PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Sarson*, 2015 NSPC 41

Date: 2015-07-02
Docket: 2708553, 2738722
Registry: Pictou

Between:

Her Majesty the Queen

v.

John Michael Blake Sarson

DECISION REGARDING ADMISSIBILITY OF STATEMENTS AND BLOOD ANALYSES

Judge:	The Honourable Judge Del W. Atwood
Heard:	14 May, 26 June 2015, in Pictou, Nova Scotia
Charge:	Paras. 253(1)(a) and 253(1)(b) of the Criminal Code of Canada
Counsel:	William Gorman for the Nova Scotia Public Prosecution Service Andrew O'Blenis for John Michael Blake Sarson

By the Court:

[1] John Michael Blake Sarson put his pickup truck off the road near Scotsburn, Nova Scotia the early evening of 23 February 2014. He was rescued by a husband and wife—Mr. Kevin MacMillan and Mrs. Jennifer MacMillan—who had witnessed the mishap, came to his aid and assisted by helping Mr. Sarson out of his overturned vehicle and calling 9-1-1. Mr. Sarson told Mr. MacMillan that he had been drinking and ought not to have been driving. Police and an ambulance arrived in response to the emergency-services call. By then, Mr. Sarson's condition had deteriorated, and he needed to be medically evacuated to hospital. En route, Mr. Sarson repeated to a police officer who was accompanying the EHS team the same admission he had made to Mr. MacMillan. That officer—who took the lead in the investigation—concluded that Mr. Sarson's ability to drive had been impaired by alcohol; he informed Mr. Sarson of his right to counsel, then made a demand for blood samples. Upon arrival at the Aberdeen, Mr. Sarson was turned over to the emergency medical team. Under the direction of a physician, a team nurse collected forensic blood specimens from Mr. Sarson. A chemical analysis of those samples established that Mr. Sarson's blood-alcohol concentration was over the legal limit. The next day, after he'd gotten patched up, Mr. Sarson met with the officer and gave an audio-and-video-recorded statement. Police charged Mr.

Sarson with impaired operation and drive-over-.80. The charges proceeded summarily, and Mr. Sarson pleaded not guilty. The trial commenced with a *voir dire*, requiring the court to rule on the admissibility of the following:

- The results of the chemical blood analyses.
- Mr. Sarson's statements to the investigating officer during the ambulance trip, and then on camera the next day;
- Mr. Sarson's utterances to Mr. Kevin MacMillan;

[2] I am excluding all but the admissions Mr. Sarson made to Mr. MacMillan. These are my reasons.

Blood sample analyses

[3] This was a high-pressure situation; it is in times such as these that loss of situational awareness can set in. The officer who accompanied Mr. Sarson for the medevac had the task of carrying out an impaired-driver investigation—something involving many complexities in even the most favourable of circumstances—while EHS dealt with an emerging critical-care situation. Once the officer had formed the grounds that Mr. Sarson's ability to operate a motor vehicle had been impaired

by alcohol, he informed Mr. Sarson promptly that he was being placed under arrest, and he told him the reasons for the arrest.

[4] The officer then explained to Mr. Sarson his right to retain and instruct counsel without delay, and asked Mr. Sarson if he would like to call a lawyer. Mr. Sarson answered by admitting to drinking and driving. The investigator recognized perceptively that this was not responsive of his question; according to his testimony:

> [S]o I asked him a second time, "Do you wish to speak to a lawyer right now?" And he replied, "No I have my own and we'll talk later."

[5] After this, things sort of steamrolled right along. The ambulance arrived at the Aberdeen, Mr. Sarson was turned over to the emergency medical team, a nurse collected forensic blood specimens from Mr. Sarson at the request of the investigator, and Mr. Sarson was kept in hospital for a few more hours for treatment before being discharged medically.

[6] On the *voir dire*, defence sought exclusion of the blood analysis. It was argued that Mr. Sarson did not understand his right to counsel, or that he did not unequivocally waive it, or that the investigator did not explain it properly. The prosecution countered that there was an unequivocal waiver, or alternatively, that Mr. Sarson was not diligent in asserting his rights.

[7] Para. 10(b) of the *Charter* states:

> Everyone has the right on arrest or detention
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> . . . .
>
> (*b*) to retain and instruct counsel without delay and to be informed of that right;
>
> . . . .[1]

[8] Sub-section 24(2) of the *Charter* states:

> Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.[2]

[9] This is my assessment of the evidence. This is not an instance of a detainee waiving his right to counsel. Rather, in this case Mr. Sarson asserted it. He asked to speak to his own lawyer later. It seems that the investigator assumed that Mr. Sarson meant that he would call his lawyer after the investigation had gotten wrapped up and the blood specimens had been collected.

[10] However, context is everything; in my view, the officer's assumption was incorrect.

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[1] [1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.
[2] *Id*.

[11] Recall that the inquiry the investigator made of Mr. Sarson was whether he wanted to call counsel "now". At that moment, Mr. Sarson was strapped into a gurney in the back of an ambulance. There was no way he would have been able to have contacted counsel "now"; a call would have to have waited until, yes, later, which was Mr. Sarson's request precisely. That reasonable request was not acted upon by the investigator, with the result being that Mr. Sarson was denied access to counsel completely prior to the collecting of the blood specimens.

[12] The court was referred to a number of cases by counsel. However, my view is that the case that is right on point—both factually and legally—is *R. v. Taylor*.[3] The facts are an analogue of Mr. Sarson's predicament. Taylor was arrested for impaired driving causing bodily harm; he had put his car off the road, which resulted in injury to his passengers. Upon his arrest, he was informed of his right to counsel, and was asked whether he wanted to call a lawyer. Taylor responded that he wanted to speak to his father and to his lawyer. At no time was he given access to a phone at the scene of the accident. He was taken by ambulance to the hospital for examination. At the hospital, a nurse took five vials of blood from him for diagnostic purposes. The police later demanded and obtained a second set of samples of Taylor's blood to assist in a criminal investigation. At no point during

[3] 2014 SCC 50; *aff'g*. 2013 ABCA 342.

Mr. Taylor's time in hospital did the investigator attempt to provide him with access to counsel. The police obtained a warrant to seize the first vials of diagnostic blood the hospital had taken from Taylor. The trial judge agreed with the prosecution that the second set of blood samples had been taken in violation of the Taylor's para. 10(b) *Charter* rights, but found that there had been no breach of his para. 10(b) rights prior to the diagnostic samples being taken. This was based on the trial judge's assumption that, when an accused is awaiting or receiving medical treatment, there is typically no reasonable opportunity to provide to an accused access to a telephone to implement his right to instruct counsel in privacy. The analyses of the diagnostic samples were admitted at trial. On the basis of this evidence, Taylor was convicted of three counts of impaired driving causing bodily harm. A majority in the Alberta Court of Appeal allowed the appeal, and found that the trial judge had erred when he concluded that there had been no reasonable opportunity to facilitate access to a lawyer prior to the taking of the diagnostic samples. The evidence was excluded, the conviction set aside, and an acquittal entered. The Supreme Court of Canada dismissed the appeal. In rendering the judgment of the Court, Abella J. noted that hospitals are not *Charter*-free zones. Once a detainee has requested access to counsel, police are under a continuing obligation to refrain from taking further investigative steps to elicit evidence from

the detainee until he or she has spoken to counsel. The plain and simple reason for this is that detainees are entitled to make informed decisions whether to offer up evidence that might be self-incriminating. Barriers to or waivers of the constitutionally protected right of access to counsel cannot be displaced by assumptions, but must be proven—proactive steps are required of police to turn the right to counsel into access to counsel.[4]

[13] As in *Taylor*, this is a case of Mr. Sarson having been denied completely his right to have access to his counsel prior to his compelled self-conscription in the collection of blood. Mr. Sarson has satisfied me on a balance of probabilities that his rights under para. 10(b) of the *Charter* were violated.

[14] I must now decide what sort of remedy to grant under sub-s. 24(2) of the *Charter*.

[15] The remedy granted in *Taylor* was the exclusion of evidence. Here, the argument in favour of exclusion is even stronger. In *Taylor*, there was at least some tension between, on the one hand, the need to obtain diagnostic blood specimens from Mr. Taylor in order to assess his medical needs, and, on the other, the risk that those specimens might be utilized by the state to make out a criminal

[4] Id., at paras. 26, 28, 33, 34.

charge. In this case, there is no tension: the specimens that are the focus of this *voir dire* were collected entirely for forensic purposes, so that there is no competing interest in favor of admitting the evidence.

[16] The public certainly has an interest in the adjudication of this case on the merits; the evidence sought to be excluded is a reliable analysis of Mr. Sarson's blood-alcohol concentration. However, as noted in *R. v. Spencer*, the public has an interest also in ensuring that the justice system remain beyond reproach in its treatment of persons charged with serious offences.[5] This favours exclusion.

[17] While the investigator's conduct in this case was not wilful, in that I find he honestly misunderstood what Mr. Sarson had asked of him and was dealing with a very trying unfolding of events, the failure to enable Mr. Sarson's constitutionally-protected access to counsel constituted a significant departure from the standard of conduct expected of police and must not be condoned. The impact upon Mr. Sarson's constitutionally protected rights was serious. He was effectively denied counsel; he was in a vulnerable medical condition; he was compelled to provide evidence that turned out to be incriminating. This also operates in favour of exclusion.

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[5] 2014 SCC 43 at para. 80.

[18] As reasoned by Abella J. in *Taylor*, there is no need for me to speculate about the advice Mr. Sarson might have been given had he been allowed to contact counsel as he had requested. To engage in such conjecture would hearken back to the discoverability criterion described originally in *R. v. Collins* as evidence that would have been obtained in any event.[6] As re-analyzed by the same Court over twenty years later in *R. v. Grant*, discoverability presents an obscured approach to the runway, as it requires courts to engage in guesswork, speculation, and the evaluation of hypothetical facts—things courts ought to avoid doing, as a hypothetical case deserves only a hypothetical judgment (except, it seems, when assessing the constitutionality of mandatory-minimum sentences).[7]

[19] Applying the *Grant* analysis, I find that the assessment of the factors which I have just addressed favours the exclusion the blood-analysis evidence.

The video-recorded statement

[20] The investigator contacted Mr. Sarson after he had gotten discharged from hospital and asked Mr. Sarson to give a statement. Mr. Sarson went along with it. The investigator advised Mr. Sarson of his right to counsel and appropriately

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[6] [1987] S.C.J. No. 15 at para. 35
[7] 2009 SCC 32 at para. 120.

cautioned him prior to embarking on his interrogation. Notwithstanding all this, I find it necessary to exclude this statement, as I find that it was inextricably linked to the unconstitutional collection of blood from Mr. Sarson the previous day. At the time he gave his statement, Mr. Sarson knew that police had in hand evidence that was likely to incriminate him; although Mr. Sarson did not give evidence in the *voir dire*, I find I am able to infer reasonably from these facts that Mr. Sarson's statement was made as a direct result of the unconstitutional seizure of blood from him the day prior. In the alternative, I would exclude the statement on the grounds that I am not satisfied beyond a reasonable doubt that it was made voluntarily; it was induced the his unconstitutional self-conscription.

Statements made during the medevac

[21] Mr. Sarson uttered a number of potentially incriminating comments to the investigator during the ambulance ride about drinking and driving. These statements were entirely spontaneous, and did not arise from any prompting or inquiry by the investigator. Nevertheless, they were statements made to a person in authority, and a *voir dire* must be held to assess their voluntariness.[8]

[8] *See, e.g., R. v. Erven* (1978), 44 C.C.C. (2d) 76 at p. 87.

[22] Voluntariness must be assessed by taking into account a number of factors; some of the key ones—the employment of threats or promises or trickery by the interrogator—are not in play here. The main concern of the court is whether Mr. Sarson's utterances were the product of an operating mind; that is to say, am I satisfied beyond a reasonable doubt that Mr. Sarson understood what he was saying and knew that what he said could be used against him?[9] My judgment, in a word, is no. The evidence is clear to me that Mr. Sarson experienced an acute medical crisis while in the back of the ambulance. At one point while Mr. Sarson was speaking with the investigator, the paramedics had to intervene aggressively to revive Mr. Sarson. There was no medical evidence put before me by either the prosecution or defence counsel; however, the investigator's very comprehensive description of the intervention satisfies me that Mr. Sarson would not have been aware of what he was saying or of his potential jeopardy in saying it.

[23] Accordingly, I exclude the statements made by Mr. Sarson to the investigator during the medevac.

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[9] *See, e.g., R. v. Oickle* 2000 SCC 38 at paras. 63-71.

Incriminating statements made to Mr. MacMillan

[24] Mr. Sarson was aided by Mr. Kevin MacMillan and Mrs. Jennifer MacMillan who were driving home with their children when they saw Mr. Sarson flip over his truck. Mr. MacMillan aided Mr. Sarson while Mrs. MacMillan called for help. Their commendable efforts ensured that Mr. Sarson got the medical attention he needed. As he was being tended to by Mr. MacMillan, Mr. Sarson admitted that he had been drinking and ought not to have been driving. Mr. MacMillan had figured this out on his own, as he could tell from the odour of alcohol emitting from Mr. Sarson's mouth that Mr. Sarson had drunk too much.

[25] As the evidence of these utterances came out during the *voir dire*, I find it appropriate to rule on their admissibility. In my view, this comes in under the need for the court to consider whether the probative value of the evidence would be outweighed by its prejudicial effect upon the trial.[10]

[26] In my view, this evidence is highly probative. First of all, it was an admission by Mr. Sarson himself that he had been drinking and should not have been behind the wheel. *R. v. Graat* would allow an observer to offer non-expert

[10] *See, e.g., R. v. Araya* 2015 SCC 11 at para. 31.

opinion evidence of another's alcohol impairment;[11] the reliability of one's self-appraisal of intoxication is decidedly more compelling.

[27] Secondly, Mr. Sarson's utterance was made in the immediate aftermath of his accident, prior to any evidence of medical crisis. It carries the same badges of reliability as, say, *res-gestae* or statement-against-interest evidence from a non-party witness.

[28] Third, it constitutes significant evidence of consciousness of guilt. I recognize that I must be careful here, as the reception into evidence of post-offence conduct—even when the conduct under analysis involves the making of a seemingly incriminating statement—carries the potential for misuse. This was underscored in *R. v. Arcangioli.*[12] Arcangioli was charged with aggravated assault; evidence was led at trial that he had fled from the scene. The trial judge gave a limiting instruction to the jury to the effect that sometimes even the innocent will run away. It was the judgment of the Supreme Court of Canada that this was not enough, as aggravated assault includes the lesser offence of assault; therefore, an inference of guilt of aggravated assault only could not be drawn from the evidence of Arcangioli's flight. Consider a similar scenario of a probationer on a curfew

[11] [1982] 2 S.C.R. 819.
[12] [1994] S.C.J. No. 5 at paras. 39-45.

caught by police running away from the vicinity of a late-evening robbery: is the suspect fleeing the robbery, or merely trying to avoid being found out after hours? These are good examples of evidence of post-offence conduct limited probative value, but potentially of great prejudicial effect.

[29] I feel it necessary to point out here that the concept of prejudice is not intended to capture credible and reliable evidence that also happens to be incriminating. Concepts of incrimination and prejudice ought not to be conflated. Rather, prejudice arises when evidence of limited probative value has the potential of being misinterpreted or misapplied by a trier of fact to the detriment of an accused.

[30] In my view, no such risk arises in the admission into evidence of Mr. Sarson's statements to Mr. MacMillan. As I have stated above, I find the admissions highly reliable, and they speak specifically to the charges Mr. Sarson faces now: driving while impaired and with too much alcohol in his body. There are no lesser offences to confuse the drawing of inferences from what Mr. Sarson told Mr. MacMillan. This is evidence that is highly probative with no risk of prejudicial effect, and it will be admitted into evidence. Defence counsel did not object to its admission in any event.

[31] I am grateful to counsel for their thorough briefs in this case.