R. v. MacLeod, 2001 YKSC 549

Date: 20011221
Docket: S.C. No. 00-AP0023
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

HER MAJESTY THE QUEEN

RESPONDENT

AND:

NATASHA MARIE MacLEOD

APPELLANT

REASONS FOR JUDGMENT OF
MR. JUSTICE VEALE

INTRODUCTION

[1] The defence appeals the conviction of Ms. MacLeod by Judge Faulkner on a charge of operating a motor vehicle with a blood alcohol level in excess of 80 milligrams contrary to s. 253(b) of the *Criminal Code.* The conviction for impaired driving under s. 253(a) was stayed according to the rule against multiple convictions.

ISSUES

[2] The defence raises two main issues to be determined:

1. Did the trial judge correctly assess the “evidence to the contrary” in considering the presumptions of accuracy and identity set out in s. 258(1)(g), s. 258(1)(c) and s. 258(1)(d.1) of the *Criminal Code.*

2. With respect to the presumption of identity, can the trial judge use expert evidence to extrapolate back to determine the blood alcohol content of Ms. MacLeod at the time of driving?

THE FACTS

[3] The Crown and defence are in agreement about the essential facts in this case. The facts are as follows:

1. At 2:45 a.m. on September 3, 2000, Ms. MacLeod was stopped by the police while driving her motor vehicle. A demand was made for a roadside screening sample and a fail was registered.

2. As a result, two breathalyzer samples were taken. The first sample at 3:37 a.m. was 220 milligrams and the second at 3:58 a.m. was 210 milligrams.

3. Ms. MacLeod and her brother gave evidence on the amount of alcohol she consumed. Their evidence was that just prior to 2:45 a.m., she consumed 3 ounces of vodka. The expert testified that for a 170-pound female (Ms. MacLeod’s weight), 3 ounces of vodka would produce a blood alcohol concentration of 62 milligrams.

4. Expert evidence was led, assuming the claimed consumption to be accurate, establishing a range of her blood alcohol content at the time of driving between 49 and 102 milligrams.

[4] This summary of the facts is sufficient to set up the submissions of counsel on the meaning of ”evidence to the contrary”.

THE TRIAL JUDGMENT

[5] The trial judge based his decision on two general principles for assessing “evidence to the contrary”:

1. The evidence to the contrary need only raise a reasonable doubt. The defendant bears no burden of persuasion, and

2. To be capable of being evidence to the contrary, the evidence need only tend to show that the blood alcohol level at the time of driving was less than 80 milligrams of alcohol.

[6] The presumption of accuracy of the breathalyzer tests presumes that the equipment used has given an accurate reading. The presumption of identity means that the readings obtained at the time of the breathalyzer tests are the same as when the person was driving. The trial judge considered the readings from the breathalyzer tests as part of his assessment of the evidence to the contrary. He was careful to distinguish between the presumption of accuracy of the readings and the presumption of identity.

[7] The trial judge said the following about the evidence to the contrary:

> [12] The issue here is, as always, the credibility of the evidence given by the accused and her witness, her brother. In this case the defendant's evidence at trial was seriously undermined by the fact that she twice lied to the police as to the amount of alcohol she had consumed. Her evidence was supported by her brother, who gave evidence which was precisely modelled on that of the defendant with regard to times of drinking and amounts consumed. However, his claimed precision with respect to his sister's drinking did not extend to his own consumption.
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> [13] The observations of the police officer were said to be inconsistent with the readings obtained and consistent with the claimed consumption. In fact, the symptoms observed might have been better said to fall between those described by the expert for each of the two scenarios, that is, more pronounced than expected at the claimed level of 49 to 102 milligrams and less extreme than those that might be expected at the 210-, 220-milligram level that was disclosed by the BAC Datamaster. It is, however, common experience that the symptoms observed at given levels of consumption vary considerably and that, as Mr. Wong himself testified, may be less overt in persons like the defendant who, on her own admission, is an experienced drinker.
>
> [14] Having considered the evidence as a whole, I do not find that the evidence presented by the defendant raises a reasonable doubt as to the accuracy of the readings obtained. However, in the circumstances of this case, it must also be considered whether or not the evidence raises a doubt as to the blood alcohol level at the time of driving. This possibility arises in this case since the accused was stopped very shortly after leaving the lounge, and it is therefore conceivable that there was unabsorbed alcohol at the time of driving which elevated the readings obtained approximately 45 minutes later. However, even assuming that, as claimed, the accused drank three ounces of vodka immediately before leaving the bar, her blood alcohol level at the time of driving would still have been well in excess of 80 milligrams, since Mr. Wong indicated that the final three ounces of vodka would account for, at most, 62 milligrams of the total. I therefore find that Count 2 has been proved.

[8] As to the impaired charge, the trial judge stated:

> [16] Taking the evidence with regard to impaired driving as a whole, including the driving pattern, especially the speeding up and slowing down, the signs of impairment observed by the investigating constable and the blood alcohol level readings which were ultimately obtained, I am satisfied that the accused's ability to operate a motor vehicle was impaired by alcohol.

ANALYSIS

[9] The applicable presumptions are found in s. 258(1)(g), s. 258(1)(c) and s. 258(1)(d.1). The presumptions were legislated to assist the Crown in proving its case. The case law describes the presumptions as a shortcut to assist the Crown in proving its case. However, the presumptions can be displaced by "evidence to the contrary". If the presumptions are displaced, the Crown can still call evidence to prove the accuracy of the readings and that the breathalyzer reading at the time of driving would be over 80 milligrams. (See *R. v. St. Pierre,* [1995] 1 S.C.R. 791. (QL)).

[10] The applicable sections of the *Criminal Code* are as follows:

> **258 (1)(g):** … where samples of the breath of the accused have been taken pursuant to demand made under subsection 254(3), a certificate of a qualified technician stating
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> …
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> is evidence of the facts allerged in the certificate without proof of the signature or the official character of the person appearing to have signed the certificate;
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> **258(1)(c):** … where samples of breath of the accused have been taken pursuant to a demand made under subsection 254(3),
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> …

> evidence of the results of the analyses so made is, in the absence of evidence to the contrary, proof that the concentration of alcohol in the blood of the accused at the time when the offence was alleged to have been committed was, where the results of the analyses are the same, the concentration determined by the analyses and, where the results of the analyses are different, the lowest of the concentrations determined by the analyses;
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> **258(1)(d.1):** … where samples of the breath of the accused or a sample of the blood of the accused have been taken as described in paragraph (c) or (d) under the conditions described therein and the results of the analyses show a concentration of alcohol in blood exceeding eighty milligrams of alcohol in one hundred millilitres of blood, evidence of the result of the analyses is, in the absence of evidence tending to show that the concentration of alcohol in the blood of the accused at the time when the offence was alleged to have been committed did not exceed eighty milligrams of alcohol in one hundred millilitres of blood, proof that the concentration of alcohol in the blood of the accused at the time when the offence was alleged to have been committed exceeded eighty milligrams of alcohol in one hundred millilitres of blood;

[11] *R. v. St. Pierre*, *supra*, provides a useful restatement of the law, subject to later amendments to the *Criminal Code*. In paragraph 26, Iacobucci J. states that presumption of accuracy in s. 258(1)(g) presumes that the reading received on the breathalyzer provides an accurate determination of the accused's blood alcohol at the time the testing. He goes on to say:

> However, if the accused leads or points to "evidence to the contrary" which tends to show that, in fact, his or her blood alcohol level, at the time of testing, was not that shown on the certificate, then the certificate is no longer proof of that fact. Therefore, for the Crown to be successful it must prove the accused's blood alcohol level some other way.

[12] The *St. Pierre, supra,* case actually dealt with the presumption of identity in s. 258(1)(c) (now amended to include s. 258(d.1)), which presumes that the breathalyzer

reading at the time of testing is the same as the reading would be at the time of driving. Iacobucci J. agreed with the remarks of Arbour J., then of the Ontario Court of Appeal. She stated, as quoted at para. 29 of *R. v. St. Pierre*, *supra*:

> This presumption [of identity] can be displaced by evidence to the contrary; that is, any evidence which raises a reasonable doubt that the levels at the two different points in time were in fact identical. When the Crown loses the benefit of the presumption, for instance because of evidence indicating that the accused consumed alcohol between the two points in time, the Crown does not lose the benefit of the presumption that the certificate accurately represents the blood alcohol level at the time of the test. The Crown may still prove, with or without recourse to expert evidence, that the blood level of the accused at the time of the offence was over 80. One of the relevant pieces of evidence will be, of course, the reading taken by the breathalyzer, the accuracy of which is not disputed.

[13] It is clear that so long as the breathalyzer reading is accurate, it remains a relevant piece of evidence. However, the law has been changed since *R. v. St. Pierre, supra,* by adding s. 258(1)(d.1). It is no longer sufficient to raise any "evidence to the contrary" to displace the presumption of identity. The defence must now have evidence which tends to show that the blood alcohol level of the accused at the time of driving did not exceed 80 milligrams. (See *R. v. Coutts,* [1999] O.J. No. 2013, (Ont C.A.)). Therefore, it follows that if the trial judge rejected the evidence of the accused and her witness, or found that it did not raise a reasonable doubt, the presumption of identity prevails.

[14] The following is a summary of the principles that apply to the presumption of identity:

- Section 258(1)(c) states that the results of breathalyzer tests may be used as proof of blood alcohol content at the time of driving unless there is evidence to the contrary.

- Section 258(1)(d.1) states that “evidence to the contrary” described in s. 258(1)(c) must be evidence that “tends to show” that the blood alcohol concentration was less that 80 milligrams in 100millilitres of blood.

- If there is no reasonable doubt, the “evidence to the contrary” is rejected, the presumption of identity stands and a conviction will be entered subject to any other legal argument that may be in issue.

- If there is reasonable doubt, then the presumption will not stand and the Crown will not be able to rely on the presumption of identity. However, the Crown can still rely upon the breathalyzer reading, assuming it is accurate, to prove the blood alcohol level at the time of driving in another manner.

- Reasonable doubt on the “evidence to the contrary” should be determined in accordance with *R. v. W.(D),* [1991] 1 S.C.R. 742.

1. Did the trial judge correctly assess the “evidence to the contrary” in considering the presumptions of accuracy and identity set out in s. 258(1)(g), s. 258(1)(c) and s. 258(1)(d.1) of the *Criminal Code.*

[15] Counsel for Ms. MacLeod submits that the presumption of accuracy was displaced. I am satisfied that the trial judge was well aware of the difference between the presumption of accuracy and the presumption of identity. He simply did not accept the evidence of Ms. MacLeod and her brother and found that it did not raise a

reasonable doubt. The trial judge therefore found the presumption of accuracy was not displaced.

[16] In so finding, I am relying upon the principle set out in *R. v. Burns* (1994), 89 C.C.C. (3d) 193 (S.C.C.) at 199:

> …the general rule [is] that a trial judge does not err merely because he or she does not give reasons for deciding one way or the other on problematic points: … The judge is not required to demonstrate that he or she knows the law and has considered all aspects of the evidence. Nor is the judge required to explain why he or she does not entertain a reasonable doubt as to the accused's guilt.

[17] As to the presumption of identity, the defence submitted that the trial judge could not rely upon the breathalyzer readings as being the same at the time of the offence based upon "evidence to the contrary" led at trial. This submission must be based upon the trial judge either accepting the evidence of Ms. MacLeod and her brother, or finding that it raised a reasonable doubt, according to the principle in *R. v. W.(D.), supra.* In other words, in order for the evidence led to be "evidence to the contrary", thereby displacing the presumption of identity, it must raise a reasonable doubt as to the blood alcohol content reading at the time of driving. It is not "evidence to the contrary" simply because it has been led.

[18] The defence submitted that the trial judge did not expressly reject the evidence of Ms. MacLeod and her brother. I agree that express wording of rejection is not used, but it is clear that he did not accept the evidence to the contrary when he stated that "… the defendant's evidence was seriously undermined by the fact that she lied twice to the police as to the amount of alcohol she had consumed."

[19] In my view, the judge has implicitly, if not explicitly, rejected the evidence of the accused and found that she did not raise a reasonable doubt on her own evidence or the evidence as a whole. There is no requirement for trial judges to repeat the exact words used in *R. v. W.(D)., supra*, so long as the essence is applied.

[20] Counsel for the defence also submitted that the readings themselves could not be considered by the trial judge. In my view, the breathalyzer readings are part of the evidence as a whole and may be used so long as they are accurate. The trial judge did not at any time suggest that he was accepting the results of the breathalyzer over the evidence of the accused. Rather, he considered the evidence of the accused and her brother on its own and in the context of the evidence as a whole.

[21] I conclude that the trial judge correctly assessed the “evidence to the contrary”.

2. With respect to the presumption of identity, can the trial judge use expert evidence to extrapolate back to determine the blood alcohol content of Ms. MacLeod at the time of driving?

[22] In paragraph 14 of the reasons of the trial judge, he accepted the breathalyzer readings of 240 and 220 milligrams. The trial judge then used the hypothetical evidence of the defence breathalyzer expert to extrapolate back to show a reading of greater than 80 milligrams at the time of driving. The trial judge made this assessment in the context of determining whether the evidence to the contrary raised a reasonable doubt about the presumption of identity.

[23] Counsel for Ms. MacLeod submitted that the trial judge could not use the breathalyzer readings and then rely on the expert evidence to extrapolate back from the

breathalyzer readings to show a reading over 80 milligrams at the time of driving. I am of the view that the hypothetical evidence of the defence expert could be used to “tend to show” that the presumption is or is not displaced.

[24] However, that the trial judge did not find that the presumption of identity was displaced. Rather, he was dealing with the assumption that the evidence of the accused was believed. In that circumstance, the trial judge found that based upon an accurate breathalyzer reading, the hypothetical evidence of the defence expert tended to show a blood alcohol content over 80 milligrams, thereby not raising a reasonable doubt. The trial judge was simply using the accused’s evidence, which he did not believe, to show why he did not accept the hypothetical of the defence as raising a reasonable doubt about the accused’s breathalyzer reading being over 80 milligrams at the time of driving.

[25] The appeal is dismissed.

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Veale J.

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Counsel for the Respondent	John W. Phelps