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1971

S. H. No. 00831

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION
CROWN SIDE

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

LOUIS COLLICUTT

Respondent

[ORAL OPINION]

McKINNON, C.J.N.S.:

This is an appeal by the Crown from a decision by His Honour Judge P. T. J. O Hearn, a Judge of the County Court, District Number One, by way of an information sworn on April 30, 1971, the respondent was charged

"that he at or near Halifax, in the County of Halifax, Nova Scotia, on or about the 30th day of April, 1971, did unlawfully without reasonable excuse, fail to comply with a demand made to him by a peace officer to provide a sample of his breath suitable to enable an analysis to be made and to accompany the peace officer for that purpose, contrary to section 223 (2) of the Criminal Code".

On September 1, 1971, the respondent was tried before the learned Judge of the County Court in a trial de novo, was acquitted and his appeal allowed.

The facts are:

On April 30, 1971, in the early morning, Constables Wayne MacDonald and Leslie Fletcher of the Halifax City Police Force, were carrying out their duties on foot patrol on Maynard Street, in the City of Halifax, Province of Nova Scotia. At about 2.40 a.m. they saw a

particular motor vehicle which was being driven in a slow and hesitant manner. Cst. MacDonald caused the vehicle to stop and the respondent was discovered to be the driver and lone occupant. Both constables observed the respondent to exhibit certain physical signs associated with impairment such as glassy or bloodshot eyes, the odour of alcohol on his breath and a certain unsteadiness. After conferring with each other momentarily, Cst. MacDonald, having formed the belief that the respondent had consumed a sufficient amount of alcohol to justify a breathalyzer test, related to him a breathalyzer demand in the words of subsection 235. (1) of the Criminal Code.

Shortly after Cst. Vincent MacDonald, also of the Halifax City Police Force, arrived in a police vehicle and he and Cst. Wayne MacDonald drove the respondent to the Halifax Police Station for the purpose of conducting the test. On the way to the station Cst. Wayne MacDonald observed that the respondent seemed unsure of what was happening and told him that he would be charged with impaired driving.

Upon arrival at the station, at about 3 a.m., the respondent stated to Wayne MacDonald that he "would not go in for the breathalyzer test". Wayne MacDonald informed Cst. Vincent MacDonald, who was a qualified technician under subsection 237. (b) of the Code, of this circumstance. Vincent MacDonald then observed the respondent and also read to him a breathalyzer demand in words essentially the same as those previously used by Wayne MacDonald. To this the respondent replied that he did not intend to take any breathalyzer test. He was then charged with refusal.

The grounds of appeal are:

(1) If the appellant's appeal really is from the decision of Judge O Hearn dated October 7, 1971, then the notice of appeal dated June 21, 1972, is out of time, and the first point then will be whether or not the appellant should be granted an extension of time;

(2) on a charge under what is now section 235. (2) of the Criminal Code, should the information specify the peace officer who gave the demand.

Leave to appeal is granted.

With regard to the first ground the Court finds that the time for filing the notice of appeal here ran from the 8th day of June, 1972, when the learned trial Judge gave his decision of acquittal. The notice of appeal dated June 2, 1972, was therefore not out of time.

The evidence shows that the demand was given by Cst. Wayne MacDonald, who had reasonable cause to believe that the appellant had more than the permissible amount of alcohol in his blood. When the appellant refused to agree to this demand and take the breathalyzer test, the offence was complete.

That Cst. Vincent MacDonald, the technician, afterwards repeated the demand in essentially the same words does not nullify, cloud or vitiate the demand given by Cst. Wayne MacDonald.

Cst. Wayne MacDonald was the only officer involved in issuing the demand, and the appellant was not misled by the information which did not specify the name of the peace officer who gave the demand but merely noted it was given by "a peace officer": see section 512. (g) of the Criminal Code.

It would appear that there was only one transaction and the appellant should not be prevented from pleading autrefois acquit or autrefois convict in the event of subsequent charges: see Regina v. Layne, (1972)

6 C.C.C. B.C. S.C. 476.

Accordingly, and with deference, the acquittal by the learned Judge of the County Court should be set aside and the conviction of the Magistrate restored.

It is our unanimous opinion that the appellant should be provided with a conditional license prohibiting him from driving a motor vehicle between the hours of 11 p.m. and 6 a.m. in the area usually travelled by him in his business in accordance with s. 238. (1) of the Criminal Code.

DATED at Halifax, Nova Scotia, this 7th day of February,
A. D., 1973.

Members of Appeal Division

McKinnon, C.J.N.S.

Coffin, J.A.

Cooper, J.A.

Counsel

Graham W. Stewart, Esq. Appellant

Angus L. Macdonald, Q.C. Respondent