SC CR 77030

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN ON THE
INFORMATION OF CONSTABLE
PATRICK F. McCLOSKEY,

Respondent

- and -

EDWARD ROLAND,

Appellant

Appeal from sentence imposed by Justice of the Peace Dennis Cichelly

Appeal heard at Yellowknife June 27, 1977

Appeal allowed - sentence varied

Reasons for Judgment filed November 14, 1977

Reasons for Judgment by:

The Honourable Mr. Justice C. F. Tallis

Counsel:

Mr. C. Dalton, for the Appellant

Mr. E. Brogden, for the Crown, Respondent

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REASONS FOR JUDGMENT OF THE HONOURABLE
MR. JUSTICE C. F. TALLIS

The Appellant Edward Roland appeared at Inuvik in the Northwest Territories before Justice of the Peace Dennis Cichelly, a Justice of the Peace in and for the Northwest Territories, on the 19th day of May, A.D. 1977 and pleaded guilty to the following two counts in an information dated May 19th, 1977 and sworn by Constable Patrick McCloskey of the Royal Canadian Mounted Police:

> "Count #1 - that he did on or about the 18th day of May, A.D. 1977, at or near the Town of Inuvik in the Northwest Territories, while his ability to drive a motor vehicle was impaired by alcohol or a drug, have care and control of a motor vehicle, contrary to Section 234 of the Criminal Code.

"Count #2 - that he did on or about the 18th day of May A.D. 1977 at or near the Town of Inuvik in the Northwest Territories, without reasonable excuse fail to comply with a demand made to him by Cst. Glen W. Hunter, a peace officer, to provide then or soon thereafter as was practicable a sample of his breath suitable to enable an analysis to be made in order to determine the proportion, if any, of alcohol in his blood contrary to Section 235 of the Criminal Code."

In this particular case the Style of Cause on this appeal does not set forth the name of the Informant. For the future guidance of the Bar I would point out that the name of the Informant should appear in the Style of Cause and the Style of Cause in this particular appeal is accordingly amended to read "Her Majesty the Queen on the Information of Constable Patrick F. McCloskey".

From the record placed before this Court on the hearing of the appeal it appears that Justice of the Peace Dennis Cichelly sentenced the Appellant to pay a fine of $300.00 and costs of $2.00 on Count No. 1 charging an offence under Section 234 of the Criminal Code of Canada. In default of payment of the said fine of $300.00 and $2.00 costs the Appellant was sentenced to a term of 30 days imprisonment. There was a further order for suspension of the Appellant's driver's licence under Section 53 of the Vehicles Ordinance for four months "unconditional".

The record also discloses that Justice of the Peace Dennis Cichelly sentenced the Appellant to pay a fine of $150.00

and $2.00 costs in respect of Count No. 2 which was an offence under Section 235 of the Criminal Code of Canada. In default of payment the Appellant was sentenced to a term of 14 days imprisonment. A further order was made suspending the appellant's driver's licence under Section 53 of the Vehicles Ordinance for four months "unconditional".

At the hearing of this Appeal Counsel for the Appellant with the consent of Counsel for the Crown was granted leave to amend his Notice of Appeal. The grounds of appeal as set forth in the amended Notice of Appeal are as follows:

> "1. The sentences were unreasonable and excessive in all of the circumstances.
>
> 2. The sentences were passed on the basis of wrong principle.
>
> 3. The acceptance by the learned Justice of the Peace of the plea of guilty of the Appellant in respect of Section 235(2) of the Criminal Code and the subsequent registering of the conviction of the Appellant occurred on the basis of wrong principle."

There is no real disagreement on the facts of this case. Shortly before 5.00 p.m. on May 18th, 1977 the Royal Canadian Mounted Police attended outside the A & W Restaurant at Inuvik in the Northwest Territories where the accused who was obviously under the influence of liquor was attempting to start a motorcycle. He was astride the machine with the ignition key in the on position.

A demand for a breathalyzer test was made and the accused was taken to the R.C.M.P. Detachment at Inuvik. One test was administered with a reading of 190 mg. of alcohol in 100 ml. of blood. It is common ground that this sample was a good sample for purposes of analysis. However when the Appellant was properly asked for a second sample he refused to give the same and the effect of this refusal would be to deprive the Crown of the availability of a Certificate of Analysis for use as evidence pursuant to the provisions of Section 237 of the *Criminal Code of Canada*. However in this particular case the need for such a Certificate did not arise at the hearing in Court because the accused appeared and pleaded guilty to both counts in the information.

It should also be observed that the accused appeared in person and was not represented by counsel. The prosecution was not represented by counsel at the hearing and the matter was spoken to by a member of the Royal Canadian Mounted Police who was attending to the Court Docket on the date in question.

It is also common ground that the Appellant has no previous convictions under Sections 234, 235 or 236 of the *Criminal Code of Canada*. Reference was made to the fact that he does have some other convictions but no particulars of these convictions appear on the record in the Court below and no particulars were given at the hearing of this appeal.

On the hearing of this appeal a number of matters were raised and leave was given to counsel for the Appellant and

counsel for the Respondent to file written arguments. These written arguments have now been received and I would like to express my appreciation to both counsel for the comprehensive arguments that have been submitted.

On the hearing of this appeal I questioned the propriety of the Crown seeking two convictions arising out of the factual background to this case and having regard to the judgment of the Supreme Court of Canada in *Kienapple v. The Queen* (1975) 1 S.C.R. 729, I invited counsel to consider whether or not the rule in *Kienapple v. The Queen* applies to this case.

After carefully considering this matter I have concluded with some reluctance having regard to the factual situation herein that the rule in the *Kienapple* case does not preclude a conviction for a refusal to comply with a demand for a sample of breath where there has already been a conviction for having care and control of a motor vehicle contrary to Section 234 of the *Criminal Code of Canada*. Reference has been made to many decisions in this connection including, *inter alia*, *Regina v. Wildeman*, (1977) 4 W.W.R. 126; *Regina v. Haubrich*, (1977) 3 W.W.R. 727; *Regina v. Hedrick* (unreported judgment of Mr. Justice D. C. McDonald dated August 15th, 1977); and *Regina v. Schilbe*, 30 C.C.C. (2d) 113 (Ontario Court of Appeal). I recognize the case of *Regina v. Schilbe* as being a binding authority on this Court and I accordingly hold that the plea of *res judicata* or the rule in *Kienapple* does not apply to this case. The offences under sections 234 and 235(2) are separate or distinct acts or delicts therefore the

Appellant may be convicted of both charges.

In this particular case learned counsel for the Appellant submitted that the Court below had no jurisdiction to impose a licence suspension or prohibition under Section 53(3) of the *Vehicles Ordinance*, R.O.N.W.T. 1974 c. V-2 because Section 53(1)(b) of the said Ordinance did not encompass the offences to which the Appellant pleaded guilty. Section 53(1)(b) of the *Vehicles Ordinance*, R.O.N.W.T. 1974 c. V-2 provides as follows:

> "53. (1) Every person who is convicted of
>
> (b) an offence under the *Criminal Code* arising out of the operation of a motor vehicle,
>
> . . . . .
>
> shall forthwith deliver up his licence to the justice making the conviction, and the justice shall endorse on the licence the particulars of the conviction."

Section 53(3) and Section 54 of the *Vehicles Ordinance* provide as follows:

> "53. (3) The justice to whom a licence is delivered up as a result of a conviction under subsection (1), may make an order prohibiting the holder of the licence from driving a motor vehicle for any period not exceeding twelve months that to the justice seems proper."
>
> "54. Where an order has been made prohibiting a person from operating a motor vehicle in respect of an offence referred to in subsection 53(1) the justice who made the order may, if in his opinion a chauffeur's or operator's licence is essential to the licensee in carrying on the occupation by which the licensee

"earns his living direct the Registrar to issue a restricted licence to such person subject to any conditions that the justice may deem proper."

After carefully considering this matter I am satisfied that the terminology used in section 53(1)(b) clearly contemplates an offence under Section 234 of the *Criminal Code* regardless or not of whether the accused is charged with having care and control of a motor vehicle or driving a motor vehicle while his ability to do so is impaired by alcohol or a drug.

Having regard to my determination of this appeal it is not necessary for me to give any specific ruling concerning Section 235(2) of the *Criminal Code* but I must say that I do have some doubt as to whether or not an offence under Section 235(2) of the *Criminal Code* is contemplated by the language of Section 53(1)(b) of the *Vehicles Ordinance*. Consideration might quite properly be given to amending this section to clarify the situation.

On this appeal the question of an appropriate and proper sentence regardless of the above ruling was also carefully canvassed by counsel. I would point out that legislation such as is contained in section 234 of the *Criminal Code* is passed with a view to protecting the public from the hazard associated with drivers who have been drinking. The right or licence to drive a motor vehicle carries with it certain responsibilities and one of these responsibilities is to refrain from driving that vehicle or having care and control of it while in violation of section 234

of the *Criminal Code of Canada*. Similarly legislation such as section 235(2) of the *Criminal Code of Canada* was passed with a view to extending further protection to the public and recognizes the fact that people who have been drinking in excess of acceptable levels must be kept off the roads and streets. Drivers of motor vehicles must be put on notice that they can expect lengthy driving prohibitions. In many cases this is a much more effective sentence than the imposition of heavy fines.

On the other hand I can see little purpose in the prosecution proceeding to obtain convictions for two offences arising out of this set of circumstances where the Court can impose adequate punishment once a conviction has been registered for one offence. I recognize that the prosecution has the right to lay these two charges arising out of the same incident or set of circumstances but as a matter of principle the Court should take into account these matters when imposing sentence. In my opinion the totality of the sentences must be carefully considered by the Court where the prosecution has unreasonably insisted on its right to secure two convictions arising out of the same incident or set of circumstances. In this particular case the facts and circumstances are such that I consider it to be unreasonable for the prosecution to have proceeded to secure convictions on both charges.

In this particular case I allow the appeal as to sentence on Count No. 1 to the extent that the sentence is varied as follows:

1. I sentence the Appellant (accused) to pay a fine of $150.00 and costs of $2.00 and in default of payment I sentence him to serve a period of 14 days imprisonment. If the appellant has already paid the fine of $300.00 and costs I direct the Clerk of the Court to remit the sum of $150.00 to him.

2. Pursuant to sections 53.1 and 53.3 of the *Vehicles Ordinance* I direct that the Appellant forthwith deliver up his Chauffeur's or Operator's Licence and I prohibit the Appellant from driving a motor vehicle for a period of six months. In the oral submissions to this Court counsel for the Appellant indicated that the Appellant required his licence from time to time in connection with his work and pursuant to Section 54 of the *Vehicles Ordinance* I direct the Registrar to issue a restricted licence to the Appellant valid only when used in carrying on the occupation by which he earns his living and when used when going directly to and from his place of employment. In the event that the Appellant has abided by the prohibition imposed in the lower Court for any period of time prior to the launching of this appeal, that period is counted as part of the six months driving prohibition hereinbefore prescribed by me.

For the guidance of the lower Courts in this jurisdiction I would point out that in a case of this kind involving an offence under section 234 of the *Criminal Code* or section 236 I feel that a driving prohibition must be imposed in addition to a fine. This will be a meaningful sentence to those who choose to create hazards on public streets and roads by driving and drinking.

With respect to the appeal from sentence on Count No. 2 I affirm the fine of $150.00 and costs of $2.00 and direct that in default of payment the Appellant shall serve a period of 14 days imprisonment with the same to be concurrent. I delete the provision for a licence suspension under section 53 having regard to the Order that I have made on Count No. 1.

Leave is reserved to counsel to speak to the question of time for payment of either of the fines imposed if such is necessary.

There will be no order as to costs on this appeal.

Dated at Yellowknife, Northwest Territories this 14th day of November, 1977.

C. L. Tallis

C. F. Tallis, J.S.C.