

Date: 20130114
Docket: 12/24
Citation: *R. v. Benoit*, 2013 NLCA 3

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN: HER MAJESTY THE QUEEN
APPELLANT

AND: MAYNARD BENOIT
RESPONDENT

Coram: Welsh, White and Hoegg JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
 Trial Division (General) 201104G0213

Appeal Heard: November 5, 2012
Judgment Rendered: January 14, 2013

Reasons for Judgment by Hoegg J.A.
Concurred in by Welsh and White JJ.A.

Counsel for the Appellant: Sheldon Steeves
Counsel for the Respondent: Roxanne Pike

Hoegg J.A.:

INTRODUCTION

[1] Section 258(1)(d.1) of the *Criminal Code* sets out the evidentiary requirements which must be met by an accused who seeks to challenge the presumptive proof of breathalyzer certificate evidence on the basis of his or

her post-driving alcohol consumption. This case clarifies the type of evidence required to do so.

FACTS

[2] On January 14, 2011, Maynard Benoit was apprehended by police shortly after he arrived at his worksite. The police, who were acting on an anonymous tip, found Mr. Benoit standing next to a blue pickup truck bearing the licence plate number provided by the tipster. The police officer smelled a faint odor of alcohol from Mr. Benoit and saw that his eyes were watery. Mr. Benoit submitted to breathalyzer testing from a roadside screening device which registered a “fail”. The officer then read Mr. Benoit the police caution and his *Charter* rights, and demanded samples of his breath pursuant to section 254(3)(a) of the *Code*.

[3] Mr. Benoit was conveyed to the Stephenville RCMP detachment where his breath samples were tested. The result was 150 milligrams of alcohol in 100 millilitres of blood for each of the two tests. While under caution, Mr. Benoit stated to the officer that he had consumed 2 ½ bottles of beer and a drink of vodka.

[4] At trial, Mr. Benoit testified he had drunk one beer at home and the remainder of the beer at a birthday party he attended en route to work. He said the party hostess (Ms. Bennett) gave him two “little” bottles of vodka to take with him, and when he arrived at work, he went around to the back of a shack on his work premises and drank the two bottles of vodka. Ms. Bennett testified, and she corroborated Mr. Benoit’s evidence about his drinking beer at her party and gifting him the two little bottles of vodka.

[5] A certificate of analysis showing the breathalyzer test results was admitted at trial. This certificate evidence presumptively established that Mr. Benoit’s blood alcohol concentration at the time of his driving was 150 milligrams of alcohol in 100 millilitres of his blood (Section 258(1)(c)). Mr. Benoit argued that his evidence about drinking the vodka after he arrived at work, Ms. Bennett’s evidence that she gave him the little bottles when he was leaving her party, as well as the police officer’s testimony raised a reasonable doubt about the certificate evidence accurately reflecting the concentration of alcohol in his blood when he was driving. Crown counsel argued against this notion and referenced the provisions of section 258(1)(d.1) to the Court.

[6] The trial judge held that the evidence of Mr. Benoit and Ms. Bennett, and the police officer's observations of Mr. Benoit and of the tire tracks his truck made in the snow gave her a reasonable doubt that Mr. Benoit's blood alcohol concentration had exceeded .08 at the time he was driving. She acquitted Mr. Benoit. In doing so, she did not advert to the provisions of section 258(1)(d.1) or apply them to the trial evidence.

[7] The Crown appealed to the summary conviction appeal court, arguing that the trial judge's acquittal effectively held that the evidence of Mr. Benoit, Ms. Bennett and the police officer rebutted the certificate evidence, and that this was an error because their evidence did not satisfy the requirements of section 258(1)(d.1). The summary conviction appeal court judge dismissed the Crown's appeal, saying that the trial judge made no error of law in interpreting and applying s. 258(1)(d.1).

[8] The reasoning of the summary conviction appeal court judge in dismissing the Crown's appeal is contained in paragraph 3 of his reasons for judgment (2012 NLTD(G) 47, 320 Nfld. & P.E.I.R. 97):

Expert opinion evidence will usually, but not always, be required to rebut the presumption established under s. 258(1)(d.1). It is possible for a judge to make the factual findings necessary to apply both sub-(i) and (ii) above without the benefit of opinion evidence from a defence expert. The Crown agrees in this case that there was evidence tending to show that the Respondent's alcohol consumption was consistent with an alcohol concentration under 80 at the time of driving. In other words, the Crown concedes this sub-(i) component above was met without the benefit of an expert's opinion. The trial judge reviewed the relevant evidence on this point in her reasons: drank just over two beers prior to driving, normal speech, eyes not red, normal gait, and tire tracks along the road consistent with normal driving. In paragraph 7 of the Crown's *factum* it is acknowledged that the trial judge determined as fact that the Respondent had consumed just over two beers earlier in the evening before driving and then consumed two small bottles of vodka after driving. The concentration of alcohol in the Respondent's blood at the time when the samples were taken (sub-(ii) above) was proven through the Crown's evidence, once the Certificate of Qualified Technician was entered. The finding of fact of the trial judge meant that the s. 258(1)(d.1) presumption was rebutted. The trial judge then detailed the basis of her reasonable doubt on a key element of the *actus* of the s. 253(1)(b) offence. She determined that the Crown failed to prove, beyond a reasonable doubt, all the essential elements of the offence.

[9] The Crown appeals the decision of the summary conviction appeal court judge, saying that: 1) he erred in finding that the presumption in s. 258(1)(d.1) had been rebutted when the trial record shows that the trial judge

had not considered the presumption and whether it had been rebutted by the evidence, and 2) he erred in his interpretation of s. 258(1)(d.1) of the *Code*.

LEAVE TO APPEAL

[10] An appeal from a decision of a summary conviction appeal court judge lies pursuant to the provisions of section 839(1)(b) of the *Code*. Leave to appeal must be granted, and the appeal must be taken on a question of law alone. A proposed ground of appeal must have a “reasonable possibility of success”, or have “significance to the administration of justice” (*R. v. Newfoundland Recycling Limited*, 2009 NLCA 28, 284 Nfld. & P.E.I.R. 153 at para. 9).

[11] Leave to appeal was granted at the hearing on the basis that the proposed grounds of appeal involve a question of law which has significance to the administration of justice. Whether a legal standard has been met by the evidence, in this case whether there was evidence which met the requirements of section 258(1)(d.1) of the *Code*, is a question of law (*R. v. Sheppard*, 2009 SCC 35, [2009] 2 S.C.R. 527, at para. 20).

ISSUE

[12] Section 258(1)(d.1) of the *Criminal Code* reads:

258. (1) In any proceedings under subsection 255(1) in respect of an offence committed under section 253 or subsection 254(5) or in any proceedings under any of subsections 255(2) to (3.2),

...

(d.1) if samples of the accused’s breath or a sample of the accused’s blood have been taken as described in paragraph (c) or (d) under the conditions described in that paragraph and the results of the analyses show a concentration of alcohol in blood exceeding 80 mg of alcohol in 100 mL of blood, evidence of the results of the analyses is proof that the concentration of alcohol in the accused’s blood at the time when the offence was alleged to have been committed exceeded 80 mg of alcohol in 100 mL of blood, in the absence of evidence tending to show that the accused’s consumption of alcohol was consistent with both

(i) a concentration of alcohol in the accused’s blood that did not exceed 80 mg of alcohol in 100 mL of blood at the time when the offence was alleged to have been committed, and

(ii) the concentration of alcohol in the accused's blood as determined under paragraph (c) or (d), as the case may be, at the time when the sample or samples were taken[.]

[13] The question raised in this appeal is what kind of evidence meets the requirements of section 258(1)(d.1)(i) and (ii) of the *Code*. In other words, what kind of evidence *tends to show that Mr. Benoit's consumption of alcohol was consistent with both his blood alcohol concentration being under .08 when he was driving and his breathalyzer test results.*

THE CASE LAW

[14] In *R. v. St. Pierre*, [1995] 1 S.C.R. 791, the Supreme Court held that evidence of alcohol consumed after an accused ceases driving is capable of rebutting certificate evidence of breathalyzer test results which is presumptive proof of the concentration of alcohol in the accused's blood at the time when he or she was driving. Accordingly, if certificate evidence were to show that an accused's blood alcohol concentration exceeded legal limits, and the accused adduced evidence that he or she consumed alcohol after driving but before the tests were taken, a judge could have a reasonable doubt about the accuracy of the test results stated in the certificate and acquit the accused.

[15] The decision in *St. Pierre* accords with this Court's earlier decision in *R. v. White* (1986), 60 Nfld. & P.E.I.R. 70. *White* held that the evidence required to rebut the presumptive accuracy of breathalyzer test results contained in certificate evidence must be evidence that the blood alcohol of an accused was increased to such an extent by the later consumption of alcohol, that it would leave a doubt as to the blood alcohol content being over the allowable maximum at the time of the offence (paragraph 8).

[16] In response to the *St. Pierre* decision, Parliament enacted section 258(1)(d.1) of the *Code*, seemingly out of concern

... that the presumption would be rebutted in every case where the accused invokes either the 'last drink' defence or the 'post-driving drinking' defence where there is not even an iota of proof to suggest that the discrepancy occasioned by the alcohol consumption would be of any legal relevance to conviction or acquittal on a charge of 'over 80'.

(*R. v. St-Onge Lamoureux*, 2012 SCC 57, at para. 87)

[17] Section 258(1)(d.1) provides that a person who consumes alcohol after relinquishing care and control of his or her vehicle but before taking breathalyzer tests can still raise a reasonable doubt about the breathalyzer test results accurately reflecting the accused's blood alcohol levels at the time of driving, but in order to do so, he or she must meet the two evidentiary criteria set out in the section.

[18] The constitutionality of section 258(1)(d.1) was challenged in *St-Onge Lamoureux*. In finding the section constitutional, the Court discussed the two evidentiary requirements at paragraphs 84 and 89:

[84] As a result of the statutory amendments, evidence to the contrary adduced by the accused must tend to show two facts: (1) the consumption of alcohol of the accused was consistent with a blood alcohol level that did not exceed .08 at the time when the offence was alleged to have been committed; and (2) the consumption of alcohol of the accused was consistent with the test results.

...

[89] A rational connection can easily be established between each of the requirements set out in s. 258(1)(d.1) and the requirement's legislative objective. In the first case, the measure is linked to Parliament's wish to ensure that the prosecution does not have to have recourse to experts to prove the blood alcohol level of the accused at the time of the alleged offence where the difference is not significant. In the second case, the measure is linked to Parliament's wish to confirm the scientific value of the test results and to establish an explicit correlation between those results and a variation in blood alcohol level due to consumption of alcohol by the accused shortly before or after the time of the alleged offence.

ANALYSIS

[19] In this case, a certificate of analysis was admitted into evidence. It stated that the result of each of Mr. Benoit's breathalyzer tests was 150 milligrams of alcohol in 100 millilitres of his blood. The certificate evidence was therefore presumptive proof that Mr. Benoit's blood alcohol concentration was over .08 when he was driving. There was no other trial evidence pertaining to the concentration of alcohol in Mr. Benoit's blood at any time.

[20] Certificate evidence is expert evidence, provided to a court by trained technicians, usually police officers, using scientifically designed machinery and scientific techniques that explain the rate of absorption of alcohol in an

accused's blood between the time when an offence was allegedly committed and the time of the breathalyzer tests. This type of evidence is beyond the ken of ordinary witnesses and fact-finders. An ordinary person may well be able to speak to his or her observations of an accused's behaviours, like unsteady gait, slurred speech, erratic driving, etc. which are so commonly known to be associated with impairment by alcohol or drugs that his or her evidence could be used to support a charge of impaired driving, but such evidence does not say anything about the concentration of alcohol in that accused's blood.

[21] Section 258(1)(d.1) requires an accused to show that what he or she says about his or her consumption of alcohol, both before and after driving, tends to be consistent with: 1) his or her being under the legal limit when he or she drove, and 2) with his or her test results. A trial judge necessarily has to advert to the evidence and find that it establishes both of these consistencies before he or she can find that the presumptive proof of the certificate evidence is rebutted. The type of evidence the trial judge needs in order to determine the two consistencies, will, as a practical necessity, come from an expert, for an ordinary person is not able to say whether the quantity of alcohol an accused says he or she consumed, both before and after driving, is consistent with that accused's blood alcohol level not exceeding .08 when driving and consistent with his or her breathalyzer test results. An ordinary person is simply not possessed of the skills, knowledge and tools necessary to give evidence which addresses the absorption rate of alcohol an accused says he consumed.

[22] In Mr. Benoit's case, evidence speaking to the absorption into his blood of the alcohol he said he consumed was necessary for the trial judge to determine whether Mr. Benoit's consumption of two and one-half beers during a period of time before he left Ms. Bennett's party was consistent with his blood alcohol concentration being under the legal limit and whether his consumption of two and one-half beer beers and two small bottles of vodka was consistent with his breathalyzer test results.

[23] The trial evidence respecting Mr. Benoit's normal speech upon arrest and of the straight tire tracks his truck made in the snow, and his evidence of post-driving alcohol consumption, do not say anything about the concentration of alcohol in his blood either when he was driving or after his breath samples were taken. Use of evidence about an accused's physical presentation and manner of driving to support the requirements of the section would be pure speculation.

[24] In *St-Onge Lamoureux*, the Court explained why it is that the burden on an accused to call evidence to cast doubt on the reliability of breathalyzer certificate evidence is not onerous:

[90] ... Whereas requiring the accused to show a connection between a malfunction of the instrument and the determination that his or her blood alcohol level exceeded .08 imposes an undue burden on the accused, the same is not true of requiring the accused to show that his or her consumption of alcohol shortly before or after the alleged offence was consistent with a blood alcohol level that did not exceed .08 at the time of the alleged offence. In such situations, the accused does not challenge the test results, but invokes his or her own unusual behaviour. It is the accused — and not the prosecution — who knows when he or she drank, and how much. What is more, it is also the accused — and not the prosecution — who would decide to analyze his or her capacity to absorb and eliminate alcohol, and to adduce evidence in this regard. I do not therefore consider it unduly onerous to require the person who has this information and is in a position to tender relevant evidence to show not only that he or she had a “last drink”, or drank after being pulled over, but also that the difference resulting from that consumption is relevant to the determination of his or her guilt or innocence. I should also note that the cases in which such a defence is raised should be rare, and that such a case would denote either significant irresponsibility with regard to public safety or a pathological reaction by the accused. As L’Heureux-Dubé J. pointed out in *St. Pierre* (para. 106),

[i]n most cases, moreover, there is good reason to suspect that post-driving drinking (or just the claim thereof) is an act of mischief intended to thwart police investigators. All such cases, at the very least, involve a significant degree of irresponsibility and a cavalier disregard for the safety of others and the integrity of the judicial system. This Court should not encourage or, at the very least, lend legitimacy, to such behaviour.

[25] In this case, there was no evidence that tended to show that Mr. Benoit’s blood alcohol concentration was under .08 when he drove or that the amount of alcohol he says he consumed was consistent with his test results. There being no such evidence, the presumption in the certificate evidence that Mr. Benoit’s blood alcohol concentration was 150 milligrams of alcohol in 100 millilitres of his blood when he drove is not rebutted.

DISPOSITION

[26] In the result, the summary conviction appeal court judge misinterpreted the requirements of section 258(1)(d.1), and erred in dismissing the Crown’s appeal on the basis that the factual findings made by

the trial judge rebutted the presumption of the certificate evidence. Accordingly, the Crown's appeal is allowed.

Conviction or New Trial

[27] There remains the question as to whether this Court ought to substitute a conviction for the trial judge's acquittal of Mr. Benoit or whether the matter ought to be remitted to Provincial Court for a new trial.

[28] The certificate and other evidence tendered at trial established the essential elements of the offence of driving "over 80". However, the Crown has not asked this Court to convict Mr. Benoit. Rather, the Crown is asking that the matter be remitted to the trial court so that Mr. Benoit will have the opportunity to adduce expert evidence to support his testimony if he is inclined and able to do so. In these circumstances, the matter is remitted to Provincial Court for a new trial.

L. R. Hoegg J.A.

I concur: _____

B. G. Welsh J.A.

I concur: _____

C. W. White J.A.