

Case Name:
R. v. Palmaria

Between
Her Majesty the Queen, and
Pierre Palmaria

[2005] O.J. No. 5276

Ontario Court of Justice
Toronto, Ontario

S.R. Shamai J.

Oral judgment: June 6, 2005.

(9 paras.)

Criminal law -- Offences -- Offences against person and reputation -- Motor vehicle offences -- Impaired driving or driving over the legal limit -- Accused's conviction for driving with a blood alcohol concentration above zero was set aside for lack of sufficient evidence.

Criminal law -- Appeals -- From verdict -- Grounds -- Misapprehension of or failure to consider evidence -- Accused's conviction for driving with a blood alcohol concentration above zero was set aside for lack of sufficient evidence -- Crown failed to prove that accused held licence that was subject to zero blood alcohol concentration requirement and that instrument used to test him was approved.

Appeal by the accused Palmaria for driving with a blood alcohol concentration above zero -- Palmaria was alleged to hold a G2 driving licence -- G2 licence holder was not allowed to drive with a blood alcohol concentration above zero -- Palmaria claimed that the trial court was not provided with admissible evidence regarding the licence -- Only evidence provided that he was a G2 licence holder was the testimony of a police officer who stated he saw a G2 licence with a number attached to it -- No evidence of the suitability of the approved instrument was provided to the court -- HELD: Appeal allowed -- Conviction was quashed -- G2 licence was a critical aspect of the Crown's case -- Hearsay evidence provided was not sufficient to prove this element -- Crown also failed to prove that device used to test Palmaria was an approved instrument.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982 s. 10(b)

Criminal Code s. 254

Highway Traffic Act s. 48.1, s. 48.1(14), s. 57.1

Highway Traffic Act Regulation, Ontario Regulation 340-94 s. 6(1)

Counsel:

Ms. L. Solish: City Prosecutor.

Mr. M. Higgins: Agent for the accused.

REASONS FOR JUDGEMENT

1 S.R. SHAMAI J. (orally):-- Mr. Palmaria was convicted on a charge of - and I quote the certificate of the offence,

"G2 licence holder drive when blood alcohol concentration above zero, contrary to Ontario Regulation 340-94 s. 6(1)."

2 A number of issues were raised at his trial, which took place on December 12th, 2002, in the City of Toronto. A number of the issues on trial are raised on this appeal, although others appear from a close examination of the transcript to have been left to the trial proceeding itself.

3 To summarize the issues raised by the appellant: The appellant says that no admissible evidence of the alleged licence was placed before the trial court. The appellant says that no evidence of the suitability of the approved instrument was placed before the Court, no evidence was placed before the Court that the witness testifying to the interpretations of the result of the test had the basis for doing so. He says he was never trained. And finally, the appellant says that there was a violation of Mr. Palmaria's rights under s. 10(b) of the Charter of Rights.

4 As I conclude that the Crown had no admissible evidence to support the case that day and at least two critical elements of its case, I will not deal with the Charter application to exclude evidence as there was no evidence that might have been excluded properly admissible before the Court. With regard to the evidence of the G2 licence holder, it may be that if the evidence led by the prosecutor at trial regarding the licence had been for the purpose of providing reasonable and probable grounds, for example, for an investigation, then the hearsay nature of the testimony in that regard may well have been sufficient for the purposes of the Court. However when the G2 licence is a critical aspect of the Crown's case then it is incumbent upon the Crown to provide evidence which overcomes the hearsay nature of the police officer's testimony that he observed a G2 licence with a certain number attached to it. None was provided. The Crown's case must fail on that ground alone.

5 With regard to the test results in relation to the screening device, the only manner in which the screening device was identified was by the officer's testimony as to the name of the device. He said that he used an Alcotest 7410-GLC Blood Alcohol Screening Device. Now it is interesting to note that the officer says when he began his investigation it was with regard to a possible Criminal Code infraction, however the conclusion of the investigation was not a charge under the Criminal Code,

but rather the charge under the stated regulation. I have determined that it is a regulation under the Highway Traffic Act. No complaint was taken on this appeal with regard to that aspect of the evidence. In any event, a charge was ultimately laid under the Highway Traffic Act, and not under the Criminal Code. The Highway Traffic Act in s. 48.1(14) provides a provincially approved a screening device, meaning a device of a kind that is designed to ascertain the presence of alcohol in the blood of a person, and that is prescribed for the purpose of this section by the regulations made under s. 57.1. The section that that definition refers to is the breath testing of novice drivers provided for in s. 48.1 of the Highway Traffic Act. Other portions of the Highway Traffic Act incorporate by reference the designation and approval of devices under the Criminal Code s. 254.

6 In this case, there is no reference whatsoever to the designation of the instrument which is used, and indeed given the circumstances of the case a live issue arises as to whether the instrument was approved at all, and if so under which statute. It gives some greater life perhaps to the issue which is taken with the change of investigatory direction, although for reasons other than those advanced on the appeal. The absence of any basis or qualification that the officer could provide to the Court with regard to his training on any instrument of this sort is another issue which concerns this court. And finally with regard to the Charter issue, as I have indicated, because there is not, in my view, any evidence which might be properly admissible and therefore susceptible to exclusion under a successful Charter argument, I will not deal with this matter except by way of saying in passing, that the Courts have been very clear over these past twenty-three years that the detention referred to in s. 10(b) of the Charter of Rights is only justified with respect to roadside testing, because it is an investigatory stop, and because the purposes of the investigation would be defeated by the full application or the full allowance of rights under the Charter, and for that reason, s. 1 has prevailed when argued to allow the investigations to take place without resort or application of s. 10(b) as is argued in this case.

7 It is very plain in Mr. Palmaria's case that the use of the screening device was not for the purpose of investigation ultimately, but for the purpose of collecting evidence. As the collection of a breath sample in this case was for the purpose of providing evidence at trial, it seems to me that the s. 1 argument would not prevail in this case. However as I have indicated that is not a live issue before this Court.

8 Issues relating to the quality of the evidence given by the officer are within the jurisdiction of a trial court. The evidence is very plainly that the officer said he had no basic training on the use of the device, and I cannot quite frankly see how the evidence could get any better or worse on that point, depending on your perspective. I think it amounts to no evidence whatsoever that could be properly considered by the Court as being evidence worthy of consideration on the interpretation of the readout on the device.

9 The issues on which I am deciding this matter in favour of the appellant are the two that I have dealt with earlier on, having regard to the extent of evidence of the licence, or the lack of it in this case, and the evidence as to the propriety of the instrument given the ambiguity on the one hand as to what instrument would be appropriate for the purposes of this prosecution and the entire absence of any specificity as to which instrument was used apart from the name of the instrument. The absence of admissible evidence of the licence and the instrument are fatal to the prosecution. In all of the circumstances, I am allowing the appeal and quashing the conviction.

qp/s/qw/qlmxf/qlmll