IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Gibson, 2004 NSPC 40

Date: 20040421
Docket: 1339511
Registry: Kentville

HER MAJESTY THE QUEEN

v.

ROBERT ALBERT GIBSON

D E C I S I O N

Judge:	The Honourable Judge Alan T. Tufts
Heard:	March 11, 2004, in Kentville, Nova Scotia
Oral Decision:	April 21, 2004
Written Decision:	June 25, 2004
Counsel:	Lloyd Lombard, Esq., Crown Attorney Chris Manning, Esq., Defense Counsel

By the Court (Orally):

[1] This is the matter of Regina v. Robert Albert Gibson. The defendant is charged under s. 253 (b) of the Criminal Code. It is alleged his blood alcohol exceeded the legal limit when he was driving an all-terrain vehicle on the night in question which was July the 13th of 2003.

[2] The issues in this proceeding are:

(1) what is the proper interpretation of "evidence tending to show" in s. 258(1)(d.l) of the Criminal Code,

(2) is the testimony of the defendant as it relates to his pattern of alcohol consumption believable, and

(3) does the evidence of the toxicologist amount to "evidence tending to show" that the defendant's blood alcohol level was below 80 milligrams of alcohol in 100 millilitres of blood.

Summary of facts:

[3] The defendant was stopped by the R.C.M. Police while operating an ATV on a portion of the highway near Harbourville, Kings County, Nova Scotia. He was stopped at 8:59 p.m.. The breath demand was read at 9:17 p.m.. He was taken to the New Minas R.C.M.P. detachment and gave two breath

samples. The lower of the two readings was 100 milligrams in 100 millilitres of blood.

[4] The defendant testified as to his pattern of drinking on the day in question. He said he went to a restaurant between one and two p.m. that afternoon and consumed one pint of beer along with a meal. He then went to the local golf course and played nine holes of golf with friends during which he consumed three pints of beer.

[5] He then travelled with a friend to a residence of another acquaintance where another one pint of beer was consumed. The defendant then left with two others on ATVs and travelled a short distance to the Harbourville area where they borrowed ten pints of beer. It is when they were in the Harbourville area that they noticed a gentlemen whose daughter he had once dated. He surmised that this man may call the police because of his objection to ATVs.

[6] The defendant and his two friends then went to the beach and to another friend's residence and consumed the beer they borrowed. The defendant consumed five more pints of beer. Expecting the police to arrive, they left immediately after consuming the beer and were stopped by the R.C.M.P. moments later.

[7] The testimony of Dr. Peter Mullen was to the effect that if the pattern of consumption of alcohol described by the defendant was accurate the defendant's blood alcohol level at the time that he was stopped would have been between 40 milligrams of alcohol and 100 millilitres of blood and 105 milligrams in 100 millilitres of blood. The result of his analysis are expressed in a range because of the elimination rate for alcohol for most people falls within a 10 to 20 milligrams per 100 millilitres of blood per hour range, ergo, the range of blood-alcohol concentrations.

[8] The crown also presented other possible drinking scenarios which Dr. Mullen analysed with results at higher ranges of alcohol concentration.

Issue No. 1:

[9] There are two presumptions related to the use of breath analyses. They are referred to as the presumption of accuracy found in s. 258 (1)(g) of the Criminal Code and s. 25 of the Interpretation Act., and the presumption of identity contained in s. 258 (1)(c) and (d.1) of the Criminal Code. These presumptions are fully described in *R. v. St. Pierre*, 96 C.C.C.(3d) 386, a decision of the Supreme Court of Canada with which counsel are very familiar.

[10] The presumption of accuracy simply means that the results of the breath analysis at the time of testing are presumed accurate as shown in the certificate of analysis. This is not being directly challenged by defence here.

[11] The presumption of identity simply means that the breath analysis at the time of testing is the same as the blood alcohol concentration at the time of driving. This presumption can be rebutted if evidence "tending to show" that the blood alcohol concentration did not exceed 80 milligrams of alcohol in 100 millilitres of blood - see s. 258 (1) (d.1).

[12] Section 258 (1) (d.1) was proclaimed June 16th, 1997 and changed the law which existed before then as laid down in *Regina v. St. Pierre, supra*. In that case the Supreme Court of Canada held that if there was evidence to the contrary present which showed the blood alcohol concentration was simply different at the time of driving the presumption of identity was rebutted and the crown was required to prove that the blood alcohol concentration exceeded the legal limit at the time of driving. The dissent in *Regina v. St. Pierre, supra* found that the presumption was not rebutted unless there was evidence which "tended to show" the concentration was below eighty, not simply different. Section 258 (1) (d.1) was passed in the wake of the *R v. St. Pierre* ruling.

The proper interpretation of s. 258 (1) (d) becomes particularly critical when the evidence proffered by the defence toxicologist shows a range of blood alcohol concentrations which straddle the legal limit. These are referred to as the so-called "straddle cases".

There are essentially three lines of analysis which have developed in the jurisprudence which I will now review.

R. v. Heideman line.

[13] *R v. Heideman* [2002] O.J. No. 3461 is a decision of the Ontario Court of Appeal and was decided September 12, 2002. The toxicologist there testified that the range of alcohol content would be between .047 to .095. The Ontario Court of Appeal held that such evidence does not rebut the presumption. It held at Paragraph 12:

> Parliament must be taken to know that the body eliminates alcohol over time and that different persons eliminate at different rates. In applying the test levels to an offence time up to two hours earlier Parliament has built the elimination factor into the choice of 80 milligrams as a standard and, in doing so, has treated all drivers as one. In other words, Parliament may have inserted into the formula a slower than average elimination rate and, as a balance a higher offence level than might otherwise have been imposed.
>
> These contextual considerations lead me to conclude that "tending to show" does not mean "bearing on the subject" or evidence that "could show".

> On the other hand, it need not be persuasive. The guilt or innocence stage has not been reached. However, the evidence must be probative of the issue before the Court; that is, probative of the level of alcohol in this person's blood at the time of the offence. The opinion must offer a choice to acceptance of the certificate as indicating a blood alcohol level at the time of the offence, and must indicate the level was below .08.

[14] In short, evidence of results which straddle the 80 level will not rebut the presumption, as in the Court's opinion, Parliament took the elimination rate into account, presumed a slower elimination rate and set the legal limit accordingly.

[15] Other courts in Ontario and the Manitoba Court of Appeal have followed this result - see:

R. v. Usichenko, [2002] O.J.No.4998
R. v. Tavares, [2003] O.J.No.4663
R. v. Smith, [2003] O.J.No.285
R. v. Riveset, [2003] O.J.No4135
R. v. Noros,Adams, [2003] M.J.No.197
R. v. Olliver, [2003] M.J.No.37

The *Gaynor* line.

[16] These cases are those following *R. v. Gaynor* [2000] A.J. No. 840 which I refer to as the "prevailing direction cases". In *R. v. Gaynor* supra the toxicologist's results showed a range of breath analysis of 60 to 132. There the court focused on the words "evidence tending to show" and relied on the

dictionary definition of “tend” to mean “having a prevailing direction” or “to have a leaning”.

[17] At Paragraph 22 of the Alberta Provincial Court decision held:

> Applying these dictionary meanings to the phrase “evidence tending to show” in s. 258 (1)(d.1) may be interpreted to mean: evidence the leaning or prevailing direction of which makes clear that at the time the offence is alleged to have committed, the accused’s blood alcohol level did not exceed 80 milligrams percent.

[18] The Court then goes on to note that the word “any” which proceeded the words evidence to the contrary was dropped in the later amendments to s. 258(1)(c) of the Criminal Code, notwithstanding that the courts referred to the word “any” when describing evidence to the contrary, (e.g. see *R. v. Gibson* (1992), 72 C.C.C. (3d) 28).

[19] The Court here also notes the word “any” does not modify the words evidence tending show in s. 258(1)(d.1). The Court concludes that one must, therefore, look at all of the evidence, not just a portion of it, to determine if it “tends to show” a blood alcohol concentration which does not exceed 80. Consequently, the Court looked at the evidence in a quantitative sense and if it shows a balance or prevailing direction in favor of below 80 the presumption is rebutted, otherwise it is not. It appears a purely mathematical approach, in my opinion, is used.

[20] Accordingly, if a range of results are tendered in evidence which "straddled" the legal limit one must examine if the range is more above than below or vice versa . In *R. v. Gaynor, supra* because the range was 60 to 132 the prevailing direction or weight of the range was above 80, that is, 80 minus 60 equals 20 versus 132 minus 80 is 52. So, accordingly, the evidence did not tend to show that the reading at the time of driving would not exceed 80.

[21] This analysis was adopted by other trial courts in Alberta and in Prince Edward Island. The same approach was adopted by *R. v. MacMahon* [2001] A.J. No. 1512, an Alberta Provincial Court decision, later upheld on appeal by the Alberta Queen's Bench. The other cases in the *Gaynor* line are as follows:

R. v. Turner [2002], A.J.No.1343
R. v. MacMahon [2002], A.J.No. 1512
R. v. Lapointe, [2003], A.J. No.918
R. v. Senko [2004], A.J. No. 82
R. v. Mathews [2002], P.E.I.J.No. 105
R. v. Pannucci [2001], O.J.No.3754

R. v. Clarke

[22] In *R. v. Clarke*, [2003] A. J. No. 914 Seninook, P.C.J., adopted a different approach although in the final analysis that court was bound by the Queen's

Bench ruling in *R. v. MacMahon,* supra which confirms the *R. v. Gaynor* analysis.

[23] However, in *R. v. Clarke* the court reviewed the principles related to this area of the law and rejected the analysis which was approved in R. v. *Heideman, supra* and rejected the prevailing direction view set out in *R. v Gaynor*, *supra*. It is not necessary to repeat the analysis of the court as it is succinctly set out in the court's reasons. In short, the court concluded that the *R. v. Gaynor* approach required an ignoring of evidence which is capable of raising a reasonable doubt and may offend the presumption of innocence and unfairly places a persuasive burden on the accused as opposed to an evidentiary one.

[24] In *R. v. Clarke, supra* the Court said that s. 258(1)(d.1) did nothing more than endorse the dissent in *R. v. St. Pierre.*

[25] I prefer the reasoning expressed in *R. v. Clarke*. In my view s. 258(1)(d.1) is a confirmation in the dissent in *R v. St. Pierre* and that if the defendant can point to credible evidence with tends to show that the blood alcohol level could have been under the legal limit the presumption is rebutted.

[26] I agree that the analysis adopted in *R. v. Gaynor* regarding the prevailing direction places a persuasive burden on the defendant which is contrary to the principles laid down in *St. Pierre*.

[27] I also, with respect, cannot agree with the holding in *R. v. Heideman,* supra. The suggestion that Parliament intended to insert into the formula a slower than average elimination rate is not one that I can accept, with respect. However, given my finding on the facts surrounding the pattern of drinking whether I adopt the *R. v. Gaynor, supra* reasoning or that proposed by *R. v. Clarke*, supra the same result occurs.

Findings of Fact.

[28] I accept the defendant's evidence as credible. While his testimony of consuming five pints of beer in rapid succession seems somewhat suspect, upon reflection I am satisfied it is credible. First, this evidence was confirmed by Mr. Banks, the other defense witness. Also, the evidence that ten pints of beer were borrowed is easily challenged if untrue and here it is unrebutted. The defendant's explanation of consuming the beer before the police arrived is also believable given Constable Lutz' testimony of

receiving a complaint and travelling directly to the area and the times involved. No beer was found by the police.

[29] Finally, the breathalyzer reading which is admissible evidence here is consistent with the ranges of blood alcohol levels proffered by the toxicologist.

[30] Accordingly, I am satisfied the toxicologist's evidence of reading of 40 to 105 is evidence which tends to show that the defendant's blood alcohol level was below the legal limit at the time of driving. The presumption of identity is rebutted based on either the *R. v. Gaynor* analysis reasoning or that set out in *R. v. Clarke*, *supra*.

[31] Finally, I am left with a reasonable doubt that the defendant's blood alcohol level exceeded the legal limit at the time he was driving.

[32] Accordingly, he is found not guilty and acquitted.

TUFTS, J.P.C.