

CANADA / JUDGMENT

R. v. Deruelle

[1992] 2 SCR 663

COURT

Supreme Court of Canada

DECIDED

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R. v. Deruelle

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Report

[1992] 2 SCR 663

Case number

22305

Judges

Lamer, Antonio; La Forest, Gérard V.; L'Heureux-Dubé, Claire; Sopinka, John; Gonthier, Charles
Doherty; McLachlin, Beverley; Stevenson, William

On appeal from

Nova Scotia

Subjects

Criminal law

Notes

SCC Case Information: 22305

Decision Content

R. v. Deruelle, [1992] 2 S.C.R. 663

Her Majesty The Queen Appellant

v.

Joseph Leon Deruelle Respondent

Indexed as: R. v. Deruelle

File No.: 22305.

1992: May 1; 1992: July 9.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, McLachlin and Stevenson* JJ.

on appeal from the nova scotia supreme court, appeal division

Criminal law -- Motor vehicles -- Breathalyzer demand for sample of breath or blood -- Time limit -- Whether demand must be made within two hours of offence -- Criminal Code, R.S.C., 1985, c. C-46, s. 254(3) .

The accused was the driver of a car involved in a single-vehicle accident which occurred at 3:30 a.m. Because he was slightly injured in the accident, he was sent by ambulance to a hospital. The investigating police officer reported the accident to another officer at 5:20 a.m., informing him that the driver of the car was, in his opinion, impaired by alcohol. The second officer arrived at the hospital at 5:26 a.m. to obtain a breath or blood sample from the accused. The accused had wandered off, and was found at 5:45 a.m. At 5:54 a.m., after consultation with a doctor, the officer informed the accused of his right to counsel and demanded a blood sample. The accused refused and was accordingly charged with refusing to comply with a demand under s. 254(5) of the Criminal Code . Under s. 254(3), "[w]here a peace officer believes . . . that a person is committing, or at any time within the preceding two hours has committed . . . an offence under section 253 , the peace officer may, by demand made to that person forthwith or as soon as practicable, require that person to provide" a breath or blood sample. The trial judge dismissed the charge because in his view s. 254(3) requires that a blood sample demand be made within two hours of the time when the impaired driving offence was committed. The Court of Appeal, in a majority decision, dismissed the Crown's appeal. This appeal is to determine whether the police must make their breathalyzer demand within two hours of the offence, or whether they need only form a belief that a person has committed an impaired driving offence within the previous two hours.

Held: The appeal should be allowed.

Section 254(3) should be interpreted as requiring only that a peace officer form a belief that an impaired driving offence has been committed by the suspect within the past two hours. A demand made pursuant to that belief must follow forthwith or as soon as practicable, but this may fall outside the two-hour limit. The formation of the belief and the resulting demand need not be concurrent. The language of the section does not describe a solitary event, but rather is

split into two temporal modes. The present and retrospective tense used for the formation of the peace officer's belief ("believes . . . that a person is committing, or at any time within the preceding two hours has committed") must be contrasted with the timing of the demand, which is in the present and future tense ("by demand made to that person forthwith or as soon as practicable").

The broader breathalyzer scheme of the Criminal Code , which is designed to ensure that breath or blood samples are obtained as quickly as possible after the alleged impaired driving offence, supports this view. The two-hour limit in s. 254(3) contributes to the objective of the scheme by forcing prompt police investigation, and by requiring the police to take the sample as soon as practicable. This specific purpose, which goes to the admissibility of the sample into evidence, can be distinguished from the purpose of the time limit in the presumption section, s. 258(1) (c), which provides a procedural shortcut for the police, but only if the breath or blood sample is obtained within two hours of the alleged offence. Where, as here, the breath or blood sample is taken more than two hours after the commission of the alleged offence, the Crown loses the benefit of the presumption but nothing more. The evidence obtained is still admissible, provided the officer who demanded the breath or blood samples formed a belief that within the preceding two hours the accused had committed a drinking and driving offence.

Cases Cited

Not followed: *R. v. Willis* (1974), 5 Nfld. & P.E.I.R. 398; *R. v. Goodyear* (1988), 70 Nfld. & P.E.I.R. 256; referred to: *R. v. Pavel* (1989), 53 C.C.C. (3d) 296; *R. v. Hitchner* (1989), 13 M.V.R. (2d) 37; *R. v. Hamm* (1973), 15 C.C.C. (2d) 32; *R. v. May* (1971), 16 C.R.N.S. 392; *R. v. Burnison* (1979), 70 C.C.C. (2d) 38; *R. v. Therens*, [1985] 1 S.C.R. 613; *R. v. Thomsen*, [1988] 1 S.C.R. 640; *R. v. Green*, [1992] 1 S.C.R. 614.

Statutes and Regulations Cited

Criminal Code, R.S.C., 1985, c. C-46 [am. c. 27 (1st Supp.), s. 36], ss. 253 [rep. & sub. c. 32 (4th Supp.), s. 59], 254(3), (5), 256, 258(1)(c).

Authors Cited

McLeod, Roderick M., John D. Takach and Murray D. Segal. *Breathalyzer Law in Canada*, vol. 2, 3rd ed. Toronto: Carswell, 1986.

APPEAL from a judgment of the Nova Scotia Supreme Court, Appeal Division (1990), 100 N.S.R. (2d) 423, 272 A.P.R. 423, 62 C.C.C. (3d) 44, 27 M.V.R. (2d) 266, dismissing the Crown's appeal from the dismissal by Campbell Prov. Ct. J. of the charge against the accused of refusing to comply with a demand for a blood sample. Appeal allowed.

Kenneth W. F. Fiske and Denise C. Smith, for the appellant.

Patricia A. Fricker and Allan F. Nicholson, for the respondent.

//La Forest J.//

The judgment of the Court was delivered by

La Forest J. -- This appeal concerns the meaning of the time limit within which a breathalyzer demand must be made by the police under s. 254(3) of the Criminal Code, R.S.C., 1985, c. C-46 . The provision reads as follows:

254. . . .

- (3) Where a peace officer believes on reasonable and probable grounds that a person is committing, or at any time within the preceding two hours has committed, as a result of the consumption of alcohol, an offence under section 253, the peace officer may, by demand made to that person forthwith or as soon as practicable, require that person to provide then or as soon thereafter as is practicable
 - (a) such samples of the person's breath as in the opinion of a qualified technician, or
 - (b) where the peace officer has reasonable and probable grounds to believe that, by reason of any physical condition of the person,
 - (i) the person may be incapable of providing a sample of his breath, or
 - (ii) it would be impracticable to obtain a sample of the person's breath,

such samples of the person's blood, under the conditions referred to in subsection (4), as in the opinion of the qualified medical practitioner or qualified technician taking the samples

are necessary to enable proper analysis to be made in order to determine the concentration, if any, of alcohol in the person's blood, and to accompany the peace officer for the purpose of enabling such samples to be taken. [Emphasis added.]

As can be seen, s. 254(3) requires the police to act within two hours of the suspected impaired driving offence, but the lower courts have taken different approaches to the question of which of two events must take place within this time span. One interpretation is that the police must make their breathalyzer demand within two hours of the offence. The other is that the police need only form a belief that a person has committed an impaired driving offence within the previous two hours. Under the latter approach, the actual demand by the police could be made after the expiry of the two-hour limit. This is the issue requiring determination in this case.

Facts

The respondent, Joseph Leon Deruelle, was the driver of a car involved in a single-vehicle accident which occurred at 3:30 a.m. on October 27, 1989 at Framboise, Cape Breton, Nova Scotia. The accident was investigated by a Constable Watson of the RCMP, who formed the opinion that the respondent was impaired by alcohol. Because the respondent was slightly injured in the accident, he was sent by ambulance to the Sydney City Hospital. Constable Watson then telephoned the RCMP detachment in Sydney, reporting the accident to a Constable Smith at 5:20

a.m. Watson informed Smith that the driver of the car was, in his opinion, impaired by alcohol.

Constable Smith proceeded to the hospital to obtain either a breath or blood sample from the respondent. Smith arrived at the hospital at 5:26 a.m., only to discover that the respondent had wandered off. He was found at 5:45 a.m. sitting in a hallway between two locked doors. At 5:54 a.m., after consultation with a doctor, Constable Smith informed the respondent of his right to counsel and demanded a blood sample. The respondent refused to comply with the demand, and was accordingly charged under s. 254(5) of the Criminal Code .

At trial in the Provincial Court of Nova Scotia, the Crown called one witness, Constable Smith. The respondent offered no evidence. Campbell Prov. Ct. J. dismissed the charge because in his view s. 254(3) of the Criminal Code requires that a blood sample demand be made within two hours of the time when the impaired driving offence was committed. An appeal to the Supreme Court of Nova Scotia, Appeal Division was dismissed, Macdonald J.A. dissenting: (1990), 100 N.S.R. (2d) 423, 272 A.P.R. 423, 62 C.C.C. (3d) 44, 27 M.V.R. (2d) 266 (hereinafter cited to N.S.R.). Leave to appeal to this Court was granted on June 13, 1991: [1991] 1 S.C.R. xiii.

Judicial History

The facts of the case were not disputed at trial. Accordingly, Campbell Prov. Ct. J. found that the issue before him was confined to whether the two-hour time limit in s. 254(3) relates to the time when an officer forms the belief that an impaired driving offence has occurred, or to the time when a demand for a breath or blood sample is actually made to the suspect.

Following the decision of the Prince Edward Island Supreme Court in *R. v. Willis* (1974), 5 Nfld. & P.E.I.R. 398, Judge Campbell held that the demand must be made within two hours of the impaired driving offence. Since the demand in this case came more than two hours after the respondent's accident, the charge was dismissed.

On the appeal to the Supreme Court of Nova Scotia, Appeal Division, Freeman J.A. gave the principal majority reasons. He found that the "plain meaning" and "simple logic" of s. 254(3) require the linkage of the two-hour time limit to the making of the demand by the police. His reasons are encapsulated in the following passage, at pp. 425-26:

The words of s. 254(3) must be given their clear, ordinary meaning. For purposes of the present issue the operative words for a demand under s. 254 are: "where a peace officer believes . . . he may, by demand . . . require . . ."

"Believes" is in the present tense. In my opinion, this means that the belief must be subsisting and ongoing, at least until the words of the demand have been pronounced. There is nothing in the subsection suggesting that a formerly held belief can be put on hold, its effects preserved frozen in time until it can be used. A continuing belief is, in my opinion, a condition precedent to a valid demand. Section 254(3) is silent as to when the peace officer's belief may be formulated. The scheme of the subsection is such that reference to the formulation of the belief is unnecessary. If a belief within the meaning of s. 254(3) is held at the time of the demand, it does

not matter at what earlier time that belief was formed, provided the demand is made "forthwith or as soon as practicable" after it is formed. What is essential is that the belief be actually held on reasonable and probable grounds at the very moment when the demand is given; it must be a belief that the person to whom it is given "is committing, or at any time within the preceding two hours has committed, as a result of the consumption of alcohol, an offence under section 253".

Freeman J.A. concluded that Constable Smith's belief expired at 5:30 a.m., and the demand made after that point was out of time.

In reviewing the case law on this aspect of s. 254(3), Freeman J.A. acknowledged obiter statements from other appellate courts which suggested that the relevant event is the formation of the police officer's belief: see *R. v. Pavel* (1989), 53 C.C.C. (3d) 296 (Ont. C.A.); *R. v. Hitchner* (1989), 13 M.V.R. (2d) 37 (Alta. C.A.). However, he favoured the opposite interpretation stated in *R. v. Willis*, *supra*, and in *R. v. Goodyear* (1988), 70 Nfld. & P.E.I.R. 256 (Nfld. S.C. T.D.).

Jones J.A. wrote brief concurring reasons which focus on the breathalyzer scheme rather than on the text of the subsection. In his view, the two-hour limits found in ss. 256 and 258 of the Code determine the meaning of the limit in s. 254(3). On this point he stated, at p. 429:

Obviously Parliament regarded these time limits as significant and intended strict compliance with the provisions before a sample could be admitted into evidence. It would have been a simple matter to provide in the subsequent sections that where the sample is obtained pursuant to a demand under s. 254(3) the results of the tests are admissible in evidence.

As these sections refer to the time of the offence it leads me to the conclusion that the demand under s. 254(3) is related to the time of the offence.

Jones J.A. favoured a linkage to the time of demand as it resulted in an objective test under s. 254(3), which in his view was preferable to the subjective test created when the relevant event is the formation of a belief by the police. Finally, Jones J.A. agreed with Freeman J.A. that any ambiguity in this penal provision should be resolved in favour of the accused.

In dissent, Macdonald J.A. maintained that the only practicable interpretation of the subsection was to link the time limit to the formation of a belief by the police. He cited the circumstance where police formulate their belief on hearsay evidence but cannot get to the driver to make a demand within the two-hour limit. In his view, the provision was designed to accommodate the police in this circumstance, by requiring only that they form their belief within two hours of the offence. He found support for his interpretation in the Hitchner and Pavel decisions, and in the comments of Culliton C.J.S. in *R. v. Hamm* (1973), 15 C.C.C. (2d) 32 (Sask. C.A.).

Macdonald J.A. rejected the argument of his colleague Jones J.A. that the meaning of s. 254(3) must be determined by reference to s. 258. In his view, a reading of the entire breathalyzer scheme suggested that ss. 254 and 258 have discrete purposes, and should not be read with a view to incorporating the terms of the latter into the former. He concluded that s. 258 is an evidentiary provision and nothing more; it provides the police with a presumptive shortcut when the breath or blood sample is taken within two hours. A sample taken after two hours was still admissible,

and thus the two-hour limit in s. 258 need not parallel the more flexible limit in s. 254(3) . Accordingly, Macdonald J.A. would have allowed the appeal.

Issue

Simply put, then, the issue in this case is whether the two-hour limit referred to in s. 254(3) of the Criminal Code applies to the making of the breath or blood sample demand, or to the formation of the peace officer's belief on reasonable and probable grounds that a person is committing or has committed, as a result of the consumption of alcohol, an offence under s. 253 of the Code.

Analysis

In my view s. 254(3) should be interpreted as requiring only that a peace officer form a belief that an impaired driving offence has been committed by the suspect within the past two hours. A demand made pursuant to that belief must follow forthwith or as soon as practicable, but this may fall outside the two-hour limit. The language of the subsection and the broader breathalyzer scheme of the Criminal Code both support this view. It follows that I am largely in agreement with the dissenting judgment of Macdonald J.A.

In the court below, Freeman J.A. found that the "plain meaning" of s. 254(3) demands an interpretation that the formation of the belief and the resulting demand must be concurrent -- that is, when the demand is made the officer's belief must still be fresh. I do not agree. The language of the section does not describe a solitary event. Rather, it is split into two temporal modes. First, there is the present and retrospective tense: "Where a peace officer believes . . . that a person is committing, or at any time within the preceding two hours has committed . . . an offence under section 253 . . . (he may make a demand)". (Emphasis added.) This must be contrasted with the timing of the demand, which is in the present and future tense: "by demand made to that person forthwith or as soon as practicable". (Emphasis added.) In my view, the past and future tenses are not linked by the wording of the section. Belief and demand may be concurrent (i.e., when the demand is made "forthwith") but it is not correct to suggest that they must be concurrent.

Looking beyond the text of the provision, the breathalyzer scheme of the Code is designed to ensure that breath or blood samples are obtained as quickly as possible after the alleged impaired driving offence. This overriding objective is achieved through various mechanisms found in specific Code provisions. While the general objective is the same throughout the scheme, the specific purposes of each mechanism are different. As such, the fact that the provisions constitute a "scheme" does not mandate a unitary interpretation contrary to the language of each individual provision. The two-hour limit in s. 254(3) contributes to the objective of the scheme by forcing prompt police investigation, and by requiring the police to take the sample as soon as practicable. This specific purpose, which goes to the admissibility of the sample into evidence, can be distinguished from the purpose of the time limit in the presumption section, s. 258(1)(c). The latter provides a procedural shortcut for the police, but only if the breath or blood sample is obtained within two hours of the alleged offence. As such, it is concerned with the quality of the

evidence obtained by the police, rather than its admissibility.

Counsel for the respondent argued that s. 254(3) is meant to prevent breath or blood samples taken long after the fact from being used in evidence, and as such the section must be interpreted as requiring a demand within two hours. This is something of a red herring, as neither the demand nor the formation of a belief controls the timing of the sample. Rather, the sample need only be taken as soon as is practicable after the demand. In other words, even if a demand is made within two hours, there may be long delays in some cases before the sample can practicably be taken. As such, "stale" samples will still be received in evidence no matter which interpretation of s. 254(3) is accepted in this appeal. Of course that does not end the matter, as another provision -- s. 258(1)(c) -- will govern the use of the sample evidence at trial.

The invalid premise that s. 258(1)(c) governs admissibility is at the heart of the interpretational approach of Jones J.A. in the court below. This approach was first advanced by Barry J. in *Goodyear*, supra, and was stressed by counsel for the respondent during this appeal. The dissenting reasons of Macdonald J.A. provide an apt response to this approach, at pp. 432-33:

Because alcohol is metabolized by the human body, the result of a breath or blood sample analysis in actual fact is not the same as the alcohol/blood concentration at the time the accused committed the alleged offence. Section 258(1)(c) and (d) provides the Crown with a procedural shortcut in the form of a presumption that the concentration of alcohol in the blood of the accused at the time of the alleged offence was the same as determined by the breath or blood analysis. The benefit of the presumption saves the Crown from calling expert evidence as to what the actual blood-alcohol concentration was at the time the alleged offence was committed based on the results of the analysis of the sample of blood or breath. In order to take advantage of this presumption, the prosecution must establish amongst other things that the breath or blood samples were taken not later than two hours after the alleged offence was committed.

Where, as here, the breath or blood sample is taken more than two hours after the commission of the alleged offence, the Crown loses the benefit of the presumption but nothing more, provided the officer who demanded the breath or blood samples formulated a belief that within the preceding two hours the accused had committed a drinking and driving offence.

The position taken by Barry J., in *R. v. Goodyear*, supra, as expressed at p. 261 of the report was that the two hour time period stipulated in what is now s. 254(3) of the Code is the same two hour time period prescribed by what is now 258(1)(c). In other words, Mr. Justice Barry interprets s. 254(3) as requiring that the belief, the demand and the breath or blood sample be formulated, given and taken within two hours of the alleged offence. I agree with the judgment in *R. v. Pavel*, supra, that s. 254(3) cannot reasonably bear such interpretation.

I do not read the presumption sections (ss. 253(1)(c) and (d)) which are purely evidentiary as relating back to the substantive provisions of s. 254(3) of the Code so as to require not only that the requisite belief be formulated within two hours of the alleged offence, but also that the breath or blood sample demand, let alone the taking of such samples, also be done within such two hour period.

As Macdonald J.A. suggests, it is now settled law that a failure to comply with the provisions of s. 258 robs the Crown of the benefit of the presumption therein but nothing more. The evidence obtained is still admissible: see *R. v. May* (1971), 16 C.R.N.S. 392 (Alta. S.C.); *R. v. Hamm*, supra; *R. v. Burnison* (1979), 70 C.C.C. (2d) 38 (Ont. C.A.). This point was made by this Court at the hearing and was conceded by counsel for the respondent. I note, however, that McLeod, Takach and Segal in *Breathalyzer Law in Canada* (3rd ed. 1986), at pp. 12-40 to 12-49, suggest that this proposition is still open for debate. In my view, however, the analysis of the Saskatchewan Court of Appeal in *Hamm* put this issue to rest some years ago.

During the hearing of this appeal, counsel for the respondent conceded that s. 258(1)(c) does not govern admissibility. This concession reduced her argument on the breathalyzer scheme to this: the scheme is preoccupied with a two-hour limit, and consequently such a limit should be attached to the making of the demand by the police. However, this is far too tenuous a link to influence the interpretation of the provision in question. The specific objective of s. 254(3) does not depend upon attaching the time limit to the demand. Whether the limiting event is the belief or the demand, the overriding requirement in the subsection is that the sample be obtained as soon as is practicable. Thus, both interpretations under consideration in this appeal will impose some requirement of promptness on the police. However, the interpretation urged by the respondent would be unfair to the police in some circumstances.

Macdonald J.A. raises an obvious example of a situation in which the section can operate unfairly to the police, at p. 433:

In certain circumstances, although the peace officer formulates the belief required by s. 254(3) within two hours of the alleged offence, he may not be able to give the breath or blood sample demand within such two hour period. Since the requisite belief may be formulated on hearsay evidence, the situation can arise where the peace officer formulates the belief some distance away from where the person who committed the alleged offence is. It may take a peace officer some considerable time to reach that person and give the breath or blood demand. It may be partly due to such possibility that Parliament saw fit to provide that the demand for a breath or blood sample had to be given forthwith after the required belief was formulated or if it couldn't be given forthwith, then it had to be given "as soon as practicable".

Another example arises when the police investigate an impaired driving offence, only to find that the driver has fled the scene, or has wandered off. By interviewing witnesses and examining the scene, the police may form a reasonable belief that the driver was impaired. However, a demand will not be possible until the driver is found. This may take more than two hours, but a breath sample may still be relevant at that later time. If the demand is to be the limiting event, then these relevant breath samples will be unfairly excluded from evidence.

The authorities cited by the parties are of little assistance in resolving this appeal. For the most part, judgments on both sides of the issue fail to justify their interpretation of the subsection. The exception is *Goodyear*, although its reasoning is flawed as demonstrated above. The respondent placed considerable reliance on past references to the two-hour limit by this Court. These are found in the judgments of Le Dain J. in *R. v. Therens*, [1985] 1 S.C.R. 613, and *R. v. Thomsen*, [1988] 1 S.C.R. 640, which considered the right to counsel with respect to breathalyzer samples and roadside screening devices. In particular, the following passage from *Thomsen*, at p. 651, was cited:

In our reasons for judgment in *Therens*, both Estey J. and I, in comparing s. 234.1(1) and s. 235(1) [now s. 254(3)], also attached importance to the fact that Parliament chose to use the word "forthwith" without qualification in s. 234.1(1) but the words "forthwith or as soon as practicable" and "then or as soon thereafter as is practicable" in s. 235(1). In the end, however, it was the two-hour operating limit under s. 237(1) [now s. 258(1)] for the breathalyzer test that was seen as affording a possibility of contact with counsel prior to compliance with a s. 235(1) demand. [Emphasis added.]

The respondent argues that this in some way links the two-hour time limit to the demand. As I read Le Dain J.'s reasons, however, the point of this passage is simply to illustrate that in the normal case the police will have nearly two hours to complete the breathalyzer test and still benefit from the presumption under s. 258, and that in this time span it is reasonable to allow the driver to contact counsel. I see nothing in his comments that suggests that the demand must as a matter of law be made within the two-hour period.

In the court below, the majority suggested that any ambiguity in a penal provision should be resolved in favour of the accused. Indeed, I took exactly the same position on a different portion of s. 254(3) in my reasons in *R. v. Green*, [1992] 1 S.C.R. 614. However, in my view the same ambiguity does not exist in this case. While it is true that s. 254(3) is not a model of clarity, in this instance the intent of Parliament is sufficiently clear that there is no need for the aid of that canon of statutory construction.

For these reasons, I would allow the appeal, set aside the order of the Appeal Division of the Supreme Court, substitute a conviction for the acquittal entered below, and remit the matter to the Provincial Court for the imposition of sentence.

Appeal allowed.

Solicitor for the appellant: The Attorney General of Nova Scotia, Halifax.

Solicitors for the respondent: Patricia A. Fricker and Allan F. Nicholson, Sydney.

* Stevenson J. took no part in the judgment.

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