

Date: 20140603
Docket: 13/75
Citation: *R. v. Ackerman*, 2014 NLCA 26

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

BETWEEN:

CALVIN CLEO ACKERMAN

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: Welsh, White and Harrington JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 201308G0014

Appeal Heard: April 16, 2014
Judgment Rendered: June 3, 2014

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

Counsel for the Appellant: Stephen Orr
Counsel for the Respondent: Frances Knickle Q.C.

Welsh J.A.:

[1] On December 4, 2012, Calvin Ackerman was convicted of operating a motor vehicle while his blood alcohol content exceeded .08, contrary to section 253(1)(b) of the *Criminal Code*. His appeal to the summary conviction appeal court was dismissed. He seeks leave to appeal and, if granted, appeals that decision to this Court. The focus of his submissions is that his right to counsel under section 10(b) of the *Canadian Charter of Rights and Freedoms* was violated and that the trial judge made evidentiary errors which the summary conviction appeal judge did not recognize.

BACKGROUND

[2] At approximately 6:40 a.m. on September 22, 2011, on his way to work, Michael Pritchett observed a vehicle ahead of him swerving and being driven “all over the road”. He called the police to report his concern that the driver may be impaired. He provided the police with the licence plate number, together with a general description of the vehicle. During the call to the police, Mr. Pritchett reported that the vehicle had turned into the Wabush Industrial Park and that he would not be following. An officer was immediately dispatched and was advised that the vehicle was registered to Mr. Ackerman. Within about ten minutes the officer located the vehicle in the parking lot. Mr. Ackerman had gone to report for work, but came out of the building to speak with the officer as a result of a message the officer had sent via another worker.

[3] In response to questions by the officer, Mr. Ackerman identified his vehicle and told the officer that he had parked the car there. He did not suggest, as he later testified, that he had not driven the car that morning but had left it in the parking lot overnight. The officer noted an odour of alcohol on Mr. Ackerman’s breath and that his speech was slurred. She told Mr. Ackerman that she was investigating a report of an impaired driver and that his vehicle was the one in question. She asked Mr. Ackerman to accompany her to the police vehicle, and he did so without objection. Based on the information she had, the officer made a demand, pursuant to section 254(2) of the *Criminal Code*, for Mr. Ackerman to provide breath samples on an approved screening device. Mr. Ackerman complied, but registered a “fail”. The officer then arrested Mr. Ackerman, advised him of his right to counsel under section 10(b) of the *Charter*, and brought him to the detachment for a breathalyzer test.

[4] At the trial, Mr. Ackerman testified that on the evening prior to the police officer questioning and subsequently charging him, he had left his vehicle in the parking lot and had his fiancé, Ms. Lane, pick him up from work. He said that Ms. Lane had driven him to work the next morning. Ms. Lane confirmed this. However, in his oral decision, the trial judge found that Mr. Pritchett “presented as a credible and reliable witness”. He did not accept the evidence that Ms. Lane had driven Mr. Ackerman to work that morning, having found that their evidence on that point was not credible. The trial judge concluded that “the only rational inference that can be drawn from the circumstantial evidence” is that Mr. Ackerman drove the vehicle into work on the morning in question, and that he was the driver of the vehicle that led Mr. Pritchett to contact the police.

[5] The trial judge discussed and applied the law, including *R. v. Orbanski*; *R. v. Elias*, 2005 SCC 37, [2005] 2 S.C.R. 3, and *R. v. W.(D.)*, [1991] 1 S.C.R. 742. He concluded that Mr. Ackerman’s right to counsel had not been infringed and that the Crown had proven the offence beyond a reasonable doubt. The summary conviction appeal judge found no error in the trial judge’s decision with respect to the section 10(b) right to counsel. He also rejected Mr. Ackerman’s submission that the trial judge had reversed the burden of proof when he accepted the circumstantial evidence that Mr. Ackerman had been driving the vehicle despite Mr. Ackerman’s testimony that he had been driven to work by Ms. Lane.

ISSUES

[6] The first issue is whether Mr. Ackerman should be granted leave to appeal the decision of the summary conviction appeal judge upholding the trial judge’s decision. He contends that: (1) his right to counsel under section 10(b) of the *Charter* was violated; (2) the burden of proof regarding the identity of the driver of the vehicle was imposed on him rather than on the Crown; and (3) the trial judge improperly relied on circumstantial evidence in finding that he was the driver of the vehicle.

ANALYSIS

Leave to Appeal

[7] An appeal from the decision of a summary conviction appeal court is governed by section 839(1) of the *Criminal Code*, which provides that an

appeal may be brought to this Court, with leave, “on any ground that involves a question of law alone”.

[8] The test to be applied in determining whether leave should be granted is set out in *R. v. Newfoundland Recycling Ltd.*, 2009 NLCA 28, 284 Nfld. & P.E.I.R. 153:

[9] Thus, to obtain leave to appeal pursuant to s. 839(1):

(a) the appeal must “be taken on a ground that involves a question of law alone”, and

(b) the ground(s) of appeal must be such that:

(i) either the ground of appeal has a “reasonable possibility of success”, or

(ii) “the proposed question of law [has significance] to the administration of justice”.

Section 10(b) of the *Charter*

[9] Section 10(b) of the *Charter* provides:

Everyone has the right on arrest or detention

...

(b) to retain and instruct counsel without delay and to be informed of that right; ...

[10] Section 1 of the *Charter* qualifies that right:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[11] Crown counsel submits that leave should be granted on the question of whether Mr. Ackerman’s right to counsel under section 10(b) of the *Charter* was violated because the issue raises a question of law that has significance to the administration of justice.

[12] The law is settled that, in an impaired driving case, where the police officer stops the vehicle in accordance with provincial legislation and

identifies the individual who was driving, *Charter* requirements are satisfied if the right to counsel under section 10(b) is provided at the time of arrest (*R. v. Orbanski*; *R. v. Elias*, *supra*). However, Crown counsel submits that there are few cases addressing the same *Charter* issue when the vehicle has been parked and it was a person other than a police officer who saw the vehicle being driven. In view of the Crown's position, and in order to address any uncertainty, the issue of when an individual must be informed of the right to counsel in the circumstances of this case is a question of law on which I would grant leave to appeal.

[13] The analysis begins with the principles discussed in *Orbanski*. A review of the facts in the two situations sets the context within which the principles are established.

[14] Mr. Orbanski was stopped after a police officer saw him driving in an erratic manner. The officer detected an odour of alcohol on Mr. Orbanski's breath and asked him if he had been drinking. He said he had consumed one beer that night. The officer asked Mr. Orbanski to perform some sobriety tests. He was told that the tests were voluntary and that he could contact a lawyer. He was offered the use of a cellular phone. He was not informed about the availability of free legal assistance. Having declined to call a lawyer, Mr. Orbanski was unable to perform the sobriety tests and was arrested. He was subsequently advised of his section 10(b) right to counsel.

[15] Mr. Elias was stopped by the police in a random stop. The odour of alcohol was detected on his breath. When asked, he admitted that he had been drinking. The officer brought Mr. Elias to the police vehicle where a test on an approved screening device was administered. Upon registering a "fail", Mr. Elias was arrested for impaired driving and was informed of his section 10(b) right to counsel.

[16] Regarding both cases, Charron J., for the majority, summarized:

[31] The Crown conceded that Orbanski and Elias were each detained within the meaning of s. 10(b) of the *Charter* when pulled over by the police. In my view, this concession was well founded. ...

[32] Therefore, there is no issue that the s. 10(b) right to counsel was triggered in each of these cases. It is also conceded on these appeals that neither Orbanski nor Elias was provided with his right to counsel during the period of detention at the roadside from the time they were pulled over by the police until the time of their arrest.

[33] The s. 10(b) right to counsel, however, is not absolute. It is subject, under s. 1 of the *Charter*, “to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. The analysis under s. 1 of the *Charter* involves two separate components: the proposed limit must be prescribed by law and, if it is, it must be reasonable and demonstrably justified in a free and democratic society. ...

[17] Mr. Ackerman’s case is slightly different from the two situations in *Orbanski* in that he was not pulled over while driving. However, at the time the police officer commenced asking questions related to driving his vehicle, I accept that Mr. Ackerman was detained within the meaning of section 10(b) of the *Charter*. This follows from the discussion in *R. v. Thomsen*, [1988] 1 S.C.R. 640, at page 649, in which Le Dain J., for the Court, explained:

...

2. In addition to the case of deprivation of liberty by physical constraint, there is a detention within s. 10 of the *Charter*, when a police officer or other agent of the state assumes control over the movement of a person by a demand or direction which may have significant legal consequence and which prevents or impedes access to counsel.

3. The necessary element of compulsion or coercion to constitute a detention may arise from criminal liability for refusal to comply with a demand or direction, or from a reasonable belief that one does not have a choice as to whether or not to comply.

...

[18] Mr. Ackerman was not provided with his right to counsel when he was initially detained. Accordingly, consistent with the decision in *Orbanski*, it is necessary to proceed to the analysis under section 1 of the *Charter*.

[19] First, the limit on the section 10(b) right must be prescribed by law. The analysis under this component is two-fold: (1) was the police action lawful under the statutory scheme, and (2) was the limit on the section 10(b) right to counsel “implied from the operating requirements of a statute” (*Orbanski*, at paragraphs 36 and 39)?

[20] The statutory scheme at issue here is found in sections 253 and 254 of the *Criminal Code*. Section 253 makes it an offence to operate a motor vehicle while impaired by alcohol:

Every one commits an offence who operates a motor vehicle ... or has the care or control of a motor vehicle ...

(a) while the person's ability to operate the vehicle ... is impaired by alcohol or a drug; or

(b) having consumed alcohol in such quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.

Section 254 provides authority for a police officer to conduct specified sobriety tests and to make a demand for breath samples for purposes of an approved screening device and a breathalyzer.

[21] In *Orbanski*, Charron J. discussed the scope of the authority of the police to investigate impaired driving offences:

[41] It is also settled law that the police have the authority to check the sobriety of drivers. This authority was found to exist at common law in *Dedman* [[1985] 2 S.C.R. 2]. ...

...

[44] Hence, it cannot be disputed that the police had the general power, indeed the duty, to check the sobriety of Orbanski and Elias and that, logically, certain measures could lawfully be taken to fulfill this duty. What is questioned in these cases is whether those measures included the right to ask the driver questions about prior alcohol consumption and request that he perform sobriety tests.

[45] The screening of drivers necessarily requires a certain degree of interaction between police officers and motorists at the roadside. It is both impossible to predict all the aspects of such encounters and impractical to legislate exhaustive details as to how they must be conducted. ... The scope of justifiable police conduct will not always be defined by express wording found in a statute, but, rather, according to the purpose of the police power in question and by the particular circumstances in which it is exercised. Hence, it is inevitable that common law principles will need to be invoked to determine the scope of permissible police action under any statute. In this context, it becomes particularly important to keep in mind that any enforcement scheme must allow sufficient flexibility to be effective. The police power to check for sobriety, as any other power, is not without its limits; it is circumscribed, in the words of the

majority of this Court in *Dedman* by that which is “necessary for the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference” (p. 35).

[22] Charron J. referred to criteria to be applied in determining a reasonable screening procedure:

[46] ... “a procedure cannot be reasonable ... unless it can be performed at the site of the detention, with dispatch, with no danger to the safety of the detainee and with minimal inconvenience to the detainee”

[23] Regarding questioning an individual as to the consumption of alcohol, Charron J. explained:

[49] ... The questions were relevant, involved minimal intrusion and did not go beyond what was necessary for the officer to carry out his duty to control traffic on the public roads in order to protect life and property. In my view, the police officers were authorized in each case to make such inquiries.

[24] Charron J. summarized:

[51] I therefore conclude in each case that the measures fell within the scope of reasonable police authority conferred by necessary implication from the operational requirements of the combined provincial and federal statutes. However, as discussed earlier, the operational requirements of a statute will only constitute a limit prescribed by law to the extent that their fulfilment is incompatible with the motorist’s right to counsel. This brings me to the next inquiry.

I note here that the reference to provincial legislation in the above quotation relates to the authority to stop a vehicle and would not be relevant in the circumstances of this case where the car had already been parked. As discussed below, the necessary police authority arises from the *Criminal Code* provisions authorizing the police to investigate suspected impaired drivers.

[25] The second component of the “prescribed by law” analysis is the implied limit on the right to counsel. Charron J. explained:

[52] ...

In my view, it logically follows from *Thomsen* that a limit on the right to counsel is also prescribed during the roadside screening techniques utilized in these cases.

If a limit on the right to counsel is prescribed *during* compliance with a s. 254(2) demand for a sample for analysis in the roadside screening device, then the limit must necessarily be prescribed during the screening measures *preceding* the demand, conducted with the very objective of determining whether there is a reasonable suspicion justifying the demand. Similarly, the limit must necessarily be prescribed during the screening measure that is the functional equivalent to the roadside screening device, namely, a technique conducted with the very objective of determining whether there are reasonable and probable grounds justifying a s. 254(3) demand for a breath or blood sample.

[26] In the result, Charron J. concluded that the delay in advising an individual of the section 10(b) right to counsel until the time of arrest satisfied both components of the “prescribed by law” criterion.

[27] The second component of the section 1 analysis is whether the limit on the section 10(b) right is reasonable and demonstrably justified in a free and democratic society. In *Orbanski*, Charron J. canvassed the relevant criteria for assessing this component of the section 1 test, at paragraphs 54 to 59, summarizing:

[60] For these reasons, I conclude that while both Elias and Orbanski were detained for the purpose of s. 10(b), hence triggering the right to counsel, the operational requirements of the statutory regimes in place in Manitoba [giving police the authority to stop vehicles] prescribed a limitation of the right to counsel. This limitation is justifiable in a free and democratic society given the importance of detecting and deterring drunk driving, the highly regulated nature of driving on public roads, the limits placed by the common law on the types of screening that can be conducted at the roadside, and the limited use that can be made of the compelled evidence collected during the screening process.

Regarding the latter point, Charron J. explained:

[58] ... As the Crown concedes, the evidence obtained as a result of the motorist’s participation without the right to counsel can only be used as an investigative tool to confirm or reject the officer’s suspicion that the driver might be impaired. It cannot be used as direct evidence to incriminate the driver: [citations omitted]. ...

[28] Applying the principles to the situations in *Orbanski*, Charron J. concluded:

[59] In each case before the Court, the impugned evidence was adduced at trial solely to confirm the police officers’ grounds for making the breathalyzer demand. Each driver was informed and given the opportunity to exercise his s. 10(b) right upon arrest and before he was requested to provide incriminating

evidence through breath samples. The abridgment of the s. 10(b) right was strictly confined for the purpose of roadside screening and was constitutional.

[29] The same principles, with the same result, apply in this case. The fact that the erratic driving, together with information to identify the vehicle, was provided by a concerned citizen has no effect on the analysis. It is clearly within the authority of the police to investigate potential offences reported by members of the public.

[30] In this case, the police officer was undoubtedly acting within the lawful execution of her duties and responsibilities when she pursued an investigation into a suspected impaired driver based on the information supplied just minutes earlier by a concerned citizen. Significant detail was provided including the basis for the observer's concerns, the licence plate number and a description of the vehicle, and information that the vehicle had turned into a commercial parking lot. The officer arrived at the scene within about ten minutes and immediately located the parked vehicle. By that time she had already obtained the name of the registered owner of the vehicle and, without delay, took steps to locate him. The officer asked Mr. Ackerman if he had parked the car in the lot, to which he responded yes. He did not qualify his response by saying he had not driven the vehicle since the previous day having left it overnight in the parking lot. He gave no indication that he had not just been driving the vehicle, or that someone else had been driving it, with or without his permission. The officer noticed the odour of alcohol on Mr. Ackerman's breath and that his speech was slurred. While Mr. Ackerman testified at trial that he had not been driving the vehicle at the relevant time, the police officer was entitled to proceed on the basis of the information she had at the time of her investigation.

[31] The officer formed the opinion, based on the collected information, that she had sufficient grounds for making a demand, pursuant to section 254(2) of the *Criminal Code*, requiring Mr. Ackerman to provide breath samples on an approved screening device. He registered a "fail". At that point the officer arrested Mr. Ackerman, charged him with the impaired driving offence and advised him of his section 10(b) right to counsel.

[32] Applying the principles set out in *Orbanski*, Mr. Ackerman's right to counsel under section 10(b) of the *Charter* was infringed when he was initially detained. However, that infringement was justified under section 1 of the *Charter* given the nature of the offence, the circumstances surrounding the police officer's investigation, and the officer's action in

advising Mr. Ackerman of his right to counsel upon his arrest at the conclusion of the investigation phase.

[33] It follows that the summary conviction appeal judge did not err in upholding the trial judge's conclusion that Mr. Ackerman's section 10(b) right to counsel was not breached in this case.

Burden of Proof and Reliance on Circumstantial Evidence

[34] Mr. Ackerman submits that the summary conviction appeal judge erred in upholding the trial judge's conclusion that the only reasonable inference to be drawn from the circumstantial evidence was that Mr. Ackerman had been driving the vehicle that was observed by Mr. Pritchett. He submits that the trial judge erred in the application of the principles used to assess the testimony of an accused, set out in *R. v. W.(D.)*, *supra*.

[35] This submission is not persuasive. The trial judge did not believe the testimony of Mr. Ackerman or Ms. Lane that Mr. Ackerman had been driven to work and had left his vehicle in the parking lot overnight. Mr. Ackerman's testimony did not leave the judge with a reasonable doubt that he was driving the vehicle at the relevant time. Indeed, the trial judge gave reasons why, considering all the other evidence, he was satisfied beyond a reasonable doubt that Mr. Ackerman was guilty of the offence.

[36] As to Mr. Ackerman's submission regarding the use of circumstantial evidence, the trial judge applied the correct test, being satisfied on the basis of all the evidence that the only rational inference that could be drawn was that Mr. Ackerman had been driving the vehicle at the relevant time.

[37] Neither of these grounds considered separately would have provided a basis on which to grant leave to appeal because, applying the *Newfoundland Recycling* test, there was no reasonable possibility of success in respect of either ground. Assuming these grounds could be considered once leave to appeal was granted on the right to counsel issue, I would dismiss the appeal on these grounds as having no merit.

SUMMARY AND DISPOSITION

[38] In the circumstances, I would grant leave to appeal regarding Mr. Ackerman's right to counsel under section 10(b) of the *Charter*. However, the summary conviction appeal court did not err in upholding the trial judge's conclusion that the right to counsel guaranteed by section 10(b) of

the *Charter* was not breached. The *Charter* requirement was satisfied by the police officer advising Mr. Ackerman of his right to counsel after the screening process and upon his arrest.

[39] Accordingly, I would dismiss the appeal.

B. G. Welsh J.A.

I Concur: _____

C. W. White J.A.

I Concur: _____

M. F. Harrington J.A.