C.T. No. 08233

Cite as: R. v. Fraser, 1984 NSCO 12

IN THE COUNTY COURT OF DISTRICT NUMBER FOUR

BETWEEN:

HER MAJESTY THE QUEEN

- and -

LARRY ZANE FRASER

HEARD: At Truro, N.S., March 1, 1984

BEFORE: The Honourable Judge Donald M. Hall, J.C.C.

DECISION: April 2, 1984

COUNSEL: Peter Lederman, Esq., for the Crown

Robert M. Purdy, Esq., for the appellant

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Hall, D.M., J.C.C.

This is an appeal of a decision of his Honour H.A. Veinot, a Judge of the Provincial Magistrates' Court, delivered January 4th, 1984, wherein he convicted the appellant of an offence under section 236 of the Criminal Code, that is, of driving a motor vehicle having a blood alcohol level in excess of the prescribed maximum.

The appellant filed a notice of appeal contending that the trial judge erred in holding that the Crown had proved beyond a reasonable doubt that the appellant was driving a motor vehicle at the relevant time.

Subsequently, the appellant through his counsel moved to amend the notice of appeal to provide an additional ground of appeal, namely, that the trial judge erred in finding that the Crown had proved that not less than 15 minutes had elapsed between the taking of the two samples of the breath of the appellant. Crown counsel consented to this amendment being made and the motion to amend was granted.

At the trial the prosecution witnesses at no time specifically stated that the appellant was driving a "motor vehicle." Most of the references were to him driving "a vehicle."

Corporal Dale R. King, however, stated that he was in a marked police car and at times referred to it as a "vehicle." He also stated in his evidence that after stopping the appellant he formed the opinion that the appellant was "too impaired to drive a motor vehicle ..." He also stated that the appellant's vehicle was proceeding along the highway at an estimated speed of 60 - 70 kilometers per hour. The appellant also submitted to a so called "ALERT" demand, which is a device for determining if a driver or a person having the care or control of a motor vehicle has alcohol in his body.

From all of the foregoing I am satisfied that there was ample evidence from which the trial judge could properly have inferred that the vehicle being driven by the appellant was a motor vehicle.

Turning next to the second ground of appeal the Crown relied on a certificate of analysis under section 237(1)(c) as proof of the blood alcohol level of the appellant at the relevant time. The certificate stated that the qualified technician, who was Corporal King, took two samples of the breath of the appellant and stated further the following:

> THAT the first of the said samples was taken at 2:35 A.M. on the 13th day of November, 1983 and that the result of the proper chemical analysis of this sample was 160 milligrams of

> alcohol in 100 millitres of blood;
> THAT the second of the said samples was taken at 2:52 A.M. on the 13th day of November, 1983 and that the result of the proper chemical analysis of this sample was 140 milligrams of alcohol in 100 millitres of blood.

Corporal King confirmed the evidence of the time of the taking of the two samples in his viva voce evidence, but provided no additional information concerning the time that it actually took to obtain each sample.

The appellant relies upon a recent decision of the Ontario Court of Appeal, Regina v. Taylor (1984) 7 CCC (3d) 293, in support of his contention that the crown had failed to prove that at least 15 minutes had elapsed between the times when the two samples were taken. In Taylor the Court of Appeal was dealing with a certificate with similar wording to the certificate that is before me, at least insofar as the times of the taking of the samples is concerned. The first sample in that case was said to have been taken at 1:12 a.m. and a second sample at 1:27 a.m. Goodman, J.A., in delivering the judgment of the majority of the court in allowing the appeal and setting aside the conviction said the following at page 303:

> It was the submission of the Crown, that based on the contents of the certificate of analysis, it was open to the learned trial judge to find as a fact that the taking of the first breath sample was completed at precisely 1:12 a.m. and that the commencement of the taking of the second sample took place at precisely 1:27 a.m. Following the decision in Perry he would then be entitled to find

> that there was an interval of at least 15 minutes between those times and accordingly there was compliance with s. 237(1)(c)(ii). It was his further submission that if the trial judge had found that to be a fact, then this court should not interfere with that finding.
>
> The difficulty that I have in accepting these submissions is that the information contained in the certificate of analysis was at least equally open to a finding on the part of the trial judge that the taking of each sample commenced at the time noted or that the taking of each sample was completed at the time noted. There was no evidence to indicate which of these three possible combination of circumstances existed. I accept the statement of Seaton, J.A. in the Perry case that 1:12 a.m. and 1:27 a.m. are points in time without duration. It cannot be doubted, however, that the taking of a breath sample by a technician takes some appreciable time. If the technician commenced to take the first sample at precisely 1:12 a.m., it would be some time after that point in time when he completed taking the sample. If he then commenced to take the second sample at precisely 1:27 a.m. it is clear that there would not have been an interval of at least 15 minutes between the times when the samples were taken within the meaning of s. 237(1)(c)(ii) as explained by Taggart J.A. in Perry.

and further at page 304:

> I should state that, if the Crown intends to rely in the future solely on a certificate of analysis such as the one relied on in these proceedings in order to prove the existence of a 15 minute interval between the times when samples are taken, it will have to be much more specific in the information contained in the certificate. In view of the reasons for decision given by Taggart J.A., approved by the Supreme Court of Canada in Perry it would appear that even if the times stated in a certificate in the form used in the present case were said, for example, to be 1:10 a.m. and 1:27 a.m., it would not be sufficient to support a finding that a 15 minute interval had elapsed between the taking of the samples. The example stated is open to the interpretation that the commencement of taking each sample was at the times stated. Since it is beyond dispute that taking a breath sample takes some period of time and since the time consumed in taking a sample may vary in each case, it would not be possible for a trial judge to make a finding on the basis of such information standing alone as to the time at which the taking of the first sample was completed and the taking of the second sample was commenced. Accordingly he would not be in a position

> to make a finding that the requisite 15 minute interval existed. Indeed, it seems to me, that where you have a certificate completed in the manner of the one used in the case at bar where the wording is identical for the time of the taking of the first sample and the taking of the second sample, the reasonable interpretation is that both samples were commenced at the times stated or both samples were completed at the times stated. It would seem to stretch the rules of interpretation of a document to conclude on the basis of identical wording that in the case of the first sample the time refers to the time of completion and that in the case of the second sample the time refers to the time of commencement. Accordingly, the information in the certificate of analysis should clearly state the time at which the taking of the first sample was completed and the time at which the taking of the second sample was commenced.

Although judgements of the Ontario Court of Appeal are not binding on the courts of this province, certainly decisions of Provincial Courts of Appeal are of great persuasive influence. It also may be noted that the latter statement by Goodman, J.A., is obiter since the Taylor case dealt with a time period of exactly 15 minutes. With respect, I agree with this statement of Mr. Justice Goodman and choose to follow the reasoning he has set forth therein.

It is to be noted that the Corwn's application for leave to appeal to the Supreme Court of Canada was refused by that court, although MacKinnon, A.C.J.O., wrote a dissenting judgment.

Accordingly, I find that the learned trial judge was in error in finding that the requisite 15 minute interval between the taking of the two samples had been proved by the certificate or by the viva voce evidence of Cpl. King. As stated by Goodman, J.A., a reasonable interpretation is that both samples were commenced at the times stated, or both samples were completed at the times stated, which fails to reveal "

time that actually elapsed between the completion of the taking of the first sample and the commencement of the taking of the second sample.

Since S. 237 (1)(c)(ii) has not been complied with the evidence of the chemical analysis should not have been received in evidence. Without it there was no evidence of the proportion of alcohol in the blood of the appellant. Therefore the appeal is allowed, the conviction is set aside and a verdict of acquittal shall be entered.

April 2, 1984

Donald M. Hall
Judge of the County Court of
District Number Four