Cite as: R. v. Dacey, 1990 NSCO 10

C A N A D A
PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX C.H. 67271

I N T H E C O U N T Y C O U R T
OF DISTRICT NUMBER ONE

BETWEEN:

BARBARA ELAINE DACEY,

Appellant

- and -

HER MAJESTY THE QUEEN,

Respondent

Donald C. Murray, Esq., solicitor for the appellant.
Craig Botterill, Esq., solicitor for the respondent.

1990, February 20, Cacchione, J.C.C.:- This appeal arises from the appellant's conviction on a charge pursuant to s.253(b) of the **Criminal Code of Canada.** A second charge pursuant to s.253(a) of the **Criminal Code** was stayed.

The grounds of appeal, as stated in the Notice of Appeal, are as follows:

> 1. That the Learned Provincial Court Judge erred in law in assuming facts favourable to the prosecution which were essential to the Crown's case but upon which no evidence was led.
>
> 2. That the Learned Provincial Court Judge erred in law and fact in finding that the Crown had established an appropriate demand and consent to the taking of blood samples under s.254(3)(b).

The facts are that a motor vehicle driven by the appellant on January 21, 1989 was in collision with another motor vehicle. After the arrival of the police and an ambulance the appellant was transported to the Victoria

General Hospital where she was examined by Dr. Dauphinee. Once the appellant had been examined, Constable Dumas was permitted to speak with her and then Dr. Dauphinee took certain blood samples from her. The samples were turned over to Constable Dumas who sent them for analysis. A certificate of analysis was personally served on the appellant and it disclosed a blood alcohol reading of 240 milligrams of alcohol in 100 millilitres of blood.

The evidence also disclosed that at the scene of the accident the appellant was hysterical, her speech was incoherent and slurred and she was difficult to understand. There was also evidence showing that the appellant did not respond to specific requests made of her, such as the request to leave her motor vehicle. During the ambulance ride to the hospital the attendant described the appellant as slipping in and out of consciousness.

Upon examination by Dr. Dauphinee the appellant was found to be stable without gross injuries to her head and neck and to have vital signs within normal limits. A laceration to her chin was noted as well as some bruising to her extremities. She was hospitalized overnight in order to monitor if her incoherent speech was as a result of alcohol consumption or due to a closed head injury. Once Dr. Dauphinee finished his initial physical examination and determined that the appellant was medically stable he then allowed Constable Dumas to "talk to her and do whatever he had to do."

Constable Dumas testified that he approached the appellant and advised her that she had been in a motor vehicle accident and that he was a policeman. He also gave her a demand for blood samples and her Charter Right to counsel. The officer did not indicate what responses

were given to him. His evidence concerning the right to counsel and the demand for blood sample is ambiguous as can be seen from the following exerpt.

> "Before I ...at the end of the demand I explained that she did not have to answer me at this time, she could consult legal counsel if she wanted to and I asked her if she understood that. She gave me an answer and I asked her if she wanted to take the test or call somebody and she answered 'Yes', she wanted to take the test ... not the test to give samples." (Transcript p.12, line 17-21)

The appellant argues that the learned Provincial Court Judge erred in law by assuming facts favourable to the prosecution which were essential to the Crown's case but upon which no evidence was led. The facts which the appellant states were assumed without evidence are:

1. A negative answer as to interest in contacting counsel.

2. That the doctor told the police officer that Barbara Dacey could understand him.

3. The formation of a belief of the police officer on reasonable and probable grounds that it was impracticable or required by Barbara Dacey's physical condition that a breath sample could not be taken.

4. The analysis shown on the Certificate of analysis was an analysis of the appellant's blood.

It is acknowledged that in a criminal trial the Crown can prove its case by direct evidence, circumstantial evidence or both. When proof of a charge or an element

thereof is made through an inference, the inference must be based on a proven fact. A criminal court cannot base its decision on conjecture. There must be some evidentiary basis for a rational conclusion to be reached; one cannot find a rational conclusion on possibilities. **R. v. Dillman** (1979), 7 C.R. (3d) 378. As was stated in **R. v. Gosby** (1974), 16 C.C.C. (2d) 228 (N.S.S.C., A.D.)

> "The criminal law cannot however convict on probabilities".

In addressing the question of whether or not the appellant waived her right to counsel, a review of the transcript shows that there is no evidence of the appellant's response or any evidence showing that she understood the rights that were given to her. As stated above, the transcript discloses that the appellant had on route to the hospital slipped in and out of consciousness on several occasions, that she was incoherent and failed to understand requests made of her to leave her motor vehicle. In order for a voluntary waiver to be valid and effective it must be based on a true appreciation of the consequences of giving up the right. **Clarkson v. The Queen** (1986), 25 C.C.C. (3d) 207 (S.C.C.). The one response which the appellant is alleged to have made is ambilvalent. Constable Dumas testified as follows, at p.12

> "She gave me an answer and I asked her if she wanted to take the test or call somebody and she answered 'Yes', she wanted to take the test ... not the test to give samples."

It appears that the learned trial judge interpreted this evidence as a waiver of the right to counsel and a permission to take blood samples. There is no evidence

of an unequivocal waiver of the right to counsel in these circumstances. To suppose that the officer would not have proceeded as he did if there had not been a waiver is simply conjecture. In **Jones v. Great Western Railroad Company** (1931), 144 L.T. 194, at 202 (H.L.), adopted in **R. v. German** (1979), 33 N.S.R. (2d) 565, at 570 (N.S.S.C., A.D.), the court stated:

> "The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible, but it is of no legal value, and its essence is that it is a mere guess. Since inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof."

In the present case there was no evidence on which to determine or infer that the appellant had waived her right to counsel. In deciding that the appellant had waived her right to counsel the learned trial judge erred.

The learned trial judge further erred in assuming that the appellant understood the demand given to her by Constable Dumas. The evidence shows that the appellant was unable to give a complete history of what sequence of events transpired, that her speech was slurred and her thoughts incoherent as to the sequence of events. In fact, the appellant when speaking with the doctor shortly before being given the demand, was not even aware that she had been involved in a motor vehicle accident. Reference has also been made to the appellant's slipping in and out of consciousness on the way to the hospital. The facts proven in evidence do not establish that the demand was understood nor is there a basis to infer that it was understood. On the contrary the evidence tends to show that the appellant was not aware of very much

and to infer that she understood the demand is contrary to the proven facts.

The appellant further argues that there is nothing in the evidence to show that the officer had reasonable and probable grounds to believe that because of the physical condition of the appellant she would be incapable of providing a breath sample or it would be impracticable to do so. The evidence does disclose that the appellant had been injured in a motor vehicle accident, that she had a laceration below her lower lip, that she had lapsed in and out of consciousness and that she was dressed in hospital clothing. These facts would, in my opinion, be sufficient basis for the officer forming a belief on reasonable and probable grounds that the appellant might be incapable of providing a sample or that it would be impracticable to do so. I am satisfied that the learned trial judge did not err in drawing the inference that blood samples were properly obtained.

I find no merit in the appellant's argument respecting the continuity of the blood samples. The Certificate tendered refers to samples identified as Barbara Dacey 89.01.22 0004, plus other markings. The appellant submits that other markings could be another name or something entirely different from names. The transcript shows that Dr. Dauphinee labelled the vials with his name, the appellant's name, time and date. The Certificate in this case is accurate as to name and date which distinquishes this case from that of **R. v. Schmidt** (1987), 40 C.C.C. (3d) 452 (B.C.Co.Ct.) where because there was nothing in the Certificate to tie it to the particular date and because of the misspelling of the name on the Certificate a reasonable doubt existed. This is not the case here. I am satisfied that the learned trial judge

did not assume this fact without the proper evidentiary basis.

In conclusion on the first ground of appeal the learned trial judge erred in assuming the following facts favourable to the Crown without the requisite evidentiary foundation. (a) That the appellant had waived her right to counsel, and (b) that the appellant understood the demand for blood samples made of her.

The making of these assumptions or inferences was not based on evidence. It was of no legal value in that it amounted to no more than a mere guess and the appellant therefore succeeds on the first ground of appeal and the conviction is overturned and an acquittal is entered. The appeal having been allowed on the first ground it is therefore unnecessary to deal with the second ground of appeal.

The appeal is allowed with costs to the appellant in the amount of $250.00.

A Judge of the County
Court of District Number One