

*evidence
to the
contrary: 12 hr
suspension
notice*

*D & D - EVIDENCE TO THE
0290/88 CONTRARY*

DISTRICT COURT OF ONTARIO

B E T W E E N:

GAETANO DIPIETRO

Appellant

vs

HER MAJESTY THE QUEEN

Respondent

APPEARANCES

L. G. Stortini, Esq.

Ms. G. Dobney

For the Appellant

For the Respondent

ENDORSEMENT

H. R. LOCKE, D.C.J.

The issue raised on this appeal is whether the Provincial Judge who convicted the appellant erred in permitting the Crown to reopen the prosecution of the appellant after the appellant had pleaded not guilty, and after all the evidence against him had been led by the Crown and after which the appellant had elected to call no evidence and, further, at a point after the submissions of both sides had been totally given or substantially given.

The appellant was apprehended by a police officer on a charge of driving a motor vehicle on a highway at a speed of 88 kilometers per hour in a 60 kilometer per hour zone. The arresting officer, after stopping the appellant, smelled alcohol on the latter's breath. That prompted a demand for a roadside breath test. The time was prior to 1:06 a.m. on the day in question. The device registered "a fail". That further prompted a demand for a breathalyzer test at the police station. The reading on the breathalyzer machine taken first at 1:55 a.m. and the second at 2:15 a.m. registered 100 milligrams of alcohol in 100 milliliters of blood.

The arresting officer completed a document known as Notice of Suspension of Driver's Licence. It is dated the 22nd of July, 1987. The time the officer noted was 1:06 a.m. The reason for the suspension in the arresting officer's handwriting is as follows:

Of his 12 hour suspension obtained
reading of 50 milligrams or more
on a breathalyzer (Borkenstein)
pursuant to Section 30(a) of the
Highway Traffic Act.

During his cross-examination the arresting officer was asked the following questions and gave the following answers concerning the Notice of Suspension (an exhibit at trial).

Q. In fact after the roadside test,
did you later serve him with a
Notice of Suspension of his
drivers (sic) license?

A. That is correct.

Q. And, is that the document that you prepared?

A. That is correct.

Q. Does that document accurately reflect information that you put on it?

A. Yes, I completed that document.

Q. What time did you complete that document?

A. I don't know when completed. I presume it would be completed sometime after the breathalyzer (sic) test.

The Learned Provincial Judge after hearing argument adjourned the matter to another date. Upon its return and upon a motion by Crown counsel, in a long set of reasons which I find quite confusing, the Crown was permitted to reopen the trial and to call the arresting officer back to question him concerning the Notice of Suspension and the contents the officer had written on it.

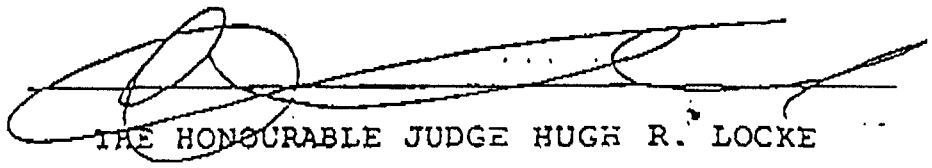
In my respectful view that Notice of Suspension and its contents which referred to the appellant at a certain period of time having blown a breath sample into the roadside machine in excess of 50 milligrams, in the absence of the document itself testifying what the reading actually was as obtained from the breathalyzer, is evidence which is admissible and is capable in law and fact of being evidence to the contrary.

The Crown counsel at the trial who was not counsel on this appeal was experienced and capable. He was well aware that the document had become an exhibit at trial. For reasons best known to himself he does not appear to have thought it necessary to re-examine the arresting officer on the contents to clear this matter up. The Learned Provincial Judge obviously felt the same way. The Provincial Judge should not have reopened the trial in these circumstances after the accused had elected to call no evidence and after argument had been given. The Crown is surely entitled to only "one bite" and not two.

Both counsel on this appeal have agreed that if I should conclude as I have, that the exhibit was capable of constituting evidence to the contrary, rather than ordering a new trial the appeal should be allowed and a verdict of acquittal entered.

Accordingly, the appeal is allowed. The conviction is quashed and, in these circumstances, a verdict of acquittal is entered.

DATED AT TORONTO THIS 20th day of January, 1989.



THE HONOURABLE JUDGE HUGH R. LOCKE