SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Mills*, 2015 NSSC 213

Date: 20150610
Docket: Hfx No. 436786A
Registry: Halifax

Between:

Charlene Alison Mills

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice M. Heather Robertson
Heard:	June 10, 2015, in Halifax, Nova Scotia
Written Release:	July 22, 2015 **(Orally: June 10, 2015)**
Counsel:	Nicholaus Fitch and Noel Fellows, for the appellant Ronald Lacey, for the respondent

Robertson, J.: (Orally)

[1] This is an appeal of the decision of the Honourable Judge William Digby appealing the appellant's conviction pursuant to s. 253(1)(1b) of the *Criminal Code* (over 80).

[2] The appellant had been charges with two counts contrary to s. 253(1)(a) impaired driving and s. 253(1)(b) over 80.

[3] The learned trial judge convicted on the second count and stayed the first count.

[4] The appellant now asks that the conviction be overturned and an acquittal be entered because the pre-condition that the breath sample must be taken as soon as practicable from the time of the breath demand was not met and the one hour delay remained unexplained and that the learned Provincial Court judge erred by not giving reasons or misapprehended the evidence.

[5] The respondent Crown concedes the appeal of the conviction under s. 253(1)(b) on the grounds that there is evidence that there was an unexplained one hour delay in taking the first breath sample.

[6] However, the Crown says that this court should remit the impaired charge – count number one – back to the trial judge for entry of a conviction and imposition of the appropriate sentence, as there was ample evidence of impairment before the court.

[7] So the issues before the court as stated by counsel:

1. Did the learned Provincial Court Judge err in his assessment that the breath samples had been taken as soon as practicable after the breath demand?
2. Did the learned Provincial Court Judge err by not giving reasons or misapprehending the evidence?

[8] The appellant has argued these grounds together.

STANDARD OF CORRECTNESS

[9] The standard of appellate review of law is correctness. The appeal of the factual issues are reviewed for any palpable or overriding error and the trial judge is given deference with respect to findings of fact.

ISSUE #1: "as soon as practicable" and ISSUE #2: "misapprehension of the evidence or the failure to give reasons."

[10] It appears to me that the trial judge misapprehended the evidence with respect to the one hour delay deciding as follows:

> I am satisfied on listening to the officer's explanation of what happened at the police station that the delay, if you want to call it that, was caused by the difficulty in getting in touch with Legal Aid counsel in order to assure Ms. Mills' Charter rights to counsel were respected. The office had to leave a message, get a call back from Legal Aid. Anything further, gentlemen?

[11] The record shows that Mr. Fitch on behalf of the accused attempting to clarifying the timing of the first sample made it clear that the sample was taken one hour following the call from Legal Aid being completed. But the trial judge went on to say, "I find the accused guilty of the offence under s. 253.1(b) [sic] I'm going to stay the first count."

[12] Those were the stated reasons for the conviction. So on review of the transcript now available after the appeal of the conviction it is obvious that there was indeed an unexplained one hour delay and that the precondition that the breath sample must be taken as soon as practicable from the time of the breath demand was not met. So the trial judge misheard or misapprehended this evidence. Even the Crown concedes this ground of appeal must succeed.

[13] However, the remedy that the court should provide is at issue – an absolute acquittal or remitting the impaired driving charge back to the trial judge for entry of a conviction and sentencing or a possible third option that I would now consider of remitting the matter back to the trial judge to hear argument and then to consider whether to register a conviction on the first count and if so, to impose sentence. So I see that as a third option available to me.

[14] The Crown argues that the staying of the first charge follows the well-accepted law in *R. v. Kienapple* [1975], 1 S.C.R. 729, and they argue the rule

against multiple convictions is regularly applied by the courts in relation to offences under s. 253(1)(a) impaired driving and s. 253(1)(b) over 80.

[15] They rely on *R. v. Terlecki*, 1983 ABCA 87, affirmed by the Supreme Court in 1985 – see [1985], 2 S.C.R. 483. And they also urge the court to recognize *R. v. Provo* [1989], 2 S.C.R. 3; *R. v. Paul-Marr*, 2005 NSCA 73, and the *Provo* case, s*upra,* that indeed answered by query about preserving the accused's right of appeal relative to the first count.

[16] The appellant relies on *R. v. Stellato* (1993), 78 C.C.C (3d) 380 (Ont. C.A.) and *R. v. Andrews* (1996), 104 C.C.C. (3d) 392 (Alta. C.A.), and suggesting that the proof that the required for the offence of impaired driving is an issue of fact to be decided in each case and pointing out there was not a deliberation on the impaired driving charge in this judge's earlier proceeding.

[17] The appellant is urging the court to allow the appeal and enter an acquittal – call a matter to an end. I agree with Crown counsel that because of the principles in *R. v. Kienapple, supra*, a stay of proceeding on the impaired driving charge is a frequent occurrence in Provincial Court. However now that there will be an acquittal of the second count on this appeal, I think it is appropriate to remit the matter back to the trial judge so that he can consider whether the conviction under the first count is appropriate. He should hear from counsel argument on the matter before determining which way to go – enter the conviction or not and impose the sentence or not.

[18] I remit the matter back to the trial judge for a decision on the first count.

Justice M. Heather Robertson