R. v. Parker, 2015 NWTSC 69 S-1-CR-2015-000066

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

COLTON DENNIS PARKER

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Transcript of the Oral Decision delivered by The Honourable

Justice A. M. Mahar, sitting in Yellowknife, in the

Northwest Territories, on the 10th day of December, 2015.

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APPEARANCES:

Mr. M. Lecorre: Counsel for the Crown

Ms. S. Prithipaul: Counsel for the Accused

(Charges under s. 253(1)(a), 253(1)(b) and 249.1(1) of

the Criminal Code of Canada)

1 THE COURT: Good morning, everybody.

2 MR. LECORRE: Good morning. Your Honour.

3 THE COURT: Ms. Prithipaul, you're on the

4 phone?

5 MS. PRITHIPAUL: I am, My Lord.

6 THE COURT: All right. Mr. Lecorre, this

7 is the Colton Dennis Parker matter.

8 BACKGROUND

9 At trial on a charge under Section 253(1)(b)

10 of the Criminal Code of Canada, a voir dire was

11 held under Section 8 and 10 of the Charter to

12 determine the admissibility of the breathalyzer

13 readings. Several issues were raised and dealt

14 with, but the trial judge raised a separate issue

15 under Section 8 of the Charter; that the

16 reasonable and probable grounds on which the

17 police officer based the demand for a breath

18 sample relied on the use of a roadside screening

19 device that was not approved by Parliament.

20 One of the devices listed as approved is the

21 "Alcotest 7410 GLC". At trial, the officer

22 identified the device as a "Drager

23 Alcotest 7410 GLC". The trial judge made the

24 following findings as a result, at page 217:

25 I find it interesting that the case

law, as I understand it, is that the

26 peace officer can say an approved

screening device, and that is the

27 end of it unless there is a

challenge, and then it is proved it

1

1 was an approved screening device.

In this case the peace officer

2 describes the device he used as a

Drager Alcotest GLC and effectively

3 proved that it was not an approved

screening device.

4

5 And, in conclusion at page 236:

6 ... how reliable can the officer's

evidence be if I cannot rely on him

7 to describe and use the regulated

approved screening device. It seems

8 to me and I find that it could bring

the administration of justice into

9 disrepute if Parker in particular

was convicted based on a peace

10 officer running around with an

instrument that the Crown has not

11 proven is an approved screening

device. So it is an issue of

12 reliability, not credibility, and I

am going to exclude the certificate.

13

14 Defence counsel at trial adopted the judge's

15 reasoning for obvious reasons. Crown counsel

16 argued, at page 192 of the transcript, that:

17 ... in describing the device as a

Drager Alcotest 7410 GLC the officer

18 is just providing additional

information. It would be no

19 different than saying the Alcotest

7410 GLC made by Drager. It's a

20 descriptor.

21 ANALYSIS

22 The law dealing with drinking and driving

23 offences has become highly technical and complex.

24 We have not reached the point, however, where the

25 ordinary meaning of words and the commonly

26 understood rules of semantic construction no

27 longer apply. A Drager Alcotest 7410 GLC is an

2

1 Alcotest 7410 GLC. The words used by Parliament

2 in the order - "Alcotest 7410 GLC" - are

3 sufficient and the addition of a modifier before

4 or after the specific required words does not

5 make them any less sufficient. In finding that

6 the addition of the word Drager turned the device

7 described into one that was not approved, the

8 learned trial judge was drawing a legal

9 conclusion and made a clear error of law.

10 I disagree, respectfully, with the position

11 of the respondent that the trial judge's findings

12 are findings of credibility with respect to the

13 police witness. Any such findings flow from the

14 error of law and are not in any true sense

15 findings of credibility.

16 I cannot state the principles in this appeal

17 more clearly than was stated by Justice Durno in

18 R. v. Neziol [2001] O.J. No. 4372, at paragraph

19 27.

20 It is not necessary to resolve the

conflicting decisions in the Supreme

21 Court where something is missing

from the "approved" designation. In

22 this case, there is a word before.

Parliament has approved the Alcotest

23 7410 GLC. It was not unreasonable

for the trial judge to conclude the

24 name, Drager, was a manufacturer,

judicial notice aside. By approving

25 the Alcotest 7410 GLC without a

manufacturer's name, it is an

26 approved instrument regardless of

the manufacturer's name.

27

3

1 DECISION

2 The error in this case was not trivial or

3 insignificant. It formed the basis for the trial

4 judge's decision to exclude the certificate. The

5 appeal is allowed.

6 The appellant asks that I substitute a

7 finding of guilt in this case. While there does

8 not appear to be much dispute about the basic

9 facts and the defence did not call evidence at

10 trial, the parties do not agree about the legal

11 conclusions to be drawn from these facts. I

12 would only move to substitute a verdict in the

13 clearest of cases and this case is not quite at

14 that threshold. A new trial is ordered.

15 Thank you both for your attendance here this

16 morning. We will close court.

17 .................................

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20 Certified Pursuant to Rule 723

of the Rules of Court

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Jane Romanowich, CSR(A)

24 Court Reporter

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