IN THE SUPREME COURT OF NOVA SCOTIA
**Citation:** R. v. Gibson, 2004 NSSC 228

**Date:** 20041118
**Docket:** S.K. 222870
**Registry:** Kentville

**Between:**

Her Majesty The Queen

Appellant

v.

Robert Albert Gibson

Respondent

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| **Judge:** | The Honourable Justice Gregory M. Warner |
| **Heard:** | September 7, 2004, in Kentville, Nova Scotia |
| **Counsel:** | Lloyd Lombard, Esq., counsel for the Crown |
| | Chris Manning, Esq., counsel for the respondent |

**By the Court:**

[1] This is an appeal by the Crown from the acquittal of Robert Gibson on a charge that he operated an all terrain vehicle with a blood alcohol concentration (called BAC) of more than 80 milligrams of alcohol in one hundred millilitres of blood (hereafter the number "80" etc shall refer to milligrams in 100 millilitres of blood).

[2] The Notice of Appeal included a claim that the trial judge misinterpreted the facts; this ground has been abandoned.

[3] The only issue is whether the evidence tendered by the accused at trial constitutes evidence tending to show that the BAC of the accused at the time of the offence exceeded 80. The narrower issue is whether expert evidence as to the elimination rate of average persons can be probative (and therefore relevant) as part of " evidence to the contrary." This is one of the so-called "straddle" cases.

FACTUAL CONTEXT

[4] The respondent was stopped on Highway 316 near Harbourville, Kings County, Nova Scotia, while driving an all terrain vehicle at about 8:59 p.m. July 13, 2003. In response to a demand he provided two breathalyser

samples -the first at 10:02 p.m. providing a reading of 120 and the second at 10:21 p.m. resulting in a reading of 100.

[5] The respondent was charged with failing the breathalyser but not with impaired driving.

[6] The learned trial judge accepted the evidence of the respondent as to his drinking, which evidence included consuming several bottles of beer shortly before the police stopped him on his vehicle.

[7] An expert toxicologist testified for the accused that, based on the evidence of drinking accepted by the learned trial judge, and on his age, height and weight, the respondent's BAC would have been between 40 and 105 at the time that he was stopped by the police, and that this was consistent with the breathalyser readings of 120 and 100.

[8] His conclusion was based on the assumption that the respondent had an elimination rate of between 10 and 20 milligrams of alcohol in 100 millilitres of blood for each hour after consumption. This figure is the average for all persons.

**ST. PIERRE v. THE QUEEN,** [1995] 96 C.C.C.(3d) 385

[9] In 1995 the Supreme Court of Canada recognized certain statutory presumptions that assisted the Crown in proving offences such as impaired driving and driving with a BAC over 80. Among the presumptions were the presumption of accuracy and the presumption of identity. The former established that the breathalyzer reading accurately reflects the BAC at the time of testing. The latter establishes that the BAC at the time of testing is the same as at the time of the offence.

[10] The majority per Iacobucci, J., believed that the presumption of accuracy was contained in s. 258(1)(g) and the presumption of identity was contained in s. 258(1)(c), and that the standard of proof to overcome each presumption differed.

[11] The minority per L'Heureux-Dube, J., believed that s. 258(1)(g) set out a presumption of continuity of the evidence and that s. 258(1)(c) set out both the presumption of accuracy and the presumption of identity. They held that the same standard of proof applied to overcome both presumptions.

[12] With respect to the presumption of identity, the majority held that where there was evidence of a difference in the BAC between the time of the offence and the time of testing then the presumption was rebutted - whether or not the evidence showed that the BAC could be below 80. Once the

presumption was rebutted the court had to decide, on the admissible evidence, (which evidence could include expert or opinion evidence) whether the BAC in fact exceeded 80. At paragraph 55, the majority said:

> . . . it is important to recall the essential difference between a presumption and evidence. Section 258(1)(c) establishes a presumption that the blood-alcohol level at the time of driving was the same as at the time of testing, but it does not provide evidence of this fact. It is simply a short-cut for the Crown. If the accused is able to rebut the presumption by showing that the blood-alcohol level at the two times was different, then the Crown will have to call evidence to prove its case. . . .The evidence called would go to establishing what the accused's blood-alcohol level at the time of driving actually was.

The majority stated that it was relying on the plain meaning of the words in s. 258(1)(c) - (at paragraph 45.)

[13] The minority held that s. 258(1)(c) required the same standard of proof to be applied to rebut both presumptions. They held that the plain meaning had to give way to the remedial or purpose approach, where, as they found, the plain meaning approach would lead to absurdities. One of the absurdities was that if the evidence was not "legally material" as to whether the accused's BAC was over or under 80, it could not be the basis for rebutting the presumption. The absurdity was that the great number of breathalyser charges in Canada, combined with the delays and cost to the Crown to produce expert evidence in all of these cases where the presumption of identity was rebutted, would frustrate the legislative intent.

1996 CODE AMENDMENT - s. 258(1)(d.1)

[14] Immediately after the **St. Pierre** decision, and obviously in response to the majority view, Parliament enacted s. 258(1)(d.1). This subsection clearly rejected the majority position (that any difference from the presumed BAC rebutted the presumption of identity); it clearly adopted the minority position that only "evidence tending to show that the [BAC] of the accused at the time of the offence . . . did not exceed 80 . . ." could constitute evidence to the contrary.

[15] As a result of the amendment, this Court is left with two questions to answer:

(a) What is evidence that "tends to show" that the BAC did not exceed 80 in "straddle" cases?

(b) What kind or quality of evidence could constitute "evidence to the contrary"?

[16] Decisions of all levels of courts in Canada have determined that the onus on an accused, when there is an evidentiary onus on the accused, is simply to present any evidence that raises a reasonable doubt and for that purpose has an air of reality. This is founded on the presumption of innocence which has been incorporated in s. 11(d) of the **Charter**. It is reflected in the Supreme Court of Canada's decision in **R. v. St. Pierre** by Iacobucci, J., at paragraph 29 and by L'Heureux-Dube, J., at paragraph 102.

(a) What is evidence that "tends to show" that the BAC did not exceed 80 in "straddle" cases?

[17] Since the 1996 amendment, a few lower courts have examined the words "tending to show" in the context of cases where toxicologists testified that the range of BAC straddled the 80 standard.

[18] In **R. v. Gaynor [2002]** A.J. No. 840, the expert evidence was to the effect that the range of BAC was from a low of 60 to a high of 132. The breathalyzer readings were both 120. Because only a small percentage of the population would have a BAC under 80 in that scenario, Davie, Prov. J., held that the "prevailing direction" of the evidence was over 80 and for that reason did not meet the test for overcoming the presumption of identity and he convicted the accused. He did accept that expert evidence of an average person's absorption and elimination rate was admissible to rebut the presumption. This decision and its reasoning was followed by Thompson, Prov. C.J., in **R. v. Matthews** [2002] P.E.I.J. No. 105, and based on readings that ranged from 61.5 to 95, (where the average was slightly below 80) the court acquitted the accused.

[19] A different approach was taken by Semenuk, Prov. J., in **R. v. Clarke** [2003] A.J. 914. The expert evidence in this case stated that the accused's

BAC would have been between 55 and 100 at the time of driving, despite breathalyzer readings of 150 and 160. The expert testified that Clarke would have had to have consumed more alcohol than the evidence before the court in order for the breathalyzer readings to be accurate. In effect, this was a challenge on the presumption of accuracy and in that sense the case differed from the case at bar and **Gaynor** and **Matthews**.

[20] Semenuk, Prov. J., rejected the "prevailing direction" analysis in **Gaynor**, he wrote that it wrongly placed a legal burden of proof on an accused contrary to the presumption of innocence. Relying upon **R. v. Pappajohn** (1980) S.C.R. 120, **R. v. Osolin** (1993) 4 S.C.R. 595, and paragraph 102 and 103 of L'Heureux-Dube's minority decision in **R. v, St. Pierre**, **supra**, he held that the only burden on the accused was as set out by L'Heureux-Dube in the first sentence of paragraph 103 of her analysis.

[21] In the case at bar, the range of readings (40 - 105) meets the standard in both the **Gaynor** and the **Clarke** analysis and for that reason it is not necessary to choose between them.

(b) <u>Second Question: What kind or quality of evidence could constitute "evidence to the contrary"?</u>

[22] The law respecting the kind or quality of evidence that could constitute "evidence to the contrary" remained unchanged by the amendment, except for the qualification relating the evidence to the 80 milligrams per 100 millilitre standard.

[23] In many breathalyzer cases, where expert evidence has been called, it has been accepted by the courts that the absorption and elimination rate of an individual will vary under different circumstances and from time to time and even from day to day.

[24] Examples of cases where this has been stated include:

(a) **R. Dery**, 2001 Carswell Que 1499 (Q.C.A.) at paragraph 20

(b) **R. v. Heideman,** [2002] O.J. No. 3461 (O.C.A.**)** at paragraph 15

(c) **R. v. Gibson** (1992) 100 Sask. R. 88 (S.C.A.) at paragraph 5

(d) **R. v. Senko** [2004] A.J. 82 (A.Q.B.) at paragraphs 5 - 8

(e) **R. v. MacDonald** [2004] A.J. 971 at paragraphs 22 - 24

(f) **R. v. Usichanko** [2002] O.J. 4998 at paragraph 10

(g) **R. v. Gaynor, supra,** at paragraph 11

[25] For this reason, in cases where expert evidence is given as to the absorption and elimination rate of an individual, the evidence involves providing a

range of readings (as opposed to a single reading) and is based on testing that shows that the absorption and elimination rate for most people, while they may vary from time to time, are between 10 milligrams of alcohol per 100 millilitres of blood per hour, and 20 milligrams of alcohol per 100 millilitres of blood per hour.

[26] It is clear, based on the nature of the expert evidence in these cases, that it is, for all practical purposes, impossible for an accused to obtain a determination of his or her individual absorption/elimination rate at the time of the offence.

[27] If evidence given by toxicologists to rebut the presumption of identity, which includes the application of a range of absorptions/elimination rates of an average person, was not admissible to rebut the presumption, and because it appears impossible, for all practical purposes, to measure the exact absorption/elimination rate at the time of the offence, then the presumption of identity ceases to be a rebuttable presumption and becomes an irrebuttable fact. This could lead to the conviction of persons whose BAC at the time of the offence was below 80.

[28] In the case at bar the events constituted a “last drink defence”. The accused's pattern and quantity of drinking was accepted by the court as his

actual drinking scenario. The defence did not challenge the presumption of accuracy or the breathalyzer readings. The defence is that, based on the pattern of drinking of the accused and on his age and weight, and on the absorption/elimination rate of an average person, his BAC at the time of the offence may not exceed 80.

[29] The Ontario Court of Appeal in **Heideman** said at paragraph 12:

> Parliament must be taken to know that the body eliminates alcohol over time and that different persons eliminate at different rates. In applying the test levels to an offence time up to two hours earlier Parliament has built the elimination factor into the choice of 80 milligrams as a standard and, in doing so, has treated all drivers as one. In other words, Parliament may have inserted into the formula a slower than average elimination rate and, as a balance a higher offence level than might otherwise have been imposed.

[30] This statement is said to flow from paragraph 13 of the dissenting opinion of Wakeling, J.A., in **R. v. Gibson**. This statement appears to be consistent with paragraphs 61 of the majority decision in **St. Pierre** , which reads as follows:

> The effect of normal biological processes of absorption and elimination of alcohol cannot of and by itself constitute "evidence to the contrary", because Parliament can be assumed to have known that blood-alcohol levels constantly change, yet it saw fit to implement the presumption. Therefore, as Arbour J.A. states, to permit this to become "evidence to the contrary" would, in effect, be nothing more than an attack on the presumption itself by showing that it is a legal fiction and therefore should never be applied. In my view, such an attack on the presumption should not be allowed.

[31] I do not accept that these quotations as to Parliament's intent should be applied or construed, or have been applied or construed, to eliminate the "last drink defence".

[32] The Ontario Court of Appeal in **Heideman**, at paragraphs 15 and 16, rejected the approach that had been adopted by the Saskatchewan Court of Appeal in **Gibson,** and held that to constitute "evidence to the contrary" the evidence must <u>all</u> be particular to the accused. The court rejected, as incapable of establishing a material fact, evidence from expert witnesses about absorption and elimination rates, which vary from person to person

and from time to time with each person. This position has been accepted by the Manitoba Court of Appeal in R. v. Noros-Adams [2003] M.J. 259 and by Superior Courts in **R. v. Usichenko** [2002] O.J. 4998 and **R. v. MacDonald** [2004] A.J. 971.

[33] For the majority in **St. Pierre,** Iacobucci, J. said at paragraph 49:

> . . .The presumption of identity in effect puts the accused in the car with that blood-alcohol level at a prior point in time. Hence, the presumption of identity is a temporal presumption designed to simplify the evidentiary necessity of bridging the time gap between the time of the breathalyzer and the time of the offence. The presumption is simply a "short-cut" for the Crown, and if the accused is able to show that the short-cut should not apply in this case, and that his or her blood-alcohol level was different at the time of driving from that at the time of the test, then it would be unreasonable to apply the presumption, and on the wording of the section, the presumption would be rebutted.

And at paragraph 51:

> . . .It may be possible to bridge the time gap between the test and the driving by the use of expert evidence on absorption rates of alcohol to work "backwards" in order to establish what the accused's blood-alcohol level would have been at the time of driving. Thus, for example, if an accused blew .250 on the breathalyzer, but had consumed 100 ml of vodka one hour before the test, it would be open for an expert in this area to work backwards to give an opinion on what the accused's blood-alcohol level would have been at the time of driving. Such an opinion would be given in terms of a range, and if the expert said that the accused would have been between .170 and .200, for instance, then a conviction would in all likelihood follow because it must be remembered that the mere fact that the presumption of identity is rebutted does not render the certificate of analysis inadmissible. This is still admissible evidence under s. 258(1)(g) for the facts contained therein and it, along with the expert's testimony and any other relevant evidence, may be easily capable of supporting a conviction.

[34] At paragraph 85 of **St. Pierre,** Madame Justice L'Heureux-Dube categorizes four possible defences, two of which relate specifically to the presumption of identity and one of which is the "last drink" defence.

[35] At paragraph 103, she analyses the nature and quality of the evidence that would constitute evidence to the contrary with respect to the presumption of identity as follows:

> In the context of an "over 80" charge, it will be necessary for the accused to point to credible evidence which tends to show that his blood-alcohol level could have been under the legal limit. This evidence will typically take the form of expert evidence to the effect that the alcohol consumed after driving (or immediately before embarking) would generally affect a person of the accused's sex, height

> and body weight within a certain range of values. Thus, for instance, an accused may adduce expert evidence indicating that when the effect of alcohol allegedly consumed after driving is subtracted from the actual blood-alcohol reading on the breathalyzer, it would bring the accused's blood-alcohol level to anywhere between 70 mg and 120 mg of alcohol per 100 ml of blood. This evidence would amount to "evidence to the contrary" of the presumption in s. 258(1)(c), and the Crown would no longer be able to rely on that presumption to prove its case against the accused. There is no need for the accused to demonstrate that his blood-alcohol level is actually below .08. He need only adduce credible evidence tending to show that this is possible under the circumstances. He needs to show, in other words, that the discrepancy is legally material. The onus on the accused is strictly evidentiary in nature, and arises as a practical consequence of the Crown justifiably relying on the presumption in s. 258(1)(c) until the accused adduces some evidence to show that this reliance is unjustified to a legally material degree.

[36] And at paragraph 106:

> . . . this case boils down to a question of whether we impose the burden on the Crown or on the accused to adduce expert toxicological evidence in instances in which a driver voluntarily consumes (or claims to have consumed) alcohol either shortly before or after driving but before supplying a breathalyzer sample. . . . it seems anomalous to afford the benefit of the lesser evidentiary burden to drivers who have either wilfully consumed alcohol after being involved in an offence or who have gulped down material quantities of alcohol and then tried to drive home before the alcohol took effect.

[37] This kind of evidence is exactly the kind of evidence accepted by the majority of the Saskatchewan Court of Appeal in **Gibson** , and by the Quebec Court of Appeal in **Dery** .

[38] I have difficulty with the analysis at paragraph 15 and 16 of **Heideman** that evidence of the elimination rate of an average person is not the kind of evidence that could constitute evidence to the contrary. I acknowledge that, in straddle cases, a person with a slower elimination rate, based on the kind of expert evidence given in the case at bar may have a reading above 80 and that it is not known whether the accused is a person with a slower elimination rate.

[39] Since as many accused persons would fall into the category of persons who eliminate at a faster than average rate, as fall into the category of persons who eliminate at a slower than average rate, such persons would lose the benefit of a legitimate "last drink" defence, and could be convicted even though their BAC at the time of driving did not exceed 80.

[40] It is unreasonable to place an interpretation upon s. 258 that would, by reason of the practical impossibility of securing evidence of the exact BAC

of an accused at the time of the offence, exclude evidence that may be material to many accused persons, including Mr. Gibson.

[41] I read paragraphs 103 and 106 of the **St. Pierre** decision as intending to permit the kind of opinion evidence of the effect that alcohol consumed immediately before the event would have on an accused such as Mr. Gibson, based on the kind and quality of the evidence before the trial judge in this case.

[42] In **R. v. Senko**, Watson, J., said at paragraph 25 that if the existence of a potential elimination rate was capable of amounting to a reasonable doubt "without the trial judge then going through the process of examining the evidence and assessing the case as a whole", then the effect of the "evidence to the contrary" defence would extend beyond what he felt Parliament contemplated. At paragraph 27 he said:

> The trial judge was obliged, in my view, to address whether or not on the whole of the evidence he actually had a reasonable doubt about his blood alcohol concentration at the time of the offence.

He concluded that the trial judge had misdirected himself on the law by not applying the potential elimination rate to the evidence as a whole. **In the case at bar the trial judge did.** Watson J. did not cite **Gibson** or **Dery .**I believe that his statements at paragraph 25 and the last sentence of paragraph 27 are the same approach that Bayda C.J.S. stated should have been carried out in **Gibson** , and which he used - and which included Dr. Michel's evidence about the range of absorption/elimination rates of average persons.

[43] I do not agree with MacIntyre, J., in **R. v. MacDonald, [2004] A.J. 971** at paragraph 35, where he adopted the reasoning in **R. v. Heideman** and rejected evidence as to the elimination rate (in the absence of knowledge of

the accused's elimination rate at the time of the offence) as capable of constituting "evidence to the contrary".

[44] The facts and evidence before the trial judge in this case was similar to those considered by the Quebec Court of Appeal in **Dery .** Pidgeon, J.A., confirmed the materiality of expert evidence based on the absorption and elimination rate of an average person. I adopt the reasoning of the Quebec Court of Appeal in its entirety, but, in particular, have relied on my understanding of paragraphs 28, 31, 32, 42, 43, and 44. Similarly, the thorough analysis of Bayda C.J.S. in **Gibson** is persuasive and, in my view, as applicable since the 1996 Amendment as it was when written.

[45] I therefore dismiss the appeal.

Gregory M. Warner, J.