R. v. Hamel, [2019] O.J. No. 1390

Ontario Judgments

Ontario Superior Court of Justice

Summary Conviction Appeal Court - Milton, Ontario

D.E. Harris J.

Heard: February 21, 2019.

Judgment: March 19, 2019.

Court File No.: CR-18-79-00AP

[2019] O.J. No. 1390 | 2019 ONSC 1752 | 436 C.R.R. (2d) 133 | 49 M.V.R. (7th) 65 | 2019 CarswellOnt 4057

Between Her Majesty the Queen, Respondent, and Benjamin Hamel, Appellant

(40 paras.)

Case Summary

Appeal From:

On appeal from the judgment of Justice D.A. Harris of the Ontario Court of Justice, dated March 24, 2018, with reasons reported at *2018 ONCJ 279*, *409 C.R.R. (2d) 348*.

Counsel

A. Khoorshed for the Respondent Crown.

M. Engel for the Appellant.

D.E. HARRIS J.

INTRODUCTION

1 The appellant was tried and found guilty of "over 80" and impaired driving. The "over 80" was conditionally stayed and the conviction was entered on the impaired count. The appellant takes issue with both findings of guilt.

2 The key issue here and in the trial court arose from the absence of any direct evidence of a breathalyzer demand being made pursuant to Section 254(3)(a)(i) of the *Criminal Code*, *R.S.C. 1985, Chap. C-46*. The trial judge ruled that he could also not infer the making of a demand: *R. v. Hamel*, *2018 ONCJ 279*, *409 C.R.R. (2d) 348*, at para. 30.

3 However, the trial judge then went on to rule that the defence objection to the breathalyzer technician's certificate "came too late": para. 35. He held, the "admissibility of the evidence was not challenged in a timely fashion": para. 42. The trial judge consequently held that the certificate was admissible to prove the "over 80" count and found the appellant guilty. He then used the breath results in the certificate to assist in proof of the impaired count as well.

4 With respect, the trial judge misconstrued the legal issue raised by the absence of evidence of the breath demand. Without this evidence, although the certificate remained admissible, the presumptions of identity and of accuracy in Section 258(1)(c) and (g) of the *Criminal Code* were not available to benefit the Crown. On a proper construction of those sections, no objection from the defence was necessary.

5 Without use of the presumptions, the Crown's case on the "over 80" ought to have been dismissed as there was no admissible evidence of the breath readings. I would allow the appeal with respect to both counts, enter an acquittal on the "over 80" and order a new trial on the impaired count.

THE NATURE OF THE PRESUMPTIONS IN SECTIONS 258(1)(C) AND (G)

6 The presumptions are to assist the Crown in clearing evidentiary hurdles in proving an "over 80" prosecution. The most recent statement describing the presumptions is from *R. v. Alex*, *2017 SCC 37*, *[2017] 1 S.C.R. 967*, at paras. 2-3 in which Justice Moldaver said,

> 2 To address the challenges posed by the large number of drinking and driving offences, Parliament has, over the years, taken steps to simplify and streamline the trial process. One such step, which dates back to 1969, involved the introduction of evidentiary shortcuts into the Criminal Code, R.S.C. 1985, c. C-46.1 These shortcuts, now found in ss. 258(1)(c) and 258(1)(g) of the Code, permit the Crown to establish an accused's blood-alcohol concentration at the time of the alleged offence by filing a certificate recording the accused's breath readings.
>
> 3 In the case of "over 80" charges, this relieves the Crown from having to call two witnesses at every trial: (1) a breath technician to attest to the accuracy of the breath readings; and (2) an expert toxicologist to relate the readings back to the time when the alleged offence occurred.
>
> (Footnote omitted)

7 Also see *R. v. Moreau, [1979] 1 S.C.R. 261*, at p. 272, *R. v. St. Pierre, [1995] 1 S.C.R. 791*, at para. 23, *R. v. Gibson, 2008 SCC 16*, *[2008] 1 S.C.R. 397*, at para. 14, and *R. v. Oliver, [1981] 2 S.C.R. 240*.

8 The presumption of identity in subsection 258(1)(c) extrapolates the breath readings registered on the breathalyzer back to the time of driving. The presumption of accuracy in subsection 258(1)(g), deems the contents of the qualified breathalyzer officer's certificate to be correct. Both have the same introductory clause: "where samples of the breath of the accused have been taken pursuant to a demand made under

subsection 254(3)."[1] Section 254(3) is the provision which authorizes a demand for breath -- the provision which the trial judge held was not satisfied on the evidence in this case.

9 This introductory wording is common to both presumptions. It is an extrinsic requirement that cannot be proven by the certificate itself. Satisfaction of this clause is a perquisite to the availability of the presumptions benefiting the Crown in making its case.

10 As Justice MacDonnell, as he then was, said in *R. v. Lee*, *2008 ONCJ 120*,

> 15 Before either of these shortcuts [s. 258(1)(c and (g)] can be invoked, a number of preconditions must be satisfied, among them that the breath samples were taken "pursuant to a demand made under subsection 254(3)."

11 In this case, there was no direct evidence of a demand of any kind. I agree with the trial judge that the meagre circumstantial evidence was insufficient, in the end, to enable the Crown to satisfy the "pursuant to a Section 254(3) demand" initial clause of the two presumptions.

12 The trial judge was correct to distinguish this case from the authorities in which it could be inferred that a breath demand was made: see *R. v. Pickles* *(1973), 11 C.C.C. (2d) 210* (Ont. C.A.); *R. v. Walsh,* *(1980), 53 C.C.C. (2d) 568* (Ont. C.A.); and *R. v. Boyce* *(1997), 26 M.V.R. (3d) 238* (Ont. C.A.). Here, the inference was simply not available: see the trial judgment, paragraphs 14-31.

THE FAILURE TO OBJECT TO THE ADMISSION OF THE CERTIFICATE

13 Having found that there was no evidence of a breath demand, the trial judge held that the defence counsel's objection to admissibility of the certificate came too late. He first set out this passage which occurred when the certificate was first tendered:

> MR. KHOORSHED [the Crown]: Next exhibit please, Your Honour.
>
> THE COURT: Mr. Engel?
>
> MR. ENGEL [defence counsel]: Subject to argument, sir.
>
> THE COURT: Subject to the Charter or...
>
> MR. ENGEL: Yeah.

THE COURT: ...other argument?

MR. ENGEL: The Charter, yes.

14 At the end of the Crown's case, defence counsel indicated to the trial judge that there had been no evidence of a breath demand. Mr. Khoorshed said for the Crown,

> ...I think its safe to say that I didn't adduce that evidence. I may have to bring an application to see if I can reopen my case...

15 Mr. Khoorshed came back after the break and said that he did not think he had grounds to apply to reopen.

16 The trial judge in his reasons, relying on cases supplied by the Crown, held that the objection was not timely and was therefore ineffective. He relied upon the *Charter* cases of *R. v. Gundy, 2008 ONCA 284*, *231 C.C.C. (3d) 26* per Rosenberg J.A. at para. 19 and *R. v. Kutynec (1992), 7 O.R. (3d) 277* (Ont. C.A.), at 294-95. See the trial reasons for judgment, paragraphs 34-43.

17 The trial judge concluded:

> 42 ... the admissibility of the evidence was not challenged in a timely fashion. Had the objection been raised then it would have been open to Crown counsel to ask further questions of Constable Morris [the arresting officer] which may or may not have cured the deficiency in his evidence. Whether that would have succeeded will never be known but only because of counsel's failure to object at the appropriate time.
>
> 43 The application to exclude the certificate on this basis is dismissed.

18 A similar conclusion was reached in *R. v. Shrirasa*, *2018 ONCJ 526*, at paras. 70-79.

19 With respect, the trial judge erred in law in relying on a failure to object. An objection was not required. The trial judge's holding displayed a misunderstanding of the nature of the presumptions and the consequences of a failure to satisfy their prerequisites.

20 Without the presumptions or calling as witnesses the breathalyzer technician and a toxicologist, the prosecution can neither prove the accused's blood alcohol level nor relate it back to the time of the driving. Clearing the evidentiary hurdles posed by the presumptions is wholly the Crown's responsibility. In this case, failure to adduce evidence that there was a proper breath demand prevented their operation.

21 It was not, with respect, a question of admissibility of the certificate at all. As is the case generally with documentary evidence, the certificate was admissible if a proper foundation was laid for it. In most cases, the arresting officer will receive the certificate from the breathalyzer operator and then will serve it on the accused. It is admissible as a document within the knowledge of the arresting officer.

22 On this basis, the certificate will almost inevitably be admissible, subject of course to *Charter* remedies. The critical issue is whether the *contents of the certificate* can be used for their truth. Without the assistance of the statutory presumption of accuracy, the certificate would have no weight as its contents are hearsay statements of the breathalyzer officer.

23 As Justice Durno has held:

> 19 ... the certificate's admissibility does not establish the appellant's blood alcohol level at the time of the alleged offence. *With respect to those who have dealt with the issue on the basis of admissibility of the certificate where the times are unambiguously noted, the issue is not the admissibility of the Certificate, but the use that can be made of it*: *R. v. Cardinal,* [2001] A.J. No. 1355 (Alta. Q.B.) contra. *R. v. Shadoff,* [1993] O.J. No. 534 (Ont. Gen. Div.), *R. v. Gosby, supra*
>
> (Emphasis Added)

24 See to the same effect *R. v. Moonessar,* 2017 ONCJ 262, at para. 9, aff'd on this point, 2019 ONSC 340, at para. 41 and *R. v. Shadoff*, [1993] O.J. No. 534 (Ont. C.J.), at paras. 44-46.

25 Whether or not the certificate was admitted as evidence, a proper demand was a prerequisite to the triggering of the presumptions. Simply put, neither shortcut operated in this case because the breath demand precondition was not satisfied. The result was an inability to prove the *actus reus* of a blood alcohol concentration above the legal limit at the time of driving.

26 Strictly speaking, the defence could have sat by until submissions and only then made the argument. Even going further, it could have raised the matter for the first time on appeal: see *Shadoff,* at para. 45.

27 The presumptions may obscure the reality that what is in issue is proof of an element of the offence--having an excess of the legal limit of alcohol in the bloodstream. Conceptually, the absence of the benefit of the presumptions is no different than an assault case in which the Crown fails to tender evidence of an actual or apprehended application of force. The *actus reus* of the offence has not been proved and the accused must be acquitted.

28 Mr. Khoorshed for the Crown strenuously argues that the Supreme Court's judgment in *Alex* is a complete answer to the absence of evidence of a breath demand. It is his position that after *Alex*, "Everything is *Charter*." As best I can understand this epigram, it appears that it is the Crown's position that any difficulty with the presumptions is legally irrelevant unless framed as a *Charter* argument.

29 The Crown has misconstrued the holding in *Alex*. In that case, the trial judge found that there were insufficient grounds for a breathalyzer demand but found the accused guilty nonetheless. There was no *Charter* argument before the court. It was argued on appeal that the breath demand introductory wording

required that the Section 254(3) breath demand had to be *lawful*--that is, based on reasonable grounds. The majority of the Supreme Court disagreed, saying that a *lawful* demand--a demand based on reasonable grounds--was not a precondition to the presumptions. A *Charter* application would have to be brought to exclude evidence if there was a demand not supported by reasonable grounds.

30 The *Alex* decision is irrelevant to the issue here. In this case, based on its unequivocal wording, the breath demand condition at the outset of the presumptions was not satisfied. No resort to the *Charter* was required. The Crown failed to bring itself within the express preconditions of the statutory framework.

31 For these reasons, the trial judge erred in concluding that the failure of the accused's counsel to object at the time of the admission of the certificate was fatal.

32 As an aside, if there had been an obligation to object, in my opinion, the record shows an adequate objection in this case. Defence counsel, when the certificate was being marked as an exhibit, said that it was "subject to argument." When pressed by the trial judge, he refined this and said it was subject to *Charter* argument. Neither the judge nor the Crown insisted that defence counsel make his argument then and there. And so he did not.

33 When the arresting officer's evidence was completed, defence counsel immediately voiced his concern, recognized by all the participants, that there had been no evidence of a demand. If there had been prejudice as a result of insufficient notice of the argument to be made--and I have held above that there was not--the witness was still present and could have been recalled.

34 Criminal trials should be not be overly formalized without a good rationale. It should not be expected that special passwords be uttered to magically open up access to judicial relief.

35 Counsel for the appellant also argued on appeal that the breath readings should be excluded as a consequence of a Section 10(a) violation of the *Charter*. The trial judge found a breach and excluded utterances of the appellant but declined to exclude the readings. In light of the conclusion that the presumptions did not operate, there is no need to examine this issue.

THE IMPAIRED COUNT

36 Defence counsel argued that the trial judge's finding of guilt on this count was unreasonable as the indications of impairment were insufficient. I do not agree. Although it was not a strong case, it was not a weak case either. Amongst other things, the appellant had an open bottle of vodka on the seat beside him, his driving was somewhat erratic, he had alcohol on his breath, his eyes were red and glossy, he mumbled and had a slight slur and he was slow to retrieve his documents from the glove box.

37 However, the trial judge also relied upon the breath readings in finding the appellant guilty of impaired driving. After listing the signs of impairment he said,

> 140 Finally, the results of the breath tests provided further confirmation that Mr. Hamel still had alcohol in his body at the time that he was driving and for some time after.

141 After considering all of these factors, I am satisfied that the Crown has proven beyond a reasonable doubt that Mr. Hamel was operating a motor vehicle ... when his ability to do so was impaired by alcohol.

CONCLUSION

38 The Crown failed to make out its case on the "over 80" as there was no admissible evidence before the court of the appellant's breath readings. The presumptions of accuracy and of identity were both unavailable to the Crown. I would allow the appeal, lift the conditional stay, vacate the "over 80" finding of guilt and enter an acquittal.

39 With respect to the impaired count, the trial judge, in factoring in his erroneous "over 80" conclusion to fortify his findings of impairment, committed an error of law. This error is not amenable to the curative proviso. It was not inconsequential nor was the case overwhelming: *R. v. Van,* 2009 SCC 22, [2009] 1 S.C.R. 716, at paras. 34-36.

40 The appeal against that count is allowed and the conviction is set aside but, because the guilty verdict was not unreasonable, a new trial is ordered.

D.E. HARRIS J.

* * * * *

APPENDIX A

258. (1) In any proceedings under subsection 255(1) in respect of an offence committed under section 253 or subsection 254(5) or in any proceedings under any of subsections 255(2) to (3.2),

...

(*c*) *where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3)*, if

(i) [Repealed before coming into force, 2008, c. 20, s. 3]

(ii) each sample was taken as soon as practicable after the time when the offence was alleged to have been committed and, in the case of the first sample, not later than two hours after that time, with an interval of at least fifteen minutes between the times when the samples were taken,

(iii) each sample was received from the accused directly into an approved container or into an approved instrument operated by a qualified technician, and

(iv) an analysis of each sample was made by means of an approved instrument operated by a qualified technician,

evidence of the results of the analyses so made is conclusive proof that the concentration of alcohol in the accused's blood both at the time when the analyses were made and at the time when the offence was alleged to have been committed was, if the results of the analyses are the same, the

concentration determined by the analyses and, if the results of the analyses are different, the lowest of the concentrations determined by the analyses, in the absence of evidence tending to show all of the following things - that the approved instrument was malfunctioning or was operated improperly, that the malfunction or improper operation resulted in the determination that the concentration of alcohol in the accused's blood exceeded 80 mg of alcohol in 100 mL of blood, and that the concentration of alcohol in the accused's blood would not in fact have exceeded 80 mg of alcohol in 100 mL of blood at the time when the offence was alleged to have been committed;

(Emphasis Added)

Subsection (c) states that if the listed conditions are met--i.e. (ii) samples were taken as soon as practicable, (iii) directly into an approved instrument and (iv) an analysis was made by a qualified technician with an approved instrument--evidence of the results of the analysis is presumed to be the same as the reading at the time of the offence. All the conditions from ii. to iv. must be met to benefit from the retrospective extrapolation to the time of driving.

Without the use of this presumption, an expert toxicologist must be called to undertake this scientific calculation: *Alex,* at para. 3; *R. v. Burnison* *(1979), 70 C.C.C. (2d) 38* (Ont. C.A.).

(*g*) *where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3)*, a certificate of a qualified technician stating

(*i*) that the analysis of each of the samples has been made by means of an approved instrument operated by the technician and ascertained by the technician to be in proper working order by means of an alcohol standard, identified in the certificate, that is suitable for use with an approved instrument,

(*ii*) the results of the analyses so made, and

if the samples were taken by the technician,

(A) [Repealed before coming into force, 2008, c. 20, s. 3]

(B) the time when and place where each sample and any specimen described in clause (A) was taken, and

(C) that each sample was received from the accused directly into an approved container or into an approved instrument operated by the technician,

is evidence of the facts alleged in the certificate without proof of the signature or the official character of the person appearing to have signed the certificate;

(Emphasis Added)

Subsection (g) permits a qualified breath technician certificate to prove important factual matters in an "over 80" prosecution. They are, i. analysis of the samples was made by means of an approved instrument in proper working order, carried out by a technician; ii. the results themselves; iii. the time and place of the samples being taken; and iv. the samples were received into an approved instrument operated by a technician.

The certificate provided for in (g) serves to prove the majority of the criteria in the presumption of identity under (c). The exception is the "as soon as practicable" condition which must be proved extrinsically.

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1 The full text of ss. 258(1)(c) and 258(1)(g), together with a brief explanation, are found in Appendix A.

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