PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Marshall*, 2017 NSPC 26

Date: 2017-06-15
Docket: 8039218, 8039219
Registry: Pictou

Between:

Her Majesty the Queen

v.

Shane Marshall

DECISION TO ADJOURN VERDICT

Judge:	The Honourable Judge Del W. Atwood
Heard:	15 June 2017 in Pictou, Nova Scotia
Charge:	Paras. 253(1)(a) and (b) of the *Criminal Code of Canada*
Counsel:	T. William Gorman for the Nova Scotia Public Prosecution Service Stephen Robertson, Nova Scotia Legal Aid, for Shane Marshall

By the Court:

[1] Shane Marshall is charged in information # 741762 with offences contrary to paras. 253(1)(a) and (b) of the *Criminal Code*. The prosecution elected to proceed summarily and Mr. Marshall pleaded not guilty.

[2] The court has completed hearing the evidence and the parties have made their closing submissions.

[3] The case for the prosecution is based primarily on a certificate of a qualified technician. Defence counsel asserts that there exists sufficient evidence to the contrary as to displace the statutory presumptions of accuracy and identity upon which certificate cases are founded.

[4] Defence counsel made one more argument.

[5] It is that the court ought to exclude the breath-analysis results in this case as police did not have grounds to make a lawful breath demand of Mr. Marshall. This position was advanced without defence counsel having brought an application under any provision of the *Charter*. I confirmed that point when the case was inscribed for trial, reconfirmed it at the beginning of the trial, and once again after the submissions of counsel.

[6] Prior to the coming into force of the *Charter*, there existed no right to the exclusion of unlawfully obtained evidence which was otherwise reliable. *R. v. Rilling*, [1976] 2 S.C.R. 183 is pivotal.

[7] *Rilling* is a pre-*Charter* case which stands for the proposition that the sufficiency of the grounds for the making of a breath demand becomes immaterial once a person under investigation for a drinking-and-driving offence has complied with the demand.

[8] *Rilling* recognized that there are two distinct parts at work in the *Criminal Code* that deal with the investigation of alcohol-impaired driving.

[9] The first part authorizes the collection of screening and evidential breath samples (now paras. 254(2) and (3) of the *Code*) and requires the state agent demanding the collection to have either a reasonable suspicion or reasonable belief as to certain triggering circumstances.

[10] The second part gives presumptive evidentiary effect to analyses of those collected samples (now paras. 258(1)(c) and (g)); these presumptions are to be given effect by trial courts only when the statutory requirements of those paragraphs have been fulfilled by investigating authorities, so as to ensure their reliability under the scientific regime approved by Parliament.

[11] These presumptions are not dependent on there having existed lawful grounds for the collecting of samples for analysis.

[12] At least, that is the way things were found to be in *Rilling*.

[13] Numerous post-*Charter* cases have stated that *Rilling* remains good law. *R. v. Charette,* 2009 ONCA 310 is one of them. *R. v. Searle,* 2006 NBCA 118 went the other way.

[14] However, there is currently pending before the Supreme Court of Canada *R. v. Alex* 2015 S.C.A.A. No. 533 (a conviction appeal from 2015 BCCA 435, *aff'g*. 2014 BCSC 2328), which was heard and reserved on 8 December 2016. The focal point of that case is, indeed, whether *Rilling* should be reconsidered in light of *Charter* values that evidentiary shortcuts and presumptions should be given effect only when the statutory regimes allowing them have been complied with strictly. Given the usual short duration of reserves in the Supreme Court of Canada, and given that the outcome in that case might have a bearing on this one, the court of its own motion adjourns its verdict to 21 August 2017 at 9:30 a.m.

JPC