IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. McGean, 2004 NSPC 65

Date: October 26, 2004
Case No.(s): 1123695
1123696
Registry: Sydney

Between:

Her Majesty The Queen

v.

Derek McGean

Judge:	The Honourable Judge C. H. F. Williams, JPC
Heard:	Decision rendered orally on October 26, 2004 in Sydney, Nova Scotia
Written decision:	Released on December 17, 2004
Counsel:	Kathryn E. Pentz, for the Crown William P. Burchell, for the Defence

By the Court

Introduction

[1] The police have charged the accused, Derek McGean with having a blood alcohol level that exceeded the legal limit and with operating a motor vehicle when alcohol or a drug impaired his ability to do so. The accused opposes the admissibility of certain evidence as violation of his constitutional rights that are protected by ss.7 and 10(b) of the ***Charter***.

[2] Two Voir Dires were conducted to determine the voluntariness and the constitutionality of certain statements attributed to the accused. In the first Voir Dire the issue was the voluntariness of a statement made by the accused to the arresting officer and subsequently, its admissibility. The second Voir Dire addressed the admissibility of any evidence gathered following the assertion of an insufficiency of information in the rights to counsel advice that the police gave to the accused. Both parties agree that the evidence on the Voir Dire would be the evidence on the case in chief without the necessity to recall the witnesses.

Summary of the Relevant Evidence on the Voir Dire

[3] At about 0215 hours on November 11, 2001, Constable David Hickey of the Cape Breton Regional Police observed a vehicle that the accused was driving at a rate of speed that exceeded the posted speed limit of 50 kph. Following this vehicle for about one kilometer, the Constable noted that the vehicle swerved several times crossing the centre line of the highway. When he stopped the vehicle and requested the accused, who was the sole occupant and driver, to produce his driver's licence, the Constable not only detected the smell of alcohol from his breath but that the accused fumbled when he attempted to acquire his papers. Subsequently, the Constable asked the accused how much he drank that night. The accused responded that he drank, "a few beers, four to five".

[4] Requesting the accused go to the police cruiser the Constable noted that when the accused walked he was unsteady on his feet. At this point, based upon the vehicle's speed, the smell of alcohol from the accused breath, his fumbling when attempting to get his papers and his unsteadiness on his feet, the Constable was of the opinion that the accused ability to operate a motor vehicle was impaired by alcohol. Thereupon, the Constable arrested the accused for impaired driving, read him the Breathalyzer demand and ***Chartered*** *him.*

[5] When at the police station the Constable placed the accused in a room that contained a telephone. The accused used the telephone to call his girlfriend and then indicated to the Constable that he would take the test. After he provided the first breath sample for analysis the accused told the Constable that he wanted to speak to his lawyer. The Constable again placed him in the room with the telephone and the accused called his brother who gave him the name of a lawyer but with no contact telephone number. When the accused was unable

to contact this lawyer, the Constable provided him with the number for the Legal Aid duty counsel whom he contacted and had consultation. Subsequently, the accused provided the second breath sample for analysis.

[6] Therefore, this case raises two fundamental issues. First, did the Constable by eliciting information from the accused concerning his consumption of alcohol after he was detained but before issuing him with a police caution or other constitutional safeguards violate the accused rights against self incrimination? Second, did the Constable when he read from a card that did not mention the availability of duty counsel or Legal Aid but only mentioned that the accused could receive free legal advice meet the constitutional requirements of the advice of the accused rights to counsel?

Analysis

[7] With respect to the first issue, I found and ruled that the comments of the accused in response to the question from the Constable concerning his consumption of alcohol was voluntary. Nonetheless, I found and ruled that the eliciting of this information was conscriptive non-passive evidence that ran foul of ***Charter*** principles as stated in ***R. v. MacLennan*** (1995) 138 N.S.R. (2d) 369 (C.A.). Essentially, the police asked the question to confirm his belief that the accused had consumed alcohol. Constable Hickey had detected some passive indicia and emanations of impairment but until he questioned the accused and received a positive response, on the evidence, he did not form the opinion that the accused ability to operate a motor vehicle was impaired by alcohol. Thus, I think that by asking the question concerning his consumption of alcohol and receiving an affirmative response the officer made good use of the central issue that would be the foundation of a criminal offence without the proper regard for the accused right against self-incrimination.

[8] On the second issue, the Crown concedes that following ***R. v. Moore*** [2002] N.S.J. No. 570 (C.A.), the information that Constable Hickey read to the accused concerning his rights to counsel did not meet the constitutional requirements and, as a result, did not pass the constitutional test. The Crown however urges that even though there existed some constitutional deficit and even allowing that, on the evidence, the accused might have been confused concerning his rights to counsel regarding his providing the first breath sample for analysis, because he did speak to counsel before he gave the second sample, this sample was not constitutionally tainted and was therefore admissible against the accused.

[9] Essentially, counsel for the accused submitted that following the principles proposed in ***R. v. Whiteway*** [2003] N.S.J. No. 219, 2003 NSPC 22, here there was a clear violation of the accused rights to counsel and when this factor is added to the other ***Charter*** violation it not only denied the accused a real informed choice but it would also render the trial unfair

[10] Overall, it seems to me that the central issue is whether the accused was fully aware of his

right to contact a lawyer and was diligent in exercising that right. On the total evidence, I accept that the officer did read to the accused, from the card, his rights to counsel. However, it is reasonable to infer from his subsequent conduct that the accused did not fully appreciate that, at that time of day, he could obtain the services of duty counsel. That, in my opinion, becomes clear when after providing the first sample for analysis he informed the officer that he wanted to speak to his lawyer. In my view, the discussion between him and his brother was indicative of his confused state of mind about the sufficiency of the advice of his legal rights and if properly advised, the alternative steps he would have taken, as he subsequently did, to consult with counsel prior to taking the Breathalyzer test. Therefore, I accept and find that it was only after he spoke with his brother and he called and consulted with duty counsel after the first test but before the second test it can be said that his right to counsel was truly constitutionally consummated.

[11] On the total evidence, I think that the decision to exclude evidence always represents a balance between competing interests. ***Collins v. The Queen*** (1987), 33 C.C.C. (3d) 1 (S.C.C.), ***R. v. Stillman*** (1997), 113 C.C.C. (3d) 321 (S.C.C.). Here, I think that despite the good faith of Constable Hickey, the evidence concerning the consumption of alcohol was conscriptive evidence and it was an essential component for the formulation of the Constable's opinion of impairment by alcohol. It was a direct breach of the accused right against self-incrimination. Consequently, in my opinion, the admission of that evidence would render the trial unfair.

[12] I find that the information provided by the police and conceded to by the Crown did not pass the constitutional requirements as referenced in the cases cited in ***Whiteway***. This exclusion however can properly be applied to the first test. On the same principles, the results of the second test is separable from the first. It is the result of the accused being properly informed and exercising his right to counsel. In my view, the fact that the accused spoke to and consulted with counsel would, of necessity, militate against the exclusion of the admissibility of the second breath sample and, to exclude this test, would render the trial unfair.

[13] This, however, creates a conundrum. Because it requires two lawfully constitutionally acquired breath samples showing a blood alcohol concentration that exceeds 80 mg. of alcohol in 100 ml. of blood for the Crown to establish a contravention of s.253(b), one breath sample cannot ground a conviction under this subsection. Nonetheless, the second sample is constitutionally valid. Thus, I think that if the results of its analysis show a blood alcohol concentration that exceeds the legal limit when considered together with other admissible evidence of impairment such as slurred speech, smell of alcohol, erratic driving, unsteady balance when walking and other indications of intoxication by alcohol, it could assist the Crown in grounding a conviction under s. 253(a).

Conclusion

[14] Therefore, on the evidence on the Voir Dire, it is my opinion that the conscriptive evidence that was obtained by the police when the officer stopped the accused, when the accused said that he had four to five drinks, is excluded. And it is also my opinion that the first breath sample, the results of which, whatever it is, is also excluded. The second breath sample, however, the results of it can be included.

[15] I said that creates a conundrum. The Crown cannot rely upon the second breath sample for conviction under s.253(b), and since the Crown has stayed s.253(a), there is nothing for the accused to be convicted upon, at least today, and therefore he is discharged.

[16] Please stand, Mr. McGean. On the evidence before me, this Court finds you **not guilty** of the charge contrary to s.253(b) and you are discharged. With respect to s.253(a) that is **stayed** pursuant to s.579. You are free to go.