Date: 2002-11-07

IN THE PROVINCIAL COURT OF NOVA SCOTIA
Cite: R. v. Finlayson, 2002-NSPC-034

HER MAJESTY THE QUEEN

versus

Terrance Michael Finlayson

s. 253(a) cc
253(b) cc

DECISION

Before: His Honour Judge A. Peter Ross

Counsel: Mr. Darcy MacPherson, for the Prosecution
Mr. William Burchell, for the Defence

Released: November 7, 2002

INTRODUCTION

[1] Shortly after noon on September 2, 2000, lifeguards at Ingonish Beach, in Cape Breton Highlands National Park, observed the accused, Terrance Michael Finlayson, and a companion with a cooler of beer. Contact was made with a local Commissionaire and the Ingonish RCMP. Each attended the scene and made observations. The RCMP member left. In the meantime, the accused drove 100 yards to a picnic area. A short time later Constable Sampson approached and made a roadside screening device (RSD) demand on the accused, which he failed. Mr. Finlayson was then arrested and given a breathalyzer demand. Readings later taken at the Detachment revealed blood alcohol levels of 150 and 140 milligrams of alcohol in 100 millilitres of blood. The accused was charged with impaired driving under s. 253(a) and the "over 80" offence under s. 253(b) of the Criminal Code.

[2] The events under examination in this case pose a problem, one which begs a solution if a proper decision is to be rendered. Because the accused drank alcoholic beverage in the time between his driving and the breathalyzer tests (and also, perhaps because of his drinking pattern prior to driving) the measured Blood Alcohol Content (BAC) may not accord with the BAC at the time of driving. In such circumstances the application of the presumptions in s. 258(1)(c) and (d.1) may render an injustice to an accused. Expert opinion may serve to correct the course of justice. Triers of fact cannot steer this course alone. We are not permitted to take judicial notice of elimination and absorption of alcohol, however often we may have heard such evidence.

[3] Recognizing this, expert evidence was lead by both crown and defence concerning the actual BAC at the time of driving. The court is first required to consider the applicability of the presumptions contained in s. 258(1)(c) and (d.1). However, even if there is "evidence to the contrary" concerning the equivalence of the BAC in the certificate with the BAC at the time of driving, or evidence "tending to show" that the BAC at the time of driving did not exceed 80 despite analyses showing a BAC of over 80, - even if, in other words, the presumptions are displaced - the court must next consider *viva voce* evidence, including expert opinion evidence, on the ultimate issue of whether this element of the 253(b) offence has been proven beyond a reasonable doubt.

[4] The expert opinions proffered in this case employ different methodologies. The experts may also be contrasted in the extent to which they rely upon proven facts which emerge from the evidence. While a trial is not a "credibility contest"[1], this case involves an assessment of the relative strengths of two expert opinions, each competing for the approval of the trier of fact.

FACTS

[5] The Crown's witnesses in chief were RCMP Constable Darren Sampson and Park Commissionaire Stan Harper. The police officer came bearing documents, which were admitted. The defence evidence was comprised of testimony from the accused, Mr. Finlayson, and an expert opinion from Dr. Gerald McKenzie, entered in the form of an affidavit. In rebuttal, Crown called *viva voce* evidence from Mr. Jean-Claude Landry. The latter two are the expert witnesses alluded to above.

[6] Most of the factual frame work will be set out in the following paragraphs. Other factual aspects more directly related to the opinion evidence, such as the drinking pattern of the accused prior to driving, will be set out in later discussion.

[7] Constable Darren Sampson was off duty but taking calls at 13:00 hours on September 2, 2000. Stan Harper was a Commissionaire on duty in the Park at the same time. Mr. Harper monitored a radio call from the lifeguards to the Park Warden concerning two people who were drinking on the beach. Evidently the Warden contacted the RCMP, and Constable Sampson and Commissionaire Harper both responded by going to the scene and observing the two individuals, and a vehicle. One was wearing an orange T-shirt, the other a white T-shirt.

[8] Sampson instructed Harper to keep an eye on the individuals, and to report to him if the vehicle was moved, while Sampson went to get a police car. Shortly after 13:25 Harper observed the two individuals carry their cooler to a picnic table at the adjacent soccer field. At 13:46 he saw the individual with the white T-shirt drive the vehicle, a red Nissan bearing plates DDL704, to that same location. The two sat at the picnic table drinking from large plastic glasses. Harper apprised Sampson of these facts via radio.

[9] When Constable Sampson returned with his police car he went directly to the picnic table and approached the individuals. One was wearing an orange

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[1] R. v. W. (D.) [1991] 1 S.C.R. 742 (S.C.C.)

T-shirt; the other was topless, a white T-shirt lying on the table beside him. Sampson approached the individual with no top, who identified himself as Terrance Finlayson. Sampson asked the accused to come to the police car, and noted a mild to moderate smell of liquor on his breath at that time. He asked the accused when he had finished his last drink, having observed a plastic glass partly filled with beer under the picnic table close to where the accused had been seated. When Mr. Finlayson advised that he had "just finished" Sampson told him he would wait ten minutes to allow for absorption before making a screening device demand. Sampson made such a demand at 14:20. The accused failed at 14:21. Thereafter, the accused was arrested for impaired driving and given his rights to counsel. At 14:23 he was read the standard police caution and at 14:24 the usual demand for breath samples. They returned directly to the Ingonish RCMP Detachment where Constable Sampson, a qualified technician, administered a breath test. Samples were taken at 14:49 and 15:09 and analysed at 150 milligrams and 140 milligrams in 100 millilitres of blood, respectively. A certificate of qualified technician was then prepared and served.

[10] Seized at the scene were eleven full and unopened cans of Keith's beer, five empty cans of Keith's beer, and two "eight pack" holders. Also found was a receipt for two eight packs of Keith's beer totalling $23.60, and showing a time of purchase at 12:25 at the Ingonish Liquor Store that same day. Seized from the trunk of the vehicle was a 750 ml. bottle of Captain Morgan rum partly filled with a mix of white rum and a soft beverage of some sort.

[11] There is no question that Constable Sampson possessed sufficient grounds to make a RSD demand, based on the information given to him by the Commissionaire, and his own observations. These, coupled with failure of the RSD, gave grounds for the breathalyzer demand. The evidence clearly proves that the accused drove the motor vehicle, albeit a very short distance, at 13:46. All the prerequisites in 258(1)(c) are met such that the presumption there and in sub-section (d.1) calls out for possible application. Whether the presumptions are displaced, and, if they are, whether there is sufficient evidence to prove the "over 80" element of the offence beyond a reasonable doubt, even without the benefit of a presumption, is the principal issue in this trial. The discussion of this issue focuses entirely on the weight and reliability of the respective expert opinions. I will discuss each in turn.

DR MACKENZIE'S OPINION

[12] Pursuant to s. 657.3 of the Criminal Code the expert evidence of Dr. Gerald M. McKenzie was given by way of affidavit tendered by the defence. Crown waived any opportunity to cross examine Dr. McKenzie under 657.3(2), and took no issue with his qualifications. The *curriculum vitae* attached to the affidavit appeared to establish Dr. McKenzie as a qualified expert in the field of pharmacology, and in particular in the calculation of blood alcohol levels by taking into account the effects of absorption, metabolism and elimination. Although prior to the codification of notice requirements, defence had supplied the crown with a copy of this opinion, thus enabling the crown to call its own expert in rebuttal. I took the foregoing c.v., in the absence of objection to qualifications by the crown, as sufficient proof of the Mohan[2] requirement of a "properly qualified expert". The opinion was obviously relevant to a matter in issue. It addressed an aspect of the case which was beyond the ken of the trier of fact (blood alcohol absorption, etc.) and thus necessary. To the extent that the reliability of an opinion may be relevant at the admissibility stage, there was nothing to call this into question - it was only later on, when the court had the benefit of hearing other evidence in rebuttal, that concerns about reliability came to the fore. This was addressed by assigning appropriate weight to the opinion, considering its relative merit.

[13] Dr. McKenzie's opinion was rendered prior to trial and rested on an assumed factual foundation comprised of the "Crown sheet" and a letter from the accused detailing his drinking pattern from the evening of the previous day up to the time he was approached at the picnic table by Constable Sampson. The Crown sheet and letter were referenced in the opinion and attached as exhibits to the affidavit. The fact-related evidence at trial is found in the testimony of Constable Sampson, Mr. Harper, and the accused, Mr. Finlayson, together with the certificate of qualified technician and the liquor store receipt. The crown sheet and Mr. Finlayson's letter, taken together, accord with some aspects of the trial evidence, but not all. In certain particulars, therefore, the factual assumptions made by Dr. McKenzie in rendering his opinion do not find support in the trial evidence. For instance,

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[2] R. v. Mohan [1994] 2 S.C.R. 9 (S.C.C.)

Mr. Finlayson related to Dr. McKenzie that he had consumed six to eight beer and one half quart of white rum between 10:00 p.m. the previous evening and 4:00 a.m. of the date in question, September 2nd. To my recollection, Mr. Finlayson did not speak to the consumption of six to eight beer the previous evening, and thus this point finds no support in sworn testimony. As well, he testified to drinking one third of the bottle of rum, (as did his companion) and adding mix to the remaining third, which remainder was found in the trunk of the car by police. On this point his testimony is thus at variance with the information he gave to Dr. McKenzie, namely, that he had consumed *one half* bottle of rum. As well, he indicated to Dr. McKenzie that he had consumed two to three beer between 12:00 hours and 13:30 hours on the date in question, whereas, as the accused himself acknowledged in testimony, the receipt indicates that the beer was purchased at 12:25, and consumption would have begun five to ten minutes after that. The stipulated fact that he had consumed two to three beer *does* accord with the evidence found at the scene (five empty cans, eleven full cans, a glass partly filled with beer) on the reasonable assumption that the accused and his companion drank roughly equal amounts. As to the previous evening's drinking, whatever it may have been, there is only Mr. Finlayson's evidence of this. Finally, Dr. McKenzie puts the time of driving at 13:30 hours, whereas the evidence at trial fixes the time at 13:46.

[14] To calculate the BAC at the time of driving, Dr. McKenzie employed a method whereby he projected forward from a given prior consumption pattern to calculate a range of BAC's at the time of driving. He gave this range as 17 to 137. He then said that this was "consistent with" the BAC of 140 analysed by the breathalyzer at 15:09.

MR LANDRY'S OPINION

[15] Mr. Landry's opinion evidence was given *viva voce*. He spoke briefly to his credentials and tendered a written *curriculum vitae*. There was no cross examination on his credentials or proposed opinion before it was enunciated. Again, as with Dr. McKenzie, counsel essentially conceded the issue of admissibility without the necessity of a *voir dire*.

[16] Mr. Landry performed a calculation of BAC to 13:46 hours, the time of driving. Proceeding from the BAC's measured by the breathalyzer instrument, he calculated the effect of elimination rates as well as the effect that the consumption of two and one half beers would contribute to the

result. He concluded the BAC at the time of driving would be between 108 and 121 milligrams in 100 millilitres of blood. He stated that he chose the lower of the two breathalyzer readings, which was 140 at 15:09 hours, as this gave the greater benefit to the accused. He spoke to the variance in elimination rates in the general population and explained how this contributed to the range of values in his conclusion.

[17] Mr. Landry also addressed the opinion rendered by Dr. McKenzie. He said that while the methodology employed was "not very clear" from the documentary evidence provided, it appears that Dr. McKenzie had done a so called "forward calculation". In other words, he proceeded from the alleged consumption pattern prior to the time of driving, employed a range of elimination rates, assumed the veracity of the pattern as given by the defendant, and formed a conclusion about a range of BAC's at the time of driving. Mr. Landry contended that his method, which proceeded from the known quantity of alcohol in the blood revealed by the breathalyzer test, was a superior, accurate and more reliable method. He indicated that the very wide range of BAC's worked out by Dr. McKenzie results from the application of a range of elimination rates over a long period of time. In contrast, working backwards, there is a much shorter interval from the breath tests to the time of driving over which the range of elimination rates is applied. He was also able to adjust his opinion to other factual scenarios; in particular, he said that if the time of driving was actually 13:30 rather than 13:46, his results would not change substantially. Mr. Landry said his calculation involved a presumption that none of the alcohol from the two and a half beer consumed by the accused were in his blood at the time of driving, but that it all *had* entered the blood stream at the time of the test.

COMPARISON OF THE EXPERT OPINIONS

[18] Mr. Landry works for the RCMP. Dr. McKenzie was recruited by the accused to give an opinion and paid for his services. One might speculate about a possible lack of objectivity on either part, there is really no basis on the evidence at this trial to question the objectivity of the witnesses. While I will express a preference for the opinion of one over the other, it is not because I have found any bias.

[19] It may be that utilization of the procedure in 657.3 creates a danger that the court will give short shrift to the prerequisites for admissibility. If the inquiry focuses mainly on the qualifications of the expert, such may be apparent from a c.v. attached to an affidavit. Questions of reliability may

not be as readily apparent, based as they are on using proper scientific methodology and reasoning. In the present case, the affidavit of Dr. McKenzie appeared to establish at least a *prima facie* case for admissibility. This, coupled with the absence of objection from the crown, served to have the opinion, rendered in documentary form, admitted. Only when tested against the testimony of the other expert, Mr. Landry, did deficiencies in *the methodology* of Dr. McKenzie become apparent. However, I do not think there is great impropriety in now evaluating the opinions as to their weight and ultimate reliability, even if reliability was not adequately canvassed at the outset. In any event, having received the evidence, it is the only approach left available to me.

[20] Cracks in the factual foundation also appeared as the trial progressed. This sort of deficiency is not usually caught by a *voir dire*. Indeed, case law suggests that lack of proof of facts relied upon by an expert goes to weight, not admissibility.[3]

[21] A person who attempts to find the solution to a problem, or test a hypothesis, ought to take account of all available reliable data. Although Dr. McKenzie alluded to the BAC of 140 at 15:09, as measured by the breathalyzer, he did not utilize it in his calculations. Rather, he worked from prior consumption patterns, extending back to the evening of the previous day, to conclude that at 12:40 on the date in question the accused's BAC was between 0 and 129. He went on to conclude that at 1:30 (the time he assumed to be the last time of driving) the BAC was between 17 and 137. He then states that the above are "consistent with" a BAC of 140 at 15:09 as set out in the certificate of qualified technician. What Dr. McKenzie does not say, and was not available for questioning about, is what *other* BAC's his calculations would be "consistent with". Presumably his results are consistent with any number of breathalyzer - measured BAC's. In contrast, Mr. Landry takes a singular, known and verifiable quantity at 15:09, a BAC of 140, and he proceeds from there to calculate an answer to the problem.[4]. Mr. Landry's opinion, as it employs a superior methodology, is therefore more reliable and entitled to greater weight for this reason alone.

[22] Dr. McKenzie's opinion suffers from a further deficiency. The probative value of an opinion is dependant, among other things, upon a proven factual

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[3] R. v. Mathieu (1994) 90 C.C.C. (3d) 415 (Que. C.A.); Aff'd 101 C.C.C. (3d) 575 (S.C.C.)

[4] See para. 2

foundation. R. v. Collins[5] holds that the more an expert relies on facts not proven, the less weight ought to be assigned to it, and the more an expert fails to consider relevant facts, the less weight ought to be assigned to it. In this case there are instances of both. Firstly, Dr. McKenzie relied upon a prior consumption pattern which did not have firm testimonial support from the accused. The accused failed to mention in testimony some of the drinking he had outlined in his letter to Dr. McKenzie. As well, this evidence was uncorroborated and coming as it did from the memory of someone whose memory would have been impaired by the very drinking he tries to remember, it suffers from an inherent frailty. Second, his opinion refers to times for driving and for drinking the two and a half beer which are at variance with the facts which emerge from the trial. A party who tenders expert opinion must establish, through properly admissible evidence, the factual basis for the expert's opinion.[6] The accused has here fallen short of what is expected, and the defence expert's opinion suffers accordingly. For this reason, too, it is assigned considerably less weight than Mr. Landry's.

[23] Mr. Landry stated that his opinion was corroborated by the "fail" reading in the roadside screening device. Dr. McKenzie's opinion makes no mention of this. Mr. Landry has thus looked to see whether his conclusion is consistent with available data, whereas Dr. McKenzie did not seek out and analyse other facts to test his conclusions.

[24] Since Dr. McKenzie was not made available for questioning, he could not be asked to revise his calculations to accord with the trial evidence.

[25] At the conclusion of the rebuttal evidence I expressed some concern about the methodology employed by Dr. McKenzie and granted defence counsel an opportunity to call its witness for direct and cross examination. This would give Dr. McKenzie the same opportunity as Mr. Landry to defend his opinion and comment on the opinion of the other. Defence did not chose to take this step, citing cost as one consideration. While the accused may have been confronted with a difficult cost/benefit analysis, and while the court should be cognizant of the limited resources of accused persons who are attempting to defend themselves, this provides cold comfort to the accused.

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[5] [2001] 160 C.C.C. (3d) 85 (Ont. C.A.)

[6] R. v. Abbey [1982] 2 S.C.R. 24

I am left to evaluate the evidence that I have, not to speculate on what it might have been.

[26] There is no reason to think that there is any deficiency in the expertise of Dr. McKenzie in the sense that he would be capable, one presumes, of utilizing the methodology of Mr. Landry. However, for opinion evidence to have significant probative value it should be founded on proven facts, support the suggested inference, tend to prove a matter in issue, and be reliable. [7] For the reasons given above, I attach much greater probative value to the opinion of Mr. Landry than I do to the opinion of Dr. McKenzie.

CONCLUSION

[27] In conclusion, the evidence of the defence expert does not constitute "evidence to the contrary" sufficient to displace the presumption in s. 258(1)(c) of the Criminal Code, nor is it evidence "tending to show" that the BAC of the accused was under the prescribed limit at the time of driving per s. 258(1)(d.1). If I am wrong to attach so little weight to this evidence, and were to proceed to consider whether, without the benefit of a presumption, the crown has proven beyond a reasonable doubt, on the totality of the evidence, that the accused was driving when the concentration of alcohol in his blood exceeded 80 milligrams in 100 millilitres of blood, I would likewise conclude that this burden has been met.

[28] As all the elements of the offence are proven on the criminal standard, a finding of guilty will be entered on the s. 253(b) charge. A stay will be entered on the s. 253(a).

Dated at Sydney, this 5th day of November, A.D., 2002

[7] See for example, R v. K.(A) [1999] 27 C.R. (5d) 226 (Ont. C.A.)

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A. Peter Ross, JPC