TC CR 87016

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- and -

GORDON ANDREW HUNKE

Transcript of the Oral Reasons for Judgment delivered by His Honour Deputy Judge R. A. Fowler, sitting at Inuvik, in the Northwest Territories, on Monday, March 16, A.D. 1987.

APPEARANCES:

MR. T. HUMPHRIES — On behalf of the Crown

MS. J. LILLEGRAN — On behalf of the Defence

THE COURT: Mr. Hunke was charged under Section 238(5) and 237(a) of the Criminal Code. The facts of the case are not complicated, and the issue is easily focused. Basically, I see the first issue as being whether or not the Defendant had a reasonable excuse for refusing to comply with the demand under Section 238(3) of the Criminal Code of Canada, and the second issue is whether or not the doctrine against multiple convictions applies to the two charges before the Court. The second issue, I suppose, might readily have been framed in whether or not the Crown had proved the essence of the impairment under that section--and I'll make further remarks to that a little later in my decision--but, the main issue is, as I said, whether or not the doctrine against multiple convictions applies.

The Defendant, Mr. Hunke, a resident of Inuvik in the Northwest Territories, in driving his automobile from his residence was involved in a motor vehicle accident. The accident occurred at approximately 11:30 p.m. on November 23, 1986, upon a highway within the Town of Inuvik. A second motorist, Mr. Omilgoitok, having stalled his vehicle on the driving portion of this highway and being successful in getting it re-started, was about to get underway when he was struck from behind by the Defendant's vehicle. While very little damage was done to Mr. Omilgoitok's vehicle, the Defendant's vehicle received considerable damage, rendering it inoperable. At the time of the accident, Mr. Omilgoitok's vehicle had its motor running with its head lights and tail lights operating.

The vehicle, however, was not in motion, the weather at the time was very cold--between minus 40 to minus 50 degrees Celsius--such that exhaust fumes and human breath hung in the air. There was no wind, and there were considerable patches of ice fog along the highway, this roadway, so as to cause a decrease in visibility where the fog lay. The Defendant estimates that he was driving at approximately, as he states, 40 kilometers an hour or 20 miles per hour, in that vicinity.

When Constables Chisholm and Streeter arrived at the scene approximately five minutes after the accident, Constable Chisholm determined the respective operators of the motor vehicles involved in the accident. Constable Chisholm stated that he noticed Mr. Hunke swaying in a circular motion and shifting from one foot to another. You will recall that while demonstrating this motion from the witness box, Constable Chisholm's indication was of a slow but discernable circular motion of his torso. He then stated that the Defendant has slurred speech, as if something was in his mouth. He also noted that the Defendant's eyes were red and that, if he stood very close to him, he could detect an odor of alcohol. Constable Streeter testified as well that he observed a smell of alcohol, slurred speech, bloodshot eyes, glazed eyes, as well as dried saliva on the lips of the Defendant.

Constable Chisholm then asked the Defendant if he had been drinking, to which Mr. Hunke replied, "No." Constable Chisholm then requested the Defendant to get in the

police vehicle. The Defendant complied. Constable Chisholm then testified that once in the warm police vehicle he could then detect a very strong odor of alcohol on the breath of the Defendant, whereupon he informed the Defendant he felt the Defendant to be impaired. At 11:43 p.m. on the same date Constable Chisholm read the breathalyzer demand to the Defendant, along with his rights under the Charter, to which the Defendant acknowledged his understanding. En route to the R.C.M.P. detachment the Defendant asked Constable Streeter about the penalty for not providing a sample. This information was given to the Defendant along with a further indication of his rights to legal counsel. The Defendant attempted but was unable to contact a lawyer at any time during his detention.

At approximately midnight the Defendant was turned over to Constable Streeter, the breathalyzer operator, for testing. Constable Chisholm went to the main office to do some paperwork. When Constable Streeter, however, commenced to prepare to give the tests, he discovered the breathalyzer, Borkenstein Model 900A, instrument was inoperable. He stated, "I checked the connections. The plug was in. I couldn't understand why it was not working." He then commenced, to use his own words, "poking about" to see if he could determine and fix the problem. He stated there was no power to the instrument, none of the operating lights were on, and the instrument is normally always left on. He further stated that "the temperature gauge was well out of its range

increments." Constable Streeter stated in his evidence that he was a qualified operator and was familiar with the breathalyzer instrument. He stated that the instrument must have electricity to operate. The test ampules as well as the cylinder and piston must be at an operating temperature between 47 and 53 degrees Celsius, which is well above room temperature. The breathalyzer, he stated, must be brought to this temperature and, depending on the room temperature, takes from a half to one hour to get there. Constable Streeter further testified that during this time the Defendant was in his presence, three to four feet away, observing him, asking him what was wrong with the breathalyzer, why wasn't it working, and what he--Streeter--was doing. Constable Streeter stated, "He was asking me a barrage of questions." "He may well have asked me about my qualifications. He asked, 'Are you qualified to work on it?'" And Streeter stated, "I told him there was no power, and I'm trying to fix it." Constable Streeter states that "the questions continued, so I ignored him. I wanted to concentrate on the machine." Then he says, "I told him to shut up and sit down and not to bother me." Constable Streeter states, "I was concerned he may approach the breathalyzer."

Constable Streeter then testified that when Constable Chisholm returned some three to four minutes later that he told Constable Chisholm to remove the Defendant from the room. Constable Streeter then continued his search for the problem and was joined by Constable McDonald who, according

to the evidence of Constable Streeter, went to the fuse box and fiddled around with the breakers. Apparently there had been a power outage at around 6:00 p.m. the same day, and there was some indication that this may have been the cause of the malfunction of the breathalyzer. In any event, the breathalyzer began to work again. The lights came on, and according to Constable Streeter he was satisfied the problem was solved. He states that he observed the temperature increasing and waited for it to warm to the standard operating temperature. He states that this took from 12:05 a.m. to 12:45 a.m. He further stated that in between times he went to where Constable Chisholm and the Defendant were and said that the problem was solved and that at 12:45 he told Constable Chisholm the breathalyzer was ready and to bring the Defendant in.

Constable Streeter testified that he had asked the Defendant for a breath sample, and he said that the Defendant said that "he wouldn't blow unless he saw my papers allowing me to fix the breathalyzer"--this is Constable Streeter speaking. Constable Streeter said that he had told the Defendant that he was required to provide breath samples or it would be a criminal offence and that the Defendant replied, "No," he was not going to blow. Constable Streeter further testified that after the Defendant left the breathalyzer, he--Streeter--ran an S.A.S. test, a standard alcohol solution test, on the breathalyzer and found the instrument to be working properly. This was not done in the presence of the

Defendant, nor was the Defendant present when Constable McDonald was fiddling with the fuses.

The evidence of the Defendant is consistent with that of the Crown's case as it relates to the happenings in the breathalyzer room. The Defendant says Constable Streeter noticed something wrong with the machine and he began looking inside of it. The Defendant testified that the police officer officer has his hands inside a little door on the machine, and he could see wires there. When the Defendant began asking questions, according to Mr. Hunke, the police officer had another police officer take him out of the room. He was told a short time after that the problem was found, and the instrument would be ready in five to ten minutes. However, it was another 45 minutes to an hour, according to the Defendant, before he was presented to the breathalyzer machine again. The Defendant once again asked the police officer if he was qualified to repair the breathalyzer and testified that in response the police officer stated that he was trained to give the breathalyzer tests. The Defendant then testified that, "I said I refuse to blow in that machine because I felt they were tampering with it." There was only one machine.

On cross-examination, the Defendant again stated, "I refused to blow because it was not working correctly. I said I refused to blow in that particular machine due to the fact he was fooling around with it."

The question then to be decided at this point is

whether or not the Defendant has a reasonable excuse to refuse to give such breath samples as per Section 238(5) of the Criminal Code, which states:

> 238(5) Everyone commits an offence who without reasonable excuse fails or refuses to comply with a demand made to him by a peace officer under this section.

In determinine what is a reasonable excuse, the case law is clear that the test to be applied is an objective test, not a subjective one. In R. v. Skwark, 1983, 3 W.W.R., p91 at p93, Mr. Justice MacDonald of the Saskatchewan Court of Appeal quoting from the trial judge's reference to R. v. Hill, May 9, 1974, Saskatchewan Court of Appeal, unreported case, states:

> The Court held that what amounts to a reasonable excuse is an objective test and that the onus is on the accused to prove by a preponderance of probabilities that he had a reasonable excuse.

In R. v. Crosthwaite, 1980, 52 C.C.C. 2d, p129 at p139, Mr. Justice Pigeon also used the objective test analysis in determining what might be considered evidence to the contrary to assist an accused in negating the breathalyzer readings once taken. He states:

> Mere possibility of some inaccuracy will not assist the accused. What is necessary to furnish evidence to the contrary is some evidence which would tend to show an inaccuracy in the breathalyzer or in the manner of its operation on the occasion in question of such a degree and nature that it could effect the result of the analysis to the extent that it would leave a doubt as to the blood-alcohol content of the accused person being over the allowable maximum. (The emphasis is mine.)

In R. v. Phinney, 1980, 49 C.C.C. 2d, p81 at p102, Mr. Justice MacDonald of the Nova Scotia Court of Appeal stated:

> In my view, an excuse is not reasonable that based on subjective evidence, delusion, unreason, self-deception, deceit or some act done by the accused between the time of his detention and when the technician is ready to perform the test, i.e., consuming alcohol."

In the Phinney case, Mr. Justice Hart lists a number of instances which would support a reasonable excuse defence, such as medical grounds, mental grounds, denial of right to counsel in private, unreasonable inconvenience, no reasonable probable grounds, breathalyzer machine not working. On this final condition, he states:

> If the suspected person is taken to a machine for a test and that machine is not able to give an accurate reading of the amount of alcohol in the blood of the accused, I can see no purpose in administering the test, and if the police officer should insist the suspected person would have a "reasonable excuse" for refusing. I do not accept the argument that the accused should take the test and then establish later before the Court that the machine was not accurate, but prefer the reasoning of Cavanagh, J.A., in the Campbell case, supra. The taking of such a test not only puts the accused in jeopardy in connection with any subsequent criminal trial, but also may be used in civil proceedings claiming damages as a result of accidents. It may be very difficult a year or so after the event to establish that the machine was not functioning properly and that the reading did not properly show the alcoholic content of the suspects blood. Before such an excuse is accepted, however, it must refer to a particular machine and not to a breathalyzer generally, since it is an approved instrument acceptable to Parliament. Furthermore, the knowledge that the instrument was not working properly would have to be based upon a firm foundation sufficient to raise in the mind of an ordinary, reasonable layman a

> fear that the performance of the test would be of little or no use to the prosecution and might cause unnecessary inconvenience or harm to him in the future.

Mr. Justice MacDonald, at page 103, of the same case states:

> It is my opinion that if the objective evidence makes it clear to the recipient of a breath-alyzer demand that the machine is not functioning properly then he has a reasonable excuse to refuse to provide a sample of his breath that might not be properly analyzed.

It is clear from the evidence in the instant case that the breathalyzer instrument was not working properly when it was presented to the accused in the first instance. It is also abundantly clear that the operator, Constable Streeter, nor any other person present had any idea as to what caused the malfunction. The accused was quite rightly concerned that he was required to provide samples of his breath on a machine which was not working. He was the one in jeopardy, facing criminal proceedings, and was well within his rights to question and inquire as to what was wrong and who was going to fix it. He was entitled to have his questions answered and to be reassured that the procedure was a proper one under the circumstances. However bothersome it may have been to Constable Streeter to have these questions put to him, he ought not to have dismissed the accused with his "shut up and sit down" reply. This would naturally confirm in the mind of the accused that the person didn't know what he was doing and that he wasn't qualified to effect a repair on the breathalyzer instrument. This could only be further entrenched in the mind of the accused when he was

ordered to be removed from the room. From a purely objective basis it is clear that the breathalyser instrument was not functioning at all and that the operator had no idea as to the source of the problem. His poking, fiddling or fooling around was of a blind, explorative nature. There was no indication whatsoever of any logical, troubleshooting procedure which could establish the fault. It was clear that Constable Streeter was annoyed and bothered by the questions of the accused; however, the accused had a right to reasonable answers.

In the Crosthwaite case, supra, the Supreme Court of Canada refers to the manner of its operation on the occasion in question when referring to the breathalyzer instrument, which would constitute evidence to the contrary. There can be no doubt that the manner of its operation in the instant case would cause an accused to be reasonably concerned as to the outcome of his proceeding with the tests and would afford a reasonable excuse to refuse to comply with the demand. Even if the problem were found to be a simple malfunction, such as a fuse, the total confusion and uncertainty surrounding the determination and the steps taken to rectify this, such as poking and fiddling around, would cause any reasonable person to question the reliability of any subsequent test. It should also be noted that once the instrument had been readied, no trouble check was then made to see if indeed it was now operating properly. It was only after the accused had refused and had been taken from the room for the final

time the operator applied the S.A.S. test to determine whether whether or not the machine was working. Surely, under the circumstances, it would have been prudent to perform such a test and to inform the accused that this had been done.

The Phinney case, supra, is similar in many respects to the instant case, and I agree with the reasoning of the Nova Scotia Court of Appeal in that case. For the reasons I have stated, I am dismissing the charge of refusing to comply with the demand under Section 238(3), punishable under 238(5) of the Criminal Code against the accused, Mr. Hunke.

This brings us now to the second count in the Information; that is, the impaired driving charge under Section 237(a) of the Criminal Code. Now, let me first say that as far as establishing the degree of impairment, it would be very dangerous to convict on that evidence alone. The fact of the accident, as agreed by the Crown, is not proof of impairment in itself. In fact, the fact that the accident occurred on the driving portion of the road under the circumstances that it did I would think is more of a mitigating factor than an compounding factor. A normal driver would not expect in any event to encounter a vehicle in the middle of the road or on the driving portion of the road with his lights on, stopped dead.

Also, the handwriting evidence has very, very little weight to it when it is not compared with any other sample of the Defendant's handwriting, and it's not relevant in that instance. Every person has a different style and

different manner of writing, and unless one compares the writing under the influence of alcohol, or allegedly the influence of alcohol, with handwriting on another occasion, then to submit one or the other by itself is meaningless.

The questions and the types of questions and the concerns shown by the Defendant at the time of the breathalyzer testing rather than going to a confused and impaired type of thing, rather reflect ordinary and logical type of questioning, notwithstanding that the police officer indicated that the questions were a "barrage" of questions. It is clear that had the accused complied with the demand under Section 238(3) of the Criminal Code of Canada and provided such samples as requested, he would then have open to him the defence of res judicata as defined in Kienapple v. The Queen, 1974, 15 C.C.C. 2d, p524, Supreme Court of Canada decision. Such reasoning was applied and followed in R. v. Houchen, 1977, 31 C.C.C. 2d, p274, a decision of the British Columbia Court of Appeal and R. v. Boivin, 1977, 34 C.C.C. 2d, p203, a decision of the Quebec Court of Appeal.

Following such reasoning, I conclude that the accused would have been entitled to have the impaired driving charge dismissed since it obviously arose out of the same cause or matter notwithstanding the results of the breathalyzer test; that is assuming, of course, that he had taken the test and that some samples had been received, whether they were in his favour or otherwise. In the instant case, the accused had a ligitimate and reasonable excuse for

refusing to comply with the demand under Section 238(3) of the Criminal Code. Had the accused not exercised his right to refuse under the circumstances he would be placing himself in jeopardy. (Reference J. v. Phinney, supra.) It would constitute an absurdity in the extreme to conclude that in order for the res judicata or Kienapple principle to apply that an accused must first put himself in criminal jeopardy to trigger it. Once it had been determined that an accused had a ligitmate and reasonable excuse for refusing to comply with the demand for samples of his breath arising out of a specific cause or matter affording him a defence under the Kienapple principle, then the Crown is barred from proceeding on the impaired driving charge in the same way as if the accused had taken the breathalyzer test. Had the accused, for example, in the instant case provided samples of his breath resulting in his blowing over 80, he would have found it extremely difficult to adduce evidence to the contrary when he was not permitted to observe the repair or testing of the instrument nor have his questions reasonably answered. Where a person is found to have a reasonable excuse for refusing to comply with the demand as in the instant case, to bring the results of such testing into doubt, and all facts relate to the same cause or matter, then the matter has in fact been decided and the accused is entitled to a dismissal.

In the instant case, it was the informant who would decide whether to go with one charge or two. Where it was obvious that the breathalyzer instrument was inoperable and

if the police officer had reasonable and probable grounds for believing that an offence could be maintained under Section 237(a), the impaired section, then that is the only offence which ought to have been laid. To do otherwise is to risk multiple convictions for the one set of circumstances. And this charge as well against the accused is dismissed.

(AT WHICH TIME THIS MATTER WAS CONCLUDED.)

Certified a correct transcript

Edna Thiessen

Edna Thiessen, Court Reporter