IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. C.A.S., 2006 NSSC 215

Date: 20060628
Docket: Cr. S.AT. No. 258379
Registry: Antigonish

Between:

C. A. A.

Appellant

v.

Her Majesty the Queen

Respondent

Editorial Notice: Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Justice Douglas L. MacLellan

Heard: June 27, 2006 at Antigonish, Nova Scotia

Written Decision: Wednesday, June 28, 2006

Counsel: Lawrence O'Neil, Q.C., for the appellant
Doug Lloy, Esq., for the Crown

By the Court: (Orally)

[1] This is an appeal from a decision of Judge Marc C. Chisholm of the Provincial Court dated October 14th, 2005, in which he convicted the appellant on the following charge:

> That on or about the 8th day of May, 2005, at or near Fairview Street, Antigonish, Antigonish County, Nova Scotia did without reasonable excuse refuse to comply with a demand made to her by a peace officer under section 254(2) of the *Criminal Code* to provide forthwith a sample of her breath necessary to enable a proper analysis of her breath to be made by means of an approved screening device contrary to section 254(5) of the *Criminal Code of Canada.*

[2] The Notice of Appeal filed by the appellant indicates the following grounds of appeal:

> 1. That the Learned Trial Judge erred in finding that the Appellant was operating a vehicle as that language is used in s. 254(2) of the *Criminal Code.*
>
> 2. That the Learned Trial Judge erred in failing to consider that the demand to provide a sample Roadside Screening for analysis by a device requires that the evidence so gained be necessary to determine if grounds exist to make a breathalyzer demand.

3. That the Learned Trial Judge failed to consider evidence going to the reliability of the evidence of Crown witnesses.

4. Such other grounds as may appear.

[3] Section 254(2) of the ***Criminal Code*** provides as follows:

> Section 254(2) Where a peace officer reasonably suspects that a person who is operating a motor vehicle or vessel or operating or assisting in the operation of an aircraft or of railway equipment or who has care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not, has alcohol in the person's body, the peace officer may, by demand made to that person, require the person to provide forthwith such a sample of breath as in the opinion of the peace officer is necessary to enable a proper analysis of the breath to be made by means of an approved screening device and, where necessary, to accompany the peace officer for the purpose of enabling such a sample of breath to be taken.

[4] Section 254(5) provides that a person who refuses commits an offence.

[5] Both counsel to this appeal agree that the standard of review for this Court in regard to this conviction in the Provincial Court has been set out by Cromwell, J.A. in our Court of Appeal decision of ***R v. Nickerson*** (2000) 178 N.S.R. (2d) 189 where Justice Cromwell said:

> The scope of review of the trial court's findings of fact by the Summary Conviction Appeal Court is the same as on appeal against conviction to the Court of Appeal in indictable offences: see ss.822(1) and 686(1)(a)(i) and *R v. Gillis* (1981), 45 N.S.R. (2d) 137; A.P.R. 137; 60 C.C.C. (2d) 169 (C.A.), per Jones, J.A. at p. 176. Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in *R v. Burns* (R.H.), [1994] 1 S.C.R. 656; 165 N.R. 374; 42 B.C.A.C. 161; 67 W.A.C. 161; 89 C.C.C. (3d) 193, at p. 657 [S.C.R.], the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was <u>some</u> evidence to support the trial judge's conclusions nor a new trial on the transcript.

[6] The main argument advanced by counsel for the appellant here is basically that the demand made by the police officer here to the appellant is not legal and therefore her refusal was justified.

[7] The background facts of this case are relatively simple and are set out in the appellant's factum and indicate as follows:

> 1. Shortly after 7:00 p.m. on May 8, 2005, the Appellant called the R.C.M.P. to report an assault upon her by her husband. The R.C.M.P. responded by telephone to the call. The Appellant asked that the R.C.M.P. meet her at the police station, not her home.

2. The Appellant arrived at the police station at approximately 7:30 p.m. She was met by two police officers as she left her vehicle. All three entered the police station. Ms. A., the appellant, was lead to as(sic) witness interview room for the purpose of being interviewed about the alleged spousal assault. She began to report the details of the alleged assault to the two officers.

3. Officer Geoffrion left the interview room. She returned to the interview room with a Roadside Screening Device and demanded that the Appellant provide a sample of her breath. The Appellant refused.

4. She was then arrested for impaired driving and chartered. She was eventually charged with refusing the RSD demand.

[8] Added to those facts, I would note from the evidence, that the officers when the appellant first drove into the police station noted what they felt was a bit of erratic driving and smelled alcohol off the appellant's breath.

[9] Judge Chisholm, in his decision, canvassed a large number of cases on the issue of demands under Section 254(2) of the ***Criminal Code.*** He also made a number of clear findings. He found that the appellant was not detained until she was given the demand. He found that the Roadside Screening test was given forthwith after the demand was made. He found that the time between the observing of the grounds by the officers and the giving of the demand was not unreasonable because they were dealing with the appellant's personal situation and

delaying giving the demand until they were in the interview room did not, in his opinion, and based on the various cases that he canvassed, make the demand unlawful which would make the appellant's refusal justified.

[10] I have reviewed the evidence presented at trial and I conclude that the trial judge's findings were in fact supported by the evidence before him and that his conclusions are not unreasonable.

[11] I also conclude that he has not made any errors of law when applying the present state of the law to the facts of the case before him.

[12] Counsel for the appellant argues that the police officer should not have given a demand under Section 254(2), but in fact a demand under the breathalyzer sections of the ***Code***. That would have permitted the appellant an opportunity to consult counsel before deciding if she would take the test or not. The suggestion being that she has been deprived of the opportunity to have legal advise before refusing or agreeing to take the test.

[13] The evidence here is that the two police officers did observe certain symptoms of impairment. They observed a smell of alcohol coming from the appellant's breath and that she had a certain degree of slurred speech and blood shot eyes. They also observed a bit of erratic driving in that she drove into a handicapped parking zone in the parking lot and after backing out of that ended up parking at a forty-five degree angle to the parking spot.

[14] Counsel for the respondent points out, appropriately here, however, that with the exception of the smell of alcohol all these symptoms could have been a result of the emotional state of the appellant considering the circumstances that she found herself in and the reason she was going to the police station. I agree with the Crown's position on that point.

[15] Counsel for the appellant has offered no case authority for his argument that if a police officer has grounds for a breathalyzer demand it is improper to give a Section 254(2) demand. It does not appear that this issue about the type of demand was argued before the trial judge, however, considering the evidence before him and the argument presented at this hearing, I can conclude that what the police

officers did in these circumstances was appropriate and that it was proper for them to give the 254(2) demand instead of the breathalyzer demand.

[16] Counsel for the appellant also argues that because the demand was given inside the police station instead of outside in the parking lot that it would make the demand unlawful. I reject that argument and accept the trial judge's conclusion that the situation here was similar to making a demand in a police car close to the scene of an alleged driving infraction.

[17] I conclude that the trial judge's decision in this case is reasonable and that he committed no error of law, and I would therefore dismiss the appeal and confirm the conviction entered against the appellant.

[18] No costs to either party.

J.