Date: 1999 06 03
Docket: CR 03736

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HARPER BAY SINGH

APPELLANT

-AND-

HER MAJESTY THE QUEEN

RESPONDENT

MEMORANDUM OF JUDGMENT

[1] The Appellant appeals his summary conviction after a trial in the Territorial Court on a charge under s.253 (b) of the Criminal Code, for operating a motor vehicle while having consumed alcohol in such a quantity that the concentration of same in his blood exceeded the legal limit.

[2] The time of driving was tied to an accident. The Appellant had been found injured near the scene of the accident. He admitted to the police that he was driving the vehicle at the time the accident occurred.

[3] At trial, the Crown was not in a position to rely on the statutory presumption contained in s.258 (1)(d.1) of the Criminal Code to prove that at the time of the accident the Appellant's blood alcohol level exceeded the legal limit. Instead, the Crown relied upon the opinion of its expert witness, who extrapolated back from the time blood samples were taken from the Appellant to the time of the accident in order to say what the Appellant's blood alcohol level would have been at the time of the accident.

[4] The expert witness testified that his opinion was based on the assumption that the Appellant had not consumed any alcoholic beverage for a period of half an hour before the accident. For this opinion to have any probative value, the Crown had to adduce evidence to prove that the Appellant had not consumed alcohol in the half hour before the accident: *R. v. English* (1982), 47 Alta. L.R. (2d) 372 (C.A.). In other words, the Crown had to prove the foundation of the opinion evidence it offered.

[5] As that foundation, the Crown tendered in evidence a verbal statement made by the Appellant to a police officer in which the Appellant said that he had not had anything to drink for two hours before the accident. This statement was admitted into evidence after a voir dire and there is no issue as to its admissibility.

[6] The trial judge relied on the Appellant's statement in convicting him, stating that without it he would have had no evidence as to when the Appellant was drinking and would not have been able to rely on the extrapolation opinion evidence given by the expert.

[7] The Appellant argues that the conviction should be quashed because the trial judge erred in giving any weight to the Appellant's statement as the basis for the expert's opinion and therefore erred also in giving the opinion any weight.

[8] Weight is a matter for the trier of fact. As I understand the Appellant's argument, it is that because the statement was the only evidence tendered as proof of a fact which was the basis of the expert opinion, a higher or more strict standard should be applied in assessing the weight it should be given. I have to say that, with respect, and for the reasons that follow, I think the Appellant's argument confuses to some extent the issue of weight with the issue of admissibility of evidence for a certain purpose.

[9] Counsel for the Appellant characterized the Appellant's statement to the police officer as hearsay evidence. While that is true, the statement also falls within a well-recognized exception to the rule against hearsay evidence. This is explained in *R. v. Simpson and Ochs*, [1988], 1 S.C.R. 3, 33 C.C.C. (3d) 481, where MacIntyre J. said on behalf of a unanimous Court:

> As a general rule, the statements of an accused person made outside court - subject to a finding of voluntariness where the statement is made to one in authority - are receivable in evidence against him but not for him. This rule is based on the sound proposition that an accused person should not be free to make an unsworn statement and compel its admission into evidence through other witnesses and thus put his defence before the jury without being put on oath and being subjected , as well, to cross-examination.

[10] The general rule just referred to is important because in my view the Appellant's argument fails to distinguish between statements made by an accused and tendered as part of the Crown's case and such statements tendered as part of the defence case.

[11] The Appellant's argument is based on the ruling in *Lavallee v. The Queen* (1990), 55 C.C.C. (3d) 97 (S.C.C.). In *Lavallee*, the defence expert witness, a psychiatrist, based his opinion on a number of sources including his own interviews with the accused and others and a statement made by the accused to the police and tendered in evidence by the Crown.

[12] In *Lavallee* Wilson J. set forth four propositions based on the earlier case of *R. v. Abbey* (1982), 68 C.C.C. (2d) 394 (S.C.C.):

1. An expert opinion is admissible if relevant, even if it is based on second-hand evidence.

2. This second-hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based.

3. Where the psychiatric evidence is comprised of hearsay evidence, the problem is the weight to be attributed to the opinion.

4. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.

[13] The Appellant relied on the second of the above propositions in arguing that the evidence of his statement was not admissible or could not have any weight as evidence going to the existence of the facts upon which the expert's opinion was based. I disagree and I think this is where the Appellant confuses admissibility and weight. In discussing the second proposition, Wilson J. specifically distinguished between (i) the psychiatrist's interviews with the accused and others and (ii) the accused's statement to the police. The interviews and what was said by the accused in them were admissible to show the information on which the opinion was based, but not admissible to prove the existence of the facts contained in that information.

[14] In *Lavallee*, the accused's statement to the police was admissible to show the information on which the expert opinion was based. It was also admissible evidence about the nature of the accused's relationship with the deceased - a fact taken into account by the psychiatrist in arriving at his opinion.

[15] Similarly, in this case the Appellant's statement was admissible evidence about when the Appellant had last had a drink. This provided a factual basis for the assumption made by the expert witness in coming to his opinion.

[16] The Appellant also relied on the following words of Sopinka J. in *Lavallee:*

> Where, however, the information upon which an expert forms his or her opinion comes from the mouth of a party to the litigation, or from any other source that is inherently suspect, a court ought to require independent proof of that information. The lack of such proof will, consistent with *Abbey*, have a direct effect on the weight to be given to the opinion, perhaps to the vanishing point.

[17] Those remarks must be taken in context. The concern in *Lavallee* was not the evidence of the accused's statement to the police. That evidence was admissible to prove a fact upon which the expert opinion was based. The issue in *Lavallee* was instead the inadmissible evidence - the statements made by the accused and others to the psychiatrist in out-of-court interviews. Inadmissible in this sense means inadmissible to prove the existence of facts as described in proposition no. 2 as set out by Wilson J. in *Lavallee*.

[18] In my view, the concern that Sopinka J. was expressing was that without any proof by admissible evidence of the facts contained in the information relied on by the expert, the expert opinion has no weight. Sopinka J. recognized that this would be rare because only rarely would an expert opinion be based entirely on inadmissible evidence.

[19] In this case, the trial judge had before him admissible evidence in the form of the Appellant's statement. The weight of that evidence was for him to determine, just as it was for him to determine what weight to give to the expert's opinion. Any issues about how the Appellant's statement should be interpreted or what he meant by it or whether it was accurately related could be addressed in at least two ways: by cross-examination of the witness from whom the statement was elicited or by the accused testifying. No such issues were raised at trial.

[20] A case not cited by counsel, but which is relevant to this appeal is *R. v. Grosse* (1996), 107 C.C.C. (3d) 97 (Ont. C.A.). In *Grosse*, the Crown was unable to rely on the statutory presumption as to the accused's blood alcohol level. One of the assumptions upon which the Crown's expert witness based his opinion as to the accused's blood alcohol level was that the accused had not consumed large quantities of alcohol immediately before he was stopped while driving. The accused did not testify and was convicted. The trial judge took into account that only the accused knew

whether he had consumed alcohol within the relevant time frame and that he had chosen not to testify.

[21] The Ontario Court of Appeal held that in view of the circumstantial evidence, albeit not a great deal of it, tending to show that the accused had not consumed large quantities of alcohol before he was stopped and the accused's unique position to offer an explanation, the trial judge was entitled to draw an adverse inference unfavourable to the accused from his failure to testify. The Court also referred to the trial judge's task and the standard of review by a summary conviction appeal court:

> Whether or not the Crown had proved the assumptions upon which [the expert's] opinion was based was an issue of fact for the trier of fact. In *R. v. Dean, supra* [(1992), 37 M.V.R. (2d) 238, 1 Alta. L.R. (3d) 153 (C.A.)] Major J.A. described the task of the trial judge in the following terms, at p. 242:
>
> > In the absence of *any* proof of the facts on which the expert opinion is based no weight will be given to it. Equally, if some proof of the hypothetical facts is offered by admissible evidence, then the question will be whether it is sufficient to meet the requirements for which it was called. Proof beyond reasonable doubt requires more than evidence intended to raise a reasonable doubt. The balance of probabilities in civil litigation has its own requirement. *In each case the trier of fact will consider to what extent the hypothetical question has been proven and whether in the circumstances it is sufficient.*
>
> (Emphasis added.) Under ss. 686(1)(a)(i) and 822(1) of the *Code* the jurisdiction of the summary conviction appeal court judge to review the finding as to sufficiency of the evidence was limited. He was not entitled to retry the case but to determine whether the verdict was unreasonable: see *R. v. Colbeck* (1978), 42 C.C.C. (2d) 117 (Ont.C.A.) at p. 118. This required the appeal court judge to determine whether the trial judge could reasonably have reached the conclusion that the accused was guilty beyond a reasonable doubt: see *R. v. W.* (R.) (1992), 74 C.C.C. (3d) 134 at p.141, [1992] 2 S.C.R. 122, 13 C.R. (4th) 257.

[22] Nothing in the above passage suggests to me that there is a higher or more strict standard for the weight or sufficiency of evidence when that evidence is tendered to prove the assumption on which an expert's opinion is based, than would apply with evidence tendered for other purposes. On this appeal, the only question is whether the verdict was unreasonable.

[23] The trial judge in this case had before him a statement by the Appellant as to when he had last consumed alcohol before the accident. The Appellant was uniquely in a position to have that information. There was no other evidence which cast doubt on that statement. The trial judge was entitled to consider the statement sufficient as proof of the assumption relied upon by the expert witness for his opinion. He was also entitled to rely on that opinion in convicting the Appellant.

[24] That being so, it cannot be said that the decision of the trial judge to convict was unreasonable. The appeal is therefore dismissed.

V.A. Schuler
J.S.C.

Dated at Yellowknife , NT , this
3rd.. day of June, 1999

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