SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Rushton, 2009 NSSC 239

Date: 20090807
Docket: CR ST 307515
Registry: Truro

Between:

Douglas Troy Rushton

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Glen G. McDougall
Heard:	May 27, 2009, in Truro, Nova Scotia
Written Decision:	August 11, 2009
Counsel:	Brad Yuill, Ll.B., on behalf of the appellant Richard Hartlen, Ll.B., on behalf of the respondent

By the Court:

INTRODUCTION

[1] The appellant pleaded not guilty to charges of impaired driving and failing the breathalyzer. He was charged pursuant to ss. 253(a) and (b) of the *Criminal Code*. The trial judge found the appellant not guilty on the charge of impaired driving, but convicted him of failing the breathalyzer. He appeals that conviction.

FACTS

[2] The accused was detained by police while driving. He was given a breathalyzer demand. Test were administered by Cst. Reddy, a qualified breathalyzer technician,

at the RCMP detachment in Bible Hill. He was subsequently charged with impaired driving and failing the breathalyzer.

ISSUE

[3] While the appellant presents the issue as being whether the trial judge erred in law by finding that the Crown had proven its case under s. 258(1)(c) beyond a reasonable doubt, by finding "that the samples of breath were taken within two hours after the offence [was] alleged to have occurred based on the evidence," the issue is better characterized as framed by the Crown: "[w]as the factual finding that the first sample was taken within two (2) hours of when the offence was alleged to have been committed reasonably supported by the evidence?"

LAW

[4] Paragraph 686(1)(a) of the *Criminal Code* provides that an appeal court may allow an appeal against conviction where the court is of the opinion that:

> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (iii) on any ground there was a miscarriage of justice....

[5] The appellant cites the comments on appeals by the Supreme Court of Canada in **R.** v. **Yebes**, [1987] 2 S.C.R. 168, where McIntyre J., for the court, said, at p. 186:

> ... The function of the Court of Appeal, under s. 613(1)(a)(i) of the Criminal Code, goes beyond merely finding that there is evidence to support a conviction. The Court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the Court must re-examine and to some extent reweigh and consider the effect of the evidence. This process will be the same whether the case is based on circumstantial or direct evidence....

[6] In **R.** v. **Nickerson** (1999), 178 N.S.R. (2d) 189, [1999] N.S.J. No. 210, Cromwell J.A. (as he then was), for the court, said, at para. 6:

> 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.... 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, [1994] 1 S.C.R. 656 at 657, 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 some evidence to support the trial judge's conclusions nor a new trial on the transcript.

[7] The Supreme Court of Canada stated in **R.** v. **Clark**, [2005] 1 S.C.R. 6, 2005 SCC 2:

> ... Appellate courts may not interfere with the findings of fact made and the factual inferences drawn by the trial judge, unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. The imputed error must, moreover, be plainly identified. And it must be shown to have affected the result. "Palpable and overriding error" is a resonant and compendious expression of this well-established norm....

[8] The question on this appeal, then, is whether the trial judge's factual findings were reasonably supported by the evidence, or whether the trial judge made a palpable or overriding error on the evidence.

THE CHARGES

[9] Subsection 253 of the *Criminal Code*, provides that it is an offence to operate a motor vehicle while one's ability is impaired by alcohol or after "having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood." The trial judge acquitted the appellant under what was then ss. (a) (now 1(a)), and convicted on (b) (now (1)(b).) Section 258 provides, in part:

> 258. (1) In any proceedings under subsection 255(1) in respect of an offence committed under section 253 or subsection 254(5) or in any proceedings under any of subsections 255(2) to (3.2) [...]
>
> > (c) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), if [...]
> >
> > > (ii) each sample was taken as soon as practicable after the time when the offence was alleged to have been committed and, in the case of the first sample, not later than two hours after that time, with an interval of at least fifteen minutes between the times when the samples were taken,
> > >
> > > (iii) each sample was received from the accused directly into an approved container or into an approved instrument operated by a qualified technician, and
> > >
> > > (iv) an analysis of each sample was made by means of an approved instrument operated by a qualified technician,
>
> evidence of the results of the analyses so made is conclusive proof that the concentration of alcohol in the accused's blood both at the time when the analyses were made and at the time when the offence was alleged to have been committed was, if the results of the analyses are the same, the concentration determined by the analyses....

[10] It has been said that this provision "provides a procedural shortcut for the police, but only if the breath or blood sample is obtained within two hours of the alleged offence": **R.** v. **Deruelle**, [1992] 2 S.C.R. 663, [1992] S.C.J. No. 69, at para. 15.

[11] The appellant maintains that the Crown failed to prove beyond a reasonable doubt that the first sample of his breath was taken "not later than two hours" after the offence was allegedly committed. The two-hour limit was discussed in **R.** v. **King**, [2008] N.J. No. 99, where the court said, at para. 19:

> It is not sufficient for the evidence to lead to a conclusion that the time of the alleged offence might be or is probably 6:19 or 6:20 p.m. The Crown must prove beyond a reasonable doubt that the first breath sample was taken "not later than two hours" after the time of the alleged offence in order to rely on the statutory presumption.

> Where, as here, the driving may have occurred either a minute or two inside or outside that two-hour time frame, the burden of proof is not met.

[12] The question, then, is whether the trial judge's conclusion that the first sample was taken within two hours of the commission of the offence was reasonably supported by the evidence, or whether he made a palpable or overriding error in making that finding.

[13] The trial judge heard evidence from Cst. Deschenes, the officer who apprehended the appellant and delivered him to the Bible Hill detachment, and Cst. Reddy, who administered the breathalyzer at the detachment. The timing issue revolves around the officers' failure to synchronize their watches with each other and with the time on the datamaster machine. The datamaster indicated that the first sample was taken at 3:39 a.m. The trial judge was satisfied beyond a reasonable doubt that the last moment of care and control of his vehicle by the appellant was not before 1:39 a.m., thus bringing the time of the alleged commission of the offence within two hours of the test.

ARGUMENTS

[14] The appellant says the trial judge's verdict is unreasonable and cannot be supported by the evidence. Specifically, the appellant argues:

> (1) Cst. Deschenes did not note the time at which he detained the accused and when the accused was last in care and control of the vehicle. In the Crown sheet he indicated that he believed this time to be "approximately 1:45." He equated the word approximate with a margin of error of between five and ten minutes. As such, the appellant says, the time of detention could have been any time between 1:35 and 1:55. I note that, according to the transcript, the "five or ten minute" error suggested by the appellant was not conceded by Cst. Deschenes specifically in relation to the time of the appellant's detention. He was asked generally whether the word "approximately" meant "an error of five or ten minutes, give or take," and answered, "yes, it could be." [See p. 33]
>
> (2) Cst. Deschenes testified that he began taking notes at 1:50. He agreed on cross-examination that he took certain steps before he began to take notes, including walking to the vehicle, searching the vehicle and the appellant, handcuffing the appellant, seating the appellant in the police car, returning to the appellant's vehicle and seizing the beer. According to the appellant,

> Cst. Deschenes twice stated that these steps were taken before he took the first notes, and then testified that he was not sure. He said the process would take three to seven minutes.

[15] The appellant submits that if the various steps taken by Cst. Deschenes were taken (as the appellant claims) before the first note was made, "this" (presumably referring to the time of detention) could have been at 1:43.

[16] According to the appellant, the evidence only supports the conclusion that all of the actions taken by Cst. Deschenes were taken before the first note was taken at 1:50. The trial judge stated that Cst. Deschenes was not certain, but that it was a "fair assumption" that the search of the vehicle took place after 1:50. This was Cst. Deschenes's evidence on direct examination, where he stated that he got out of his vehicle at approximately 1:45 and signalled for the appellant's vehicle to stop "shortly or just a minute before 1:50." He said he formed the opinion that the appellant was intoxicated "shortly before 1:50 – a minute – thirty seconds," having waved him over to the side of the road "just a minute before 1:50." **[See transcript, p. 13, 17, 20-21]** While Cst. Deschenes expressed uncertainty on cross-examination as to whether he made his notes before or after searching the appellant's vehicle, this does not lead to the conclusion that "it is only reasonable to find, based on the evidence, that the time of detention prior to the initial noted 1:50 was seven to ten minutes prior. That is to say 1:40 in the morning." Cst. Deschenes, it should be noted, initially stated on cross-examination that approaching the vehicle, asking for identification and searching the vehicle, would probably take between three and five minutes, although he then agreed that it could have taken between three and seven minutes. **[See transcript, pp. 43-45.]**

[17] There was also a discrepancy between the evidence of the two officers with respect to the time at which Cst. Deschenes delivered the appellant to the detachment. As the trial judge noted, the times recorded by Cst. Reddy were consistently ahead of those recorded by Cst. Deschenes, by some five to seven minutes. **[See transcript, pp. 76-77]** Cst. Deschenes and Cst. Reddy did not compare their watches or synchronize them with the data master. The appellant submits that "if the actual detention was at 1:40 according to Cst. [Deschenes's] watch then Cst. Reddy's time of detention would have been 1:33. If ... the time of detention was seven minutes before 1:50 or 1:43, then Cst. Reddy's watch would have been 1:36." In either case, the appellant argues, the test timed at 1:39 "would have been late by either three

minutes or six minutes." In addition, the appellant says, there is no evidence as to what time was actually showing on the data master when the accused was detained.

[18] The Crown submits that the trial judge followed a reasonable and logical approach by adopting 3:39 as the end point of the analysis, and worked backward through the evidence. As noted, Cst. Deschenes testified that he got out of his vehicle at approximately 1:45. He signalled for the appellant's vehicle to stop "shortly or just a minute before 1:50." He described "shortly before 1:50" as "a minute – 30 seconds" and identified the time-frame as the point at which the appellant committed the offence. Cst. Deschenes testified on direct examination that the stop and detention of the appellant occurred a short time before he made his first note at 1:50, and that the detention process took about a minute. The Crown points out that Cst. Deschenes repeatedly stated that even if the search of the vehicle occurred before his first notation, the entire process would have taken some five minutes, and possibly up to seven minutes. The next entry in his notes after 1:50 is of advising the appellant of the reason for his arrest, at 1:56.

[19] As to the appellant's argument respecting the lack of synchronization of the police officers' watches, the Crown points out that after hearing the evidence and instructing himself properly on the law, the trial judge made factual findings, "while drawing the inference that the time was most important to Cst. Deschenes." **[See transcript, p. 77]** He noted that Cst. Reddy indicated that she had had trouble with the reliability of various watches, while there was no evidence suggesting unreliability of Cst. Deschenes's watch. His conclusion was that the discrepancies in times recorded by the two officers did not give rise to a reasonable doubt. The Crown says this conclusion was supported by the evidence.

[20] The Crown submits that the trial judge's exchanges with counsel and his summaries of the law and evidence demonstrate that he was aware of the statutory requirements. The Crown says the trial judge was not required to give detailed reasons for his verdict, referring to R. v. R.E.M., 2008 SCC 51, where the Supreme Court of Canada said, at paras. 15-17:

> This Court in [R. v. Sheppard, 2002 SCC 26, [2002] 1 S.C.R. 869] and subsequent cases has advocated a functional context-specific approach to the adequacy of reasons in a criminal case. The reasons must be sufficient to fulfill their functions of explaining why the accused was convicted or acquitted, providing public accountability and permitting effective appellate review.

> It follows that courts of appeal considering the sufficiency of reasons should read them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered....
>
> These purposes are fulfilled if the reasons, read in context, show why the judge decided as he or she did. The object is not to show how the judge arrived at his or her conclusion, in a "watch me think" fashion. It is rather to show why the judge made that decision....

[21] The Crown submits that the trial judge gave a clear and comprehensive decision, in which he addressed the charge under s. 253(a), demonstrated a command of the law, confirmed the standard of proof and acknowledged that the burden of proof remained with the Crown at all times.

COMMENT

[22] The Crown conceded at trial that the timing was close, and the trial judge acknowledged a doubt, but concluded that it was not a reasonable doubt. As the appellant points out, one cannot surmise or assume in a criminal trial. As such, the appellant's position is that the conclusion that the test was taken within the two-hour period cannot be based on reason and common sense, nor can it be logically derived from the evidence or absence of evidence, thus failing to rise to proof beyond a reasonable doubt.

[23] As has been noted, the question is whether the trial judge's factual findings were reasonably supported by the evidence, or whether he made a palpable or overriding error on the evidence. It is hard to conclude the latter based on a review of the evidence. The fundamental point is that the trial judge was satisfied beyond a reasonable doubt that the search of the vehicle took place after 1:50. He further found that the appellant would have had care and control of his vehicle around 1:45. There was evidence from Cst. Deschenes that could reasonably support these conclusions. Although he expressed some uncertainty on cross-examination as to the timing of the search, it was open to the trial judge to accept the account given on direct.

[24] Having made the finding that the search was conducted after 1:50, the trial judge could reasonably conclude that the admitted inconsistencies between the times recorded by the two officers did not give rise to a reasonable doubt. He said:

> The 1:50 gives him a flexibility of between five and six minutes wherein his own watch could be wrong. And if that is going to be the watch of Cst. Reddy, in my opinion, that is not a reasonable doubt. It casts some question on the accuracy of his watch and the readings. But Cst. Reddy, herself, indicted that she had problems with her timekeeper, not her timekeeping. And I am left with Cst. Deschenes' watch as being something that he relied upon, knowing that it was going to be tested or potentially tested in the ordinary course of his duties.

[25] It is noteworthy that the trial judge held that a doubt existed, but concluded that it was not a reasonable one. Another judge, weighing the same evidence, might reach a different conclusion, but this is not a retrial. The trial judge could reasonably reach the factual conclusions he did on the evidence disclosed by the transcript.

[26] As a consequence the appeal fails; the conviction stands.

Justice Glen G. McDougall