C A N A D A
PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX **C.H. 77609**

I N T H E C O U N T Y C O U R T
OF DISTRICT NUMBER ONE

BETWEEN:

GERALD SIDNEY MACNEIL,
Appellant

-and-

HER MAJESTY THE QUEEN,
Respondent

Duncan R. Beveridge, Esq., Solicitor for Appellant
Craig R. Botterill, Esq., Solicitor for Respondent

1993, January 27, Cacchione, J.C.C.:- The appellant was convicted at trial of the offence that he

> on or about the 20th day of September, 1991 did unlawfully have the control of a motor vehicle having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood contrary to section 253(b) of the Criminal Code

The issues raised on this appeal are the same as those raised at trial, that is, the certificate of the qualified technician should not have been admitted into evidence, and that the samples were not taken 'as soon as practicable' within the meaning of s.258(1)(c) of the

Criminal Code.

The facts are not in dispute. Constable Falconer was advised by a military police officer that the appellant was a possible impaired driver. After following the appellant's motor vehicle for a distance the appellant stopped his motor vehicle on the wrong side of the street. Shortly thereafter his motor vehicle was struck by an oncoming vehicle. After checking with the occupants of both vehicles Constable Falconer radioed for assistance and then requested that the appellant exit his vehicle and provide her with his relevant documentation. She then placed the appellant under arrest for impaired driving, read him the Breathalyzer demand and gave him his Charter rights. The demand was given at approximately 2:46 to 2:50 a.m. The appellant was transported to the police station and arrived there some twenty minutes later. The constable agreed that this trip would normally take only five or seven minutes but she accounted for the extra time taken by testifying that she had to speak with her Corporal concerning the motor vehicle accident and about what she was going to do with the appellant. Upon arrival at the station, the appellant was given access to a telephone which he made use of for approximately five or ten minutes. Once the appellant finished using the telephone he agreed to take

the Breathalyzer test. It was forty-five minutes from this point until the first sample was taken.

The evidence further shows that it was only after the appellant had agreed to take the test that the Breathalyzer technician was summoned and it then took him twenty minutes to arrive. There was evidence of a further period of approximately ten minutes for the preparation of the test. The test samples were taken at 3:57 and 4:14 a.m.

The appellant argues, firstly, that the certificate of analysis should not have been admitted into evidence because there was a challenge on cross-examination showing that the copy served on the appellant was not compared to the original. The evidence establishes that there was no line-by-line comparison between the original and the copy served on the appellant. Constable Falconer testified that she compared "all the written parts, most of the larger lines with the ..from the original to the copy." (Transcript p.29). Not all the lines were compared.

A copy is a true copy if it is true in all essential particulars, so that no one can be misled as to the effect of the instrument. **Sharp v. McHenry,**. **Sharp**

v. Brown (1887), 38 Ch.D. 427.

In R. v. Dale, [1974] 4 W.W.R. 429 (Sask.Dist.Ct.) Dielschneider, D.C.J. dealt with a case involving a partial or cursory comparison of the original to the copy served on the accused. In that case the officer who served the notice testified that he compared only the accused's name and the numerical readings on both documents. The court held that this was not sufficient. At p.434 the court stated:

> I return to a consideration of the evidence before me.
>
> In addition to the Constable's evidence which I have quoted, I have before me the original certificate of analysis tendered by the Crown as P.1. I observe at the bottom of the certificate letters and number - RCMP C-256C - which I believe to be an inscription intended to identify the printing on this form with others of the same. But I have no evidence that this number appeared on the form served on the accused. I further observe on the original certificate that certain words are typed in the blank spaces provided by the printed form but I have no evidence that carbon paper was used to transpose these words to whatever was served on the accused. I agree completely with Maher D.C.J. that a word-by-word reading may not be necessary if it can be concluded from other circumstances, such as the use of a typewriter and carbon paper, that a copy was produced and

> served. In fact I believe that evidence of the insertion of carbon paper between two printed forms bearing the identifying characters quoted above will even eliminate the necessity for any further comparison if a typewriter was employed. I have no such evidence before me.
>
> I agree with the submission of learned counsel for the defence that the tests set out by Culliton C.J.S., namely, that the copy served on the accused "was true in all essential particulars", has not been met by the Crown.

In the case at Bar the appellant was served with a copy produced as a result of the use of impression paper. This paper produces duplicates automatically by the mere pressure involved in writing or typing on the original. It is akin to using carbon paper without the flaws associated with carbon paper, such as the carbon paper being inserted backwards or the carbon paper not being fully behind the original so as not to entirely reproduce what is being written or typed on the original.

The learned trial judge had before him, as an exhibit, the original certificate and notice of intention to produce. This pre-printed form has at the bottom a legend showing that the white copy is for the investigator, the yellow copy is for the prosecutor and the pink copy is for the accused.

These circumstances coupled with the officer's evidence that she compared all the written parts between the original and the copy were in my view sufficient to enable the trial judge to find as a fact that the true copy had been served on the appellant. Such a finding of fact ought not to be disturbed on appeal. I would therefore dismiss the appellant's first ground of appeal.

The appellant's second ground of appeal relates to the test not being taken 'as soon as practicable'. Section 258(1) of the **Criminal Code** establishes an expeditious method for the admission of evidence relating to the results of Breathalyzer tests. The section creates a presumption as to the blood alcohol level of the accused. As Haliburton, J.C.C. noted in **R. v. Trempe** (1992), 111 N.S.R. (2d) 317, at 319

> ...The result of the section is a derogation of the common law right to "presumption of innocence". As such, the section is to be strictly interpreted.

The provisions of s.258 relevant to this appeal are the following:

> 258. (1) In any proceedings under section 255(1) in respect of an offence committed under section 253 or in any proceedings under section

255(2) or (3)...

> (c) where samples of the breath of the accused have been taken pursuant to a demand made under section 254(3), if ...
>
> (ii) each sample was taken as soon as practicable after the time when the offence was alleged to have been committed and, in the case of the first sample, not later than two hours after that time, with an interval of at least fifteen minutes between the times when the samples were taken, ...
>
> evidence of the results of the analyses so made is, in the absence of evidence to the contrary, proof that the concentration of alcohol in the blood of the accused at the time when the offence was alleged to have been committed was, where the results of the analyses are the same, the concentration determined by the analyses and, where the results of the analyses are different, the lowest of the concentrations determined by the analyses.

The appellant argues that there was a delay of one hour and twelve minutes from the time of the demand to the taking of the first breath sample. He acknowledges that there was some evidence to partially explain the delay but submits that there was a total of thirty-five minutes for which no proper explanation was provided. These delays consisted of a twenty minute delay for the technician to arrive and then a further fifteen minute delay which the appellant submits is

unaccounted for in any way. The appellant also argues that the distance from the location where the demand was first given to the police station is a mere five or seven minute drive but in this case it took twenty minutes.

In dealing with the delay of twenty minutes,occasioned by the drive to the police station, the appellant contends that no adequate explanation was provided for this delay. A review of the trial transcript discloses that there had been a motor vehicle accident involving the appellant and another vehicle just prior to the demand being given to the appellant. The arresting officer then contacted the police station for assistance and then upon the arrival of her Corporal she spoke to him concerning the accident and what she was doing with the appellant. There was therefore some explanation provided for this initial delay.

The appellant further argues that there was no explanation provided for the forty-five minute period between when the appellant agreed to take the test and when the first test was administered. The appellant admits that it is not a sufficient explanation to simply state that it took the technician twenty minutes to arrive at the station and then a further twenty-five minutes before the first test was administered. The

appellant accepts Constable Falconer's explanation that it took "approximately ten minutes" for the technician to prepare the instrument but concludes that a total of thirty-five minute delay was not properly explained.

The phrase 'as soon as practicable' has been considered in numerous cases. The Alberta Court of Appeal's judgment in **R. v. Mundry** (1979), 50 C.C.C. (2d) 518 is often cited as the leading judgment in this area. In **Mundry**, Morrow, JJ.A. discussed the meaning of this phrase by saying, at p. 521-522

> In 33 Words and Phrases at p.250, it is stated:
>
> Where something is required to be done at the earliest 'practicable' moment, the doing of the act is not required to be done at the very earliest moment, the adjective 'practicable' importing a difference according to circumstances, and meaning, ordinarily that the thing must be done as soon as reasonably can be expected.
>
> At p. 251 of the same reference it is stated: "The word 'practicable' means feasible. An act is practicable of which conditions or circumstances permit the performance."
>
> And at p.252 of this reference it is said: "Practicable' means feasible, fair, and convenient and is not synonymous with 'possible'."
>
> In considering the latitude to be extended in the interpretation of

> "practicable" under such definition, it must be kept in mind that the statute provides a leeway of two hours.

Morrow, JJ.A.'s comments have been accepted and followed by other appellate courts. **R. v. Carter** (1980), 55 C.C.C. (2d) 405 (B.C.C.A.), **R. v. Jensen** (1982), 2 C.C.C. (3d) 11 (N.S.S.C.A.D.).

Where delays occur which are longer than twenty or twenty-five minutes, the courts have regularly required evidence to explain the delay. **R. v. Porter** (1981), 64 C.C.C. (2d) 283 (Nfld.C.A.), **McCoy v. The Queen** (1990), 24 M.V.R. (2d) 245 (Sask.Q.B.), **R. v. Trempe** (1992), 111 N.S.R. (2d) 317 (N.S.Co.Ct.). The appellant relies on these cases, however they are all distinquishable from the present case in that in each of the cases cited the long periods of delay went absolutely unexplained. In the case at Bar there was some explanation offered for the delay.

In **McCoy v. The Queen** the accused waited forty-four minutes after his arrival at the police station before providing the first breath sample. The arresting officer stated that there was no explanation available for the delay. The court held that "in the complete absence of any explanation" the delay was unreasonable

and the presumption could not be relied upon.

In the **Porter** case the delay involved was fifty-one minutes between the time when the accused agreed to take the test and the time when the first breath sample was obtained. The Newfoundland Court of Appeal in upholding the District Court's decision to quash the conviction and acquit the accused agreed that there was no evidence whatsoever to explain what transpired during those fifty-one minutes. The court adopted the language of Howland C.J.O. in **R. v. Lightfoot** (1980), 4 M.V.R. 238, where he stated at p.240-241:

> In failing to adduce any evidence to explain the delay of one and one-half hours from the commission of the offence to the sampling of the accused's breath, it failed to establish that the samples were taken as soon as practicable. We are not to be taken as indicating that in each case evidence must be adduced to provide an explanation of every event which took place from the time when the offence was committed until the sampling of breath has been completed. Each case depends on its own facts.

In **R. v. Trempe** no explanation whatsoever was offered to explain a thirty-two minute delay after the accused was turned over to the Breathalyzer technician. This lack of evidence led to the conclusion that the

sample was not taken as soon as practicable and resulted in the accused's acquittal. In **Trempe** Haliburton, J.C.C. adopted as an accurate statement of the law the words of Freeman, J.C.C. (as he was then) in **R. v. Russell** (1990), 98 N.S.R. (2d) 33 where he stated at p.34:

> I take it to be well established that when there is no evidence relating to a period of fifteen minutes or more, an acquittal will result. When there is some evidence the matter is a question of fact to be determined by the trial judge.

The present case can be distinguished from the above noted cases in that here there was some evidence provided to explain the forty to forty-five minute delay. There was evidence that the technician was not summonsed until after the appellant had agreed to take the test, that it took the technician twenty minutes to arrive, and that it took at least ten minutes to prepare the machine before the first test was administered.

The respondent argued that once the technician arrived the remaining time could be accounted for based on Constable Falconer's evidence that it took a period of time to prepare the instrument for the first test. Support for this proposition can be found in **R. v. Trempe** where the court stated, at p.321, that "one could take

judicial notice of the fact that there is a practice by breathalyzer technicians to observe an accused for a period of fifteen minutes before obtaining a sample."

This case boils down to whether the Crown's inability to account for the approximately twenty minutes it took for the technician to arrive is fatal to its case. A trial judge must consider what is reasonably possible in light of all the circumstances and the Crown is not required to account for every minute that elapses in determining whether the samples were taken as soon as practicable. **Regina v. Rasmussen** (1981), 64 C.C.C. (2d) 304, **Regina v. Carter** (1981), 59 C.C.C. (2d) 450.

The requirement that the samples be taken as soon as practicable must be applied with reason and it is unnecessary to explain every incident which occurred from the time of the offence to the time of the first sample. As Culliton C.J.S. stated in **Regina v. Carter, supra**, at p. 453

> ...as long as the delay, if there is one, is explained to the satisfaction of the judge, there may be reliance on the presumption in sub para. (iv) as long as the samples are taken within the two hour limit.

In the case at Bar the trial judge determined that under all the circumstances the test was administered as soon as practicable. This is a finding of fact which was open to the trial judge to make based on all the evidence before him. I would therefore dismiss the appellant's second ground of appeal and dismiss the appeal. Accordingly the conviction is affirmed.

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Judge of the County Court
of District Number One