2000 CR. S.AM. No. 3501

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: R. v. Smith, 2000 NSSC 60

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

- and -

STEPHEN WAYNE SMITH

RESPONDENT

D E C I S I O N

HEARD: At Amherst, Nova Scotia, on October 5, 2000.

BEFORE: The Honourable Justice Donald M. Hall.

DECISION: November 22, 2000.

COUNSEL: Carole A. Beaton,
Counsel for the appellant.

Kevin A. Burke, Q.C.,
Counsel for the respondent.

Hall, J.

[1] This is an appeal by the Crown of the acquittal of the respondent on charges of impaired driving and refusal to provide a blood sample contrary to s. 253(a) and s. 254(5) respectively, of the **Criminal Code**.

[2] The essential issues argued on the appeal were whether the learned trial judge erred in law in finding:

1. that the evidence did not establish beyond a reasonable doubt that the respondent's ability to drive was impaired by alcohol at the relevant time; and

2. that the respondent had a reasonable excuse for refusing the blood demand.

[3] The material facts are not in dispute. At approximately 12:20 a.m. on June 8, 1999, the respondent was observed by Constable MacMillan driving on Victoria Street in the Town of Amherst. When the police officer first observed the respondent his vehicle was at the intersection of Victoria and La Planche streets. The traffic light was red but the respondent's vehicle was slowly moving into the intersection, apparently in anticipation of the light turning green. When the light turned green the respondent proceeded through the intersection and increased his speed to seventy kilometers per hour. The speed limit is fifty kilometers per hour in that area.

[4] As a result, the police officer stopped the respondent. He noted an odour of alcohol coming from the respondent. He also noted that his eyes were "bloodshot and

hazy" and that he was hyperventilating. The officer formed the opinion that the respondent was impaired by alcohol. Because of the respondent's breathing problem he believed that he would be unable to provide breath samples and instead of demanding samples of his breath he demanded a blood sample pursuant to s. 254(3)(b) of the **Code**. The respondent refused. When informed by the officer that he could be charged with refusing a blood demand he said that he understood.

[5] At trial the respondent testified that on the night in question he went to a local tavern and between 9:00 p.m. and midnight he consumed three to five beers. He said that he had had around five beers when he started having cramps in his stomach. He said that this was normal for him because he had had cancer of the colon and a section of his bowel had recently been removed which caused him to have cramps whenever he ate or drank too much. He then left the bar and got in his car to drive home. In order to relieve the pressure on his bowel he had been instructed to hyperventilate or take short, deep breaths which he was doing when he was stopped by the police officer. Apparently, while hyperventilating in his car he swallowed a toothpick which he had in his mouth which became lodged in his throat. He was trying to clear his airway when the police officer approached him.

[6] He explained that he refused the demand to supply a blood sample because of concern for his health. Following his surgery for colon cancer he was to continue chemotherapy treatment. He could not undergo the treatment, however, unless his blood count was up to a sufficiently high level. Apparently he was anemic and his blood count was too low to take the treatment. His doctors had been taking samples of

his blood every week but eventually concluded that that was contributing to the low blood count problem. As he said in his testimony:

> Okay, so prior to that they were taking it every week. They were taking my blood every week, but they found out that taking it every week, it was defeating its purpose because when they drew blood from me I had to rebuild that blood back up, so they decided they were going to take it every month. . . . Anyway, they said that when they drew blood from me, they were finding that it was defeating its purpose, and they had to get my blood built up to a certain level for me to take treatments.

He had had samples taken just two days before the incident in question. He feared that to provide further samples in response to the police officers demand would further delay the chemotherapy treatment, thus putting his health and even his life at risk.

[7] The learned trial judge accepted the respondent's evidence in this respect and concluded that the respondent had a reasonable excuse for refusing the blood demand.

[8] The learned trial judge also considered the evidence of the alleged symptoms of impairment, the nature of the driving, the smell of alcohol and the blood shot eyes. He also noted, however, that there was none of the usual evidence respecting slurred speech and staggering. He concluded that he was not satisfied beyond a reasonable doubt that the respondent was driving while impaired.

[9] Counsel for the Crown argued that evidence of impairment by alcohol was such that the learned trial judge erred in failing to find the respondent guilty of impaired operation. Ms. Beaton, in particular, suggested that the respondent's admission that he had consumed five beers over a three hour period, in itself, was sufficient to prove impairment.

[10] As to whether the respondent had established a reasonable excuse for refusing the blood demand, Ms. Beaton, submitted that the learned trial judge erred in concluding that the respondent had established a reasonable excuse. She noted that the respondent did not tell the police officer his reason for refusing. She emphasized that there was no expert medical evidence to support the position that providing a blood sample would have endangered the respondent's health. She maintains that even though the respondent may have honestly believed that it would have endangered his health, there was no medical evidence to support that position. Furthermore, as part of the demand, the respondent had been informed that the blood samples would be taken by a qualified medical practitioner who would only take samples if he or she was satisfied that the taking of the samples would not endanger his health. Thus, Ms. Beaton maintained that the learned trial judge erred in his conclusion.

[11] On behalf of the respondent, Mr. Burke, countered that the jurisdiction of a summary conviction appeal court is limited to the areas set out in s. 830(1) of the **Criminal Code**. With respect to the acquittal on the impaired operation charge, he submitted that the findings of the trial judge were reasonable and supported by the evidence. As to the question of reasonable excuse, he maintained that it is the subjective belief of the subject person based on reasonable grounds that is determinative. He noted that the trial judge believed the evidence of the respondent and that that evidence did indeed establish a reasonable excuse for refusing the blood demand.

[12] I cannot say that I agree with Mr. Burke's position that this appeal is under s. 830 of the **Code** and subject to the limitations imposed by that section. Rather, it seems to me that the appellant intended that the appeal be under s. 813 to which, by virtue of s. 822, ss. 683 to 689, with the exception of subsections 683(3) and 686(5), apply. Section 813 provides that an informant or the Attorney General may appeal "from an order that . . . dismisses an information". In the circumstances of this appeal, however, in my opinion, it is not particularly material whether the appeal is under s. 813 or s. 830. The fact of the matter is that the main thrust of the appellant's argument seems to be that the trial judge erred in law in his treatment of the evidence.

[13] It is also well established, however, that in a summary conviction appeal the Crown may appeal a verdict of acquittal on questions of fact, but a verdict of acquittal should only be set aside where it is unreasonable or cannot be supported by the evidence; **R. v. Gillis**, (1981) 45 N.S.R.(2d) 137; **R. v. Hewlin,** (1999) 174 N.S.R.(2d) 93.

[14] In the hearing of an appeal of this nature, it must be kept in mind that it is not for the appeal court to re-try the case; **R. v. MacDonald** (1979) 29 N.S.R.(2d) 635. As well, as pointed out in **R. v. Gillis** (supra), matters of credibility are for the trial judge and “should only be interfered with in very rare circumstances”, especially in the case of an acquittal.

[15] Turning first to the impaired operation charge, the test for impairment is set out in **R. v. Stellato** (1993) 78 C.C.C.(3d) 380 (Ontario C.A.) (affirmed by the Supreme Court

of Canada [1994] 2 S.C.R. 478, 90 C.C.C.(3d) 160). In that case the Court stated that there does not have to be a "marked departure" from normal behaviour, but if the evidence establishes "any degree of impairment ranging from slight to great the offence is made out". However, it was held in **R. v. Andrews** (1996) 104 C.C.C.(3d) 392, (leave to appeal to the Supreme Court of Canada refused 106 C.C.C.(3d) vi,) that where the evidence of impairment consisted of observations of the conduct of the operator, “in most cases, if the conduct of the accused was a slight departure from normal conduct, it would be unsafe to conclude, beyond a reasonable doubt, that his or her ability to drive was impaired by alcohol”.

[16] In my opinion, in the present case, there is little if any basis for disputing the acquittal of the respondent of the impaired operation charge. The symptoms of impairment were, at best, modest. The strongest element was the bloodshot eyes and the trial judge concluded that that was equally consistent with being tired as with being impaired by alcohol. The driving was not particularly aberrant and was more consistent with one being anxious to get home late at night rather than being impaired by alcohol. It is significant that there was no evidence of weaving, excessively high or low speeds, or crossing the centre line, which are usually associated with impaired drivers. Indeed it was only the fact that the respondent was "creeping" into the intersection on a red light and that the appellant accelerated to a speed of upwards of 70 kilometers per hour, that attracted the attention of the police officer. The trial judge concluded that such was not unusual or particularly aberrant at that time of night and I agree.

[17] Furthermore, lacking evidence of the actual blood/alcohol level of the respondent and expert evidence to interpret it, the court could not take judicial notice that the consumption of a certain quantity of alcohol would cause impairment. **R. v. Ostrowski** (1958) 122 C.C.C. 196.

[18] Accordingly, I am satisfied that the conclusions of the learned trial judge with respect to the impaired operation charge should not be disturbed.

[19] As to whether the learned trial judge erred in finding that the respondent had established a reasonable excuse for refusing the blood demand, it is acknowledged that the burden was on the respondent to establish a reasonable excuse on a balance of probabilities: **R. v. MacDougall** (1975) 15 N.B.R.(2d) 279; **R. V. Phinney** (1979) 33 N.S.R.(2d) 266.

[20] The question then is what will amount to a reasonable excuse. The Appeal Division of the Nova Scotia Supreme Court considered that issue in **R. v. Phinney**, (supra). In delivering one of the majority judgments, Hart, J.A., said at pages 278 - 279:

> In my opinion it would be dangerous for the courts to try to enunciate an all inclusive meaning to the expression "reasonable excuse" because there are always factual situations arising that are novel and do not fit into static categories. This is the approach that most of the court decisions have been taking and the results have been confined to the individual factual situations in the various cases. Patterns are arising, however, which should give some guidance to future decisions, and after considering these patterns I have reached certain conclusions.

[21] He went on to list a number of bases which would provide a reasonable excuse including medical grounds which:

> . . . would involve either a danger to the health of the accused by the performance of the test or as a result of his required attendance for medical treatment during the time period when the police officer wishes to have the test performed.

[22] Although in that case the proffered excuse was the belief that the breathalyzer instrument was not functioning properly and would yield an erroneous result, the reasoning of the Court is applicable here.

[23] In **Phinney** there was no evidence to establish whether in fact the breathalyzer instrument was not working properly. The reasonable excuse accepted by the Court was the fact that the defendant actually believed that the breathalyzer instrument would not yield an accurate reading and that there was a reasonable factual basis or reasonable grounds for this belief.

[24] Similarly, in the present case there was no conclusive medical evidence that taking the samples of blood would have jeopardized the health of the respondent. There was evidence, however, which the learned trial judge accepted, that the respondent honestly believed that the taking of blood samples would put his health in jeopardy. The learned trial judge also believed the respondent's testimony as to his medical condition and experience with blood tests that formed the basis of his belief. He concluded that this evidence established a reasonable basis for the respondent's belief.

[25] Although the respondent is not a medical expert, in my opinion, a witness is entitled to testify as to his or her own medical condition. Whether that evidence and

the opinions expressed are accepted is a matter of weight which is a question for the trial judge.

[26] In the circumstances of this case I see no basis for disputing the conclusions of the trial judge. In my opinion, with respect to both counts, it cannot be said that the verdicts are unreasonable or cannot be supported by the evidence.

[27] Accordingly, the appeal is dismissed. I will hear the parties further with respect to costs if they wish, which may be by way of written submissions.

Donald M. Hall, J.