IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Blakeney 2005 NSPC 42

Date: 20050930
Case No.(s): 1436564, 1436565
Registry: Halifax

Between:

Her Majesty the Queen

v.

Gary Alan Blakeney

Judge:	The Honourable Judge C. H. F. Williams, JPC
Heard:	Decision rendered orally on September 30, 2005 in Halifax, Nova Scotia
Written decision:	Released on October 17, 2005
Counsel:	Richard M. Hartlen, for the Crown Michael S. Taylor, for the Defence

By the Court

Introduction

[1] It was just after high noon, 1245 hours on May 9, 2004. In the Milford area on Provincial Highway 102 near Exit 9, there was fairly light traffic. Even so, Constable Jacques St. Michel of the Enfield RCMP detachment who was on routine traffic patrol and riding in a marked police cruiser, saw a truck traveling at 143 kph in a 110 kph zone, overtaking and passing another vehicle on the highway. Once the officer stopped the speeding vehicle, the operator, Gary Alan Blakeney, now the accused, got out and approached him. In the officer's opinion the accused physical motions demonstrated signs of impairment as he smelled of alcohol, almost fell and staggered when he walked, slurred his speech and the pupils of his eyes were constricted.

[2] On searching the stopped vehicle the officer recovered and seized from behind the passenger seat a 355 millilitres bottle of Coke half full and smelling of alcohol. He also seized a half full bottle of rum. Also in the vehicle was a passenger who, in the officer's opinion, was highly intoxicated and uncooperative. He arrested Blakeney for impaired driving, and cautioned and Chartered him. Transporting him to the Enfield Detachment, the officer, who was also a qualified Breathalyzer technician, prepared the breathalyser equipment and, upon demand, the accused provided two samples of his breath that read successively, two hundred and forty milligrams of alcohol in one hundred millilitres of blood and two hundred and sixty milligrams of alcohol in one hundred millilitres of blood. The accused is charged with impaired driving and driving with a blood alcohol that exceeded the legal limit.

[3] In his defence, the accused submitted that although he had consumed some alcohol earlier in the day and the night before, expert opinion evidence on his behalf opined that the quantity that he consumed tended to show that the concentration of alcohol in his blood did not exceed eighty milligrams of alcohol in one hundred millilitres of his blood at the time when the offence was alleged to have been committed. Therefore, this case is a determination of whether there is evidence to the contrary that would displace and rebut the presumptions of accuracy and/or identity.

[4] Put another way:

(1) Is there evidence that could establish that the accused blood alcohol level at the time when he was driving and committed the offence and the time of the testing has changed? or;

(2) Is there evidence that corroborates his contention that his blood alcohol level at the time of operating his vehicle was below eighty milligrams of alcohol in one hundred millilitres of blood?

Findings of Facts

[5] On the evidence, I do not doubt and I do find that the accused, Gary Alan Blakeney, was the operator and had the care and control of the subject motor vehicle and that he was driving at a speed of 143 kph in a 110 kph zone. Further, I accept and find that the accused observed physical movements and with the odor of alcohol emanating from his person caused the officer reasonably to suspect and to believe that he, the accused, was under the influence of alcohol or a drug when operating a motor vehicle.

[6] When Constable Jacques St. Michel stopped the speeding vehicle and searched it, I accept and find that he detected and seized a half full bottle of Coke that exuded the odour of alcohol. Likewise, I accept and find that he seized a half full opened bottle of rum which was the property of the accused. Additionally, I accept and find that he properly and adequately Chartered and cautioned the accused. Furthermore, I accept and find that the Constable is a qualified Breathalyzer technician capable of operating the approved instrument that he used, the Borkenstien Breathalyzer 900A. In the operation of the Breathalyzer equipment, I find that the Constable conducted and performed the required tests and procedures to ensure that the equipment was functioning in good order and, I conclude and find that the approved instrument, Breathalyzer 900A, was working properly.

[7] There is some evidence, which I accept, that the accused consumed six measured doubles of rum containing 40 percent alcohol between 2100 hours and 2359 hours the previous night. Further, in the morning at 0715 hours he consumed a medium coffee in which he added fifty millilitres of Bailey's Irish Creme that contained 17 percent of alcohol per volume. He also ate one or two donuts. Moreover, I accept and find that from the time he was stopped and arrested by Constable St. Michel, until the time he gave samples of his breath for analysis the accused did not ingest any alcohol.

[8] On demand, the accused blew samples of his breath, for analysis, in the approved instrument. I accept and find that he gave the first sample at 1345 hours which upon analysis recorded that he had two hundred and forty milligrams of alcohol in one hundred millilitres of his blood. Likewise, I accept and find that the second sample which he gave at 1404 hours, upon analysis, showed that he had two hundred and sixty milligrams of alcohol in one hundred millilitres of his blood.

Opinion Evidence

[9] Dr. Peter Mullen was qualified as an expert in the field of pharmacology and toxicology able to give opinion evidence on the absorption, distribution, elimination and effects of alcohol and drugs in the body, and the theory and operation of the Borkenstien Breath instrument. He opined, on the hypothetic scenario, that given the age, sex, weight, height and health of the accused if he, the accused, had consumed the quantity of alcohol which he asserted that he did, and in the time frame as specified, and as I have found, at 1345 hours, the accused

blood alcohol level would have been in the range of zero to forty milligrams of alcohol in one hundred millilitres of blood. At 1254 hours, given the same set of facts, he opined that the accused blood alcohol level would have been in the range of zero to forty-nine milligrams of alcohol in one hundred millilitres of blood. Significantly, in Dr. Mullen's opinion, given the same time frame, to reach a blood alcohol level of two hundred and forty milligrams of alcohol in one hundred millilitres of blood, the accused would have had to consume seven to twelve extra doubles of alcohol or between twenty-six and thirty-six ounces of rum.

[10] Furthermore, Dr. Mullen opined that the Borkenstien Breathalyzer 900A, with which he was familiar, was an accurate instrument of breath analysis. He could find no fault concerning the operation of the instrument or the manner in which Constable St. Michel ensured that the instrument was operating properly or how he conducted the breath tests. Nonetheless, he found it highly improbable that there existed such a variance between the readings of the instrument and his conclusions on the hypothetical scenario. In his view, three possibilities could account for the variance:

(1) The person consumed more alcohol than stated or was mistaken as to the amount consumed.

(2) The Breathalyzer readings were in error due to a machine malfunction or the readings were falsified.

(3) His calculations were incorrect.

[11] However, he opined that the third possibility did not apply and that there was nothing for him to conclude that the second possibility was applicable. In addition, he offered the view that the indicia of alcohol as described by the police were consistent with high impairment and that some individuals can drive with alcohol in their body as they have a high degree of tolerance.

Analysis

[12] It is clear from the authorities and it is settled law that the ***Criminal Code*** s.258 establishes a scheme for proving the offences designated in the ***Criminal Code*** s.253. It is equally well established that, to assist the Crown to overcome two important "evidential hurdles", s.258 contains two temporal presumptions that can be rebutted by "evidence to the contrary". ***R. v. St. Pierre***, [1995] 1 S.C.R. 791, [1995] S.C.J. No. 23.

[13] These temporal presumptions, in brief, are:

(a) *The presumption of accuracy*, as established by s.258(1)(g) and, by the operation of

s.25 of the ***Interpretation Act***, R.S.C., 1985, c. I-21, presumes that in the absence of "evidence to the contrary" it proves the accuracy of the certificate of analysis that the accused blood alcohol level was the same as at the time of testing on the breathalyzer. It also establishes the blood alcohol level required to prove the offence. However, to rebut this presumption, the accused must adduce or point to evidence which raises a reasonable doubt as to his or her blood alcohol level. See: ***R. v. St. Pierre***, *supra*.; ***R. v. Boucher*** [2004] R.J.Q. 423, 22 C.R. (6th) 148, 6 M.V.R. (5th) 174, ***R. v. W.(D)*** [1991] 1 S.C.R. 742.

(b) *The presumption of identity* that is established by s.258(1)(c) and (d.1). Here, the presumption is that, if all the conditions of the subsections are met, unless there is some evidence to the contrary, the reading at the time of testing is the same as the reading would have been at the time of driving. However, the accused can displace this presumption by any evidence that raises a reasonable doubt that the levels at the two different points in time were truly identical. In short, the accused must adduce evidence to show that his or her blood alcohol level at the time of the alleged offence did not exceed eighty milligrams of alcohol in one hundred millilitres of blood. ***R. v. St. Pierre***, *supra*, paras. 28-29; ***R. v. Cook*** (2005), 193 C.C.C. (3d) 27, 194 O.A.C. 43 (C.A.).

[14] The Supreme Court of Canada, when articulating these two presumptions held in ***R. v. St. Pierre***, *supra*, at para. 30:

> It is very important to keep these two presumptions separate. They arise from two entirely different subsections, they help the Crown over two entirely different evidentiary hurdles, and consequently the evidence necessary to rebut them is different. Also, . . . courts frequently have had difficulty with the distinct nature of these presumptions and have confused them . . .

[15] Here, the accused is asserting that given his consumption of alcohol, his blood alcohol level could not be the same as at the time of testing,. He is not saying that he consumed any alcohol between the time he was stopped and arrested by the police and the time of testing. Or, that there was some occurrence, such as time factors, between the time he was stopped and the time of the testing that could have affected the readings. Rather, he is proposing that the testing results are inaccurate. Thus, in my opinion, the evidence presented for acceptance on his behalf, is intended to rebut the presumption of accuracy and not the presumption of identity.

[16] Although the Crown did not present a certificate of analysis under s.258(1)(g), the qualified technician, Constable St. Michel, gave *viva voce* evidence and tendered his Breathalyzer Operational Check Sheet, Exhibit 1, to support his testimony. In these set of circumstances, I think that the Crown can still rely on the presumption of accuracy once it meets the requirements of the subsection. ***R. v. Lightfoot***, [1981] 1 S.C.R. 566, 59 C.C.C. (2d) 414,

24 C.R. (3d) 323. ***R. v. Walters*** (1975), 26 C.C.C. (2d) 56, 11 N.S.R. (2d) 443 (App. Div.).

[17] I do not doubt that the accused blew directly into and likewise that his breath samples were received directly into an approved instrument operated by the technician. Further, I do not doubt that the technician ascertained that the approved instrument was in proper working order as supported by the activities he checked off on the Operational Check Sheet. The results of the analyses were, that at 1345 hours the accused blood alcohol level was two hundred and forty milligrams of alcohol in one hundred millilitres of blood (240/100) and at 1404 hours his blood alcohol level was two hundred and sixty milligrams of alcohol in one hundred millilitres of blood (260/100). However, the issue is: whether, in fact, the approved instrument was functioning properly when it analyzed the accused breath samples. Put another way, has the accused presented "evidence to the contrary"?

[18] When I consider and assess the contextual evidence in which this alleged crime occurred, I do not doubt that, on his own testimony the accused prior evening's drinking was unusual. All the same, he related that as he was on a strike picket line, that made him upset and "peeowed" with the system, which I think presents an inference, consistent with the probabilities that a practical and informed person would readily recognize as reasonable in the circumstances, that he was consoling himself by drinking alcohol.

[19] Additionally, in the morning, at 0715 hours, he had one or two donuts and a coffee. But, he pours in his coffee fifty millilitres of Bailey's Irish Creme which is an alcoholic liquor. Together with a friend, he decided to take a road trip. However, before he started out, they each purchased a bottle of Coke. Likewise, the accused took into the vehicle, ostensibly to convey it to another friend's home where they intend to consume it, an open bottle of liquor. The accused admits that his travelling companion, is not too intoxicated when they entered the vehicle to start their journey. Yet, when they are stopped by the police the friend is highly intoxicated and the police finds the bottle of liquor open and half full and a half full bottle of Coke that smelled of alcohol.

[20] However, as I observed the accused when he testified about the open and half full bottle of liquor, and I assessed and weighed his testimony with the total evidence I formed the impression that he was being careful not to admit or to acknowledge any misconduct on his part. I also formed the impression that he was being scripted. He has denied consuming any alcohol on the journey. Nonetheless, on the observations of the police he demonstrated indicia of impairment by alcohol or drug which were indicated by unsteadiness on his feet, slurred speech, smell of alcohol emanating from his person and the pupils of his eyes constricted. Despite his opinion on the drinking scenario put forward by the accused, Dr. Mullen opined that the observations described by the police, if correct, when coupled with the Breathalyzer readings would indicate a high degree of intoxication.

[21] When Dr. Mullen opined that the accused blood alcohol level was between zero and forty millilitres of alcohol per one hundred at 1345 hours and between zero and forty-nine milligrams per millilitres at 1245 hours, it is reasonable to conclude that his deductions

assumed that the drinking scenario presented by the accused, on which he based his opinion, was factually correct. Here, however, there is a wide spread between Dr. Mullen's conclusions and the Breathalyzer readings.

[22] Thus, if I believe and accept the drinking scenario presented by the accused then, on the toxicologist's opinion, he would have little or no alcohol in his system at the time of the alleged offence. That, at first blush, would satisfy the provisions of s.258(1)(g). However, I have the test results which are some evidence that at the time of testing he did have alcohol in his system to a marked degree different from that opined to by the toxicologist based on the drinking scenario as testified by the accused. To arrive at the blood alcohol level of the testing results, the toxicologists opined that the accused would have had to consume an extra twenty-six to thirty-six ounces of alcohol. Likewise, he would not expect to see slurred speech or lower motor skills at a blood alcohol level of forty milligrams of alcohol in one hundred millilitres of blood.

[23] Concerning the operation of the approved instrument, Dr. Mullen opined that the procedure the technician used in administering the tests was proper; the technician's actions were proper; the 900A was an accurate instrument and that leakage was rare. In his opinion, there was nothing in the evidence to indicate to him that the instrument was not operating properly. Further, all things being equal, he opined that it was highly improbable to receive such a variance in the results between the breathalyzer readings and his hypothetical. As a result, he concluded that as his calculations were correct based on the drinking scenario presented and, as there was no evidence that the approved instrument malfunctioned or that its readings were falsified the only logical hypothesis was that the hypothetical individual, who is the accused, would have consumed more alcohol than he stated or was mistaken as to the amount of alcohol that he consumed.

[24] I therefore think, on assessing the total evidence, that the accused drinking scenario does not accord with all the other evidence of a high amount of alcohol consumption. I accept, as credible, the observations of the police about the indicia of impairment. When that is combined with the high readings on the breathalyzer and the opinion of the toxicologist concerning the probabilities that such readings would support the reduced motor skills as observed by the police, I conclude that the accused drinking scenario is unreliable and untrustworthy. Consequently, I do not accept, and do doubt, that his drinking scenario is accurate.

[25] Of particular interest, I noted that Dr. Mullen did not comment on, as he was not asked about, the rates of absorption and elimination and the effects of alcohol on the accused. This could have provided another tool for me to assess the accused credit. He, however, noted when asked about the high breathalyzer readings that some individuals, because of their high tolerance to alcohol, could drive with alcohol in their system.

[26] Also, I think that, on the total evidence, particularly given the accused penchant to imbibe alcohol; the discovered half empty open bottle of liquor in his vehicle; his highly intoxicated

friend with a half full bottle of Coke that exuded the smell of alcohol; his observed physical condition of extreme unsteadiness on his feet, constricted eye pupils, slurred speech and smell of alcohol when combined with the high breathalyzer readings, it is "in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable" that he consumed more alcohol than he stated or that he was mistaken as to the amount of alcohol that he consumed. See: ***Faryna v. Chorny***, [1952] 2 D.L.R. 354 (B.C.C.A.) at p.357. Consequently, I do not believe him concerning the quantity of alcohol that he consumed. ***W.(D).***, *supra.*

Conclusions

[27] The toxicologist's opinion was based upon the accused testimony about the quantity of alcohol that he consumed. If I were to accept that testimony as credible and trustworthy then this expert opinion would be evidence on the level of blood alcohol that would be in the accused system at the time of testing. This opinion, however, is at a wide variance with the breathalyzer readings at the time of the testing. However, on the above analysis, I concluded that I did not accept, nor did I believe the accused concerning his alcohol consumption. As a result, his testimony does not raise, in my mind, a reasonable doubt about the level of his blood alcohol at the time of testing as determined by the breathalyzer. Consequently, the toxicologist's opinion that is based upon the unreliable, untrustworthy and unbelievable testimony, as I have found, does not have any evidentiary impact on the accuracy of the testing results as, in my opinion, it certainly cannot rise to the level of "evidence to the contrary" in order to displace the presumption of accuracy.

[28] Accordingly, I conclude that the Crown can rely on the presumption of accuracy, as there is no evidence to the contrary. There is no evidence to show that the approved instrument malfunctioned or that the readings were falsified. The evidence that I accept shows that the accused had alcohol in his system which at the time of testing was determined to be two hundred and forty milligrams of alcohol in one hundred millilitres of blood and two hundred and sixty milligrams of alcohol in one hundred millilitres of blood. Thus, I conclude, that the Crown has proved beyond a reasonable doubt that his blood alcohol level, as determined by the breathalyzer machine is sufficient to establish the offence under s.253(b). Consequently, I find him guilty as charged. However, on the evidence, I will enter a conditional stay with respect to the s.253(a) charge. I will enter a conviction accordingly on the s.253(b) count.