

CANADA / JUDGMENT

Yurik v. Superintendent of Motor Vehicles

2004 BCSC 1530

COURT

Supreme Court of British Columbia

DECIDED

21 June 2004

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2004 BCSC 1530 Yurik v. Superintendent of Motor Vehicles

Citation:

Yurik v. Superintendent of Motor Vehicles

Date:

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2004 BCSC 1530

Docket:

L040039

Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment

The Honourable Madam Justice Martinson

June 21, 2004

BETWEEN:

NORMAN RANDALL YURIK

PETITIONER

AND:

THE SUPERINTENDENT OF MOTOR VEHICLES and

THE ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENT

Counsel for Petitioner

E.G. Jackson

Counsel for Respondents

appearing by teleconference

R.C. Mullett

Place and Date of Hearing:

Vancouver, B.C.

June 21, 2004

INTRODUCTION

- [1] This is a judicial review of the decision of an adjudicator employed by the Superintendent of Motor Vehicles (the "Superintendent") confirming a 90-day driving prohibition by a police officer. The test on review is whether the decision of the adjudicator was patently unreasonable.
- [2] I will first provide some background information, and then summarize the issues raised by the appellant and the response of the Superintendent to them. I will then deal with each issue in turn.

BACKGROUND

- [3] Mr. Yurik was stopped by Constable Lee on November 15, 2003.
- [4] She imposed the prohibition based on s. 94.1 of the Motor Vehicle Act, R.S.B.C. 1996 c. 318 (the "Act"). That section requires a police officer to serve a notice of driving prohibition if the officer has reasonable and probable grounds to believe:

94.1(a) by reason of an analysis of the breath or blood of a person, that a person operated a motor vehicle or had care or control of a motor vehicle having consumed alcohol in such a quantity that the concentration of alcohol in the person's blood exceeded 80 milligrams of alcohol in 100 millilitres of blood at any time within 3 hours after operating or having care or control of the motor vehicle.

- [5] Section 94.3 sets out the duties of the officer. Among other duties, the officer is required to forward to the Superintendent:

94.3(d) a report, in the form established by the superintendent, sworn or solemnly affirmed by the peace officer.

- [6] In this case the report was prepared and forwarded. The following portions of the form were not filled in:

Breath or Blood Sample(s)

How have you established the fact that the driver has not consumed alcohol between the time of driving/care or control of the vehicle and the time the sample(s) were taken?

- [7] The report does set out what Constable Lee observed. She noted that Mr. Yurik failed to produce his drivers licence and he said he had one beer 30 minutes prior to being spotted. The observations were a strong odour of alcohol in the vehicle and on his breath, flushed face, watery and bloodshot eyes, hiccoughs, slurred speech and uncertain balance.
- [8] He complied with the request to pull over at a road block, got out of the vehicle when requested to do so, and was polite. He was given a demand for an Approved Screening Device (ASD) test and complied. Both readings showed a Blood Alcohol Concentration (BAC) of 90 milligrams.
- [9] Section 94.4 of the Act allowed Mr. Yurik to apply to the Superintendent for a review and he did so. Section 94.5 of the Act sets out what the Superintendent must consider. One of the things the Superintendent must consider is the report of the peace officer forwarded under section 94.3(d).
- [10] Mr. Yurik was able to present evidence. He presented to the adjudicator the report of an expert forensic consultant, Audrey Jakus. The report was based on hypothetical facts as follows:

Male person 49 years old, body weight unknown

Drinking Pattern:

Admission of consumption of one beer 30 minutes prior to stop at roadblock

No facts established that the driver did not consume alcohol between the time of driving/care or control of the vehicle and the time the sample(s) were taken

Time of driving @ 21:17 hours

Two readings: 22:20 hours and 22:40 hours

- [11] Ms. Jakus notes that it has not been established that the driver did not consume alcohol between the time of driving/care or control and the time the sample(s) were taken.
- [12] The expert said that in these circumstances it is not permissible to make any back calculations of the readings using an average elimination rate of 15 mgs or employing the range of elimination rates of between 10 to 20 to the earlier time of driving at 21:17, as it would not be reasonable to conclude on these fact that the BAC was decreasing since the time of driving.

- [13] Ms. Jakus says that the BAC Datamaster instrument has an error factor of plus or minus 10mg/110ml for every sample of breath that is taken and analyzed. Though a common police practice is to truncate or round down the reading (e.g. 90 might have been anywhere between 90 and 99), scientifically this practice has no merit. She says this is not an appropriate practice. She says that the practice of truncation does not abrogate the plus or minus 10mg/100ml precision error factor. She says that for the reported result of 90, taking into account the instrument error factor and on the balance of probabilities there is an equal probability that this result could have been as low as 80, just as it could have been a result of 90.
- [14] She concluded that her scientific opinion is that the facts of this drinking pattern in conjunction with analysis results of breath samples that could be as low as 80, would establish on a balance of probabilities that the BAC would not have exceeded 80 milligrams of alcohol in 100 millilitres of blood within 3 hours after operating or having care or control of a motor vehicle.
- [15] Mr. Yurik did not provide his own evidence about the incident itself to the adjudicator.
- [16] In this case the adjudicator confirmed the driving prohibition on December 4, 2003 and advised Mr. Yurik that he was prohibited from driving for 90 days beginning December 7, 2003.

MR. YURIK'S SUBMISSIONS ON THIS JUDICIAL REVIEW

- [17] The arguments advanced can be characterized this way.
- There was no evidence before the adjudicator to establish that his BAC was due to alcohol consumed before or while operating a motor vehicle. The Report to Superintendent specifically requires evidence that the driver has not consumed alcohol between the time of driving and the time of the samples, yet the evidence was not provided. The finding of the adjudicator that Mr. Yurik's BAC was due to alcohol consumed before or while driving is incapable of being supported by the evidence, and is therefore patently unreasonable.
 - In requiring the petitioner to establish that he had consumed alcohol after the time of driving, the adjudicator improperly shifted the burden of proof onto the petitioner, denying him a fair hearing.
 - The adjudicator relied on her own knowledge as evidence for extrapolation of blood alcohol content and on the use and function of the ASD without notice to the petitioner, depriving him of the opportunity to make submissions on this evidence.
 - The adjudicator improperly rejected the uncontradicted evidence of the petitioner's expert in favour of her own knowledge in making an extrapolation of BAC.

- The adjudicator demonstrated bias against the petitioner in the manner in which the petitioner's expert's opinion was dealt with. The adjudicator characterised the opinion as 'argument' rather than evidence, indicating a lack of neutrality in the decision making process. She referred to counsel's submissions as statements. The adjudicator also without proper reason rejected the expert's uncontradicted opinion regarding the practice of the police to truncate down breath sample readings. As a result, the petitioner was denied a fair hearing.
- The adjudicator improperly denied the petitioner the benefit of the doubt by using an average elimination rate of 15mg/100ml/hour in her extrapolation, rather than the low end of the 10-20mg/100ml/hour range described by the petitioner's expert.
- The adjudicator's finding of fact that the ASD fail has probative value contradicts the petitioner's expert's opinion that it cannot be established that at the time of driving the petitioner's BAC had not exceeded 80mg/100ml. This finding by the adjudicator, it is argued, is patently unreasonable and cannot be supported by the evidence.

SUPERINTENDENT'S POSITION

- [18] The Superintendent emphasizes the patently unreasonable test that must be applied and says it is a stringent test.
- [19] The decision of the adjudicator was not patently unreasonable. The review by the Superintendent is not like a criminal prosecution where there must be evidence on each essential element of an offence. In any case the adjudicator inferred from the whole of the evidence that no alcohol was consumed after driving, and that decision was not patently unreasonable. There was no reversal of the onus of proof. It was appropriate based on the authorities for the adjudicator to take into account the ASD reading and the adjudicator's experience.
- [20] The legislation no longer requires extrapolation of the reading. The issue of the error factor has been dealt with by the Supreme Court of Canada in *R. v. Moreau*, [1979] 1 S.C.R. 261, and the same principle should apply here. That is, the legislature must have taken the error factor into account when enacting the section. The Superintendent also says that the issue of bias should have been raised at the time of the hearing, but in any event there is no evidence of bias.

EVIDENCE AND INFERENCES DRAWN; REVERSAL OF BURDEN OF PROOF

- [21] I will consider first the submissions relating to the evidence and inferences drawn and the alleged reversal of the burden of proof.
- [22] The burden of proof is a civil burden; to confirm the prohibition the adjudicator must be satisfied that it is more probable than not that there was a violation of the section: *Larose v. British Columbia (Superintendent of Motor Vehicles)*, [2000] B.C.J. No. 482 (S.C.) at para. 22.

- [23] The case law says that the court should consider the totality of the reasons in the context of the whole of the evidence that was before the adjudicator, bearing in mind the restricted jurisdiction of the court on judicial review: Larose at para. 28.
- [24] In view of that approach, a narrow focus on only one section of the report required from the police officer, and the issue of whether the petitioner consumed alcohol after driving, is not appropriate.
- [25] I am unable to agree with the argument advanced that the adjudicator reversed the onus of proof by requiring Mr. Yurik to provide evidence on this point. The case law properly says that commenting on the failure to provide evidence does not reverse the onus of proof. In this case the comments of the adjudicator did not reverse the onus of proof.
- [26] This adjudicator did look at the whole of the evidence and drew the inference that no alcohol was consumed between driving and the tests: *Johnson v. British Columbia (Superintendent of Motor Vehicles)*, [2002] B.C.J. No. 89 (S.C.); Larose, cited above, at para. 23.
- [27] It was not, in the all the circumstances, patently unreasonable for the adjudicator to find that it was more probable than not that Mr. Yurik had not consumed alcohol between the time of driving and the time of the test.

USE OF UNDISCLOSED PERSONAL KNOWLEDGE

- [28] I now turn to the question of use of personal knowledge.
- [29] Where undisclosed information is relied upon in a decision, it will generally render that decision void: "it is well established that resting a finding of fact on undisclosed information or evidence can amount to a breach of the rules of natural justice and an error of jurisdiction": *Vance and Hardit Corp. et al.* (1985), 53 O.R. (2d) 183 (Ont. Div. Ct.) at 187; cited with approval in *Dennis v. British Columbia (Superintendent of Motor Vehicles)* (2000), 82 B.C.L.R. (3d) 313 (C.A.).
- [30] Mr. Yurik says there are three areas of concern: in extrapolating BAC, in considering the rate at which the body eliminates alcohol, and in the use and function of the ASD.
- (i) BAC Extrapolation
- [31] On the first issue, that the adjudicator used undisclosed information in extrapolating BAC, the comments are unnecessary to the decision (obiter) because of the recent changes in the legislation and cannot be said to make the decision patently unreasonable.
- (ii) Rates of Elimination
- [32] The same analysis applies to the question of the rates of elimination. Any comments are not necessary to the decision and do not make the decision patently unreasonable.
- (iii) ASD

- [33] On the third issue, Mr. Yurik claims that the adjudicator used undisclosed personal knowledge of the use and function of the ASD and its probative value in confirming a BAC in excess of 80mg/100ml. The adjudicator used this information to contradict the opinion of the petitioner's expert.
- [34] The case law supports the conclusion that the adjudicator was entitled to use the results of the ASD demand: *Gordon v. British Columbia*, [2002] B.C.J. No. 713 (C.A.).

EXPERT OPINION

- [35] I turn now to the remaining aspects of the expert evidence. The two concerns raised that are still relevant under the existing legislation are the effect of the practice of truncating breath sample readings, and the margin of error of breath sample results.
- [36] Ms. Jurak opined that the margin of error of breath sample readings meant that the petitioner's actual BAC at the time of the samples could have been as low as 80mg/100ml.
- [37] In this respect I agree with the submission of the Superintendent that the principle enunciated by the Supreme Court of Canada in *R. v. Moreau*, cited above, at p. 458, in the criminal law context applies equally to this legislation. That is, the legislature should be taken to have considered the limitations of the approved instruments in setting its BAC limits in the statute.
- [38] Even if the expert's opinion is accepted it was not patently unreasonable in considering the whole of the evidence, including the observations of the police officer, for the adjudicator to conclude that a higher actual BAC than 80mg/100ml was probable.

BIAS

- [39] Finally, the petitioner says the adjudicator was biased, based on the following grounds: using the average elimination rate of 15mg/100ml/hour, rather than the lowest point of the range cited by the petitioner's expert; referring to the evidence of the petitioner's expert as 'argument'; referring to counsel's submissions as statements and rejecting the evidence of the petitioner's expert regarding the truncation and margin of error of breath sample readings.
- [40] The use of the average rate of alcohol elimination was not patently unreasonable, and cannot be said to demonstrate bias. At any rate, the recent changes to the legislation make this finding irrelevant.
- [41] The reference to the evidence of the petitioner's expert as 'argument' is unfortunate. However, I do not think this single word establishes bias against the expert's evidence. The expert was otherwise referred to in the reasons as an expert. She did in fact make a scientific argument in her evidence, to substantiate her opinion that the petitioner's BAC did not exceed 80mg/100ml at the time of driving. The rest of the adjudicator's discussion of the expert's evidence does not support the contention that the adjudicator saw that evidence as

merely legal argumentation on behalf of Mr. Yurik, rather than as evidence in the proceeding.

[42] As Melvin J. stated in Larose, cited above, at para. 28:

it would be inappropriate to minutely dissect any particular sentence in the reasons in isolation with a view to subjecting it to criticism to such a degree that it would constitute an error in law and justify the quashing of the confirmation.

[43] The same analysis applies the reference to counsel's submissions as statements. Again the use of the word was unfortunate. That word must be considered in the context of the reasons as a whole. The adjudicator has addressed the submissions made and in doing so treated them as submissions.

[44] Looking at the reasons as a whole I am unable to conclude that this adjudicator was biased, or that there is an appearance of bias.

[45] I have considered the decision of the court in Feddersen v. British Columbia (Superintendent of Motor Vehicles), 2003 BCSC 208. It is useful because it sets out the legal principles I must apply in dealing with the issue of bias. It is however distinguishable on its facts.

CONCLUSION

[46] I therefore conclude that the adjudicator applied the correct test, assessed the evidence as a whole, was not biased, and the decision was not patently unreasonable.

[47] The application is dismissed.

"D.J. Martinson, J."

The Honourable Madam Justice D.J. Martinson

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