R. v. Singh, 1998 ABPC 44

Date: 19980608
Docket: 71218622P10101 and 712185220P10102

IN THE CRIMINAL DIVISION OF
THE PROVINCIAL COURT OF ALBERTA

BETWEEN:

HER MAJESTY THE QUEEN

- and -

DILBAGH SINGH

DECISION OF THE HONOURABLE JUDGE W.M. MUSTARD

[1] The evidence before the Court is that MacIvor and Locke, two Edmonton Transit System bus drivers, were talking outside their buses at the University of Alberta Terminal. A third driver, the accused, is seen to pull his bus into an adjoining lane and exit his bus joining the other two. MacIvor initially noted the accused as having a faint smell of alcohol. Because of the arrival of more buses, all three drivers had to move their respective buses ahead. Locke too, noted a strong smell of alcohol emanating from the accused and both Locke and MacIvor discussed this and wondered what they should do.

[2] There was no evidence from either Locke or MacIvor of any unusual driving pattern by the accused, either when he initially pulled into the terminal, or in respect of his operation of pulling his bus ahead to make room for new arrivals.

[3] MacIvor noted that the accused was talking quickly and made some strange comments about beating up a neighbour. All this takes place over about six to eight minutes, ending about 17:51 hours on August 17, 1997.

[4] E.T.S. Inspector Podmoroff testified that at 17:58 hours he received a radio report from Transit Control that some bus driver had called Control to report that a fellow bus operator was driving his bus under the influence of alcohol. Podmoroff drove directly to the U of A. Terminal and arrived at 18:10 hours where he found the accused seated behind the wheel of his bus with the engine running and the bus in service. He noted slurring of speech of the accused , and a strong smell of alcohol. The accused then got up and swayed or staggered towards the rear of the bus..

[5] The accused admitted drinking heavily the night before and consuming two drinks of Ouzo some time between 11:55 a.m. and 3:40 p.m. between his split shifts that same day, August

17, 1997. After discussions with a second inspector, the police were called at 18:33 hours.

[6] Not long after the Inspector arrived, T.V. and press media arrived and began poking T.V. cameras into the bus. The accused became quite agitated, exited the bus and talked to persons nearby and the media.

[7] The Inspector had some difficulty getting the accused to return to the bus and await the police who did not arrive until 19:24 hours because of a substantial back-up of calls and other duties.

[8] While on the bus the accused was drinking from a pop bottle which the accused said was only water. Later the bottle was seized because both the police officer and the inspector thought it smelled of alcohol.

[9] Expert evidence disclosed no alcohol present in the bottle.

[10] On arrival at the bus, Constable Camp was advised by the Inspector that he had received a report from Transit Control that another driver had reported the accused operating his bus and that he was possibly impaired. The impression left with the police officer was that the driving was about 1 hour or so earlier. He was never told by the Inspector any details of who had seen the accused driving or that he, the Inspector, had found the accused in care and control at about 18:10 hours. Constable Camp noted that the accused had a strong smell of alcohol, red eyes, seemed tired and extremely nervous. According to his notes, the accused's speech was okay and no trouble understanding the police officer. Constable Camp was satisfied the accused had alcohol in his body and he had the information about the previous night's drinking as well as that day between shifts. Constable Camp realized that an Alco-Sur was required, but because of the press and media, it was decided to remove the accused from the scene. He was escorted to the police vehicle, avoiding the media, and taken to the U.of A. Security Office, less than a minute away.

[11] There the Alco-Sur demand was made, explained, a sample provided and a fail registered. He was then arrested for impaired driving and *Chartered*. He was questioned whether or not he wanted a lawyer but the response was that he was not sure.

[12] Next came the formal breathalyzer demand and the waiver at which point the accused did indicate the wish to call a lawyer, now about 19:43 hours. A cursory search disclosed a pill the accused said was a prescription he was using and that he had taken one pill earlier that day.

[13] Later expert evidence disclosed that the pill was Librium, a central nervous system depressant like alcohol, which when used in combination with alcohol exacerbates the effect of the alcohol and delays the metabolization of the alcohol by the body, such that the two together

have an effect greater than the sum of the two separately. Based on the recommended dosage range, the single pill was at the bottom end of the range and there was no evidence of when it was taken in relation to the alcohol.

[14] Because of the arrival of the media at the University Security office the police quickly moved the accused to the Old Scona Station and arrived there at 19:51 hours. There he was given access to a telephone and books and did speak to a lawyer. He was also given the chance to call a second lawyer before the second breathalyzer demand at 20:29 hours. He then provided two samples, the lower reading of which was 170 milligrams percent. Since the first of the readings was taken more than 2 hours after the operation or care and control the presumption contained in s. 258(1)(c) does not apply.

[15] Sergeant Bowthorpe provided extrapolation evidence based on the Intoxilyzer readings and testified that at the time of driving, which was pegged at 17:43 hours, the accused's blood alcohol reading would have been between 200 and 230 milligrams percent based on an elimination rate of between 10 and 20 milligrams percent per hour, the average elimination rate in the general population. He also testified that at 100 milligrams percent, everyone's ability to operate a motor vehicle, is impaired and described in detail the many aspects and indicia of impairment at the 200 plus blood alcohol levels.

[16] The accused was charged both with impaired operation and with operation over .08.

[17] According to the evidence the accused last operated the bus at about 17:51 hours and he ceased to be in care and control, according to the Inspector, shortly after 18:10 hours, although this information was not known to Constable Camp at the time the accused was arrested and maybe not until after the accused was released.

[18] A number of the cases cited acknowledged that a strict present tense interpretation of the words in s. 254(2) "is operating....." or "who has care and control..." would lead to absurd results and it is generally accepted that:

> "The time lapse after operation or care and control has ended should be no more than is reasonably necessary to enable the police officer to carry out his/her duties under the provisions. This can include the police officer's pre-eminent obligation to care for the injured and preserve vulnerable evidence"

(See Bart Rosborough "Approved Screening Device - the Forthwith Requirement" (1996) J.M.V.L. 113 at p. 116)

[19] In the present case there was a lengthy interval between the end of operating or care and control although there was less than 10 minutes between the arrival of the police on the scene,

the raising of the police officer's suspicion that there was alcohol in the accused's body and the Alco-Sur demand at the University Security Office. What delay there was was due to the pressure of the media and the obvious need to remove the accused from that situation before the Alco-Sur demand under s. 254(2) could properly and fairly be made and complied with.

[20] In my opinion if the defence succeeds in its principle argument, the determination of whether that demand was made within a reasonable time after operation or care and control, is unnecessary.

[21] Shortly put, their argument is that while the belief of the police officer as to the presence of alcohol in the body of the accused need only be one of reasonable suspicion (which is fully satisfied in this case) the second element, namely the fact of operation or care and control, requires actual knowledge on the part of the police officer established beyond a reasonable doubt. A mere suspicion or belief on the part of the police officer of one or both of those latter activities by the accused is not enough.

[22] The defence here says that Constable Camp had at best a bare suspicion of the operation and even that was based on third hand inadmissible hearsay. Constable Camp was told by Inspector Podmoroff, who had heard from the E.T.S. Central Control Operator who in turn had heard from an unnamed E.T.S. bus driver that the accused was seen operating his bus under the influence of alcohol. Absent evidence of actual knowledge by the police of operation by the accused, proved beyond a reasonable doubt, the defence argues that the Alco-Sur demand was not lawful within the meaning of s. 254(2) and therefore failure by the accused on that instrument could not provide the reasonable and probable grounds to support the Intoxilyzer demand under s. 254(3). Constable Camp admitted that without the Alco-Sur failure he had no reasonable and probable grounds to make the Intoxilyzer demand.

[23] The argument continues that the Alco-Sur demand is therefor unlawful and hence so is the Intoxilyzer demand. Thus it is alleged that the results of both machines are conscripted evidence of bodily products or samples that would not otherwise have been available to the police and the accused thereby incriminated himself. The defence then submits that if such results are admissible, that would fundamentally affect the fairness of the trial. Once the Intoxilyzer results are excluded, the defence claims that both charges fail because those results are the foundation from which the expert's extrapolation evidence of over .08 and impaired operation by the accused begins.

[24] I propose to deal first with whether the Intoxilyzer results are admissible and on that hinges whether the failure on the Alco-Sur provided the reasonable and probable grounds for the Intoxilyzer demand. Whether the Alco-Sur demand under s. 254(2) is valid depends on the interpretation of that section by the cases that have been cited.

[25] In *R. v. Campbell* (1998) 44 C.C.C. (3d) 502 (Ontario Court of Appeal) the police officer had actual knowledge of the care and control, made a breathalyzer demand, took the accused to the station, found there was a long delay there for access to the breathalyzer and therefore decided to make a demand for a roadside sample which was then refused. Even though only 9 minutes elapsed between the care and control and the Alco-Sur demand, the Court held that while the police officer had the grounds for that demand at the roadside, and had an Alco-Sur with him, he did not make it. Instead he made the breathalyzer demand and 10 minutes later, at the police station, changed his mind. At that point the Court held it could not reasonably be said that the accused was in care and control.

[26] In case of *R. v. Phillip* (1992) 120 A.R. 146 (Alberta Court of Appeal) there was no question of actual knowledge by the police of the operation. At the roadside that accused had admitted he was the driver of one of the vehicles and the only issue there was whether the present tense wording of s. 254(2) permitted some reasonable interval to allow police to attend first to the accident and injured persons.

[27] In *R. v. Tracy Burns* (1991) 32 M.V.R. (2d) 173 (Ontario Court of Justice - General Division) the police had actual knowledge of the driving before any suggestion of any impaired operation investigation. The accused there was stopped for an unrelated civil matter and only in his apartment, some 6 minutes later, did the police officer smell alcohol, and ask the the accused to return to his vehicle and there there made Alco-Sur demand. The Court in that case held that those facts supported a break in the care and control and the accused was acquitted.

[28] In the case of *The Queen v. Cadieux* [1997] O.J. 1884 (Ontario Court of Justice - Provincial Division) the police officer arrived a few minutes after the accident. There was conflicting evidence as to the care and control. The accused was outside the vehicle when the police arrived, he didn't have the keys and did not sit in the vehicle. Although there was some evidence of care and control before the Court, even the police officer was not of the view that the accused was in the care and control. The court found as a fact that the accused was not in care and control when the police arrived and was acquitted.

[29] The case of *R. v. Johnson* (1987) 46 M.V.R. 226 (Manitoba Court of Appeal) is not very helpful. The accused there was seen to drive off the road into a ditch. The witness got the police, who arrived somewhere between 12 and 30 minutes after the driving. When police arrived the accused was outside his vehicle with the witness. Remarks by the witness led the police officer to believe that the accused had been driving. The Court held that the lower Court was right in deciding the accused had recently been driving the motor vehicle and as such should have been convicted for the Alco-Sur refusal.

[30] In the case of *R. v. Swietorzecki* (1995) 97 C.C.C. (3d) 285 (Ontario Court of Appeal) the facts are sparse. On advice of counsel the accused pled guilty to refusal to provide a sample into

the roadside screening device. Originally the accused had not wished to plead guilty on the basis that he was neither operating nor in care and control of the motor vehicle. Apparently the police had a suspicion that the accused had been operating a motor vehicle or was in care and control. It is not clear from the case on what, if anything, that suspicion was based. The demand was made at the police station but it was the accused's contention that he had not driven to the police station. It was on that basis that he refused to provide a sample in response to the Alco-Sur demand. At trial, relying on the case of *Taraschuk v. The Queen* (1975) 25 C.C.C. (2d) 108, the accused was convicted. Counsel for the accused acknowledged the refusal and incorrectly advised his client that if the police believed that he was the driver, even if he was not, the person must still provide a sample as requested. *Taraschuk* however was a refusal under s. 254(3) of failing to provide a breathalyzer sample. On appeal, initially the Crown took the position that *Taraschuk* was good law. Subsequently, the Crown acknowledged that *Taraschuk* was a s.254(3) breathalyzer refusal case and did not apply. Accordingly the accused's appeal was allowed. This case clearly points out the difference between the wordings of ss. 254(2) and 254(3). Under the latter, the breathalyzer section, police need only have reasonable and probable grounds to believe that the accused is committing or within the proceeding two hours has committed an offence under s. 254(3). The Court of Appeal in the *Swietorzecki* case said at p. 287:

> "I agree that the Appellant's basic contention is correct. Section 254(2) makes the reasonable suspicion of the peace officer applicable only to whether the person in question 'has alcohol in that person's body'. This is one element of the offence. It is a separate element of the offence that the person be operating a motor vehicle or have care and control of a motor vehicle. This is an element which must exist in fact - and not as a matter of reasonable suspicion on the part of the police officer."

[31] Further at p. 288 when after comparing the wording of s. 254(3), respecting the breathalyzer demand, and s. 254(2), dealing with the roadside screening device demand, the Court, said:

> "The difference between s. 235(1) (which is now, in substantially the same form as s. 254(3) of the present *Criminal Code*) and the present s. 254(2) which is applicable to the case before us, is readily apparent. Section 235(1) (now s. 254(3)) makes the belief of the police officer cover not only the existence of impairement but, also, that the person is driving or has care and control of the motor vehicle. Section 254(2), as I have said, does not extend this scope of reasonable suspicion of a police officer this far.

[32] Finally at the bottom of p. 288, the Court quoted from McLeod, Takach and Segal's Breathalyzer Law of Canada, Third Edition, pps. 4-3 as follows:

> "What is the effect of a finding that the person to whom the screening demand was made

> was not a person who "is operating a motor vehicle" within the meaning of s. 254(2)? Under s. 254(3)(a) finding that the accused was not operating or in care and control does not provide a reasonable excuse for failing or refusing to comply with a breathalyzer demand...."
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> "It appears that in s. 254(2) the reasonable suspicion is in relation to alcohol in the body, but the Crown must prove operating or care and control beyond a reasonable doubt. In s. 254(3)(a) the language has been held to mean that the reasonable and probable grounds apply to the issue of driving (now operating) and care and control."

[33] I take it from that decision that while the police officer may have suspected the accused had been driving, but in the light of the accused's denial of driving, the Crown had no proof of "operation", much less proof beyond a reasonable doubt.

[34] The only case cited, that on the facts is close to the present case is *R. v. Blackwood* [1997] B.C.J. 3066 (British Columbia Provincial Court). In that case the police officer arrived at an accident scene, found a wrecked vehicle, the accused's physically separated from the vehicle and not in a position to set it in motion, nor was the accused the vehicle's owner. Although the evidence supported the fact that the accused had been in care and control of the vehicle earlier in the evening, the Court found the accused was not in care and control of the vehicle when the police arrived. The police made a demand for a sample into the roadside screening device, it was provided and the accused failed. The accused subsequently provided samples into the breathalyzer which were over the legal limit. At the trial there was a *voir dire* to determine the admissibility of the technician's certificate of the results of the breathalyzer, just as was the case here. The police officer in *Blackwood* also acknowledged that absent a fail on the roadside screening device he lacked the reasonable and probably grounds for the second 254(3) breathalyzer demand. In pps. 10-16 inclusive, after quoting ss. 254(2) and 254(3), the Learned Judge said:

> "(10) The juxtaposition of the phrase 'is operating or has the care and control of' in s. 254(2) and the phrase 'is committing, or at any time within the preceding two hours has committed' in s. 254(3) is striking.
>
> (11) In the first instance the officer may act on reasonable suspicion while in the second the officer may only act if he believes on reasonable and probably grounds. The Ontario Court of Appeal made it clear that 'reasonable suspicion' applies only to whether or not there is alcohol in the accused's body. Operation or control must be proved to exist in fact (*R. v. Swietorzecki* (1995) 97 C.C.C. (3d) p. 285).
>
> (12) Under s. 254(2) a peace officer can detain a citizen and compel that citizen to give evidence without the right to counsel. The social policy reasons for Parliament granting

this investigative tool to peace officers in the face of what otherwise be citizen's rights are manifest. Parliament restricted the circumstances in which this tool could be used. In *R. v. Letkeman* (1983) 28 Saskatchewan Reports 307 (Saskatchewan Queen's Bench) the accused ceased driving at the specific direction of the police and exited the vehicle at the officer's direction.

(13) Mr. Lefkeman was truly known by the officer to be the driver and the nexus between driving and the roadside screening device demand was for all practical purposes immediate and certain. That is not the situation in the case at bar. Constable Gutoskie's 'knowledge of when the accident occurred' was based on what he knew or should have known was at least second hand hearsay. He was told by the police dispatcher in Nelson who clearly had been told by a third party who may or may not have had first hand information and, Constable Gutoskie must be deemed to have known this information was indeed hearsay.

(14) The certain knowledge of driving and immediate nexus between driving and demand that occurred in the Lefkeman decision is glaringly absent here.

(15) I find that the provision of s. 254(2) have not been met and that the roadside screening device breath sample was taken from Mr. Blackwood without lawful authority. Mr. Blackwood's rights under s. 8 of *The Charter* to be secure against unreasonable search and seizure were breached. He was detained and a sample of his breath was taken from him without lawful authority. It is clear law that when there has been a *Charter* breach the rule is *R. v. Rilling* has no application, if the case has in any way survived as good law in the light of *R. v. Stillman* [1997] 34 S.C.J. March 20, 1997.

(16) Without the unlawfully taken roadside sample, Constable Gutoskie neither would or could have made a lawful breathalyzer demand from Mr. Blackwood. The Certificate of the technician would not exist nor would Mr. Blackwood have been conscripted into giving breath samples if it were not for the s. 28 *Charter* breach."

[35] In the present case, there is nothing but third hand hearsay to support Constable Camp's belief in the operation of the motor vehicle by the accused. Absent proof beyond a reasonable doubt of that element the Alco-Sur demand is unlawful. Without the fail on the Alco-Sur Constable Camp lacked reasonable and probable grounds for the breathalyzer demand, and for the reasons that follow, those results cannot be used as a basis for the interpolation of those results to what the expert believed the accused's blood alcohol reading would have been at the time of driving to support a s. 254(3)(b) conviction. Nor can those results be used by the expert to satisfy the Court that the accused, as would anyone with those readings, be guilty of impaired operation.

[36] The recent case of *Stillman v. The Queen* (1997) 113 C.C.C. (3d) at 321, the Supreme Court of Canada makes clear how the *Charter* brings us to the above conclusion. The facts are irrelevant except to say that it was a murder case and the police committed several serious *Charter* breaches in obtaining bodily samples from the accused, without consent, thereby obtaining incriminating evidence upon which the accused was convicted.

[37] Because of the length of the Stillman case and the length to which the present decision has already reached, I propose to quote from the head note to cover the relevant areas, all of which are fully supported in the decision of Cory, J., speaking on behalf of the majority.

> "As the trial judge erred in his appreciation and application of the proper principles to be considered in applying s. 24(2) of the *Canadian Charter of Rights and Freedoms* , the admissibility of the impugned evidence must be reconsidered. As a first step in the trial fairness analysis it is necessary to classify the evidence as non-conscriptive or conscriptive. If the accused was not compelled to participate in the discovery of the evidence, the evidence will be classified as non-conscriptive. The admission of evidence which falls into this category will rarely operate to render the trial unfair, and the Court should move on to consider the seriousness of the violation and the effect of the exclusion on the repute of the administration of justice. Evidence will be conscriptive when an accused, in violation of his *Charter* rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of body or the production of body samples. The right to bodily integrity and sanctity embodied in s. 7 of the *Charter* requires that any interference with or intrusion upon the human body can only be undertaken in accordance with principles of fundamental justice. Generally that will require valid statutory authority or the consent of the individual...."
>
> "The admission of self-incriminating evidence in the form of statements or bodily substances conscripted from the accused in violation of the *Charter* and evidence derived from unlawfully conscripted statements will, as a general rule, tend to render the trial unfair, unless the impunged evidence would have been discovered in the absence of the unlawful conscription of the accused. Where it is established that either a non-conscriptive means existed through which the evidence would have been discovered or that its discovery was inevitable, then the evidence was discoverable. The Crown must bear the onus of establishing discoverability on a balance of probabilities. Where the evidence was discoverable, even though it may be conscriptive, its admission will not as a general rule, render the trial unfair. Where the evidence would not have been discovered in the conscription of the accused in violation of the *Charter*, its admission would render the trial unfair and it is not necessary to consider the seriousness of the violation or the repute of the administration of justice."

The last sentence of the above quote refers to elements to be considered in a s. 24(2) *Charter*

application as set forth in the case of *R. v. Collins* (1987) 1 S.C.R. 265.

[38] That is what occurred here by virtue of the unlawfully acquired breath samples provided into the Alco-Sur and the Intoxilyzer and both are ruled inadmissible because I find that the test for exclusion under s. 24(2) of the *Charter* has not been met by the Crown.

[39] In response, the Crown relying on *R. v. Trenholm* (1991) 32 M.V.R. (2d) 98, argued that there was more than enough evidence from which the Court, given the reasonable belief of the fact of operation, (which is enough proof of that element under s. 254(3) to support the Intoxilyzer demand) could conclude that there was proof beyond a reasonable doubt that the ability of the accused to operate a motor vehicle was impaired by alcohol or a drug, or both, and this without the necessity of relying on the Alco-Sur or Intoxilyzer results.

[40] There are, in my opinion, two answers to this argument. Firstly, the reasonable and probable grounds for making a breathalyzer demand must exist adduced in the mind of the police officer prior to the demand, and not based on the totality of evidence adduced at the trial. Secondly, while much reliance was made on factors to be considered in arriving at conclusion of impairment. See p. 107 of the *Trenholm* case where Murray, J. said:

> "I also agree that in looking at all the circumstances of the case one must also consider what, if any, errors in judgment were exhibited by the accused as well as what proper exercise of judgment there may have been by the accused...."
>
> "Evidence of physical impairment is not necessary if it is established that his mental processes were impaired, which manifested itself by lack of judgment or failure to react appropriately in a given situation, or both."

It must be remembered that in the *Trenholm* case there was a horrendous driving pattern involving speed, the causing of a serious accident and injuries, a failure to stop and leaving the scene in an attempt to escape liability. In the present case there is absolutely no driving pattern to which the accused's appearance or behaviour could relate.

[41] In my opinion the evidence of the Crown witnesses describing the inappropriate behaviour of the accused in conversation with his co-workers, and his agitated behaviour once the media arrived, was at best inconsistent. There is a difference between the evidence of Inspector Podmoroff as to the accused, and that of Constable Camp whose evidence and notes indicate that while the accused displayed extreme nervousness, smell of alcohol, red eyes and seemed tired, his speech was okay and there was no trouble with his understanding of Constable Camp. Further his walk was normal and while talkative, his speech was articulate. Certainly some of his behaviour was inappropriate, but by the same token some of it explainable, at least in part. For example, the red eyes and tiredness could be supported by the evidence of the

previous late night drinking, and the agitation was certainly contributed to by the presence of the aggressive media.

[42] It may be appropriate here to repeat a statement quoted by Murray J. in the *Trenholm* case from the decision of His Honour Judge Kerans, as he then was, in *R. v. Conlon* (1977) 6 Alta A.L.R. (2d) 97 in reference to the *MacKenzie* case:

> "It was never the intention of MacKenzie to say that impairment means marked impairment, but rather to say that there must be a doubt when you are relying on physical signs alone and those signs are ambiguous."

[43] In my opinion the signs here are ambiguous and give rise to a reasonable doubt, absent any driving pattern to which they could relate.

[44] Both charges are dismissed.