

52

1971

S. H. No. 00239

IN THE SUPREME COURT OF NOVA SCOTIA
APPEAL DIVISION - CROWN SIDE

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

KENNETH ROLLAND MacLEOD

Appellant

[ORAL OPINION]

McKINNON, C.J.N.S.:

This is an appeal against conviction from a decision of His Honour Judge N. R. Anderson, a Judge of the County Court, District Number One, made on April 19, 1972. The appellant was convicted before Judge Eric D. Murray, Provincial Magistrate, on October 19, 1971, upon the following charge:

"that he on or about the 31st day of July, 1971, at or near Halifax in the County of Halifax, Nova Scotia, did unlawfully have control of a motor vehicle having consumed alcohol in such a quantity that the proportion thereof in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood contrary to section 236 of the Criminal Code of Canada".

The appellant's appeal, by way of a trial de novo to the learned Judge of the County Court, was dismissed, and he appeals to this Court.

An appeal from conviction under section 755 of the Code, a trial de novo, is limited by section 771 of the Code to questions of law alone.

Leave to appeal is granted.

With regard to the grounds of appeal, it appears to the Court that the learned trial Judge did not err in finding that proper demand had been given to the appellant by officer Saarloos. The contention that there was contradictory evidence by another officer who was present must be dismissed in view of the evidence of the appellant who stated that Cst. Saarloos took a card or paper from his hat or pocket which contained the demand read to him. This corroborates the evidence of Cst. Saarloos that he gave the demand by reading it to the appellant and then asking him if he understood it. Furthermore, it is apparent from the evidence that the appellant understood the demand and obeyed it. There is also no doubt that the breathalyzer test was performed pursuant to the demand made by the officer.

The appellant also contends that there was no evidence here that the appellant blew directly into the Borkenstein breathalyzer. We think that the trial Judge could infer this from the following evidence of the technician.

On direct examination, he testified as follows:

Q. Did you perform any tests on Mr. MacLeod?

A. I did sir.

Q. What was that and what was the purpose of it?

A. The purpose of the Borkenstein breathalyzer test is to determine the proportion if any of alcohol in the subject's blood at the time.

Q. What did you do in order to determine that?

A. The instrument is the approved instrument, the Borkenstein breathalyzer.

Q. And was it operating properly that night?

A. It was, sir.

Q. And were you able to determine the proportion of if any of alcohol in the blood of the defendant?

A. I was, sir.

Q. And what was it and what time did you take the reading?

A. Well there's a standard waiting period of 15 minutes prior to the taking of the first sample of breath. I observed this waiting period, during this time the Borkenstein breathalyzer was prepared for use. A portion of the preparation was the insertion of the test ampule which contained a solution suitable for use with the breathalyzer, . . .".

and on cross-examination:

'Q. The general operation, would it be correct to state that it measures the alcohol vapour contained in the mouth and lungs?

A. No, sir.

Q. What way is that wrong?

A. It works by sample of air from within deep within a person's lungs or it can be called alveolar air. This is received in the instrument by the subject blowing long and hard and exhausting his lungs in order to receive the sample of deep lung air.

Q. If the subject has recently taken a drink would that affect the reading?

A. Not under the operating conditions, no sir, it would not.

Q. I am not asking you about under the operating conditions, I am asking you if it would affect the reading?

A. The reason for the 15 minute waiting period prior to the taking of the first sample of breath is in order to allow any alcohol to dissipate from within a subject's mouth, which might be present due to a recent drink."

In any event it was a question of fact for the trial Judge.

In his grounds of appeal, the appellant appears to be contending that there was evidence to the contrary under section 237. (1) (c) of the Criminal Code.

The appellant did adduce evidence by a denturist that the cups of an old dental plate could hold alcohol, or alcoholic fumes, particularly if saturated in particles of food for long periods after liquor had been consumed, thus a breathalyzer test given to a person with such plates as worn by the appellant would not give a true reading of the amount of alcohol in the blood.

It is noted that the denturist gave the following evidence on cross-examination:

'Q. So that if this man was right now, an hour ago, just an hour ago was to take an ounce of Drambuie you couldn't tell us how much alcohol by weight or by volume would now be in his dentures?

A. Technically, no.

Q. Now you couldn't tell us what if any effect it would have on a breathalyzer machine?

A. No, I am not an analyst in that field.

Q. Or what if any effect it has on the deep lung air?

A. I beg your pardon? Would you repeat..

Q. What if any effect it would have on the deep lung air?

A. No, not really."

It would appear, therefore, that the denturist's evidence lacks the necessary weight to contradict the evidence of the technician quoted herein. I think it could be inferred by the trial Judge that the technician had tested samples of deep lung air given by the appellant, and any fumes from the dentures would not have affected the reading he received.

After reviewing the record and the submissions of counsel, it is the unanimous opinion of the Court that the appeal should be dismissed and the conviction confirmed.

DATED at Halifax, Nova Scotia, this 6th day of February,
A. D., 1973.

Members of Appeal Division

McKinnon, C.J.N.S.

Coffin, J.A.

Cooper, J.A.

Counsel

Charles W. MacIntosh, Q.C. Appellant

Graham W. Stewart, Esq. Respondent