Citation: *R. v. Tibbett*, 2014 YKTC 20

Date: 20140410
Docket: 12-10134A
Registry: Watson Lake

TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

DENNIS ALLEN TIBBETT

Appearances:
Bonnie Macdonald — Counsel for the Crown
Keith Aartsen — Counsel for the Defence

REASONS FOR JUDGMENT

[1] CHISHOLM T.C.J. (Oral): Dennis Tibbett is charged with three matters contrary to the *Criminal Code*.

[2] He is alleged to have driven a motor vehicle while impaired by alcohol on September the 30th, 2012.

[3] It is also alleged that while driving the motor vehicle on that day the concentration of alcohol in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood.

[4] These allegations occurred at Rancheria River, which is approximately an hour's drive from the community of Watson Lake.

[5] Finally, he is charged with having failed to attend court in Watson Lake without reasonable excuse, as he was required to do by a properly confirmed Promise to Appear.

[6] After closing its case, the Crown conceded that the charge of impaired driving had not been made out. And, with respect to the section 145(5) matter, there was no evidence called. As a result, Mr. Tibbett, I acquit you with respect to both of those charges. In other words, I find you not guilty of those charges.

[7] That leaves the section 253(1)(b) matter. The facts of that are as follows: Constable Lightfoot pulled over Mr. Tibbett after noting that the required stickers on his licence plate had expired. He had followed Mr. Tibbett for approximately 2 kilometres before pulling him over and during that period of time noted no unusual driving. When Mr. Tibbett exited his truck to speak to the officer, he was noted by the officer to display some signs of having consumed alcohol. Constable Lightfoot read him an approved screening device demand, Mr. Tibbett complied, and the resulting reading was a fail. Based on this result and the signs of alcohol consumption earlier noted, he was arrested, Chartered, and warned. The breathalyzer demand was read to him. The defence does not challenge anything that occurred up to this point in time and, in fact, has made certain admissions in this respect.

[8] The investigating police officer subsequently transported Mr. Tibbett to the police station, a trip of just over one hour. Upon arrival at the detachment, he readied the breathalyzer machine and took the first sample of Mr. Tibbett's breath within 10 minutes. He did not continually observe Mr. Tibbett face to face for a 20 minute observation

period prior to this first sample being taken. The officer admits that this was not in accordance with his training. The first breathalyzer reading was 120 milligrams percent, after which a 15 minute observation period occurred and with which the defence takes no issue. The second breathalyzer reading was 110 milligrams percent.

[9] The issue before me is whether or not the Certificate of a Qualified Technician may be relied upon due to the manner in which the officer dealt with the first observation period. No expert evidence was called in this matter.

[10] Section 258(1)(c) of the *Criminal Code* must be carefully considered in light of the argument raised by the defence. That section provides that the breathalyzer test results are conclusive proof of the concentration of alcohol in the subject's blood in the absence of evidence that could raise a reasonable doubt with respect to three things. First, the improper operation of the approved instrument or its malfunction; second, the improper operation or malfunction resulted in a reading which was over 80 milligrams percent; third, that the concentration of alcohol in Mr. Tibbett's blood would not have exceeded the legal limit at the time the offence is alleged to have been committed.

[11] Although Constable Lightfoot was able to partially observe Mr. Tibbett, who was seated directly behind him in the police vehicle while driving to the detachment, the fact that he did not observe him in a face-to-face manner either there or in the detachment prior to the taking of the first sample leads me to find that there is evidence to show improper operation of the approved instrument.

[12] Does that finding automatically lead to a reasonable doubt regarding the other two issues I must consider under section 258(1)(c)? In *R. v. Guichon*, 2010 BCPC 335,

the Court was faced with the same issues. In the circumstances of that case, the Court found that the improperly conducted observation periods did not automatically lead to the conclusion that its improper operation resulted in readings over 80 milligrams percent and did not lead automatically to the conclusion that the blood alcohol concentration would not have exceeded the legal limit at the time of driving.

[13] In the case before me, Constable Lightfoot testified that he did not observe any belching or regurgitation on the drive to the detachment, nor did he observe any such actions in the relatively small breathalyzer room.

[14] Constable Lightfoot was very aware of the concerns of mouth alcohol caused by such actions as burping or regurgitation. He made efforts to observe Mr. Tibbett prior to the first breathalyzer test. And although those observations were not perfect, I find that Mr. Tibbett did not burp or regurgitate within the 20 minute period prior to the first test.

[15] In the decision of *R. v. Taylor* (1995), 11 M.V.R. (3d) 305 (YKTZ), Judge Stuart states:

> 66 In the absence of any evidence of regurgitation, the Court is forced to speculate on whether the opportunity created by the deficiencies during the first test could have produced undetected mouth alcohol, and further, if any mouth alcohol did exist, it existed in such quantum and in such a manner that a significant impact on test results occurred.
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> 67 It is simply too long a bow to draw for the Court to find a reasonable doubt about the credibility of the test results based upon any deficiencies during the observation period.

In my view, that quote is applicable to the case at bar.

[16] In coming to this conclusion, I have also considered the fact that the readings were well within the acceptable range of 20 milligrams percent. This is significant because it is clear that the second observation period by Constable Lightfoot was properly performed. This is another piece of evidence to assist me in concluding beyond a reasonable doubt that despite the failure to conduct a proper observation before the first sample was taken, the resulting reading was accurate. In other words, I find there was no actual evidence tending to show that Constable Lightfoot's failure to conduct a proper observation period before the first sample resulted in the over .08 reading.

[17] Finally, I am of the view that it would be speculative in the circumstances of this case to find evidence to show that the first breath sample taken from Mr. Tibbett was unreliable. As a result, Mr. Tibbett, I find you guilty of count number 2.

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CHISHOLM T.C.J.