IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R.v. Barnard, 2002 NSSC 250

Date: 2002/11/13
Docket: S.H. 183770A
Registry: Halifax

Between:

Todd Forrest M. Barnard

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice David W. Gruchy
Heard:	November 13th, 2002 in Halifax, Nova Scotia
Written Decision:	November 20th, 2002
Counsel:	Brian Casey, for the Appellant Denise Smith, for the Respondent

By the Court:

[1] The trial giving rise to this appeal dealt with a fairly straight forward factual circumstance.

[2] On November 17th, 2001 the appellant spent the morning and most of the afternoon with friends in a local pub in Halifax and then proceeded to a football game, the Atlantic Bowl, and eventually to a lounge at the campus where the football game was played. When he left the lounge with his friends, the appellant gave a lift to his friends. Having dropped off all but one of his friends at a downtown point, the appellant then drove his vehicle towards the spot where he eventually parked. In entering Spring Garden Road, a busy thoroughfare within the downtown core of the City, the right side of the appellant's vehicle rubbed against a parked vehicle.

[3] This incident was seen by police officers who followed him to where he parked his vehicle. The officers told the appellant he had struck a parked vehicle and then one of them accompanied the appellant back to the parked car. While doing so the officer detected the smell of alcohol and noted certain other features about the appellant, prompting him to request the appellant take an "alert", an approved screening device having read to the appellant the requisite demand. When the appellant "failed" this test the officer requested the appellant take the Breathalyzer test, which the appellant refused. The appellant was then charged with the offence of driving while his ability was impaired by alcohol or drug and for refusing the Breathalyzer.

[4] At the trial the learned Provincial Court Judge dismissed the refusal count, as the officer had failed in his testimony to give evidence of the words used in the "Breathalyzer" demand. That decision is not under appeal.

[5] The learned trial judge then heard the evidence of the Crown and of the defence with respect to the impaired driving charge.

[6] The operative part of the learned trial judge's decision is as follows:

> The evidence indicates on that particular day, Mr. Barnard, together with a group of other individuals, attended at the Thirsty Duck pub in the morning and it was part of a gathering to go to the football game at Saint Mary's in which he had a couple of Caesars by his evidence at brunch.
>
> Leaving the bar, proceeding to the football game, and at halftime because of being cold, he and his friend, Mr. Foerster, went into the Gorsebrook Lounge on the campus of Saint Mary's University and proceeded to consume some beer within the lounge. To his recollection is (sic) was only two beers.
>
> At 4:30 after going to see a friend, Mr. Isner, making arrangements with him to meet with him later, he drove Mr. Foerster and others back to the Thirsty Duck. In the area of Thirsty Duck on the corner of Queen and Spring Garden, everybody got out of the vehicle except Mr. Foerster, and he went around the corner and from the observations of Constable Galloway, who was in the line of traffic behind him and, noticed that the truck that was being operated by Mr. Barnard struck the Honda vehicle. At this time, Constable Galloway's attention was drawn to the vehicle operated by Mr. Barnard and he stopped him or he didn't stop him but he pulled up alongside of him on Queen Street at a parking spot and a resulting investigation of his observations of Mr. Barnard at that time, together the accident, the failure of the SL-2. In my opinion it satisfies me beyond a reasonable doubt that Mr. Barnard was impaired by alcohol on the particular day which is an initial fact to be determined by myself.

> I find him guilty beyond a reasonable doubt.

[7] I emphasize the words used by the trial judge when he referred to the failure of the SL-2. The SL-2 device is the "alert" to which I have already referred.

[8] Counsel have agreed the learned trial judge erred in taking into consideration the result of the SL-2 test. I agree with counsel and for the purposes of this decision it is unnecessary to detail the reasons for my conclusions and those of counsel.

[9] The functions of an appeal court in a case such as this are set forth in the decision in **R. v. P.L.S.** (1991), 64 C.C.C. (3d) 193 at pp. 197 and 198:

> Power of a Court of Appeal
>
> In an appeal founded on s. 686(1)(a)(i) the court is engaged in a review of the facts. The role of the Court of Appeal is to determine whether on the facts that were before the trier of fact a jury properly instructed and acting reasonably could convict. The court reviews the evidence that was before the trier of fact and after re-examining and, to some extent, reweighing the evidence, determines whether it meets the test: see R. v. Yebes (1987), 36 C.C.C. (3d) 417, 43 D.L.R. (4th) 424, [1987] 2 S.C.R. 168. The appeal is a prognosis as to what a jury would do not on the basis of a version of the facts that the court determines was properly admissible, but on the basis of the evidence that was in fact before them. The exercise of this power is predicated on the accused having had a proper trial on legally admissible evidence accompanied by instructions that are correct in law. The Court of Appeal may disagree with the verdict but provided that the accused has had a trial in which the legal rules have been observed, no complaint can be upheld if there is, on the evidence, a reasonable basis for the verdict.
>
> On the other hand, if the Court of Appeal finds an error of law with the result that the accused has not had a trial in which the legal rules have been observed, then the accused is entitled to an acquittal or a new trial in accordance with the law. The latter result will obtain if there is legally admissible evidence on which a conviction could reasonably be based. The court cannot substitute its opinion for that of the trial court that the evidence proves guilt beyond a reasonable doubt because the accused is entitled to that decision from a trial judge or jury who have all the advantages that have been so often conceded to belong to the trial of fact. If the Court of Appeal were to make that decision the accused would be deprived of a trial to which he or she is entitled, first, by reason of the abortive initial trial and second by the Court of Appeal. There is, however, an exception to this rule in a case in which the evidence is so overwhelming that a trier of fact would inevitably convict. In such circumstances, depriving the

> accused of a proper trial is justified on the ground that the deprivation is minimal when the invariable result would be another conviction. These limitations on the powers of the Court of Appeal are the result of the combined effect of s.686(1)(a)(ii), (b)(ii) and (iii) and s.686(2). By virtue of s.686(1)(b)(ii) the Court of Appeal cannot dismiss the appeal if it has found an error of law unless the curative provision embodied in s.686(1)(b)(iii) applies. If the appeal is not dismissed it must be allowed, and pursuant to the provisions of s.686(2) either an acquittal or a new trial must be ordered.

[10] The findings of the learned trial judge do not address fully the various indicia of impaired driving beyond the findings that the accused had been drinking, had a very slight accident, and failed the SL-2. It was, however, open to him as well on the evidence before him to have considered that the appellant (a) had bloodshot eyes and (b) had a moderate smell of alcohol on him.

[11] The learned trial judge did not address these factors, nor did he address the defence evidence adduced before him with respect to those factors and with respect to the driving of the appellant.

[12] I have considered the entire transcript of the evidence in relation to the burden of proof required in an impaired driving charge as enunciated **in R. v. Landes**, [1997] S.J. No. 785 and **R. v. Smith**, [2000] N.S.J. No. 406. I pose the following question to myself. "Was the evidence relied upon by the trial judge sufficient to have established the offence of impaired driving beyond a reasonable doubt when viewed in the context of the accused's behaviour?" The various indicia to be considered are found in **R. v. Landes** (supra) at paragraphs 16 and 17:

> ...Those observations and tests include: (1) evidence of improper or abnormal driving by the accused; (2) presence of bloodshot or watery eyes; (3) presence of a flushed face; (4) odour of an alcohol beverage; (5) slurred speech; (6) lack of coordination and inability to perform physical tests; (7) lack of comprehension; and (8) inappropriate behaviour.
>
> In my view, a trial judge must carefully review all of the reported tests and observations which inferentially support or negate any impairment of the accused's mental and physical capabilities, and then be satisfied beyond a reasonable doubt that the reasonable inferences to be drawn therefrom establish that the accused's ability was impaired to the degree prescribed by ss. 253 and 255 of the Criminal Code. A piecemeal approach supporting or negating impairment is not permissible....

[13] I have to relate these indicia to the evidence of Constable Galloway as follows:

> Q. ...Prior to trying to obtain the first sample, what, if anything, did you explain to him regarding the operation of the SL-2?
>
> A. I explained to him that this was just a roadside screening device and it was just an indicator for me, and that if he passed it he would be sent on his way and we'd look after the accident, and that if he failed I would be reading him a Breathalyzer demand and requesting him to come back to the Halifax police headquarters...

[14] The answer which the Constable gave was really not responsive to the question posed to him, but is certainly an indication of what he had thought about the ability of the accused to drive the motor vehicle. He had apparently concluded that in the event he passed the screening device he was quite capable of continuing to drive.

[15] In order to address the question which I have posed above I had to ask myself what direction I would give to a jury (or to myself) if I were the trier of facts in a case on the totality of this evidence. My conclusion is that I would have little doubt that with the necessary proper instruction a jury (or I) would have little or no choice but to acquit the appellant.

[16] In reaching this conclusion I have reviewed and to a certain extent reweighed the evidence before the trial judge, as is my authority and duty.

[17] I have concluded that the evidence was weak to the point where there was virtually no choice but to acquit, and accordingly the appeal is allowed and the conviction quashed.

_____

Gruchy, J.