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R. v. Godsoe

Between
Her Majesty the Queen, and
David Godsoe

[1997] O.J. No. 6078
File No. 96/1272

Ontario Court of Justice (Provincial Division)
Bracebridge, Ontario
Whetung Prov. J.

Oral judgment: April 14, 1997.
(7 pp.)

Charge: S. 253(b) Criminal Code of Canada - Over 80

Counsel:

W. Paisley, for the Crown.
S. Altman, for the accused.

¶ 1 **WHETUNG PROV. J.** (orally):— The issue before me is relatively narrow. The Crown, in this matter, seeks to rely upon what purports to be a Certificate of Analysis, which is presently Exhibit Number Two in this matter.

¶ 2 The Crown seeks to utilize the Certificate, pursuant to S. 258(1)(a) of the Criminal Code. As a prerequisite to the Crown's ability to do so, I am satisfied, as I already indicated, that the notice of the Crown's intention has been shown by Exhibit Number One, however, in order for the Crown to rely upon or utilize the evidentiary information contained in Exhibit Number Two, as a prerequisite the crown must first establish by evidence extraneous to the Certificate that breath samples were taken from the accused and that the samples were taken pursuant to demand under S. 254(3).

¶ 3 There is no issue before me regarding the sufficiency of the demand made by Constable Hurley at roadside in this matter. The issue becomes simply one of linkage, to establish by evidence outside the certificate that the breath samples and the results obtained and presumably indicated in Exhibit Number "B" by chemical analysis are the result of samples taken from the accused and that the samples evidenced were taken pursuant to a demand under S. 254(3).

¶ 4 I say the latter with some reservations because I do not think the law is that absent a linkage, as expressed by Justice LaForme in Regina and Douglas Boyce. [1996] O.J. No. 903, decision released March 8th, 1996, it can safely be said that simply by administering a demand pursuant to S. 254(3) by the arresting officer, in this case Constable Hurley, that the Certificate of Analysis and results indicated there on flow automatically. Rather, there must be a form of linkage which can be established in several ways, firstly, by simply having the arresting officer or investigating officer remain present for the taking of breath samples, and that officer being able to indicate observations of same. Secondly, by inference, which Justice LaForme says must be reasonable, drawn from circumstantial evidence, but that Justice LaForme says in his decision, having read the prior authority, such

as Regina and Walsh (1980) 53 C.C.C., 5868,. and Regina and Pickles, (1963) 11 C.C.C. (2d), 210. In his opinion, the following guidelines are applicable:

> "(1) Prior to the breathalyzer certificate being admitted into evidence, the Crown must establish, by evidence extraneous to that of the certificate itself, that two prior elements have been proven, namely, (1) a breath sample had been taken from the accused, and (2) that the breath sample taken was taken pursuant to demand proved to have been made under subsection 254(3) of the Criminal Code.
>
> (2) That proof of the two prior elements may be established by a reasonable inference being drawn from the circumstantial evidence and non-verbal hearsay in the form of conduct giving rise to the arrest and testing of the accused. Furthermore, I am satisfied, on my full reading and understanding of Walsh, that such circumstantial evidence must at least include the arresting officer explaining to the qualified technician the particulars of the conduct giving rise to the arrest, and, in my opinion, infers that it should be in the presence of the accused. The better approach, again relying on the Court's comments in Walsh, would be for the arresting officer to remain and observe the testing."

¶ 5 In the present situation, the evidence of Constable Hurley was that following arrest of the accused at 1:32 a.m. and intervening events she arrived at the police detachment at 1:58 a.m. She testified that she then assisted with the preparation for breath tests and placed a call to Duty Counsel at the request of the accused. At 3:13 a.m. consultation with Duty Counsel was completed in private and at 3:14 a.m. she testified that the accused was turned over to Constable Britton. She said that she was unable to recall exactly what she told Constable Britton but she did identify Constable Britton as a Breathalyzer Technician, and she told Constable Britton that the accused was under arrest for impaired driving and that she responded to questions regarding time, place, time of breath demand and grounds. She said that she told him what her grounds were and that she was not present for the breath test and next saw the accused at a time prior to 3:55 a.m., because at that time she knows she served release papers on him.

¶ 6 In cross-examination she said that she turned the accused over to Constable Britton as soon as she was in the Breath Room and that she had given information to Constable Britton before turning the accused over, and that the accused was not present when she gave the information to Constable Britton.

¶ 7 She acknowledged that she had no independent recollection of what was said to Constable Britton, but that Constable Britton simply has a form and that she feels that he would have followed the form and he asked her questions to which she responded. She said that she was assuming that Constable Britton asked her the time of the arrest and demand but that she has no independent recollection of what was asked and what was said.

¶ 8 She said that when she left the room, she closed the door and she has no idea what was happening, her recollection of what was happening in the room when she left.

¶ 9 She next saw the accused when Constable Britton turned him back over to her and delivered some papers to her, which now appear to be Exhibits Number One and Two in this matter.

¶ 10 In the circumstances of this matter there is no direct evidence of the taking of breath tests by Constable Britton, pursuant to a demand, simply because Constable Hurley was not present. The issue then becomes is there circumstantial evidence and non-verbal hearsay in the form of conduct giving rise to the arrest and testing of the accused, which pursuant to the principles of Justice LaForme, would establish that a reasonable inference is able to be drawn that the results of breath testing as set out in Exhibit "B" arise pursuant to breath samples taken from the accused and that these samples were taken pursuant to demand under S. 254(3) of the Code.

¶ 11 In all the circumstances I would have to say no and will say no. I say this for the following reason. Despite her best efforts in this regard and the unusual circumstance in which she found herself on the night in question, Constable Hurley has no notes to assist regarding actual conversation with Constable Britton; she has

no independent recollection of her dealings with Constable Britton, and she assumes, simply, that she responded as would be her normal practice to questions asked by Constable Britton from a check list.

¶ 12 There is no evidence before me as to the contents of this check list. Similarly, there is no indication that the conversation between Constable Britton and Constable Hurley took place in the presence of the accused.

¶ 13 The evidence of Constable Hurley can therefore be placed as no higher than this. She delivered the accused to the care of Constable Britton; that there was a conversation, which based upon normal practice she feels would have contained certain information, but she has no recollection of same and is unable to testify as to the contents of such conversation of the present matter.

¶ 14 In all the circumstance of this matter I find that the prerequisite burden upon the Crown in this matter that there be evidence outside of the certificate that breath samples were taken from the accused pursuant to demand made under S. 254(3) is not present, and therefore, Exhibit Number Two can not be admitted in this matter as evidence of blood alcohol concentration on the part of the accused.

¶ 15 **THE COURT**: Now Mr. Altman and Mr. Paisley.

¶ 16 MR. PAISLEY: Yes, Your Honour, that is the case for the Crown then. That leaves us with the impaired.

¶ 17 **THE COURT**: Thank you. On that basis I will mark the offence of operating a motor vehicle with more than legal limit, dismissed at this time, there being no evidence before me.

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