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R. v. Redmond (Ont. C.A.)

Between
Her Majesty The Queen, Respondent, and
Kelly Redmond, Appellant

Ontario Judgments: [1990] O.J. No. 143
Action No. 457/88

Ontario Supreme Court - Court of Appeal
Toronto, Ontario
Blair, Finlayson and Griffiths JJ.A.

Heard: November 3, 1989
Judgment: February 6, 1990

[Ed. note: Corrigenda, released February 14, 1990, appended and corrections made to judgment.]

Charter of Rights — Fair trial — Whether right to make full answer and defence denied by failure of Crown to provide samples of blood for testing by defence.

Accused appealed from conviction for impaired driving causing bodily harm. Accused unable to obtain blood sample for testing because samples taken pursuant to s. 256 of Criminal Code destroyed in error after testing by Crown. Crown therefore unable to rely on presumption in s. 258(1)(d), that certificate of analysis is, in absence of evidence to the contrary, proof of concentration of alcohol in blood determined by analysis.

Held, where Crown does not rely on presumption in s. 258, there is no requirement that blood sample be preserved for analysis by defence. Appeal allowing in part on other grounds.

Motor vehicles -- Impaired driving and "over 80" -- Admissibility of evidence -- Whether result of hospital test for blood alcohol content admissible to prove impairment in content admissible to prove impairment in absence of expert absence of expert evidence establishing capability, accuracy and reliability of machine used to analyze blood.

Appeal from conviction by accused.

Held, expert evidence explaining how machine works and establishing its reliability not required. It could be inferred from evidence of lab technicians that machine was reliable. R. v. Bird (1989), 71 C.R. (3d) 52, 76 Sask. R. 275 (C.A.) not followed. Appeal allowed in part on other grounds.

Alexander H. Fiszauf, for the Appellant.

David B. Butt, for the Respondent.

The judgment of the Court was delivered by

BLAIR J.A.:— The issue in this case is under what circumstances may the alcohol content of blood obtained in a hospital for medical purposes be used to prove impaired driving.

The appellant appeals her conviction by Kent D.C.J. of operating a motor vehicle while impaired and thereby causing bodily harm to other persons contrary to s. 239(2) of the Criminal Code, R.S.C. 1970, c. C-34 [now s. 255(2) of the Criminal Code, R.S.C. 1985, c. C-46]. She was sentenced to thirty days imprisonment and probation for one year. Her counsel advised this court that she has served her sentence.

The appellant was the driver of an automobile that went off the road at a sharp curve and struck a pole. The appellant and her three female friends had been at a tavern where each had the equivalent of three drinks of vodka and orange juice. The three passengers suffered relatively minor injuries but the appellant's were more severe, including a fractured left wrist, lacerations to her face requiring some seventy stitches, lacerations to her leg and possible head or neck injuries.

The appellant was taken to the emergency ward of the Brantford General Hospital. The physician in charge directed that six samples of her blood be taken for various diagnostic tests. The tests included one for blood alcohol content because the physician smelled alcohol on the breath of the appellant and did not know how much her state could be related to alcohol or to head injury since they both present similar symptoms.

The Crown conceded that the conviction for impaired driving causing bodily harm could not be sustained because the trial judge had misdirected himself on the need to establish that the accident was causally connected with the impairment. Counsel for the Crown, however, submitted that the appellant was guilty of the included offence of impaired driving.

After the accident, the police obtained a warrant to take samples of the appellant's blood under the procedure set out in s. 240 [now s. 256] of the Criminal Code. The samples were destroyed in error before the appellant applied for release of one of them for purposes of examination and analysis as provided in s. 240(4) [now s. 258(4)]. The Crown was thus deprived of the benefit of the presumption in s. 241(1)(d) [now s. 258(1)(d)] and was not able to prove the blood alcohol content of the appellant simply by filing a certificate of the analyst who analyzed the appellant's blood. In order to establish impairment, the Crown had to rely on the result of the test for blood alcohol content performed at the hospital as directed by the physician in charge of the emergency ward.

Donald McRee, a medical laboratory technologist for sixteen years, described how he had taken the six samples of the appellant's blood directed by the physician. He was cross-examined on the procedure that he followed in withdrawing the blood and whether it had been contaminated by alcohol used in cleaning the skin. The trial judge held that there had been no such contamination. This finding of fact was challenged in this appeal, but it cannot be disturbed because it was supported by the evidence and was properly made by the trial judge in the exercise of his discretion.

The appellant's blood was analyzed by Debra McMaster, a laboratory technologist of fourteen years experience. The analysis was done by a TDX REAF enzyme method machine. Mr. McRee described the machine as being "idiot proof" and "user friendly". Both Mr. McRee and Mrs. McMaster testified that a control specimen was run with each test to ensure that the machine was operating within prescribed limits. Mrs. McMaster testified that such a control sample was run with the appellant's blood sample and that the machine was operating within its proper limits when it analyzed the blood of the appellant. The print-out from the machine showed a blood alcohol concentration of 41.17 millimoles per litre of blood.

Dr. William Robinson, a forensic toxicologist employed by the Centre of Forensic Sciences, was called by the Crown as an expert to give opinion evidence with respect to the analysis of blood alcohol content and the interpretation of the results of such analysis. He testified that the blood alcohol content of the appellant established by the analysis was the equivalent of 170 milligrams of alcohol per 100 millilitres of whole blood, the standard of measurement used in determining blood alcohol content for the purposes of s. 237(b) [now s. 253(b)] and other provisions of the Criminal Code.

Dr. Robinson stated that in the interval between the accident at 11:45 p.m. and the taking of the sample at 1:15 a.m. the blood alcohol concentration of the appellant would have declined. He estimated that, at the time of the accident, the blood alcohol content was 185 to 205 milligrams of alcohol per 100 millilitres of blood. He was of the opinion that "at the time of the accident all facilities [of the appellant] to operate a motor vehicle would be

impaired. This would include judgment, coordination, concentration, reaction time and ability to judge a situation".

Dr. Robinson was familiar with the TDX REAF machine which he described as "an instamatic machine to analyze for alcohol". He said that it was used primarily in hospitals in this province. He testified that he had experience with hospitals and the blood testing performed by them by the TDX REAF machine and similar machines. He was not subjected to any cross-examination about his reliance on the results of the an alysis performed by the TDX REAF machine and, in particular, as to the capability, reliability and accuracy of this machine or similar machines in determining blood alcohol content. Dr. Robinson's acceptance of the results of the test as an accurate analysis of the blood alcohol content of the appellant was unchallenged at trial.

On this appeal, the appellant objected to conviction on the lesser and included offence of impaired driving on three grounds:

1. The evidence of blood alcohol content derived from the test at the hospital was not admissible because the capability, accuracy and reliability of the TDX REAF machine had not been established;
2. That, in any event, the evidence was not admissible because a court order permitting its disclosure had not been obtained as required by regulations made under the Hospital Act, R.S.O. 1980, c. 410; and
3. The admissibility of the evidence of the blood alcohol content violated the appellant's rights under ss. 7 and 11(d) of the Canadian Charter of Rights and Freedoms.

The Admissibility of Blood Alcohol Content
Tests Derived from the Use of the TDX REAF Machine

The admissibility of the hospital test results is challenged on the basis of the decision of the Saskatchewan Court of Appeal in R. v. Bird (1989), 71 C.R. (3d) 52, 76 Sask. R. 275 which was released more than a year after the trial judgment in this case . In that case, the appellant was convicted of driving when the concentration of alcohol in hi s blood exceeded 80 milligrams of alcohol in 100 millilitres of blood contrary to s. 237(b) [now s. 253] of the Code. Two analyses were made of the appellant's blood taken in a hospital for medical purposes after a serious accident. One analysis was done in the hospital by a machine described as a "Dupont Automatic Clinical Analyzer" and the second analysis was performed in the provincial laboratory using a gas chromatograph. The analyses by the two different machines produced identical results. The hospital machine had been in use for five and one-half years and the provincial laboratory machine had been used for fifteen and one-half years. Both laboratory technicians were experienced - the provincial laboratory technician had more than thirty years' experience.

The majority of the Saskatchewan Court of Appeal held that the results of the tests conducted by the two technologists were inadmissible as evidence of the blood alcohol content. This was because the technologists were only qualified as experts in the operation of the machines but not for the purpose of establishing their capability, accuracy or reliability in an alyzing blood. The majority judgment, written by Vancise and Sherstobitoff JJ.A., stated at p. 58 C.R. and 279 Sask L.R.:

> ... [I]t is apparent that the technglogists were found to be qualified by the judge to give evidence only as to their ability to operate the machines properly and to obtain a result or readout from them. They were not found to be qualified to give evidence as to the capability or reliability of the machines, nor as to the accuracy of the results of the analyses. They did not purport to give any evidence in respect of these things. Thus, there is a complete lack of any evidence that the machines used were capable of performing the function in question and, if operated properly, would produce an accurate and reliable result. In the absence of such evidence the results of the analyses produced by the machines lack any evidentiary value at all.

Wakeling J.A., in dissent, took the position that the inability of the laboratory technologists to describe how the machines operated and their efficacy in comparison with other methods of determining blood-alcohol content

went to weight and not admissibility. Referring to the evidence of the two technologists, he stated at pp. 64-5 C.R., 284 Sask. L.R.:

> I agree that it would have been preferable to lead some evidence that the instrument is in general use for this purpose, and is generally recognized as capable of producing accurate results. To have done so would no doubt have made the trial judge's ruling less vexing to him, but its absence does not create a fundamental and irretrievable oversight if there is other credible evidence from which this conclusion can be reasonably drawn, which was certainly the case here. I cannot accept that the failure of these two witnesses to say the obvious creates such a flaw in their testimony as to make it unacceptable.
>
> What the trial judge had to decide was whether it was safe to conclude that the instrument used by each of these witnesses in their separate laboratories was fit for the purpose for which it was being used. To conclude that it was fit did not constitute taking judicial notice of that fact for there was ample evidence to support that conclusion. Putting another face on the issue, a failure to accept the instrument as fit for that purpose necessarily involved the conclusion that inappropriate instruments had been acquired by two separate institutions; that the deficiency of the instruments had not been noticed even though they had been utilized several times a day by these and other technicians over a period of several years; that its calibrations could be inaccurate even though they were checked each shift against known substances, and finally, that the existence of the same results from each of two separate laboratories was merely coincidental.

His conclusions were buttressed by his comments on the reliance on mechanical aids by experts in giving evidence at pp. 65-6 C.R., 284-5 Sask. L.R.:

> I am further influenced by my knowledge that many experts give testimony which involves the application of information made available through the use of specialized instruments. Some examples which come to mind include the chartered accountant's use of computers, and the medical profession's use of an x-ray machine. These experts would not likely be able to confirm their expertise in the technical functioning of these instruments as it would obviously take a much different form of training and background to explain the intricacies of the instrument and the chemical, electronic or other concepts which it utilizes in its function. I accept it is not asking too much to have the expert say the instrument is in general use and generally accepted as being accurate, but I also see no problem in a trial judge reaching that conclusion where the facts clearly support that result. If by so doing the trial judge is engaged in an act of faith, it is one firmly based on the reality that experts are not likely to utilize ineffective and inaccurate instruments to make scientific analyses of critical importance within their field of expertise....

With respect, I consider that the reasons of Wakeling J.A., which I adopt, are to be preferred. It seems to me that the majority may have been misled by their references to ss. 238 [now s. 254] and 241 [now s. 258] on which they commented as follows at p. 58 C.R., p. 279 Sask. L.R.:

> It is precisely to avoid difficulties such as the Crown encountered in this case that the provisions of ss. 238 and 241 of the Criminal Code were enacted permitting the results or blood alcohol analyses to be admitted into evidence by way of certificate, but only with elaborate safeguards as to qualified analysts, approved instruments, and procedures to be followed. In this case the Crown was either unwilling or unable to avail itself of these sections and must prove its case in the usual way.

The provisions in the Criminal Code referred to are intended to simplify proof of blood-alcohol content "in the absence of evidence to the contrary". They would have applied in thi s case if a sample of the appellant's blood had been preserved by the Crown. The results of analyses of breath or blood certified to the court pursuant to these sections are presumptive proof of the facts they disclose and it is for this reason that the conduct of such tests and the presentation of their results to the courts is strictly controlled. It should be noted, however, that the Criminal Code requires only that analyses of blood samples be performed by an "analyst" defined as a person

designated by the Attorney General as an analyst for the purposes of s. 241 [now s. 258]: s. 238 [s. 254]. No procedure or apparatus is prescribed for analyzing blood samples and there is nothing to indicate that an an alysis by a TDX REAF machine or similar machines would not be acceptable as proof of blood alcohol content under s. 241(1)(d) [now s. 258(1)(d)].

There are factual differences between this case and R. v. Bird, supra. As in Bird, supra, in this case two analysts gave evidence about the operation of the blood testing machines and the results of the analysis. In addition, in the present case there was the testimony of the toxicologist, Dr. Robinson, that he was familiar with TDX and similar machines which were in general use in hospitals in Ontario and that he was also familiar with their test results. From this it can properly be inferred that the test results were acceptable from the standpoint of accuracy and reliability because such machines are routinely relied on for blood testing for medical purposes where the health, or even the life, of the patient may be at stake. The evidence of Dr. Robinson was not challenged in cross-examination and its admissibility was never objected to by the appellant.

In Bird, supra, there was no expert witness like Dr. Robinson to speak about the general use of blood testing machines in hospitals in Saskatchewan. It could, however, be inferred, as Wakeling J.A. did in Bird, from the evidence of the two technicians that such machines were in general use in that province. For this reason, my respectful disagreement with the majority decision in R. v. Bird, supra, is not based on a factual distinction between the two cases but rather upon the principles established by judicial decisions governing the admission of expert evidence derived from scientific instruments.

In this province, the law regarding the admissibility of measurements derived from scientific instruments operated by experts trained in their use was settled by this court's decision in R. v. Grainger (1958), 120 C.C.C. 321. In that case, the appellant had been convicted of driving an automobile above the prescribed speed limit. The only evidence against him was data obtained from a radar speedmeter given by the police officer who operated it. On cross-examination the officer freely admitted that he was not an electronics expert and so could not explain how the radar machine worked. He claimed that the machines were well maintained by police technicians; that they were simple to operate; that he had spent two weeks as an observer to familiarize himself with the use of the machine; that he had calibrated it in the prescribed manner on the morning when the charge was laid; that he believed that the results furnished by the machine were always extremely accurate; and that they were accurate in relation to the charge before the court.

The objection to the admission of the data obtained from the machine was the same as that made by the appellant in this case. It was stated by Roach J.A. at p. 322:

> The substance of [the] argument in this Court was that the record supplied by the radar speedmeter amounted to nothing unless and until it was first established that such a machine, when properly used, was capable of registering the speed of a motor vehicle on a highway, that the machine at the relevant time was in good working condition and was properly used.

This argument was rejected by the court which held that it was not necessary for scientific evidence to be given to explain precisely how the machine operated or to prove its capability and accuracy. It is sufficient if the expert operating the machine establishes that the machine is capable of making required measurements or producing the required data; that the machine was in good working order at the relevant time; and that it was properly used. If these conditions are met, the evidence is admissible and the only question left to the trier of fact is the weight to be given to such evidence. This follows from the comprehensive statement made by Roach J.A. at pp. 322-323:

> In my respectful opinion, it is implicit in the police officer's evidence as summarized in the case stated, that this particular radar speedmeter, when properly used, is capable of registering the speed of a motor vehicle and that, at the time in question, it was being properly used and in good working order. True, the officer admitted that he was not an electronics expert, and, therefore, could not explain all of the scientific mechanism that made up the machine and that resulted in it recording accurately the speed of a motor vehicle. He was, however, familiar with the manner in which the machine was intended to be used, and from his familiarity with it over a two-weeks' period he stated that the data furnished by it was extremely accurate.

> It is possible for any machine to get out of order. On the day in question, however, the officer calibrated this machine by the use of a tuning fork and testified that by the use of that device he ascertained that the machine was in good working order. Although he could not give a scientific explanation of the operation, he stated that when the vibrations of a given tuning fork set up certain results in the machine, that in the light of his experience the machine was in good working order and capable of recording the speed of a motor vehicle. If the machine was subject to all the weaknesses and inaccuracies which [counsel] enumerated in argument in this Court, the accused could have called evidence to show these facts. He did not. On the only evidence that was before the Justice of the Peace, it was open to him to convict the accused.
>
> This is not a case of no evidence, but is a case in which the only question was the weight of the evidence.

The decision in Grainger was followed by McDonald J. of the Saskatchewan Court of Queen's Bench in R. v. Waschuk (1970), 1 C.C.C. (2d) 463. It is consistent with the law on the reliance that experts may place on evidence derived from scientific instruments and mathematical formul as stated by Wigmore on Evidence (3rd ed.), Vol. 2, para. 665a as follows:

> The use of scientific instruments, apparatus, formulas, and calculating-tables, involves to some extent a dependence on the statements of other persons, even of anonymous observers. Yet it is not feasible for the professional man to test every instrument himself; furthermore he finds that practically the standard methods are sufficiently to be trusted. Thus, the use of a vacuum-ray machine may give correct knowledge, though the user may neither have seen the object with his own eyes nor have made the calculations and adjustments on which the machine's trustworthiness depends. The adequacy of knowledge thus gained is recognized for a variety of standard instruments. In some instances the calculating tables or statistical results are admitted directly, under an exception to the Hearsay rule.

This fundamental rule was affirmed by the Supreme Court of Canada three-quarters of a century ago by Anglin J. in The Canadian Pacific Railway v. Jackson (1915), 52 S.C.R. 281 at pp. 291-92:

> If a witness called can verify a mortuary table produced in evidence as one in actual use by a company dealing in that class of business I do not understand it to be the law that he must possess knowledge sufficient to enable him to explain the basis on which the table was prepared or to give an opinion worth something as to its reliability of correctness in order to render his evidence, quantum valeat, admissible.

The evidence in this case established the capability, accuracy and reliability of the TDX REAF machine to measure blood alcohol content. It also established that the machine was in proper working order. This evidence was, therefore, properly admitted by the trial judge.

Did the Admission of Evidence of the
Hospital Blood Test Infringe the
Appellant's Rights under s. 8 of the Charter?

The three witnesses from the hospital - the physician in charge of the emergency ward and the two analysts - all had notes in their possession from which they refreshed their memory while giving testimony. The physician in charge of the emergency ward referred to her notes as "emergency records that she charted". Mr. McRee referred to what he called "'lab work sheets" on which he had recorded the control values and the test values for each test. Mrs. McMaster referred to "lab slips" on which she had recorded the appellant's test results. No objection was taken at trial to the references to these records by the witnesses and they were not filed as exhibits. Indeed, no inquiry was made about where the notes had come from and how they were obtained. The hearing in this court proceeded on the unsubstantiated assumption that the notes may have been obtained from the hospital's records by the three hospital employees in order to refresh their memories.

The appellant referred to the Regulations made under the Public Hospitals Act, R.S.O. 1980, c. 410, O.Reg. R.R.O. 1980. Section 49 of the Regulations reads in part:

> 49.-(1) Subject to subsections (2), (3), (4) and (5), a [hospital] board shall not permit any person to remove, inspect or receive information from a medical record.
>
> (2) Subsection (1) does not apply to
>
> (a) a person with a process,
>
> (i) issued in Ontario out of a court of record or any other court, and
> (ii) ordering the removing of, the inspecting of or the receiving of information from a medical record;

This section was applied by this court in a pre-Charter decision, R. v. French (1977), 37 C.C.C. (2d) 201 which held that hospital records produced in response to a subpoena were admissible in criminal proceedings even though a court order had not been obtained for their release. MacKinnon J.A. stated at p. 213:

> Under this section no one is permitted to remove, inspect or receive information from a medical record without, inter alia, "a process issued in Ontario out a court of record or any other court ... ordering the removing of, the inspecting of or the receiving of information from a medical record." The routine securing and serving of a subpoena does not, in my view, conform to the requirements of the section, even though in some circumstances it might be considered to be a process issued out of a court of record... [The] hospital records were improperly obtained, although once obtained and presented, they were admissible in the criminal proceedings. [Emphasis added.]

The appellant contended that the reference to the notes presumably taken from hospital records constituted an unreasonable search and seizure which violated her rights under s. 8 of the Charter. Reliance was placed on decisions which held that s. 8 was violated when police obtained blood samples not required for medical purposes and without a warrant and without consent from an unconscious person in a hospital: R. v. Tomaso, [1989] O.J. No. 593, 14 M.V.R. (2d) 10 (Ont. C.A.), R. v. Pohoretsky (1989), 33 C.C.C. (3d) 398 (S.C.C.). Reference was also made to R. v. Dyment (1988), 45 C.C.C. (3d) 244 (S.C.C.), where, while the blood sample was obtained for medical purposes, it was turned over to a police officer for forensic analysis without the consent of the accused or pursuant to a search warrant or any lawful process.

The facts are entirely different in the present case in which the appellant's blood was taken and tested in the hospital for medical purposes. This case is similar to R. v. Carter (1982), 2 C.C.C. (3d) 412 where a blood sample was taken in a hospital for medical purposes. The police executed a search warrant and seized the sample which was analyzed by the Crown's laboratory as well as by a hospital technician. The nurse who took the sample and the hospital technician who analyzed it were subpoenaed and testified at trial. A panel of five members of this court allowed a Crown appeal from a decision that the taking of the blood sample without the accused's consent constituted an unreasonable search and seizure and violated his rights under s. 8 of the Charter. Brooke J.A., speaking for the court, stated at p. 415:

> [T]he act of the hospital personnel in taking the blood sample was reasonable. Moreover, there is no basis on which the acts of hospital personnel in handing over the sample to the police pursuant to a search warrant and in testifying pursuant to subpoena, could be said to be unreasonable. It may be that the conduct of hospital personnel could amount to a violation of a patient's rights under the Charter but that is not the case here.

In this case, in my opinion, the references by hospital witnesses to hospital records to refresh their memories and ensure the accuracy of the evidence which they were compelled by subpoena to give were reasonable and did not violate the rights of the appellant under s. 8 of the Charter.

Were the Appellant's Rights Under
Sections 7 and 11(d) of the Charter Violated?

The appellant's argument under the Charter was that she had been denied the opportunity to make full answer and defence because there was no sample of her blood available for testing. This argument can be disposed of summarily. The preservation of blood samples for examination by an accused under s. 241 [now s. 258] affords protection to a person presumed to be guilty as a result of a blood alcohol test. The appellant was not faced with the presumption in this case and so there is no reason for requiring that a blood sample should have been preserved for analysis by her. The appellant at trial had full opportunity to meet the Crown's case by cross-examination and the adduction of contradictory evidence on her behalf but failed to do so. I am satisfied that the conduct of the trial fully satisfied Charter requirements.

For the foregoing reasons, I am of the view that the evidence of the analysis of the appellant's blood at the Brantford General Hospital was properly admitted and that it clearly establishes that she was driving her automobile while impaired when the accident occurred. I would allow the appeal to the extent of setting aside the conviction for the offence of impaired driving causing bodily harm under s. 239(2) [now s. 255(2)] and substituting therefor a conviction under s. 237(a) [now s. 253(a)] for the included offence of impaired driving. The sentence, which the appellant has already served, was, in my opinion, the appropriate sentence in the circumstances for the offence of impaired driving and I would not remit the case to the trial judge for further sentencing.

BLAIR J.A.
FINLAYSON J.A.:— I agree.
GRIFFITHS J.A.:— I agree.

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Corrigenda
Released: February 14, 1990

Page 20 - "Patoretsky" changed to "Pohoretsky"; "... (3d) 398." changed to "... (3d) 398 (S.C.C.). Reference was also made to R. v. Dyment (1988), 45 C.C.C. (3d) 244 (S.C.C.) where, while the blood sample was obtained for medical purposes, it was turned over to a police officer for forensic analysis without the consent of the accused or pursuant to a search warrant or any lawful process."