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IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

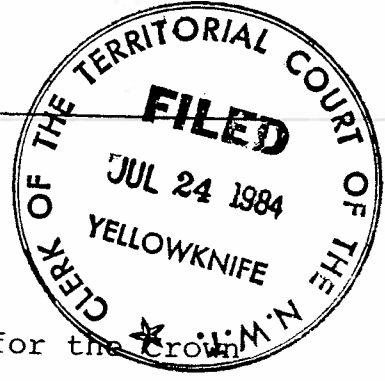
VS

KAJ KNUDSEN

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Transcript of the Oral Judgment Delivered by His Honour Judge T. B. Davis, sitting at Yellowknife in the Northwest Territories, on Monday, July 23rd, A.D. 1984.

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APPEARANCES:

MS. N. BOILLAT: Counsel for the Crown  
MR. D. COOPER: Counsel for the Defence

1 THE COURT: We had had a trial on this charge involving  
2 Mr. Knudsen, the charge being that on or about the 11th of  
3 December, 1983, at Yellowknife in the Northwest Territories,  
4 had consumed a quantity of alcohol so that the proportion  
5 in his blood exceeded 80 milligrams of alcohol in 100  
6 millilitres of blood, and had the care and control of a  
7 motor vehicle on that occasion contrary to Section 236 of  
8 the Code.

9 Filed in this court were a certificate of analysis  
10 indicating that at 4:01 p.m. on the 11th day of December,  
11 1983, a breathalyzer reading of 320 milligrams of alcohol  
12 in 100 millilitres of blood was produced and that at 4:18  
13 p.m. on the same day the reading had dropped to 300  
14 milligrams of alcohol in 100 millilitres of blood.

15 It had been acknowledged by the accused that there  
16 was a notice of intention to produce the certificate,  
17 that the certificate had been served, and therefore, the  
18 case was able to proceed to hear evidence.

19 The general facts in a very abbreviated form are  
20 such that the accused was operating a motor vehicle.  
21 He was observed by Mr. James Halpenny who thought the  
22 accused was slumped over the wheel of his vehicle and  
23 presumed that the accused was an impaired driver who  
24 had almost had an accident at an intersection near the home  
25 of this witness. The witness, although he did not observe  
26 specifically that the accused was operating the motor  
27 vehicle, did identify enough of the circumstances surrounding

1 the involvement of the accused near his home so that I  
2 have no doubt that the accused was the operator of the  
3 vehicle observed by the witness, because he was the  
4 driver of the vehicle that subsequently had been observed  
5 by the witness as the one approached by the police officer  
6 when the accused was arrested. He also had seen another  
7 person get into the accused's vehicle before the police  
8 arrived and observed that the accused had problems with  
9 walking and used the vehicle for support when he was  
10 exiting from it.

11 Constable Harding observed the usual signs about 3:30  
12 p.m. on that day and observed vehicle tracks where the  
13 car had been observed by the first witness going off the  
14 main driving portion of the road. The police officer  
15 acknowledged that the accused was polite and talkative  
16 and somewhat slow in his speech, but able to converse both  
17 somewhat logically and somewhat rationally.

18 He also observed that the accused required some  
19 support when moving from one vehicle to another. The  
20 accused himself took the stand and indicated that he had  
21 been ill for some number of weeks and had admitted that  
22 he was driving the motor vehicle after having some three  
23 drinks with orange juice in the presence of a friend.  
24 He also acknowledged that when he was stopped his employer  
25 did enter his vehicle, his employer being a subsequent  
26 witness at the trial.

27 The accused himself did not remember slumping over the

1 wheel and did not have complete memory of the circumstances  
2 and the affairs that took place at the police station  
3 when the accused subsequently did attend for a breath-  
4 alyzer test.

5 Submissions on behalf of the accused indicated to the  
6 court that the court could consider his evidence of  
7 having three drinks between 1 p.m. and the time of the  
8 test, evidence that the court could consider to the  
9 contrary for a high breathalyzer reading.

10 The employer of the accused, Mr. Rasmussen, was  
11 somewhat in favour, I would presume, of the accused in the  
12 form of evidence that he had given because he observed  
13 that the accused did make the U-turn that other persons  
14 observed and that he did back up before coming to a  
15 stop, but he also observed that although the accused  
16 looked weak and had been sick he did not appear impaired  
17 to Mr. Rasmussen, and Rasmussen was almost in doubt as  
18 to whether or not the accused had been impaired at all  
19 because he was able to carry on a normal conversation.

20 Another witness, Frank Welna, acknowledged that he  
21 had had a few drinks with the accused in Welna's residence  
22 and that when the accused had left the residence somewhat  
23 after 2 p.m. he was not in too bad condition at that time.

24 The expert witness that was called on behalf of the  
25 Defence was an R.C.M.P. lab forensic toxicologist in the  
26 past and is now on his own, by the name of Bruce D. Miller  
27 who is a science graduate and who has done analysis of

1 body fluids for toxic volatiles. He used to train  
2 breathalyzer technicians and has monitored large numbers  
3 of subjects with alcohol consumption, and their elimination  
4 or alcohol release from the bodies.

5 On review of the certificate filed, it was the  
6 opinion of this expert that the breathalyzer itself  
7 was not accurate or that the accused himself was not  
8 correct about the quantity of alcohol that he would have  
9 consumed between 1:30 and 3:30 that afternoon.

10 He had actually performed some tests on the accused  
11 as to his consumption and retention and the effect of  
12 alcohol on the accused, and it was his opinion that the  
13 accused would have been required to have consumed  
14 approximately seventeen and three-quarters ounces of  
15 alcohol between the hours of 11 o'clock in the morning  
16 and 3 o'clock in the afternoon to produce a reading of  
17 over 300 on the breathalyzer by 4 or 4:40 in the afternoon.

18 Mr. Miller also outlined the normal or usual states  
19 of impairment or drunkenness that are observed from people  
20 at various readings in excess of 270 on the breathalyzer,  
21 and he indicated that above that reading there is a strong  
22 approach to paralysis and there is usually problems with  
23 the bladder. The subject is sometimes in an in and out of a  
24 sleep condition. The subject usually would be staggering  
25 to the point of inability to stand and probably knocking  
26 things over.

27 In the case before the court I feel that I must look

1 at the general evidence of the expert on the breathalyzer  
2 and the alcohol consumption and elimination because the  
3 case of Regina vs. Madden, Manitoba County Court, seems to  
4 outline and is supported by cases of Alberta which outline  
5 that evidence to the contrary may be not only evidence that  
6 would show that the blood level was below the legal limit,  
7 that is, below .08, but it also can be merely evidence that  
8 there is some deficiency in the tests either human or  
9 functional of such a nature as to lead a reasonable doubt  
10 that the blood alcohol content of the accused at the time  
11 of the alleged offence was above the limit.

12 In this instance the charge is not a charge of impairment  
13 but a charge that is based on the breathalyzer reading  
14 because it is a charge that the accused exceeded the  
15 allowable limit. The breathalyzer charges must be  
16 based on proof of the accuracy of the machine and of the  
17 readings produced. If there is presented to the court  
18 some evidence to the contrary which can show or would  
19 show that the results were not correct under the  
20 circumstances presented.

21 I recognize and believe the accused to have been  
22 impaired when driving, but this is not the charge before  
23 the court, and there is some doubt that the readings  
24 could have been accurate since there was no dispute that  
25 the accused was not at the state where an expert would  
26 have expected him to have been if the readings were accurate.  
27 In other words, if the readings involving the accused at

1 300 and 320 were accurate, then the observations by the  
2 witnesses as such should have been such that the accused  
3 was in a far, far more excessive state of intoxication  
4 than any of them had observed.

5 I did not find that there was any proof of loss of  
6 all his mechanical abilities, and that he did retain the  
7 ability to be rational as indicated by the witnesses.

8 Therefore, I feel that there may be some possibility  
9 of error in the readings that have been produced by the  
10 breathalyzer machine on this occasion. I am satisfied  
11 that his condition was not consistent with the person  
12 with such a high reading.

13 Since the criminal law is technical to the extent that  
14 charges have to be proven as they are presented, and then  
15 proven beyond a reasonable doubt, I am accepting that we  
16 have today had evidence to the contrary which puts the  
17 burden fully on the Crown to prove beyond a reasonable  
18 doubt that the accused did have a reading as presented, and  
19 on that basis, I am satisfied that the Defence has  
20 produced some reasonable doubt, and therefore, the benefit  
21 of that doubt will go to the accused.

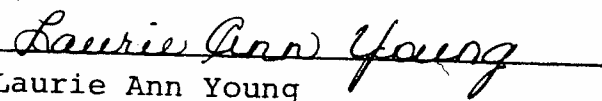
22 In closing, I would like to indicate that I would have  
23 been quicker to accept the evidence of the expert  
24 witness if instead of merely testing the rate of consumption  
25 and elimination of alcohol by the accused on a date  
26 subsequent to the date charged, he had actually allowed  
27 the accused to consume alcohol under controlled conditions

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until such time as he arrived at the readings presented. I feel that that would have been a more likely and more accurate determination rather than just using an extension of scientific inquiry and having a few drinks and determining the absorption and the elimination, but even on the basis of what has been produced, I am satisfied that I still at this time must dismiss the charge against the accused.

(AT WHICH TIME THESE PROCEEDINGS WERE CONCLUDED.)

Certified a correct transcript,

  
Laurie Ann Young  
Court Reporter