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R. v. Tresham

Between
Her Majesty the Queen, and
Craig Tresham

[1998] O.J. No. 1744
File No. 95-5556

Ontario Court of Justice (General Division)
Boyko J.

April 27, 1998.
(16 pp.)

Civil rights — Detention and imprisonment — Detention — What constitutes arbitrary detention — Right to counsel — Impaired driving, demand for breath or blood sample — Canadian Charter of Rights and Freedoms — Denial of rights — Remedies, exclusion of evidence.

This was an appeal by Tresham from conviction for driving with an excessive blood alcohol limit. Tresham and his friends called a taxi to take them home after a night of consuming alcohol in a restaurant. He drove his car over to the taxicab in order to transfer certain personal items. As he emerged from his vehicle, he was arrested. He provided a breath sample upon a demand made by the officer. The officer had been informed that there were suspects in the area and decided that Tresham was that suspect without any observation to determine if he had reasonable and probable grounds to arrest him. After his arrest, Tresham stated in response to the officer's questions that he had consumed too much alcohol to be able to drive. The officer relied on that statement to constitute reasonable and probable grounds to make the breath demand. The trial judge found that the accused's rights under section 9 of the Canadian Charter of Rights and Freedoms had been breached when he was detained arbitrarily without reasonable and probable grounds to be arrested. The trial judge ruled however that the breath sample could still be admitted into evidence as the sample was validly obtained under the authority of section 48 of the Highway Traffic Act which gave a readily identifiable officer the authority to require a driver to stop his vehicle to determine whether or not there was evidence to justify the making of a demand.

HELD: Appeal allowed. Conviction quashed. Acquittal entered. The restaurant parking lot was not a highway pursuant to the Act. Thus the demand could not be justified under section 48. The police officer obtained the breath sample in violation of the accused's rights under section 9 of the Charter by arbitrarily detaining him without reasonable and probable grounds. Tresham was also detained and the demand made without being given the right to counsel a required by section 10(b) of the Charter. In the circumstances, the resulting breaches of the Charter were sufficiently serious that the administration of justice would be brought into disrepute if the sample obtained by the breach was not excluded as evidence.

Statutes, Regulations and Rules Cited:

Automobile Insurance Act Regulations, R.S.B.C. Canadian Charter of Rights and Freedoms, 1982, s. 9. Criminal Code, R.S.C. 1985, c. C.46, ss. 253(b), 254. Highway Traffic Act, R.S.O. 1990, s. 48. Highway Traffic Act, R.S.N.B.

Counsel:

D. Russell, for the respondent.
L. Stones, for the applicant.

¶ 1 **BOYKO J.**:— At trial the learned trial Judge determined that a violation of the appellant's right under s. 9 of the Charter of Rights and Freedoms had occurred as he was detained arbitrarily, the officer not having had reasonable and probable grounds to arrest the appellant.

¶ 2 The trial judge then considered whether or not the breath sample obtained in violation of the Charter could nevertheless be used as validly obtained evidence. He ruled that it could have been obtained, pursuant to s. 48 of the Highway Traffic Act notwithstanding the Charter violation and therefore its admission as evidence would not render the trial unfair.

Issue

¶ 3 The primary issue in this appeal is whether the learned trial court judge erred at law in finding that the breath sample was validly obtained under the authority of s. 48 of the Highway Traffic Act and was therefore admissible evidence, notwithstanding the violation of the accused's rights under s. 9 of the Charter.

Background

¶ 4 The appellant and his friends had been playing golf earlier that day and had spent the evening dining and consuming alcohol at a restaurant. Being aware they were not in a position to drive home, they called a taxi cab which was waiting for them at the front door of the restaurant. While his friends entered the taxi cab, the appellant went to his car to retrieve their three sets of golf clubs from his trunk; as his car was some distance from the front door of the restaurant, he drove his car to the front door of the restaurant to transfer the golf clubs into the taxi cab. As soon as he emerged from his vehicle, he was arrested, questioned, and provided a breathalyser sample at the request of the officer.

¶ 5 Unless the officer had reasonable and probable grounds to arrest the appellant in the first instance, the breathalyser sample later demanded would not have been obtainable. Without reasonable and probable grounds, the officer could nevertheless have been authorized to make a demand for a breathalyser sample under s. 48 of the Highway Traffic Act; this section permits an officer to stop a driver of a motor vehicle on a highway, to determine whether or not there is evidence to justify making a demand for a breath sample under s. 254 of the Criminal Code.

¶ 6 It appears that the officer came to the restaurant parking lot having been informed there might be suspects in the vicinity and it seems he was of the view that the appellant was the suspect. Hence, without first making any observation to determine whether he had reasonable and probable grounds to arrest the appellant, the officer proceeded to immediately arrest and handcuff the appellant. After making the arrest the officer asked the appellant about the consumption of alcohol to which the appellant replied to the effect that he "had too much to be driving". The officer relied on this statement elicited from the appellant after his arrest, to constitute reasonable and probable grounds for making a breathalyser demand, leading ultimately to a failed breathalyser test and the conviction of the appellant on the charge of driving with a blood alcohol limit over eighty, contrary to s. 253(b) of the Criminal Code (Canada).

¶ 7 As the arrest occurred in the parking lot of a restaurant, the appellant maintains that the parking lot of a restaurant was not a "highway" within the meaning of the Highway Traffic Act. His position is that s. 48 of that Act does not authorize the officer, while in a restaurant parking lot, to take steps to determine if there were had reasonable grounds to make a demand. Consequently, the breath sample thereafter obtained, was not evidence that was "otherwise obtainable" within the meaning of R. v. Stillman (1997), 113 C.C.C. (3d) 321 (S.C.C.) at 364.

¶ 8 The respondent maintains that since s. 48 of the Highway Traffic Act does not expressly use the term "highway", the Act does not restrict the application of s. 48 to a "highway". Moreover, the officer, in the investigation of an offence under the Criminal Code, is at liberty to conduct such investigation on commercial

property. In the alternative, the respondent's position is the parking lot was a commercial parking lot, falling within the definition of "highway".

Review of the Law

¶ 9 Section 48(1) of the Highway Traffic Act, R.S.O. 1990, c. H.8 specifies:

> A police officer, readily identifiable as such, may require the driver of a motor vehicle to stop for the purpose of determining whether or not there is evidence to justify making a demand under s. 254 of the Criminal Code (Canada).

¶ 10 "Highway" is defined as follows under the Highway Traffic Act:

> Highway includes a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct, or trestle, any part of which is intended for or used by the general public for the passage of vehicles and includes the area between the lateral property lines thereof.

¶ 11 The Highway Traffic Act is a provincial statute intended to regulate traffic on highways as defined in the Act. Unless there is another specific definition which governs s. 48, and none has been brought to my attention, the general definition of 'highway' governs the application of s. 48.

¶ 12 The appellant relies on the cases of R. v. Mansour (1979), 47 C.C.C. (2d) 129 (S.C.C.) and Gill et al. v. Elwood (1969), 9 D.L.R. (3d) 681 (Ont. C.A.).

> In R. v. Mansour, supra, the Supreme Court of Canada addressed the issue of the applicability of the H.T.A. to a private parking lot. The accused was charged with driving while his licence was suspended. The driving was found to have occurred entirely on private property, ie., a parking lot adjacent to an apartment building.

¶ 13 Mr. Justice Estey noted that if a driver's licence was not required to operate a motor vehicle in the parking lot in question, the accused could not be guilty of the Criminal Code offence of driving while his licence was suspended. The learned Judge then considered the following definition of "highway" (as it then was) under the H.T.A.:

> "highway" includes a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle; designed and intended for, or used by, the general public for the passage of vehicles;

¶ 14 Mr. Justice Estey relied on the Ontario Court of Appeal case of Gill et al. v. Elwood (1969), 9 D.L.R. (3d) 681 (Ont. C.A.), which had considered the issue of whether the definition of "highway" included the parking lot of a shopping centre plaza. The definition of 'highway' was identical to that considered in R. v. Mansour. In Gill v. Elwood, the Ontario Court of Appeal held that a civil action for negligence arising out of actions occurring in the parking lot could not succeed, as the H.T.A. had no applicability. With respect to the definition of "highway", the Court in Gill et al. v. Elwood, supra stated:

> We think of great significance in that designation are the concluding words "designed and intended for, or used by, the general public for the passage of vehicles". We think too that those words taken together with all of the words comprising the clause in their cumulative effect fall short of including therein as a highway the premises with which the case deals (p. 60).

¶ 15 The Supreme Court of Canada in Mansour, adopting similar interpretation held that the parking lot of an apartment building in question similarly fell outside the purview of the H.T.A. Mr. justice Estey stated:

> I conclude that the term "highway" in its ordinary and popular sense and as illustrated by the words employed in s. 1(1), para 11 of the Act does not embrace the concept of a parking-lot

> and, particularly, a parking-lot adjacent to an apartment building, and presumably one which was established primarily for the provision of parking to its inhabitants (p. 132).

¶ 16 In Mansour, the Supreme Court of Canada also considered other provincial legislation pertaining to the definition of "highway" and found that, unlike the Ontario legislation, the definitions in some statutes were not ambiguous. For example, the Court noted that in Alberta, the definition of "highway" referred to streets, roads, etc., "whether publicly or privately owned." On the other hand, the legislation in Manitoba, specifically excluded areas for the parking of vehicles.

¶ 17 More recently, in the case of R. v. Douglas (1997), 35 O.R. (3d) 197 (Ont. Prov. Div.) Renaud J. considered whether the accused could be guilty of failing to obey a lawful signal by a police officer to stop his motor vehicle under s. 216(1) of the H.T.A., when the activity in question occurred entirely in the parking lot of an apartment building. After a thorough and detailed review of the case law on the issue, Renaud J. held that the officers had no authority under the H.T.A. in these circumstances, because both the motorist and the police officers were on the private property at the time that the signal was given by the police officers to stop the motorist. The learned Judge relied on the decisions in Mansour and Gill v. Elwood, among other, as well as the rule of statutory interpretation that ambiguities are to be resolved in favour of an accused.

¶ 18 Renaud J. expressly considered changes to the definition of "highway" since Mansour, supra, was decided. In particular the definition now includes the phrase "any part of which." Highway is now defined as follows:

> Highway includes a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct, or trestle, any part of which is intended for or used by the general public for the passage of vehicles and includes the area between the lateral property lines thereof. [Emphasis added]

¶ 19 Renaud J. held that these amendments did not change the application of earlier case law:

> Based on the foregoing review of the cases, I conclude that the touchstone to the interpretation of this definition are the three words that qualify all of the others, "common and public". In my view with great respect to the contrary opinion, unless a surface is "common and public", it may not be a highway notwithstanding that "any part of which is intended for or used by the general public."

¶ 20 Counsel for the respondent takes the position that the case of R. v. Milne (1996), 107 C.C.C. (3d) 118 (Ont. C.A.), is determinative of the issue since on the facts of that case the accused was arrested while in his vehicle on the commercial parking lot adjacent to the building in which he worked. This is disputed by the appellant's counsel who maintains that in Milne, supra, the issue was not expressly considered and so that case cannot be relied on for the proposition that s. 48 applies to a private parking lot, which she maintains is the situation in the case at bar.

¶ 21 In Milne, supra, the issue was whether the evidence obtained from physical roadside co-ordination test could be used at trial in a charge of impaired driving. The agreed statement of facts was to the effect that the O.P.P. officer received information that the driver of a green Pinto parked by an electrical shop was possibly impaired. On arriving at the scene the O.P.P. officer observed the tail lights came on as the vehicle was reversing out of its parking spot. The officer blocked the vehicle, detected a strong odour of alcohol, noticed that the driver's eyes were "very glassy", asked for his driver's licence which the driver was "very slow" in providing. Finally, after identifying himself, the driver admitted he consumed two glasses of wine.

¶ 22 There was no issue raised in that case as to whether s. 48 of the Highway Traffic Act applied to a parking lot, presumably because the officer had reasonable and probable grounds before he stopped the driver who was about to exit onto a highway within the meaning of the Highway Traffic Act.

¶ 23 In R. v. Love, [1994] N.B.J. No. 72, an unreported decision of the New Brunswick Court of Appeal, the court held that since the Motor Vehicle Act's definition of "highway" expressly included a "parking lot", that the 'parking lot' could be either public or private, where such parking lot is used by the general public for the passage of parking of vehicles. In other words, the statute was intended to regulate all parking lots, whether private or public, insofar as it is being "used" by the general public.

¶ 24 The New Brunswick Motor Vehicle Act defined "highway" as follows:

> "highway" means the entire width between the boundary lines of every street, road, lane, alley, park, parking lot, drive-in theatre, school yard, picnic site, beach, winter road across ice or place when any part thereof is used by the general public for the passage or parking of vehicles, and includes the bridges thereon; [emphasis added]

¶ 25 Ayles J. continued as follows in his reason in para 6:

> In 1980, the Legislature saw fit to extend the meaning of "highway" to include parking lots, such as the one in question here at the Lancaster Mall in Saint john, N.B., and drive-in theatres. It is also true that they are available for the invitees of the owners and the occupiers, and for owners and occupiers themselves. It is equally true that the general public have access to private shopping centre parking areas and may park their vehicles on these properties. In my opinion, the wording of the Act is broad enough to include any member of the general public that intends to pass through or park, his vehicle in that particular parking lot, even if there may be a right of the owners to remove people who use the property for other than business connected with that property.

¶ 26 At para 10, Ayles J. concludes:

> I am of the opinion that the term "highway" in the New Brunswick Act, includes a parking lot, whether it be public or private, where that parking lot is used by the general public for the passage or parking of vehicles. The public has access to these parking lots and may park there. The fact that this is private property and is subject to control by the owners does not, in my opinion, change the use to which the land is being put.

¶ 27 In Pichler Ramsay Enterprises Ltd. v. T & T Trucking ltd., an unreported decision of the Saskatchewan Court of Appeal, [1996] S.J. No. 371 Appeal File 2278, the court considered the meaning of "highway" in the long title to the Saskatchewan highways legislation: "An Act respecting the Regulation of Traffic on Saskatchewan Highways." In that case the court held that the long title to the Act together with the definition of "highway" therein, restricted the definition of "highway", such that it would not apply to an unattended motor vehicle parked within private premises.

¶ 28 The British Columbia Court of Appeal in a 1986 unreported decision, Spencer v. Lutkehaus [Vancouver registry: CA003073; [1986] B.C.J. No. 130] considered the distinction between the phrase "general public" and "public" contained in the definition of "highway" under the regulations of the Automobile Insurance Act. The regulations provided as follows:

> "Highway" includes every highway within the meaning of the Highway Act and every road, street, lane or right-of-way, designed or intended for, or used by the general public for passage of vehicles, and every private place or passageway to which the public, for the purpose of parking or servicing of vehicles, has access or is invited; [Emphasis added]

¶ 29 Hinkson J. held that a private driveway was not a highway within the meaning of the regulation. Consequently, coverage under the policy of insurance for a backhoe used on a private driveway was held not to extend to provide indemnity for an accident that occurred on a private driveway.

¶ 30 Lambert J. concurred and added further observations, including:

> My third observation is that there is a change in the use of the word "public" from the first part of the definition to the second part of the definition. In the first part of the definition the word "public" is qualified by the words "the general" so that the question is whether the general public use the highway for passage of vehicles. In the second Part of the definition there is no qualifying adjective. In my opinion, the reason for dropping the word: "general" was not to suggest that each member of the public is to be dealt with on an individual basis, but rather, to avoid the difficulty where the access is not entirely universal. Such places as supermarket parking lots or service stations might not be thought to be used by the general public, but only by patrons of the particular supermarket or service station and, in my opinion, that was the reason for dropping the qualifying adjective where the word "public" is used in the second part of that definition. [Emphasis added]

¶ 31 These considerations, however, do not apply to the case at bar where the Ontario law does not make such distinctions in the definition of "highway".

Applying the law

¶ 32 The New Brunswick decision in Lane, supra, and the British Columbia decision in Spencer v. Lutkehaus, supra, can be distinguished as the statutes in both instances expressly uses the term "parking lot" and the issues before the court was whether the term 'parking lot' was restricted in its application to either a public or private parking lot. In the latter case, the court had to interpret the term 'general public' in comparison with the term 'public'.

¶ 33 Milne, supra, in my view is also distinguishable from the case at bar insofar as the officer in Milne approached the driver having had previous information specific to the driver, namely that he was possibly impaired, and furthermore observed the driver in the vehicle, about to exit the parking lot, presumably onto a "highway" within the meaning of the Highway Traffic Act.

¶ 34 Thus, in Milne, before asking the driver to submit to physical co-ordination tests, the officer made a number of observations that would justify such a demand. In the case at bar the officer had no prior information specific to the appellant, nor was the appellant about to enter onto a highway. Indeed when the officer saw the appellant exiting from his vehicle, he had no grounds whatsoever on which to arrest him.

¶ 35 The Highway Traffic Act does not in my view justify an officer's further questioning of a driver in this situation. The term "highway", as defined under the Ontario Highway Traffic Act, although a fairly expansive definition unlike similar legislation in other provinces, does not expressly include the term "parking lot". While the definition does include the term "place" and specifies "any part of which is intended for or used by the general public for the passage of vehicles," I do not find that this provision applies to a parking lot. It states for the "passage" of vehicles and not for the "parking" of vehicles. In this regard the Supreme Court of Canada decision in Mansour, supra, applies, that the definition of highway under the Ontario Highway Traffic Act "does not embrace the concept of a parking lot."

¶ 36 The officer obtained the breath sample in violation of the appellant's rights under s. 9 of the Charter, by detaining him arbitrarily. Moreover, he was detained and the breath sample demanded, without the appellant being given his rights to counsel as required under s. 10(b) of the Charter. These circumstances make the resulting Charter breach sufficiently serious such that it would bring the administration of justice into disrepute if not excluded as evidence.

Conclusion

¶ 37 Section 48 of the Highway Traffic Act, which purports to regulate traffic on highways as defined within that Act, does not apply to a restaurant parking lot which falls outside of the definition of "highway" in the Act. Consequently, the officer was not authorized in these circumstances to obtain evidence in the manner he did so. Of course an officer is free to make observations in the course of his or her duty, and if these observations reveal reasonable and probable grounds for an arrest, an arrest may be made, even in the parking lot of

restaurants. However, where no observation has been made to give the officer reasonable and probable grounds for arrest, he or she cannot then resort to the special provision contained under s. 48 of the Highway Traffic Act which is designed to permit random stops on "highways" as defined by the Act. In this case the officer arrested Mr. Tresham, without any reasonable and probable grounds for his arrest. If Mr. Tresham had been stopped on a highway within the meaning of s. 48 of the Highway Traffic Act, the officer would have been permitted to make a demand for a breath sample. As Mr. Tresham was detained off the highway, the breath sample demand cannot be justified under s. 48 of the Highway Traffic Act.

¶ 38 The effect of the violations under the Charter are of a serious nature, there being no legal authorization for the detention, such that it would bring the administration of justice into disrepute to admit this evidence at trial. With the breathalyser evidence excluded, the conviction cannot stand.

¶ 39 The appeal is allowed, the conviction is quashed and a verdict of acquittal is entered.

BOYKO J.

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