SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Amyotte* , 2017 NSSC 278

Date: 20171122
Docket: Hfx No. 462400
Registry: Halifax

Between:

Matthew Chad Amyotte

Appellant

v.

Her Majesty the Queen

Respondent

Judge	The Honourable Justice Ann E. Smith
Heard:	August 23, 2017, in Halifax, Nova Scotia
Final Written Submissions:	October 3, 2017
Counsel:	Nicholaus Fitch, for the Appellant Erica Koresawa, for the Respondent

By the Court:

Introduction and Background

[1] The Appellant, Matthew Chad Amyotte, was charged that he did, on or about November 29, 2015, at or near Dartmouth, Nova Scotia

> Have the care or control of a motor vehicle while his ability to operate a motor vehicle was impaired by alcohol or drug, contrary to Section 253(l)(a) of the *Criminal Code*;
>
> AND FURTHER
>
> That he did unlawfully and without reasonable excuse, fail or refuse to comply with a demand made to him by a Peace Officer to provide samples of his breath suitable to enable an analysis to be made in order to determine the concentration, if any, of alcohol in his blood, contrary to Section 254(5) of the *Criminal Code*.

[2] The matter came for hearing in the Provincial Court on October 25, 2016. After hearing evidence presented by both the Crown and the Accused, the Honourable Judge Flora I. Buchan in a judgment dated January 9, 2017, acquitted Mr. Amyotte on the s. 253(1)(a) charge and entered a conviction in relation to the s. 254(5) charge. It is that conviction which is the subject of the present appeal.

[3] Mr. Amyotte was sentenced to a one-year driving prohibition.

[4] By way of brief background, on November 29, 2015 Sergeant Leger, a member of the A. Murray MacKay Bridge Patrol, attended to a disabled vehicle on the bridge. The vehicle had a flat tire. The Appellant was standing beside the vehicle. Sergeant Leger called a tow truck. While waiting for the tow truck, Sergeant Leger observed Mr. Amyotte stumble and stagger and he smelled alcohol on Mr. Amyotte's breath. Sergeant Leger called for Halifax Regional Police. Constable Kristen Bradley of the Halifax Regional Police arrived approximately 45 minutes later.

[5] Constable Bradley arrested Mr. Amyotte for having care and control of a motor vehicle while intoxicated. She read him his *Charter* rights and cautioned him. Constable Bradley then read a demand for a breath sample to Mr. Amyotte. He responded, "No, prove it." He was charged as noted above.

[6] The Appellant was taken to the Halifax Police station where he met with duty counsel. He was not asked to provide a breath sample and he did not volunteer to do so.

Issues on Appeal

[7] In the brief filed with the Court, the Appellant identifies the issues as follows:

1. Did the learned provincial Court Judge err by finding that Constable Bradley had reasonable and probable grounds to make a breath demand?
2. Did the learned Provincial Court Judge err by finding that the statement of the Appellant "No, prove it," completed the offence of refusal despite having taken place after the request for counsel, but before counsel was provided?

Powers of a Summary Conviction Appeal Court

[8] The appeal before the Court has been brought under s. 813(a)(i) of the *Criminal Code*. The powers of a summary conviction appeal court are outlined in s. 686(1) of the *Criminal Code*, which reads:

> **Powers of the Court of Appeal**
>
> POWERS
>
> 686. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> (a) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (iii) on any ground there was a miscarriage of justice;
>
> (b) may dismiss the appeal where
>
> (i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,

> (ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (a),
>
> (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, or
>
> (iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;

Standard of Review

[9] The appropriate standard of review was set out by the Court of Appeal in *R. v. Nickerson*, [1999] N.S.J. 210 as follows:

> 6. The scope of review of the trial court's findings of fact by the Summary Appeal Court is the same as on appeal against conviction to the Court of Appeal in indictable offences: see sections 822(1) and 686(1(a)(i) and *R. v. Gillis* (1981), 60 C.C.C. (2d) 169 (N.S.C.A.) Per Jones, J.A. at p. 176. Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in *R. v. B. (R.H.)*, [1994] 1 S.C.R. 656 (S.C.C.) at 657, the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was some evidence to support the trial judge's conclusions nor a new trial on the transcript.

[10] I refer as well to the statements of Cromwell J.A. (as he then was) in *R. v. Barrett*, 2004 NSCA 38 with respect to the scope of appellate review of evidence relied upon in support of a verdict at trial:

> [14] This Court may allow an appeal in indictable offences like these if of the opinion that "…the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence.": s. 686(1)(a)(i). In applying this section, the Court is to answer the question of whether the verdict is one that a properly instructed jury (or trial judge), acting judicially, could reasonably have rendered: *Corbett v. The Queen*, [1975] 2 S.C.R. 275 at 282; *R.*

v. Yebes, [1987] 2 S.C.R. 168 at 185; *R. v. Biniaris*, [2000] 1 S.C.R. 381 at para. 36.

[15] The appellate court must recognize and give effect to the advantages which the trier of fact has in assessing and weighing the evidence at trial. Recognizing this appellate disadvantage, the reviewing court must not act as if it were the "thirteenth juror" or give effect to its own feelings of unease about the conviction absent an articulable basis for a finding of unreasonableness. The question is not what the Court of Appeal would have done had it been the trial court, but what a jury or judge, properly directed and acting judicially, could reasonably do: *Biniaris* at paras. 38-40.

[16] However, the reviewing Court must go beyond merely satisfying itself that there is at least some evidence in the record, however scant, to support a conviction. While not substituting its opinion for that of the trial court, the court of appeal must "…re-examine and to some extent reweigh and consider the effect of the evidence.": *Yebes* at 186. As Arbour, J. put it in *Biniaris* at para. 36, this requires the appellate court "…to review, analyse and, within the limits of appellate disadvantage, weigh the evidence…" so as to examine the weight which the evidence could reasonably bear.

ISSUE 1: Did the learned provincial Court Judge err by finding that Constable Bradley had reasonable and probable grounds to make a breath demand?

[11] The *Criminal Code* sections relevant to the issues before the Court are s-ss. 254(3) and (5). They read:

(3) If a peace officer has reasonable grounds to believe that a person is committing, or at any time within the preceding three hours has committed, an offence under section 253 as a result of the consumption of alcohol, the peace officer may, by demand made as soon as practicable, require the person

(a) to provide, as soon as practicable,

(i) samples of breath that, in a qualified technician's opinion, will enable a proper analysis to be made to determine the concentration, if any, of alcohol in the person's blood, or

(ii) if the peace officer has reasonable grounds to believe that, because of their physical condition, the person may be incapable of providing a sample of breath or it would be impracticable to obtain a sample of breath, samples of blood that, in the opinion of the qualified medical practitioner or qualified technician taking the

> samples, will enable a proper analysis to be made to determine the concentration, if any, of alcohol in the person's blood; and
>
> (b) if necessary, to accompany the peace officer for that purpose.
>
> …
>
> (5) Everyone commits an offence who, without reasonable excuse, fails or refuses to comply with a demand made under this section.

[12] Constable Bradley testified as to her observations of the Appellant's behaviour:

> The tire was flat and then when I asked him for the paperwork for the vehicle, he got in I believe it was on the passenger's side because the passenger's side door was open and he started fumbling with some documents and handed them to me and that's when I could smell the… after I saw him fumbling with the documents could smell the liquor coming from his breath. The bloodshot watery eyes and that's when I decided I was arresting him for incoherent control.
>
> (transcript, p. 50)

[13] A review of the Trial Judge's decision shows that she gave ample consideration as to whether Constable Bradley possessed the requisite reasonable and probable grounds to make the breath demand to the Appellant.

[14] At pp. 10-12 of her decision, Judge Buchan states:

> First of all I'm a – I am satisfied that Constable Brady had reasonable grounds in the whole of the circumstances to believe that an offence had been committed within the preceding three hours. The Defendant submits that there is no evidence as to when the car in question stopped on the bridge due to a flat tire other than when Sergeant Leger was notified by his superior that the car had stopped on the bridge at 3:50 a.m.
>
> Sergeant Leger immediately went to investigate arriving within moments at the stopped car. He testified that he was on patrol duty of the bridge on the night in question and that he would make several patrols across the bridge over the course of a shift. It only makes common sense that Mr. Amyotte's car suffered the flat tire very close to the time that Sergeant Leger arrived at the scene.
>
> The flat tire car occurred on one of two toll bridges spanning the Halifax Harbour. Traffic was very light. Sergeant Leger's testimony was that he made several patrols over the bridge on the night in question but that it was his Chief who directed him to Mr. Amyotte's car which Sergeant Leger had obviously not seen during some of his patrols up to that point.

> No pedestrians are permitted on this bridge therefore I could easily infer from these facts that a stalled or disabled vehicle on this particular bridge would very quickly come to the attention of Bridge Patrol. It makes no common sense whatsoever that Mr. Amyotte could have been on the bridge unnoticed with a flat tire for anything more than a few minutes before Sergeant Leger approached. Even going so far as considering that he – if he may have been there for an hour stranded on the bridge which is under regular patrol I am satisfied beyond a reasonable doubt that the breath demand was made within the three-hour requirement.
>
> While the Crown does not have to prove beyond a reasonable doubt that the Defendant was in fact in care of control of the vehicle and charged with refusal, based on the information that Constable Bradley had received from Sergeant Leger and his own observations including the fact that Mr. Amyotte had requested a tow truck for the very vehicle in question, his belief that Mr. Amyotte had care of control of the motor vehicle having consumed alcohol was both objectively and subjectively reasonable.

[15] In my view, the Trial Judge appropriately concluded that not only did the demanding officer hold a subjective belief as to the requisite factual elements, that the belief was objectively reasonable on the evidence before him.

[16] The first ground of appeal is dismissed.

> **ISSUE 2:** Did the learned Provincial Court Judge err by finding that the statement of the Appellant "No, prove it," completed the offence of refusal having taken place after the request for counsel, but before counsel was provided?

[17] The Crown says that Mr. Amyotte's responses to Constable Bradley constituted an unequivocal and intentional refusal to provide breath samples.

[18] The Crown refers to *R. v. McKeen*, 2001 NSCA 14 and *R. v. Komenda*, 2012 BCSC 536 as standing for the proposition that a refusal is complete once the accused unequivocally refuses, even if he later offers to provide a breath sample.

[19] The Appellant in this case did not offer to provide a breath sample after talking with counsel, and was not asked to do so. The Appellant says that the refusal was not complete in those circumstances.

[20] In her decision, the learned Trial Judge addressed the Appellant's argument that a refusal followed afterwards by a request to provide a sample does not ground liability pursuant to s. 254(5) of the *Criminal Code*.

Judge Buchan referred to *R. v. Brown* as follows at p. 132 of her decision:

> In support of this submission the Defence provided the Court with a copy of an unreported decision of Judge Lenehan at his court *R. v. Martin Brown*.
>
> In that case the Court found that an – than an accused should not be asked about legal obligation until such as they have exercised their right to counsel. In that case the Defendant testified and the Court considered that testimony as follows, and I quote,
>
> > I do have some concern with regard to the refusal but after speaking with duty counsel Mr. Bright (sic) might have – Mr. Brown, I beg your pardon, might have been thinking that he was going to be asked 'are you going to be taking the test' and that what was on his mind when he said 'yes' as opposed to 'are you still refusing' so I have some concerns about whether or not Mr. Brown intended to refuse the breathalyzer demand.

[21] Judge Buchan distinguished the facts before her, stating as follows starting at p. 14 of her decision:

> Here the Court has no testimony from the Defendant about whether or not he clearly understood the demand, what his intention was with respect to the demand, nor if he requested an opportunity to blow after speaking to counsel.
>
> Constable Bradley did not testify that this was the case. He did provide Mr. Amyotte with more than one opportunity to provide a breath sample confirmed that him – hit – with him that he was still refusing but did not ask him again after Mr. Marriot (sic) – Amyotte had spoken with counsel.
>
> I do not find any circumstances that this equates to the offence not having – not having been completed.
>
> The – the demand made by Constable Bradley was unequivocal. There could not have been doubt left in the mind of Mr. Amyotte that he – that he must respond affirmatively to that demand or he will be charged with a failure or refusal of that demand.
>
> Making the demand on arrest complies with the requirements of the *Code* and also informs the accused of his or her jeopardy where they are asked whether they – before they're asked whether they wish to speak to counsel.
>
> I accept the unrefuted testimony of Constable Bradley that Mr. Amyotte understood the demand and that Mr. Amyotte [..] refusal was unequivocal on more than one occasion. Once he exercises right to counsel there is no evidence before the Court that he requested another opportunity to blow.
>
> His refusal was clearly intentional and without lawful excuse for the whole of the evidence.

> Section 254 in any event does not require – 254(3) in any event does not require multiple demands while there may be circumstances of which it would be prudent for a police officer to make a further demand following an accused exercising his or her right to counsel. This is not one of them therefore, on the whole of the evidence, the Crown has proven all the elements of the offence as noted on – as – as with respect to Count 2 of the Information and as a result I would find you, sir, guilty.
>
> Constable Bradley's testimony is that he gave Mr. Amyotte the breath demand reading from the car in his notebook at 4:37 a.m. followed by the provision of *Charter* rights including right to counsel.
>
> Mr. Amyotte wanted to exercise his right however he told Constable Bradley to prove it in response to the demand and engaged in conversation with Constable Bradley about why he – why the officer would not make a demand for his blood instead. The officer told him that he was fully capable of providing the breath sample and told him to stop talking until he had talked to his lawyer and asked him three more times to provide a breath sample to which Mr. Amyotte responded on each occasion, "Prove it."
>
> The Defence admits that Mr. Amyotte's "no" after requesting counsel was taken as a result and completed the offence in the officer's mind and as such that this was not a valid refusal.
>
> (p. 12-13)

[22] The Appellant referred the Court to the decision of the Manitoba Court of Appeal in *R. v. Bagherli*, 2014 MBCA 14.

[23] The Court of Appeal in *Bagherli* found that Mr. Bagherli's s. 10(b) *Charter* rights were violated because the investigator "failed to hold off asking the accused if he would provide breath samples until he had a reasonable opportunity to exercise his right to counsel" (p.43).

[24] The Court of Appeal placed emphasis on the language used by the officer when making the demand, which concluded with the question, "Will you provide samples of your breath?"

[25] In this case, Constable Bradley's evidence at trial was as follows:

> Q. Could you read out what you would have said to Mr. Amyotte?
>
> A. "I demand that you accompany me to…" It would be the Dartmouth Police Station at the time,
>
> "…and to provide samples of your breath suitable to enable an analysis to be made in order to determine the concentration if any of alcohol in your blood.

> Should you refuse this demand you'll be charged with the offence of refusal. Do you understand?"
>
> Q. And how did he respond to 'do you understand'?
>
> A. "No. Prove it," and that was at 4:37.
>
> Q. Okay. Did you have any concern about his ability to understand what you had read him?
>
> A. No. Not a bit.
>
> Q. Why not?
>
> A. We had just mild, not really conversation, but you know from documents – from asking from documents and I spoke English. He spoke English. Passed him the documents. He understood. He gave me the documents that I needed. He had said some words to me in English you know I had no problem – or I had no concern that he did not understand what was going on.

[26] Judge Buchan found in her decision as follows:

> The officer told him that he was fully capable of providing the breath sample and told him to stop talking until he talked to his lawyer and asked three more times to provide a breath sample to which Mr. Amyotte responded on each occasion, "Prove it."

[27] As noted above, on the evidence before the Court of Appeal in *Bagherli*, the Court found that Mr. Bagherli's s. 10(b) *Charter* rights had been violated when he was asked, "Will you provide samples of your breath?" after he had requested to speak with counsel.

[28] I invited further submissions from counsel following the hearing of this appeal on whether there was a s. 10(b) *Charter* issue at play and as to whether the *Bagherli* decision was relevant. I received submissions from both Crown and Defence counsel.

[29] I am satisfied that since Mr. Amyotte, who was represented by counsel at trial and on appeal, declined to raise the issue of a s. 10(b) *Charter* violation at trial or on appeal, I should not on my own raise a new issue on appeal. Further, I agree with Crown counsel that the evidentiary record before this Court is insufficient for this Court to consider whether a breach of *Charter* rights occurred. There is no evidence which establishes specifically when Cst. Bradley asked Mr. Amyotte to provide a sample, nor is there evidence of the precise language used by the officer in making those queries. Judge Buchan refers to him being asked three more times, but it is unclear precisely when.

[30] In any event, I am convinced that I should not raise a *Charter* issue at this juncture.

[31] I am satisfied that Judge Buchan made no error of law when she determined on the evidence before her that the Crown proved that the officer made a lawful demand for breath samples. The learned Trial Judge made no legal error in finding that Mr. Amyotte refused to comply with a valid demand.

[32] The appeal is dismissed.

Smith, J.