

CANADA / JUDGMENT

R. v. Noble

[1978] 1 SCR 632

COURT

Supreme Court of Canada

DECIDED

30 September 1977

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R. v. Noble

Collection

Supreme Court Judgments

Date

1977-09-30

Report

[1978] 1 SCR 632

Judges

Laskin, Bora; Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Spence, Wishart Flett; Pigeon, Louis-Philippe; Dickson, Robert George Brian; Beetz, Jean; de Grandpré, Louis-Philippe

On appeal from

Ontario

Subjects

Criminal law

Decision Content

Supreme Court of Canada

R. v. Noble, [1978] 1 S.C.R. 632

Date: 1977-09-30

Her Majesty The Queen Appellant;

and

Joseph Kenneth Noble Respondent.

1977: March 9; 1977: September 30.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law —Breathalyzer test —Statutes —Interpretation —Number of breath samples to be taken —Criminal Code, R.S.C. 1970, c. C-34, ss. 235, 237(1)(f) as amended by the Criminal Code Amendment Act 1975, 1974-75-76 (Can.), c. 93—Interpretation Act, R.S.C. 1970, c. I-23, s. 26(7).

Respondent was acquitted at trial on a charge of driving a motor vehicle contrary to s. 236 of the Criminal Code (i.e. while having a blood alcohol level in excess of .08). The only evidence of the blood alcohol level of the respondent introduced at his trial was a certificate of a qualified technician pursuant to s. 237(1)(f) of the Code showing the result of one analysis of a breath sample. The Crown appealed by way of stated case on the basis that the trial judge had erred in law by holding, first, that the certificate tendered pursuant to s. 237(1)(f) was inadmissible as only one sample of breath was taken and, second, that s. 26(7) of the Interpretation Act had no application to the interpretation of ss. 235 and 237 of the Criminal Code. The Appeal Division dismissed the appeal and held that at least two breath samples had to be taken under s. 237(1)(c) of the Code before certificate can be admitted into evidence.

Held: The appeal should be dismissed.

While prior to the amending legislation [Criminal Code Amendment Act 1975, 1974-75-76 (Can.), c. 93] a certificate based on the analysis of only one sample of breath constituted of itself evidence of the blood alcohol level of a person charged under s. 236 and was sufficient to create a rebuttable presumption, consideration of the wording of the sections before and after the amendment makes it clear that the rebuttable presumption now arises only where samples of the breath of the accused have been taken. That requirement is not satisfied by showing that only one sample has been taken. Section 26(7) of the Interpretation Act has no application as it is not necessary to give the apparent legislative intent to s. 237(1)(f) which taken in context clearly applies only where more than one breath sample has been taken. Further s. 237(1)(c)(ii), in providing for an “interval of at least fifteen minutes between the time when the samples were taken”, clearly establishes that more than one sample is required.

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division[1], discussing a Crown appeal by way of stated case from an acquittal at trial by Harper, Prov. Ct. J. on a charge of driving a motor vehicle contrary to s. 236 of the Criminal Code. Appeal dismissed.

Barry Athey, for the appellant.

John G. Beaton, for the respondent.

The judgment of the Court was delivered by

RITCHIE J.—This is an appeal, brought with leave of this Court, from a judgment of the Appeal Division of the Supreme Court of New Brunswick dismissing an appeal by way of stated case from the acquittal of the respondent at his trial before Provincial Court Judge Harper, on a charge of driving a motor vehicle contrary to s. 236 of the Criminal Code which provides, in part, that:

Every one who drives a motor vehicle or has the care or control of a motor vehicle, whether it is in motion or not, having consumed alcohol in such a quantity that the proportion thereof in his blood exceeds 80 milligrams of alcohol in 100 millilitres... of blood is guilty of an indictable offence or an offence punishable by summary conviction...

The case stated by the learned trial judge at the instance of the Attorney General, pursuant to s. 762 of the Criminal Code, is set out in full in the reasons for judgment delivered by Mr. Justice Limerick in the Appeal Division and it reveals that

A certificate of a qualified technician pursuant to Section 237(1)(f) of the Criminal Code of Canada showing the result of one analysis of a breath sample.... was the only evidence of the blood alcohol level of the respondent introduced at his trial in proof of the offence charged.

The following grounds of appeal are stipulated in the “stated case”:

1. The Learned Trial Judge erred in law by holding that a Certificate of a Qualified Technician tendered in evidence pursuant to section 237(1)(f) of the Criminal Code of Canada is inadmissible if only one sample of breath is taken.
2. The learned Trial Judge erred in law by holding that section 26(7) of the Interpretation Act of Canada R.S.C. 1970 has no application to the interpretation of Section 235 and Section 237 of the Criminal Code of Canada.

It is contended on behalf of the appellant that the combined effect of ss. 235 and 237 of the Criminal Code as amended by the Criminal Code Amendment Act 1975, 1974-75-76 (Can.), c. 93, is that the certificate of a qualified technician based on the analysis of only one sample of breath, constitutes of itself evidence of the blood alcohol content of a person charged under s. 236 at the time of the alleged offence.

I have no doubt that, before the amendment above referred to, such a certificate was sufficient to create a rebuttable presumption as to the blood alcohol content of the blood of such a person but the question here at issue is whether the amendment has had the effect of requiring the certificate to be based on the analysis of two or more such samples before it can be acceptable as evidence of its contents without further proof.

It appears to me that this question can best be answered by a consideration of the wording of the relevant parts of these sections before and after the amendment and these are reproduced hereunder side by side for the purpose of comparison:

Applicable parts of s. 235 and s.237 before amendment

Applicable parts of s. 235 and s. 237 as amended

235. (1) Where a peace officer on reasonable and probable grounds believes that a person is committing, or at any time within the preceding two has com-

235. (1) Where a peace officer on reasonable and probable grounds believes that a person is committing, or at any time within the preceding two has com- mitted, an offence under section 234, he may, by demand made to that person forthwith or as soon as practicable, require him to provide then or as soon thereafter as is practicable a sample of his breath suitable to enable an analysis to be made in order to determine the proportion, if any, of alcohol in his blood, and to accompany the peace officer for the purpose of enabling such a sample to be taken.

mitted, an offence under section 234 or 236, he may, by demand made to that person forthwith or as soon as practicable, require him to provide then or as soon thereafter as is practicable such samples of his breath as in the opinion of a qualified technician referred to in subsection 237(6) are necessary to enable a proper analysis to be made in order to determine the proportion, if any, of alcohol in his blood, and to accompany the peace officer for the purpose of enabling such samples to be taken.

237. (1) In any proceedings under section 234 or 236,

237. (1) In any proceedings under section 234 or 236,

(c) where a sample of the breath of the accused has been taken pursuant to a demand made under subsection 235(1), if

(c) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 235(1), if

(i) not proclaimed

(i) not proclaimed

(ii) the sample was taken as soon as practicable after the time when the offence was alleged to have been committed and in any event not later than two hours after that time,

(ii) each sample was taken as soon as practicable after the time when the offence was alleged to have been committed and in any event 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) the sample was received from the accused directly into an approved container or into an approved instrument operated by a qualified technician, and

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

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

evidence of the result of the chemical analysis so made is, in the absence of any evidence

evidence of the results of the chemical analyses so made is, in the absence of any evidence to the contrary, proof of the proportion of alcohol in the blood of the accused at the time when the offence was alleged to have been committed;

to the contrary, proof that the proportion of alcohol in the blood of the accused at the time when the offence was alleged to have been committed was, where the results of the analyses are the same, the proportion determined by such analyses and, where the results of the analyses are different, the lowest of the proportions determined by such analyses;

(d) a certificate of an analyst stating that he has made a chemical analysis of a sample of blood, urine, breath or other bodily substance of the accused and stating the result of his analysis is evidence of the statements contained in the certificate without proof of the signature or the official character of the person appearing to have signed the certificate;

(e) a certificate of an analyst stating that he has made an analysis of a sample of any substance or solution intended for use in an approved instrument and identified in the certificate and that the sample analyzed by him was found to be suitable for use in an approved instrument, is evidence that the substance or solution so identified is suitable for use in an approved instrument, without proof of the signature or the official character of the person appearing to have signed the certificate; and

(f) where a sample of the breath of the accused has been taken pursuant to a demand made under subsec-

(f) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 235(1), a certificate of a qualified technician stating

tion 235 (1), a certificate of a qualified technician stating

(i) that a chemical analysis of the sample has been made by means of an approved instrument operated by him in which a substance or solution suitable for use in that approved instrument and identified in the certificate was used,

(i) that each chemical analysis of the samples has been made by means of an approved instrument operated by him in which a substance or solution suitable for use in that approved instrument and identified in the certificate was used,

(ii) the result of the chemical analysis so made, and

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

(iii) if the sample was taken by him,

(iii) if the samples were taken by him,

(A) not proclaimed

(A) not proclaimed

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

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

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

(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 statements contained in the certificate without proof of the signature or the official character of the person appearing to have signed the certificate.

is evidence of the statements contained in the certificate without proof of the signature or the official character of the person appearing to have signed the certificate.

[The italics throughout are my own]

Sections (d) and (e) of s. 237(1) remain as they were before the amendment.

The central contention advanced on behalf of the appellant is that under the wording of s. 235 as amended, the number of samples of his breath which a suspected person may be required to provide is dependant entirely upon the opinion of the qualified technician as to what is necessary to enable a proper analysis to be made and that accordingly as there is nothing to preclude the acceptance by the technician of only one sample for analysis, it must follow that one sample so analyzed is acceptable at trial as evidence of the blood alcohol content of a person charged under s. 236. This argument is said to be strengthened by the further contention that the words "such samples of his breath" as they occur in the amended s. 235(1) are to be construed as meaning "such sample or samples" in accordance with s. 26(7) of the Interpretation Act, 1967-68 (Can.), c. 7 which provides that:

Words in the singular include the plural and words in the plural include the singular.

The questions raised by this stated case are, however, in no way dependant on whether or not the technician was satisfied that only one sample was necessary for his analysis; what is at issue here is whether or not a technician's certificate based on the analysis of only one sample is, of itself, without further proof, prima facie evidence of the statements contained in it and this must depend on whether the rebuttable presumption accorded to such a certificate by s. 237, before the amendment, subsists under the section as amended or whether the new wording requires

that the certificate be based upon two or more analyses before it can be accepted without further proof of its contents.

The effect of s. 237 both before and after the amendment is to establish the conditions under which the certificate of a qualified technician is admissible, without further evidence, as proof of the proportion of alcohol in the blood of the accused. These provisions are obviously designed to assist the Crown in proving its case, and as they serve to restrict the normal rights of the accused to cross-examination and saddle him with the burden of proving that the certificate does not accurately reflect his blood alcohol content at the time of the alleged offence, they are to be strictly construed and, where ambiguous, interpreted in favour of the accused.

I subscribe to the opinion expressed by Chief Justice Hughes in the last two paragraphs of his reasons for judgment in the Appeal Division where he said: In my opinion the new s. 237(1) makes it amply clear that the rebuttable presumption as to the proportion of alcohol in the blood of the accused at the time of the alleged offence arises only 'where samples of the breath of the accused have been taken...' and this requirement is not satisfied by showing that only one sample has been taken.

Both clauses (c) and (f) of s. 237(1) confer special advantages on the prosecution and impose a particular burden upon an accused to meet the burden of proof which arises when the certificate of a qualified technician is received in evidence. Such a provision must, in my opinion, be strictly construed and the requirement that a certificate of a qualified technician is admissible only 'where samples of the breath of the accused have been taken' cannot be extended by the provisions of the Interpretation Act declaring the singular to include the plural and vice versa to a case where only one sample of the breath of the accused has been taken. Such a provision, in my opinion, should only be resorted to where it is necessary to give effect to the apparent legislative intent of the Act being considered. No such necessity arises in construing clause (f) of s. 237(1) which in the context of the amendments referred to above clearly applies only where more than one sample of the breath of the accused has been taken.

I am of opinion also that s. 237(1)(c)(ii) in providing for "an interval of at least fifteen minutes between the time when the samples were taken", clearly establishes that more than one sample is required.

For all these reasons I would dismiss this appeal.

Appeal dismissed.

Solicitor for the appellant: Barry L. Athey, Fredericton.

Solicitor for the respondent: John G. Beaton, Fredericton.

[1] (1976), 15 N.B.R. (2d) 91.

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