nor the evidence upon which he based his findings.

A SECONDARY ISSUE

It remains to deal with one further point. The Defence has argued that having called Ms. Hall as a witness, the Crown was "stuck" with her testimony that she was the driver of the vehicle on the night in question. At trial, she said she had not indicated otherwise to the police constable. Counsel argues that the Crown was prohibited from calling the evidence of Constable Shields in contradiction of this Crown witness. He points out that the Crown made no effort to impeach their own witness under the provisions of the Canada Evidence Act and submits, based on "Cudmore's Civil Evidence Handbook", (Toronto, 1987), page 10-1:

> Because, by calling a witness, you are in effect attesting to his reliability, you should not be offering evidence to show that he is not reliable.

While the criminal process is an adversarial one, the position of the Crown is very different from that of the Accused, especially in current thinking. It is accepted that the Crown has an obligation to bring forward all the relevant and material evidence and the witnesses necessary to produce the appropriate narrative. It is certainly well recognized that the Crown must now communicate the identity and the expected evidence of "all" witnesses to the Defence, whether it is intended to call all those witnesses or not. The obligation of the Crown is to place that evidence before the Court, whether it is in conflict with the theory of the Crown or not. It is for

the Court to determine the guilt or innocence basing its conclusions, of course, in large measure, on its assessment of credibility. It is the Defence whose adversarial position will be to emphasize that evidence which will, consistent with their theory of the case, promote the acquittal of the Accused. In that context, there can be no requirement that Crown witnesses be uniform in their evidence nor even consistent with respect to collateral matters, although one would anticipate, in most cases, there will be consistency with respect to circumstances essential to the guilt of the Accused.

In dealing with the general duty of the Crown in calling witnesses, I refer again to McWilliams on "Canadian Criminal Evidence", topic 27:10810:

> In Wu v. The King (1934), 62 C.C.C. 90 (S.C.C.), Lamont, J., said at p. 101:
>
> > I have always understood that it was the duty of the Crown counsel to place before the Court the evidence of those who were eyewitnesses of the crime with which the accused was charged, whether they give evidence which is consistent with the commission of the crime by the accused or otherwise. I have always considered that counsel for the crown was in the position of an officer of the Court whose duty is to get at the truth irrespective of whether or not the evidence supports the Crown's case.
>
> Similarly, Lord Roche in Seneviratne v. The King, [1936] 3 All E.R. (P.C.)., said at p. 49::
>
> > Witnesses essential to the unfolding of the narratives on which the prosecution is based, must, of course, be called by the prosecution whether in the result the effect of their testimony is for or against the case for the prosecution.

In view of the age of the citations, the obligations of the Crown are, perhaps, not necessarily a "new age" concept.

The fact that the Crown called Ms. Hall whose evidence at trial was inconsistent with the guilt of the Accused, was not prohibited and did not lead to any procedural unfairness to the Accused.

No reversible error was committed by Judge Woolaver on the trial. His findings of fact were amply supported by the evidence. That being so, the appeal is hereby dismissed and the conviction and sentence confirmed.

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

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

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CASES AND STATUTES CITED:

"Criminal Pleadings and Practice in Canada", Ewaschuk, 17:2170 & 27:10810

R. v. Leaney and Rawlinson, [1989] 2 S.C.R. 393

"Canadian Criminal Evidence", Third Edition, P.K. McWilliams, topic 15:13010, entitled "Necessity of Voir Dire"

Erven v. The Queen (1978), 44 C.C.C. (2d) 76 (S.C.C.)

R. v. Chetwynd 25 N.S.R. (2d) 452

R. v. MacLean (unreported - Freeman, J.C.C.) C.LP. No. 3349, May 17, 1990

Canada Evidence Act, R.S., c. E-10, s.1

"Cudmore's Civil Evidence Handbook", (Toronto, 1987)

Wu v. The King (1934), 62 C.C.C. 90 (S.C.C.)

Seneviratne v. The King [1936] 3 All E.R. (P.C.)

CANADA
PROVINCE OF NOVA SCOTIA

1991 246692

IN THE PROVINCIAL COURT

HER MAJESTY THE QUEEN

versus

MICHAEL MORGAN TUPPER

HEARD BEFORE: His Honour Judge Phillip R. Woolaver

PLACE HEARD: Middleton Provincial Court

DATES HEARD: August 26, 1991

CHARGE: That he, at or near Bridgetown in the County of Annapolis, Province of Nova Scotia, on or about the 10th day of June, 1991 did without reasonable excuse, refuse to comply with a breathalyzer demand made to him by Constable William Douglas Shields, a peace officer, to provide then or as soon thereafter as was practicable, samples of his breath as in the opinion of a qualified technician were necessary to enable a proper analysis to be made in order to determine the concentration, if any, of alcohol in his blood, contrary to Section 254(5) of the Criminal Code.

David E. Acker, Esq., for the Prosecution

W. Bruce Gillis, Q.C., for the Defence