IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Fitch, 2003 NSPC 013

Date: 20030416
Docket: 1223768
Registry: Bridgewater

Between:

Her Majesty the Queen

v.

Ivan Casper Fitch

Defendant

Judge: The Honourable Judge Crawford

Heard: February 25, 2003 in Bridgewater, Nova Scotia

Counsel: Anthony Brown, for the Crown
Robert Cragg, for the Defendant

By the Court:

Issue

[1] In this case the sole issue for decision is whether or not "truncated" breathalyzer readings can constitute "evidence to the contrary" within the meaning of s. 258(1)(c) of the *Criminal Code*.

Facts

[2] The facts of the case, in so far as they are pertinent to this issue, are that on September 1, 2002 as a result of a lawful demand made at Maitland, Lunenburg County, Nova Scotia the defendant provided samples of his breath to the Breathalyzer Model 900A. The readings which resulted were recorded in the Certificate of Qualified Technician as 140 and 120 milligrams of alcohol in one hundred millilitres of blood.

[3] On cross-examination the breathalyzer technician, Cst. Smith, testified that the readings were "truncated", i.e. rounded down to the nearest tenth. He did not record and did not remember what the untruncated readings were, but in accordance with his training, anything from 140 to 149 would be recorded as 140 and anything from 120 to 129 would be recorded as 120. He agreed that it was possible that there could have been a difference of more than 20 milligrams in the untruncated readings.

[4] No evidence was called by the defendant, who, through his counsel, relies on the foregoing evidence as being sufficient "evidence to the contrary" to raise a doubt as to the reliability of the readings.

Truncation as "evidence to the contrary"

[5] The leading case on this narrow issue appears to be *R.* v. *Hanson* [1990] O.J.No.77 (1990) 39 O.A.C. 97 (1990) 75 C.R. (3d) 110 p (1990) 18 M.V.R. (2d) 172p (C.A.) in which the court quoted with approval and endorsed the opinion of Kerr, D.C.J. in *R.* v. *Dunn*, (then unreported, since reported at [1989] O.J. No. 3083 (Ont. Dist.Ct.), as follows:

> It seems to me, and I so find, that a truncated reading is the technician's judgment as to what the actual reading of the breathalyser is. Given that the nature of the machine is such that it is very difficult, if not impossible, to make a very narrow, precise finding as to what the machine indicates. [sic] In my view, it is for that reason that the Code requires that the readings be taken by a qualified technician, one who is practiced in operating and reading the machine. Moreover, any error in that reading would favour the accused and it belies commonsense, in my view, to find that the accused is in any way prejudiced by the practice of truncating the readings. This is a practice which has been carried on for many years in this Province without objection and I can see no merit to the argument that there is non-compliance with the letter and the spirit of the Legislation.

[6] The case on which the defence relies, *R.* v. *Vallieres,* [1999] J.Q. no 1440 (C.Q.) attempted to distinguish *Hanson* on the ground that in *Vallieres* unlike *Hanson*, the technician testified. His testimony, much as in the present case, added nothing to the information contained in the certificate. He did not remember the untruncated reading and therefore

> ¶27 . . . could not say what was the exact result obtained when the test was read. He could not say if it was exactly 160 or 140. Nor could he say if the first test exceeded 160 or approached 170 or if the second exceeded 140.
>
> ¶28 He agreed that the results, in these circumstances, could have had a difference of more than 20 mg. But, since he had been told, in this type of machine, that one rounds off to the nearest tenth, he he did not believe that he had to do a third test as the result, after having performed the rounding down, did not exceed 20 mg.
>
> ¶29 But, if the machine had given a result to the third decimal, the technician would have done a third test to be sure his machine was operating properly. That was what he had been taught in his training. [my translation]

[7] Relying on *R.* v. *Charbonneau* [1993] A.Q. No 1844, Abud, J.P.Q. held that because the technician had not conducted a third test, there was uncertainty as to the correctness of the results and the prosecution "had failed to establish that the results obtained were truly those indicated in the certificates." [my translation]

[8] However in *Charbonneau* an exact difference of 22 mg had been established in evidence, and the technician testified that he had not done a third test because at the time (1988) there had been no policy requiring him to do so; it was not until the next year(1989) that he was informed by his superiors of a new policy requiring a third test whenever there was a difference greater than 20 mg. between the two readings. The

type of instrument used is not mentioned in the decision on appeal; but I infer from the fact that the second reading was recorded as 108 mg. that it was probably an instrument which measured to the third decimal place, unlike the breathalyzer.

[9] With the greatest respect, in my opinion the learned Judge Abud erred in applying *Charbonneau* to the quite different facts in *Vallieres*. One cannot require more accuracy of a machine or a technician than the machine is capable of producing. A machine which is accurate to the tenths cannot be made to be accurate to the hundredths. To find "evidence to the contrary" in such circumstances is to fall into the error proscribed in *Moreau* [1979] 1 S.C.R. 261, 42 C.C.C. (2d) 525, 89 D.L.R. (3d) 449 of merely demonstrating the inherent fallibility of the approved instrument.

[10] In addition, in the present case although the technician testified, he was not asked as to present practice in this province regarding taking a third sample, nor as to the reasons, if any, for doing so. The evidence before me is simply that the readings were truncated and that this is to give the benefit of any doubt as to accuracy to the defendant. Although the technician admitted the possibility that there was a difference of more than 20 mg. in the untruncated readings, I agree with Kerr, D.C.J. that, as the Breathalyzer 900A is only capable of producing readings to the second digit, the truncated reading is, in effect, the actual reading.

[11] In short, there is nothing in the evidence before me to raise any doubt as to the accuracy of the readings recorded in the certificate.

Conclusion

[12] All other elements of the offence having been established by the Crown, I find the defendant guilty as charged.