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R. v. Karunakaran

Her Majesty the Queen and Ambikawathy Karunakaran

Ontario Court of Justice

S.C. Armstrong J.

Judgment: August 11, 2008

Docket: 4911-998-07-07272-00

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Counsel: B. Glendinning for Crown

B. Fox for Accused, Ambikawathy Karunakaran

Subject: Criminal; Constitutional

Criminal law.

Cases considered by S.C. Armstrong J.:

R. v. Stinchcombe (1995), 1995 CarswellAlta 409, 1995 CarswellAlta 27, 178 N.R. 157, 38 C.R. (4th) 42, 96 C.C.C. (3d) 318, 162 A.R. 269, 83 W.A.C. 269, [1995] 1 S.C.R. 754 (S.C.C.) -- referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally -- referred to

s. 7 -- pursuant to

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s. 10(a) -- referred to

s. 10(b) -- referred to

Criminal Code, R.S.C. 1985, c. C-46

s. 254(5) -- pursuant to

S.C. Armstrong J.:

Introduction

1 On August 11, 2007, Ambikawathy Karunakaran was charged with failing, without reasonable excuse, to comply with a demand made by a peace officer to provide a breath sample into an approved screening device contrary to section 254(5) of the *Criminal Code*.

2 The case proceeded as a combined *Charter voir dire* and trial. The arresting officer, Constable Shomari Gray, was the only witness. Before he completed his examination-in-chief, Mr. Fox complained that the officer was giving evidence about matters that were not recorded in his notes. I granted his request to obtain a transcript of the officer's testimony so that he could consider his options. Accordingly, the case was adjourned after the direct examination was completed and Mr. Fox had asked a few questions in cross-examination. Mr. Fox completed his cross-examination on June 12, 2008, followed by a brief re-examination and submissions.

3 The defendant raised various defences to the charge: (1) he sought relief for violations of his rights under sections 7, 10(a) and 10(b) of the *Charter*; and (2) he argued that, in any event, the Crown had not proven its case beyond a reasonable doubt.

4 After reviewing my notes of the officer's testimony, the transcript of the proceedings on April 25, 2008, the submissions of counsel and the case law to which I was referred, I dismissed the charge on July 17, 2008. Here are my reasons for doing so.

The Arresting Officer's Testimony in Court

5 The officer testified that he first noticed Mr. Karunakaran's grey car when it was stopped at a red light on Steeles Avenue and Middlefield in Markham because the reversing lights on the back of the car were on, and he was concerned that the car might move backwards when the light turned green. In fact, this didn't happen: the light turned green and the backup up lights went off. However, the car sat at the green light for about five seconds after the other cars moved off east-bound. The officer decided to investigate. He activated his siren to do a traffic stop. Mr. Karunakaran pulled over immediately to the right side of the road and came to a complete stop.

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6 The officer parked his cruiser behind the defendant's car, entered the fact that he was engaged in a traffic stop on his computer and approached the driver's side of the car. He noted that the driver's window was open and

7 there was only one person in the car. He approached the driver's side and spoke to Mr. Karunakaran through the window. He told him that he had noticed his back up lights on in the intersection, and asked him if everything was okay. Mr. Karunakaran appeared nervous and responded, "Oh, everything's okay". When the officer asked where he was going, he said he was on his way home.

8 The officer asked for his documentation and noticed that he was shaking when he provided it to him. He had detected a smell of an alcoholic beverage on Mr. Karunakaran's breath and asked him if he had consumed any alcohol. The defendant denied that he had. The officer didn't believe him. Based on the smell, the officer formed the "reasonable suspicion" that Mr. Karunakaran had alcohol in his body and asked him to get out of his car.

9 At about 10.25 p.m., when they were standing between the cruiser and the defendant's car, the officer read him the approved screening device demand from the back of his notebook and asked the defendant if he understood. The officer said the defendant replied, "Yes."

10 The officer asked the defendant to wait at the roadside. He went to get the approved screening device from his cruiser, which he had tested at the start of his shift, turned it on and went back to where Mr. Karunakaran was standing. The officer gave the defendant a mouthpiece in sealed plastic, and asked him to open it and insert it into the instrument. He did so. The officer then explained to him how to provide a sample. He instructed him to make a seal with his lips around the large end of the mouthpiece, take a deep breath and continue blowing until he told him to stop.

11 The officer held the device while Mr. Karunakaran, contrary to instructions, took a small breath and blew into the device for approximately three seconds and stopped. As a result, the device displayed an error code but no reading.

12 The same thing happened on Mr. Karunakaran's second attempt. The officer repeated that he had to take a deep breath and said that the defendant said he was trying to, but that it was hard for him.

13 The third attempt was no different: the defendant did the same thing with the same result. He took a small breath, blew for a short time and produced the error code and no reading. At this point, the officer told Mr. Karunakaran that the next one was his last try and that if he didn't blow correctly he'd have to arrest him for not providing a suitable sample.

14 Mr. Karunakaran responded "okay, okay", but did the same thing again: he put his lips around the mouthpiece, blew for a short time and stopped before being told to do so. At this

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point, the officer went to place him under arrest by grabbing his wrist. In describing the defendant's reaction, the officer first said Mr. Karunakaran became upset, and begged him not to arrest him, saying "Please, no. Please no, don't do it. I'm sorry, I'm sorry". In response to a question from the Crown, he said the instrument registered an error code. Then he described in more detail how the defendant reacted when he went to arrest him: "So he was upset. He begged me not to place him under arrest... I grabbed his wrist and turned him around and he said, "Please, please just give me one more chance. Please, please give me one more chance."

15 The officer agreed to give the defendant another chance but told him he had to blow correctly. He placed the device in front of Mr. Karunakaran, but the defendant did the same thing with the same result: he blew for about three or four seconds and stopped blowing without being told to do so by the officer; and the instrument displayed an error code but no reading.

16 The officer allowed the defendant a sixth attempt in response to his request for one more try. Again, he blew for a short time, three or four seconds, stopped and the instrument registered an error code because a suitable sample was not received.

17 After the sixth unsuccessful attempt, the officer placed Mr. Karunakaran under arrest at approximately 10.30 p.m. for failing to provide a suitable sample into an approved screening device. He read him his rights to counsel and caution from the back of his notebook.

The Officer's Notes of this Incident

18 The officer's notes covering events from his first observation of the defendant's car to the time he stopped it consist of one word, the word "stopped".

19 From the word "stopped" onwards, the officer notes are: "The driver appeared nervous. A slight smell of alcohol detected. No other signs of impairment. Driver was asked to exit the vehicle and driver walked normally. At a normal gait."

20 His notes dealing with the approved screening device demand and the attempts to provide a sample consist of: "Breath demand issued. Driver provided six opportunities to provide a sample. All six times, the driver failed to provide a suitable sample."

Analysis

21 When I compare the lack of detail in the officer's notes with the detailed testimony he gave in court, the contrast is startling. He basically disclosed the case during his examination-in-chief.

22 His notes were little more than cryptic jottings. There were significant omissions. For example, there was no detail in his notes about how he came to stop the defendant's car. There was no indication of where the smell of an alcoholic beverage came from. There was no note that he asked Mr. Karunakaran if he had consumed any alcohol. In fact, there was no note of any of his

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conversation with the defendant.

23 From the point he read the approved screening device demand to the point he placed the defendant under arrest, approximately five minutes later, the officer made seven lines of notes dealing with the s. 254(5) fail to comply offence. There is very little description of the events that led to Mr. Karunakaran's arrest. There is really no description of his six attempts to blow into the machine. There is no record that, after the third attempt, the officer told him that the next one would be his last and that he would be arrested if he did not blow correctly. There is no note of the officer taking hold of Mr. Karunakaran's wrist to arrest him after the fourth unsuccessful attempt, nor of the defendant asking for another chance to blow.

24 In this case, the Crown and the officer conceded that the officer's notes were sparse, and should have been more thorough. The officer vowed to prepare more detailed notes in future. However, in my opinion, the officer's notes were too sparse. They were woefully inadequate, and it was not up to the defence to supplement them by contacting the officer to obtain more detail, as was implied.

25 More significantly, the officer's notes were insufficient to enable the Crown to provide proper disclosure and resulted in a breach of Mr. Karunakaran's section 7 *Charter* rights. In this case, as is common practice, the police officer's notes were given to the Crown to disclose to the defence, without any accompanying will-say statements. As such, they constituted the means by which the Crown fulfills its disclosure obligations and assesses its case. They are also the basis on which the defence prepares full answer and defence. In the post-*Stinchcombe* era [*R. v. Stinchcombe*, 1995 CarswellAlta 409 (S.C.C.)], such notes cease to be simply a memory aid. While an officer's notes cannot be expected to record every minute detail, they must contain a complete and accurate record of the significant events in the investigation so as to enable the Crown to fulfill its constitutional obligation to make full disclosure.

26 Nor was it satisfactory that the officer in effect provided disclosure of the case in court by fleshing out his notes on the witness stand. Such a practice runs completely contrary to the principles of fundamental justice enshrined in section 7 of the *Charter*. Such a practice would also inevitably lead to unacceptable practical difficulties. As it was, this practice resulted in an adjournment of this case after the officer had testified in chief to allow the defence to obtain a transcript and consider its options. Clearly, if such a practice became widespread, trials would become intolerably fragmented and the administration of justice would grind to a halt.

27 Moreover, the state of the officer's notes led me to question the reliability of his testimony in court. Although the officer struck me as sincere and I did not disbelieve what he said, the huge discrepancy between his notes and his testimony in court had a direct impact on my assessment of the case.

28 When he testified on April 28 and June 12, 2008, the events had taken place about eight and ten months before. The officer had been involved in more than 80 drinking and driving in-

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vestigations before this one, and had taken part in more than 50 such investigations since. It is common sense that memories do not tend to improve with time and the possibility for inaccuracy increases, particularly where the investigation being described is one of dozens of the same type in which the officer participated. The officer's memory might be accurate, but with such a huge discrepancy between his notes and his testimony, I was left in a state of reasonable doubt about the reliability of his evidence in court.

Conclusion

29 I conclude that there was a violation of the defendant's rights under section 7 of the *Charter* because of the inadequacy of the officer's notes.

30 The discrepancy between his notes and his testimony in court is so large that I am not satisfied that the Crown has proven its case beyond a reasonable doubt.

31 In light of these findings, it is unnecessary to consider the other *Charter* issues raised by the defence.

32 The charge is dismissed.

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