Cite as; R. v. Seeley, 1982 NSCO 8

1982 C.A.R. No. 01240

IN THE COUNTY COURT OF DISTRICT NUMBER THREE

BETWEEN:

HER MAJESTY THE QUEEN

RESPONDENT

- and -

BENJAMIN MARK SEELEY

APPELLANT

HEARD: At Annapolis Royal, Nova Scotia, the 12th day of October, A.D. 1982.

BEFORE: His Honour Judge Peter Nicholson, J.C.C.

DECISION: The 9th day of November, A.D. 1982.

COUNSEL: David E. Acker, Esq., for the Respondent

James M. O'Neil, Esq., for the Appellant

NICHOLSON, J.C.C.

On the 9th of June, 1982, the Appellant was convicted by His Honour Judge John R. Nichols at Annapolis Royal, Nova Scotia, of a charge that he:

> "At or near Annapolis Royal in the County of Annapolis, Nova Scotia, on or about the 15th day of February 1982 did unlawfully drive a motor vehicle on the highway having consumed alcohol in such a quantity that the proportion thereof in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood, contrary to Section 236 of the Criminal Code of Canada."

The Appellant has taken an appeal from that decision and although the Notice of Appeal set out six particular grounds, counsel for the Appellant at the hearing before me pretty well confined his argument to grounds 2 and 3 as set out in the Notice of Appeal:

> "2. That the learned Trial Judge erred in law in finding that the breath test was administered 'as soon as practicable after the time when the offence was alleged to have been committed.'
>
> 3. That the learned Trial Judge erred in law in failing to give any or proper consideration or weight to evidence of a confusion in the recorded time that the first breath test was alleged to have been administered to the Appellant."

On the 15th of February, 1982, in the Town of Annapolis Royal, County of Annapolis, Constable Arthur J. Cook of the Town Police Force apprehended the Appellant who was at the time driving a Toyota light truck. After some conversation with the Appellant, Cook determined that he had grounds to demand that the Appellant take a breathalyzer test, which he did. This took place at about 6:00 p.m. The Appellant thereupon agreed to go with the Constable to the R.C.M.P.

Detachment at Bridgetown, in the County of Annapolis. The time of arrival at Bridgetown was established by Cook as being 6:30 p.m.

The test was then taken and a copy of the Certificate of Analysis and the original Notice of Intention to Produce Certificate was given to the Appellant. This Exhibit was admitted as C-1 and showed on the face of it that the first test given to the Appellant was at 6:40 p.m., on which the reading was 150, and the second test taken at 6:58 p.m. produced a reading of 140.

The learned Trial Judge had the right to make an inference from the evidence of Constable Cook that he went directly from Annapolis Royal to Bridgetown with the Appellant to take the test and in his Decision he made a finding as follows:

> "The tests, I'm satisfied, were taken as soon as practicable considering the thirty minute drive from Annapolis Royal to Bridgetown..."

There was certainly evidence upon which the learned Judge could base that finding, and even if I were entitled to disturb it, I would not do so because the facts lead inevitably to the conclusion the Judge made.

It follows that the allegation in the Notice of

Appeal that the provisions of Section 237(1)(c)(ii) were not complied with, must fail.

The Appellant urged that the learned Trial Judge did not take into account confusion as to the time of taking the tests. According to Cook's evidence the first test was taken at 6:46 p.m. as timed by his own watch. He testified that when the breathalyzer test technician at the R.C.M.P. office was taking the test that he had his own watch in front of him and Cook had no knowledge of how it was synchronized with his. In any event there was no evidence from Cook as to what the time was on his watch when the second test was taken. In his Decision the Trial Judge made a finding that the first test was performed at 6:40 p.m. and the second test at 6:58 p.m. The Certificate of Analysis bearing these times admitted as C-1 was a proof of the contents therein contained and afforded evidence upon which the Trial Judge could make the finding that he did. Of course this finding cannot be disturbed in these circumstances. The obvious reconciliation of the differences in time is that Constable Cook's watch was running at six minutes faster than the breathalyzer technician's watch.

Bearing in mind the provisions of Section 613(1)(2) of the Criminal Code and the Decision of the Nova Scotia Appeal Division in R. vs. Backman S.C.C. 00505,I find that the verdict given by the Trial Judge was reasonable and was supported by

the evidence and that there was no wrong Decision on a question of law or any miscarriage of justice.

Accordingly, the Appeal is dismissed with costs and the Decision and Order of the Trial Judge are hereby confirmed.

DATED at Annapolis Royal, Nova Scotia, this 9th day of November, A.D. 1982.

JUDGE OF THE COUNTY COURT OF
DISTRICT NUMBER THREE

TO: The Clerk of the Court,
The Court House,
Annapolis Royal, N.S.

David E. Acker, Esq.,
Crown Prosecutor,
P. O. Box 1270,
Middleton, N.S.
BOS 1PO

James M. O'Neil, Esq.,
Barrister and Solicitor,
5443 Cogswell Street,
Halifax, Nova Scotia
B3J 1R1