COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***R. v. MacLeod***
2009 YKCA 5

Date: 20090527
Docket: CA06-YU573

Between:

Regina

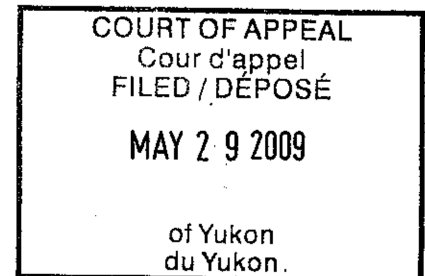
Appellant

And

Earl John MacLeod

Respondent

Before: The Honourable Mr. Justice Donald
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Smith



Oral Reasons for Judgment

Kevin Komosky — Counsel for the Appellant

Ann Pollak — Counsel for the Respondent

Place and Date: Whitehorse, Yukon Territory
May 27, 2009

[1] **DONALD J.A.**: The Crown appeals the dismissal of charges of impaired driving and driving with a blood alcohol percentage over .08 recorded by a Territorial Court judge on 3 March 2006.

[2] The judge found that the prosecution failed to prove with the requisite specificity that the police used an approved screening device in determining that the respondent had been drinking and driving. He held as a consequence that the basis for making a valid demand on reasonable and probable grounds for a breath sample had not been established and therefore the certificate showing a breathalyzer reading of .11, rendered pursuant to the demand, could not be admitted.

[3] The Crown on appeal frames the issue in this way:

> 13. The learned trial judge erred in holding that the uncontroverted evidence was insufficient to establish in law that the described device was an "approved screening device" as that phrase is defined in section 254(1) of the *Criminal Code* and section 2 of the *Approved Screening Devices Order*.

[4] If this is a case about the sufficiency of evidence, then I doubt that we have the jurisdiction to entertain a Crown appeal on that ground as it does not, on its face, raise a question of law. I refer in this connection to *R.* v. *Biniaris,* 2000 SCC 15, [2000] 1 S.C.R. 381:

> [33] There is no anomaly in this result. The powers of the court of appeal in the case of Crown appeals on a question of law are contained in s. 686(4) of the *Code*. There is no reference in that section to an unreasonable verdict. This is consistent with the limited rights of appeal conferred on the Crown by s. 676(1). The absence of language granting a remedial power corresponding to s. 686(1)(a)(i), suggests that Parliament did not intend "unreasonable acquittals" to be appealable by the Crown at first

> instance. Further, and more importantly, as a matter of law, the concept of "unreasonable acquittal" is incompatible with the presumption of innocence and the burden which rests on the prosecution to prove its case beyond a reasonable doubt. See *Lampard*, *supra*, at pp. 380-81; *Schuldt v. The Queen*, [1985] 2 S.C.R. 592, at p. 610; *B. (G.)*, *supra*, at pp. 70-71. Since, different policy considerations apply in providing the Crown with a right of appeal against acquittals, it seems to me that there is no principle of parity of appellate access in the criminal process that must inform our interpretation of this issue.

[5] However, the substance of the Crown's argument goes not so much to the sufficiency of the evidence or the reasonableness of the verdict but to the application of a wrong approach to the proof of the charges in question here.

[6] Understood in that way, the alleged error falls within our jurisdiction as a question of law. In *R.* v. *Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, Mr. Justice LeBel for the court wrote:

> [18] It is clear that this argument must fail. The interpretation of a legal standard has always been recognized as a question of law: *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 21. Moreover, our Court has recently recognized that if a question is about the application of a legal standard, that is enough to make it a question of law: *R. v. Biniaris*, [2000] 1 S.C.R. 381, 2000 SCC 15, at para. 23. In the case before us, the Court of Appeal examined the combined interpretation and application of the legal standard of investigative necessity. It also discussed the interpretation and application of the standard of review for a judge reviewing a wiretap authorization. There is no question that the Court of Appeal was dealing with questions of law. Thus, there was no jurisdictional bar to the Crown's appeal.

[7] The relevant part of the judge's reasons for judgment, 2007 YKTC 1, are as follows:

> [8] The second issue by the accused was the question of the Alco-Sensor. The police officer indicated on several occasions

throughout his evidence that he used an Alco-Sensor to take the breath sample from the accused. The *Criminal Code* in s. 254 talks about approved screening device, and it says it means:

> ... a device of a kind that is designed to ascertain the presence of alcohol in the blood of a person and that is approved for the purposes of this section by order of the Attorney General of Canada.

The Attorney General of Canada has listed seven devices which are approved screening devices in the following words set out in the *Code*:

> The following devices, each being a device of a kind that is designed to ascertain the presence of alcohol in the blood of a person, are hereby approved for the purposes of section 254 of the *Criminal Code*.

The seven devices are then listed, among which are:

> (e) Alco-Sensor IV DWF;
>
> (f) Alco-Sensor IV PWF.

[9] The accused says that the police officer's use of the expression Alco-Sensor does not meet the requirements of the *Code*, and that an Alco-Sensor, *simpliciter*, is not an approved screening device as contemplated by Parliament. This is a very technical argument, but the section itself is technical. The accused is entitled, when Parliament passes this kind of legislation, to expect the Crown to prove its case in a technical fashion. They have failed to do so in this case.

[10] The section, Alco-Sensor IV DWF, one might reasonably conclude there may well be Alco-sensor I, II, III that preceded Alco-Sensor IV; there may have been an Alco-Sensor without a number after it. Anything is possible. I do not have to delve into that. All I know is that the only approved instrument is the Alco-Sensor IV DWF or Alco-Sensor IV PWF. Neither of those instruments was described as being used by the police officer when he took the sample of the breath of the accused.

...

[16] However, having decided that the Alco-Sensor as described by the officer fails to meet the requirements of the *Criminal Code,* the officer had no reasonable and probable grounds to make the demand. The certificate is therefore not admissible. It is not going

> to go in. So we have one exhibit, Exhibit B, will now be Exhibit 1 on the trial itself.

[8] In my respectful opinion, the judge's reasoning amounts to the imposition of an incorrect requirement of proof. The error lies in applying a *strictissimi juris* standard to the proof of an item of evidence that does not constitute an essential ingredient of the offence charged.

[9] In *R.* v. *Johnson* (1999), 140 C.C.C. (3d) 176 (C.A.), a trial judge convicted on evidence that the officer believed he used an approved screening device without specifying precisely which device on the approved list he used. Nevertheless, the trial judge found that the Crown had proved that the device was an approved instrument beyond a reasonable doubt. As to that, I wrote:

> [14] Although I agree with the result, I disagree with two aspects of this reasoning: (1) the standard of proof applied to the analysis; and, (2) the implication that the officer's belief is the only thing that matters. The question of belief was just one factual item in the case, it was not an essential element of the charge and as such it ought not to have been determined on the standard of proof beyond a reasonable doubt. A piecemeal approach like this is contrary to *R. v. Morin*, [1998] 2 S.C.R. 345, 44 C.C.C. (3d) 193. The second aspect with which I disagree is the test enunciated in the passage underlined above. If it had been shown that the device was not approved and that the officer relied solely on the test for his belief supporting the breathalyzer demand, then in light of *Bernshaw* I do not know how the demand could be valid regardless of the reasonableness of the officer's belief that the device was approved. But in any event that was not the evidence in this case.
>
> [15] The officer testified that he used a "SL2" roadside testing device. If it was necessary for the Crown to prove that he used an approved device, and I assume without deciding that it was, the officer's reference to SL2 sufficiently identified the instrument as one listed in the approving order as "Alcolmeter SL2". Counsel for the appellant argues for a strict rule of proof that the instrument was approved and properly calibrated, but that argument depends on an

> application of the reasonable doubt standard to each item of the evidence which I have rejected.

[10] The Ontario Court of Appeal more recently held to the same effect in *R.* v. *Gundy*, 2008 ONCA 284, 231 C.C.C. (3d) 26. In reasons given by Mr. Justice Rosenberg, the court held that whether an approved screening device was used can be inferred from circumstantial evidence, and strict proof of the precise instrument is unnecessary:

> *(4) Identification of the Approved Screening Device*
>
> [44] In determining whether the particular device was approved, the court must consider all the evidence, including any circumstantial evidence. The court is entitled to draw reasonable inferences from the evidence. Thus, in my view, if the officer in his or her testimony refers to the device as an "approved screening device", the trial judge is entitled to infer that the device was indeed an approved device. As such, the officer is entitled to rely upon the "fail" recorded by the device to find that there were reasonable and probable grounds to make the breath demand.
>
> [45] The officer is not required to refer to the device by its particular brand and number such as "Alcotest 7410 GLC". Further, references to a part only of the identification such as "Alcotest" or "Alcotest GLC" do not rebut the reasonable inference from the officer's reference to the device as approved that it is indeed an approved screening device. The addition of the manufacturer's name, for example "Drager Alcotest 7410 GLC", is likewise not fatal: see *R. v. Neziol* (2001), 22 M.V.R. (4th) 299 (Ont. S.C.J.). Further, in my view, the context in which the officer refers to the device as approved is of no particular moment. Thus, if the officer testifies that he or she used an approved screening device, or agrees with the suggestion that it is an approved screening device, such testimony is direct evidence upon which the trial judge can rely: see *e.g. R. v. Latulippe* (2005), 26 M.V.R. (5th) 97 (Ont. S.C.J.).
>
> [46] Where, as here, the officer states that she made a demand that the motorist provide a sample for analysis by the approved screening device, surely the trier of fact can reasonably infer that the officer used an approved device. That was the holding of the trial judge in this case and I agree with that decision. As Langdon J.

> said in *R. v. James*, [1995] O.J. No. 190 (QL) at para. 5, 26 W.C.B. (2d) 108 (Gen. Div.), "what is the likelihood that the O.P.P. would supply its constables with an unapproved device with which to enforce the R.I.D.E. programme?"
>
> [47] In my view, cases holding that the officer did not have reasonable and probable grounds because, although the officer referred to the device as an approved screening device, he or she used a shorthand reference to the device or transposed some of the numbers or letters are wrongly decided. In the absence of some credible evidence to the contrary, it is not reasonable to infer that an officer who says that he or she used an approved screening device actually used an unapproved device. That was the holding of this court in *R. v. Kosa* (1992), 42 M.V.R. (2d) 290 at 291:
>
>> We are of the view that the manufacturer's model number given by the officer in evidence as Model JA3 rather than Model J3A as set forth in the regulations was no more than an innocent transposition of a number and letter and that *the unchallenged assertion by the officer that it was an approved screening device is sufficient proof thereof*. If such is the case, there is no need to look further to justify the finding of reasonable and probable grounds. [Emphasis added.]

[11] In my view, the judge's approach to the requirement of proof was reversible error and I would accordingly set aside the dismissal and order a new trial.

[12] FRANKEL J.A.: I agree.

[13] SMITH J.A.: I agree.

[14] DONALD J.A.: The appeal is allowed and a new trial is ordered. Thank you, counsel.

The Honourable Mr. Justice Donald