SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Primrose, 2009 NSSC 241

Date: 20090805
Docket: Bwt 307712
Registry: Bridgewater

Between:

Her Majesty the Queen

Appellant

v.

Christopher Wayne Primrose

Respondent

Judge: The Honourable Justice Glen G. McDougall

Heard: June 10 and August 5, 2009, in Bridgewater, Nova Scotia

Written Decision: August 12, 2009

Counsel: Paul B. Scovil, Ll.B. for the appellant
Alan G. Ferrier, Q.C., for the respondent

By the Court:

[1] The respondent, Christopher Wayne Primrose (henceforth the "respondent") stands charged with violations of s. 253(a) and s. 253(b) of the **Criminal Code of Canada**. The offence reads:

> 253 **Operation while impaired** – Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not,
>
> (a) while the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or

> (b) 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.

[2] The respondent entered "not guilty" pleas to both charges and the trial was scheduled for December 16, 2008.

[3] The Learned Provincial Court Judge, the Honourable James H. Burrill, before hearing any evidence, was asked to rule on the effects of the amendments made to s. 258(1)(c) of the **Criminal Code** by **Bill** C-2 subsequent to the date of the alleged offence by the accused.

[4] Prior to these amendments an accused who wished to rebut the statutory presumption pertaining to the reception of evidence of the results of analysis made of breath or blood samples could rely on a "Carter" defence, so-called, by leading evidence to the contrary.

[5] After July 2, 2008 s. 258(1)(c) was changed by expanding the old provision "in the absence of evidence to the contrary" to "..., in the absence of evidence tending to show all of the following three things – that the approved instrument was malfunctioning or was operated improperly, that the malfunction or improper operation resulted in the determination that the concentration of alcohol in the accused's blood exceeded 80 mg of alcohol in 100 ml of blood, and that the concentration of alcohol in the accused's blood would not in fact have exceed 80 mg of alcohol in 100 ml of blood at the time when the offence was alleged to have been committed."

[6] The issue before the trial judge was whether the legislative amendments applied prospectively or retrospectively.

[7] Without deciding the constitutionality of the new provision, the Trial Judge ruled that it did not operate retrospectively.

[8] After giving the reasons for his ruling a date was set for trial. The trial had to be adjourned to allow time for the Crown to appeal this interlocutory ruling.

[9] The hearing of the appeal was scheduled for June 10, 2009. The Court raised a concern regarding its jurisdiction to hear an appeal of an interlocutory ruling made

by a Trial Judge prior to a final determination. The appeal hearing had to be adjourned to allow counsel to research this issue. Crown counsel has submitted a written brief urging the Court to hear the appeal based on the expanded wording of s. 830(1) of the **Criminal Code** which deals with Summary Appeals on Transcript or Agreed Statement of Facts. The Crown also suggests that the Supreme Court has a discretionary power to assume jurisdiction to hear such an appeal.

[10] I believe one has to first look at the exact wording of s. 830(1) which states:

> 830. (1) A party to proceedings to which this Part applies or the Attorney General may appeal against a conviction, judgment, verdict of acquittal or verdict of not criminally responsible on account of mental disorder or of unfit to stand trial **or other final order or determination** of a summary conviction court on the ground that [emphasis added by Court]
>
> (a) it is erroneous in point of law;
>
> (b) it is in excess of jurisdiction; or
>
> (c) it constitutes a refusal or failure to exercise jurisdiction.

[11] The right of appeal in criminal cases is governed by the **Criminal Code**. It is a statutory remedy. It does not flow from the common law.

[12] Crown counsel, as part of his submissions, suggested the Court has a discretion to hear appeals from interlocutory rulings in circumstances where it is in the interest of the proper administration of justice; the appeal will further the public good; there is a clear and recognizable legal issue at stake; that to not allow the appeal will result in uncertainty as to what case or test must be met by the accused or crown; and that all other aspects of justice would be furthered by allowing the appeal to be heard and that by not hearing the appeal justice would be hindered.

[13] Although all laudable reasons for hearing the appeal they are not, individually or collectively, sufficient to ignore the plain and ordinary meaning of the Statute.

[14] The wording of s. 830(1) must be considered in context. To simply extract the word “judgment” from the provision and to suggest that the Trial Judge’s ruling is a judgment and hence appealable ignores the clear intent of the legislation.

[15] In **Sullivan on the Construction of Statutes**, Fifth Edition, by Ruth Sullivan, Lexis Nexis Canada Inc. 2008, the author borrows from the first edition of the **Construction of Contracts**, by Elmer Driedger who described an approach to the interpretation of statutes which he called the modern principle:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. [Ref: Elmer A. Driedger, **The Construction of Statutes** (Toronto: Butterworths, 1974), at p. 67]

[16] Applying the plain and ordinary meaning to the words of the statute read in context it is clear that an appeal to the Summary Conviction Court does not lie from an interlocutory ruling unless it results in "a final order or determination".

[17] The ruling under appeal although final in the sense that it laid the framework for the manner in which the Crown and Defence must approach the prosecution it did not produce a final, overall result.

[18] This appeal is, therefore, premature. Depending on the trial's final outcome it could possibly be a ground of appeal once a verdict is rendered or some other final order or determination is made.

[19] It is not for this Court at this stage of the proceedings to agree to hear the appeal. I, therefore, decline to entertain it without further comment on the merits.

Justice Glen G. McDougall