C.A.C. No. 102151

NOVA SCOTIA COURT OF APPEAL

**Cite as: R. v. Timmons, 1994 NSCA 101**

Jones, Chipman and Pugsley, JJ.A.

**BETWEEN:**

| | | |
|---|---|---|
| HANFORD VINCENT TIMMONS<br>W. Brian Smith | ) | |
| | ) | for the Appellant |
| Appellant | ) | |
| | ) | |
| - and - | ) | |
| | ) | Robert Hagell |
| | ) | for the Respondent |
| HER MAJESTY THE QUEEN | ) | |
| | ) | |
| Respondent | ) | Appeal Heard:<br>June 27, 1994 |
| | ) | |
| | ) | |
| | ) | Judgment Delivered:<br>August 3, 1994 |
| | ) | |
| | ) | |
| | ) | |
| | ) | |
| | ) | |
| | ) | |
| | ) | |
| | ) | |

**THE COURT:** Leave to appeal is granted and the appeal is dismissed, per reasons for judgment of Jones, J.A., Chipman, J.A. concurring and Pugsley, J.A. concurring by separate reasons.

**JONES, J.A.:**

On May 31, 1993 at approximately 2 a.m., Constable Stephen Timmons of the

Sydney Police Department was on duty walking along the Esplanade in Sydney when he noticed a couple arguing in a parking lot. They were beside a taxi cab. The lady started to move away abruptly and as she did so a bronze coloured car started to move out of the parking lot. The woman ran in front of the car and the driver stopped. She moved out of the way and then swatted the side of the car as the driver started to move. She kicked at the front wheel and then fell. The wheel ran over her left leg. The car stopped and then reversed backing over her leg. The officer called for assistance and an ambulance.

The woman's companion started to argue with the driver of the vehicle. The officer stepped between them and then recognized the driver as the appellant, who was a fellow police officer. Constable Timmons noted that the appellant's eyes were bloodshot and that he smelled of alcohol. Two other officers arrived at the scene. The appellant was given a breathalyzer demand.

Two breathalyzer tests were administered by Constable Walter Rutherford at 3:12 and 3:37 a.m. The readings were both 100 milligrams of alcohol in 100 millilitres of blood. When Constable Rutherford administered the tests he followed the steps in the standard check sheet for a breathalyzer test. During the initial test the machine functioned properly. In flushing the breathalyzer before the second test, which consisted of pumping air into the machine, he noticed that the piston did not rise to the top of the cylinder. He flushed it a second time and it worked properly. He then administered the second test.

The appellant was charged that he:

> Having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded 80 mg of alcohol in 100 ml of blood, did operate a motor vehicle, contrary to Section 253(b) of the **Criminal Code of Canada**.
>
> And further, while his ability to operate a motor vehicle was impaired by alcohol, did operate a motor vehicle, contrary to Section 253(a) of the **Criminal**

**Code of Canada**.

The appellant was tried before Judge Campbell in the Provincial Court.

Because of his concern about the functioning of the breathalyzer, counsel for the appellant asked for the records respecting the maintenance of the breathalyzer. The Crown refused to produce the records, maintaining they were not relevant. At the opening of the trial the defence moved for production of the records. The Crown called Constable Rutherford on the motion. Constable Rutherford described in detail what happened during the tests. He stated:

> A. I got a reading on the first test. Ah, then on the check sheet you go back to step 4 again. You set the control to take and you flush it.
>
> At that stage of the breathalyzer test, when I flushed it that time, when you are pumping air or a breath sample into the breathalyzer it forces the piston upwards. And the piston was not going up making contact with the ah...at the top of the cylinder.
>
> I had to flush it a second time. When I flushed it the second time it worked, when I purged it the second time.
>
> Q. Just by pumping air into it?
>
> A. Yes. And that's the only problem that I had with it. I went through the steps again, when I got down to take a standard alcohol test, I went through the exact same steps, 4,5, 6 and 7 on your check sheet/ And instead of having your ah pointer back to the start line you reset it at zero for a standard alcohol test. I took my standard alcohol test and I came up with a reading of one hundred and thirty-nine milligrams per one hundred millilitres and according to the chart I had a standard alcohol temperature of twenty-four degrees, the room temperature was twenty-five degrees. I had a predetermined reading according to the charts it should have been 140 milligrams and I got a reading of 139 milligrams.
>
> Q. What can you say about that reading within the allowable...?
>
> A. According to my training there is an allowable tolerance of five milligrams plus or minus and when

I get a standard alcohol reading within the five milligrams plus or minus it indicates to me as a qualified technician that the breathalyzer and all its components are in proper working order.

Q. And so what did you do after that?

A. After that I went onto ah back to step 4 again, after I took the standard alcohol test, flush the instrument again and it worked fine.

Q. And when you say "flush" you mean purge it again?

A. Purge it again, And went through..

Q. And you say it worked fine, what did the piston do?

A. It went right up and made contact at the top of the cylinder. And your green light was illuminated. When contact is made there's a light on the top of the breathalyzer that's illuminated. And ah the second test was taken at 3:37 a.m., twenty minutes after the first test.

Q. And what can you say about the consistency between the second test and the first test?

A. They were the same.

Q. Now this necessity to purge the instrument just before you performed the SAS or the Standard Alcohol Solution Test, can you indicate whether or not you've ever experienced the necessity to purge the instrument like that before?

A. You always have to purge it between each test.

Q. Any difficulty with the pistons before with the breathalyzer machines?

A. Not on any, during training and everything they show you what if...what if something happens. There's a trouble shooting guide in your manual and it gives a list of umpteen things that could go wrong and your remedial action what you should do.

Q. And with regards to the remedial action that you performed on this machine where does that fit in the continual...the list of things that you would...?

> A. That's the first...if...when you are purging an instrument or taking a breath..a breath sample is going into the instrument, if your green light does not illuminate which means your piston is not making..the contacts on the top of the piston are not making contact with..at the top of the cylinder ah the first thing they tell you to do is purge it again or take another sample.
>
> Q. And what does ah ah...what, if anything, would have caused this piston not to go up?
>
> A. It could have been...there could have been a little piece of dirt on a contact, there could have been a little bit of vapour in the ah cylinder, it could have been a little bit of vapour in one of the delivery tubes.
>
> Q. What about...ah what can you say, if anything, of any of the other working components of the instrument ah had malfunctioned, what would that purging have done?
>
> A. Once I did my standard alcohol test and that worked out it indicated to me that the breathalyzer and all the components are in working order and it is working properly at the time.

The trial judge dismissed the motion. He stated:

> The basic guideline in these applications holds that the information ought not to be withheld. If there is a reasonable possibility that the withholding of that information will impair the right of the accused to make full answer ah to the charge against him. Ah, there must, of course, as well be some indication that the evidence ah will be relevant.
>
> ...
>
> Ah to introduce the collateral issue ah and that by a collateral issue I'm referring to the introduction of this specific record, that is a record of maintenance and its subsequent examination by an expert as was suggested. In order to introduce this collateral issue I believe that there must be some reasonably clear indication that the test could be inaccurate ah because of the...or due to the fact that the instrument was not working properly.
>
> I'm not satisfied that it has been shown that the accused's ability to make a full answer in defence will be impaired by withholding the information sought.

> There has to ah as a bottom line in my opinion there has to be more of a basis ah presented ah in order for the court to ah grant such an application.
>
> For the reasons I've given Mr. Smith I'm not inclined to order the production as requested.

The case then proceeded to trial. In addition to the certificate of analysis, the officers testified that the appellant showed signs of impairment. The appellant gave evidence regarding his activities on that evening and the amount of alcohol he consumed. Expert evidence was called regarding the effect of the alcohol consumed by the appellant and that it was not consistent with the breathalyzer readings.

In a decision dated February 16th, 1994, Judge Campbell convicted the appellant on the charge under s. 253(b) and dismissed the impaired driving charge. In doing so he accepted the evidence of the officers and the accuracy of the breathalyzer tests.

The appellant applied for leave to appeal the conviction. The original notice of appeal contained the following grounds of appeal:

> 1. The learned trial Judge erred by denying the Defence application for disclosure of breathalyzer maintenance records, when there was evidence of problems with the machine used to test the Appellant, thereby violating the Appellant's right, pursuant to s. 7 of the **Canadian Charter of Rights and Freedoms**, to make full answer and defence.
>
> 2. The learned trial Judge erred by finding unreasonably that Constable Rutherford had fixed or eliminated the problem with the breathalyzer, when Constable Rutherford testified that he did not know the cause of the problem, resulting in an unreasonable verdict.
>
> 3. The learned trial Judge erred in confusing the evidence of Constable Steve Timmons, investigating officer, and Constable Hanford Timmons, the Appellant, as to what was seen and heard prior to the motor vehicle accident of May 31, 1993, thereby arriving at an unreasonable verdict.
>
> 4. Such other grounds as may appear once the transcript is received and reviewed.

The appellant sought leave to add two further grounds of appeal, however as the court was of the view that they did not raise questions of law, they were abandoned together with ground three.

The appellant's main contention on the appeal was that Constable Rutherford's evidence raised an issue regarding the accuracy of the breathalyzer test and in failing to make the records available there was a "reasonable possibility" that the appellant was denied the right to make full answer and defence in violation of s. 7 of the **Charter**. The appellant relied on **Stinchcombe v. R.** (1991), 68 C.C.C. (3d) 1. Counsel argued that because of the failure to disclose by the Crown the conviction should be set aside or in the alternative a new trial ordered.

On the hearing of the appeal while not conceding that the breathalyzer machine was not functioning properly, counsel for the Crown accepted that the records should have been produced prior to trial. In view of the Crown's position the Court adjourned the hearing of the appeal until June 27, 1994 and ordered the production of the records for the inspection of the defence. The Court made no ruling respecting the trial judge's decision refusing the motion.

When the hearing of the appeal resumed no affidavit was placed before the court on behalf of the appellant in support of a motion to adduce fresh evidence. The Crown tendered an affidavit which was not objected to by counsel for the appellant. In view of the position of counsel, we are prepared to accept the affidavit although it does not relate to records respecting the maintenance of the machine. The affidavit is by Lori Campbell, a Forensic Alcohol Specialist, employed by the R.C.M. Police. The effect of the affidavit is that the tests conducted by Constable Rutherford were appropriate and established that the machine was working properly when the tests were conducted.

On the motion before Judge Campbell it was incumbent on the appellant to show that there was a reasonable basis for the production of the records. See **R. v. Delaney** 48

C.C.C. (2d) 276. In **R. v. Stinchcombe** 68 C.C.C. (3d) 1 Sopinka J., stated at p. 17:

> In my opinion, when a court of appeal is called upon to review a failure to disclose, it must consider whether such failure impaired the right to make full answer and defence. This, in turn, depends on the nature of the information withheld and whether it might have affected the outcome.

With respect I agree with the trial judge that the appellant failed to show that the records were necessary in order to make a defence. Indeed the evidence of the officer showed that the machine was functioning properly. The affidavit of Lori Campbell simply confirms that view. There was ample evidence to support the conviction. While leave to appeal is granted, I would dismiss the appeal.

J.A.

Concurred in:

Chipman, J.A.

**PUGSLEY, J.A.:**

I have read the opinion of Jones, J.A. and agree with his disposition of this appeal.

With respect, I do not, however, agree with his opinion approving the ruling of the trial judge in dismissing the defence motion to compel the Crown to produce the maintenance records respecting the breathalyser machine.

The transcript reveals that upon being advised by his client, that at the time the test was conducted, there was some problem with the machine, defence counsel contacted the chief of police, who stated that he was not prepared to release the maintenance records, and that counsel should contact the Crown.

Crown counsel then spoke with the breathalyser technician, Constable Rutherford, who advised he was satisfied, after obtaining the first reading, purging the machine twice, and performing the standard alcohol test, that the machine was working properly, and it was only then that he performed the second test.

Crown counsel acknowledged that he had "no idea" what the maintenance records looked like, since he had never seen them nor did he take any steps to examine them. Counsel concluded that if the machine was working properly at the time, the defence request had no relevance.

The assumption the machine worked properly depended solely on the opinion expressed by Constable Rutherford who acknowledged in the course of the testimony he gave on the motion:

- he did not know what caused the problem. It could have been dirt in the contacts, vapour in the cylinder, vapour in the delivery tubes;

- he had never experienced a problem similar to the problem he experienced on this occasion;

- the machine used was a spare machine. He did not

know whether he had ever used this machine before;

- after the first test, obviously perplexed, he went for assistance to Constable Burke and "...I asked him, I flushed it once and it wouldn't work. And I went out to see Constable Burke and asked him if he had any trouble with that breathalyser and he said "no" and I came back in and I indicated to Steve Timmons who was in and I said "we may have to go to the R.C.M.P office to use their breathalyser if there's something wrong with this."

The trial judge in the course of his decision, commented that Constable Rutherford's "qualifications as a breathalyser technician were conceded".

With respect, no such concession is apparent from the record.

In the course of ruling on the motion, the trial judge, in an obvious reference to **R. v. Stinchcombe** (1992), 68 C.C.C. (3d) 1 (S.C.C.) stated:

> "the basic guideline in these applications holds that the information ought not to be withheld. If there is a reasonable possibility that the withholding of that information will impair the right of the accused to make full answer and defence to the charge against him. Ah, there must, of course, as well be some indication that the evidence will be relevant."

After stating the test in language to which no objection could be taken, the trial judge went on to say "in order to introduce this collateral issue, I believe that there must be some reasonable clear indication that the test could be inaccurate...due to the fact that the instrument was not working properly. I am not satisfied that it has been shown that the accused's ability to make a full answer and defence will be impaired by withholding the information sought." [Emphasis added]

In my opinion there is no onus on the accused to establish that his ability to make a full answer and defence will be impaired but rather it is up to the Crown to "justify its refusal to disclose" (Sopinka, J., at p. 12).

At the time the motion was denied, no one was aware what the maintenance records would reveal with respect to the spare machine that had been used.

While one might speculate as did Constable Rutherford concerning the nature of the problem (dirt in the contacts, vapour in the cylinder, vapour in the delivery tubes), the maintenance records might have disclosed information that would have been of assistance to the accused in order for him to make full answer and defence.

Crown counsel did not consider the maintenance records would disclose relevant information, but this opinion was expressed when he himself had not even looked at the records. I am of the view that the Crown has not justified the refusal to disclose.

The matter proceeded by way of summary conviction but the impact on the accused of a conviction for impaired driving could well have a significant effect with respect to his continuing employment as a police officer in the city of Sydney.

I conclude the trial judge was in error when he refused to order the Crown to produce the documents to the defence.

The error was rectified when Crown counsel, at the commencement of the appeal, agreed that the records should have been produced prior to trial.

This Court adjourned the hearing of the appeal in order to enable defence counsel a full opportunity to inspect the records.

At the resumption of the hearing, on June 27th, no affidavit was placed before this Court on behalf of the appellant in support of a motion to adduce fresh evidence.

I agree with Justice Jones that there is ample evidence to support the conviction and that the appeal should be dismissed.

Pugsley, J.A.

C.A. C. No.102151

NOVA SCOTIA COURT OF APPEAL

**BETWEEN**:

| | | |
|---|---|---|
| HANFORD VINCENT TIMMONS | ) | |
| Appellant | ) | |
| - and - | ) | REASONS FOR |
| | ) | JUDGMENT BY: |
| HER MAJESTY THE QUEEN | ) | |
| | ) | JONES, J.A., |
| | ) | CHIPMAN, J.A. |
| Respondent | ) | concurring and |
| | ) | PUGSLEY, J.A. |
| | ) | concurring by separate reasons |
| | ) | |
| | ) | |
| | ) | |