

Case Name:
R. v. Patel

Between
Her Majesty the Queen, and
Yogeshkumar Patel

[2010] O.J. No. 981

Ontario Court of Justice
Brampton, Ontario

J.J. Keaney J.

Oral judgment: January 6, 2010.

(22 paras.)

Counsel:

C. Vanden Broek, Counsel for the Crown.

R. Tsang, Esq., Counsel for the Accused.

REASONS FOR JUDGMENT

1 J.J. KEANEY J. (orally):-- Yogeshkumar Patel is charged with failing to comply with a demand that he provide an approved screening device sample of his breath under s. 254(2), that offence contrary to s. 254(5) of the Criminal Code.

2 The matter has proceeded by way of a blended Charter voir dire and trial. The accused made application seeking exclusion of evidence pursuant to s. 24(2), by reason of infringement of rights under s. 9 and s. 10(a) of the Charter; his s. 9 right, not to be arbitrarily detained or imprisoned, and his s. 10(a) right on arrest or detention to be informed promptly of the reasons therefore.

3 P.C. Darcy was the sole Crown witness. The Crown has completed its case.

4 Upon completion of the Crown's case, defence counsel made a motion that eventually resolved into a motion alleging a violation of s. 7 with the result that the Crown has failed to meet its burden of proof.

5 In respect of a s. 254(2) demand, the failure to comply offence requires proof of all of these elements:

1. A proper demand, which includes grounds for it;
2. Directing the subject to provide a sample forthwith;
3. A demand made upon reasonable suspicion of the presence of alcohol;
4. Of a person who was operating or in care or control of a vehicle;
5. Failure or refusal to comply with that demand, and;
6. Proof that the failure or refusal was willful.

6 P.C. Darcy testified that on Friday, June 12, 2009, at 10:35 p.m., he effected a traffic stop of a motor vehicle being driven by the person he subsequently identified to be the accused. He saw it exit Kennedy's Nightclub, which he knows to be a licensed establishment. He testifies the stop was for the purpose of a sobriety check. He testified that he detected alcohol breath odor on the accused, and obtained an admission of consumption of two beers. He made an approved screening device demand, and asked that the accused to come to his cruiser. The first demand was in plain language. He testified that in the cruiser he read the more formal wording of the demand from his notebook.

7 He testifies that he gave instruction to the accused as to how to provide a sample. He testified that the accused made nine attempts, all of which resulted in an "EO" read-out on the instrument, indicative of a sample that was not suitable for analysis.

8 After the sixth attempt, on his testimony, the officer communicated a caution of the consequences of failing to provide a sample.

9 He identified the instrument properly as an approved instrument.

10 The officer testifies he was relatively new to policing. Today's trial is his first giving testimony in a drinking/driving matter.

11 On cross-examination, there was identified 12 areas in which he had made no note regarding his interactions with the accused on the night in question. These include no note as to the reason for the stop; no note of the perception of alcohol odor; no note as to any admission of consumption; no note as to the officer's pre-shift self-testing of the instrument either at the beginning of his shift or in the course of his duties; no note as to any on-site test; no note that he made any inspection of the instrument for damage; no note as to when the instrument was last calibrated; no note as to who last calibrated the instrument; no note as to what was the setting or calibration for a fail; no note that prior to attempting to provide a sample the accused blew through the mouthpiece into the officer's hand; and no note as to what consequences he advised the accused in respect of continued failure to comply with the demand.

12 Being generous with the matters, it seems to me that at least eight of those absent notations were in respect of matters that go to the essential elements of the offence, and would be matters for which the accused would be entitled to disclosure in order to make full answer and defence.

13 Similar issues were addressed by my colleague Justice Armstrong, in *R. v. Karunakaran*, [2008] O.J. No. 3468. His conclusions in that case are not binding on me. There are similarities that are striking, and lead to a conclusion that there is persuasive value in that reasoning.

14 There, as here, Justice Armstrong concluded that the officer testifying before him basically disclosed the case during examination in-chief. There, as here, the Crown and the officer conceded that the officer's notes were sparse and should have been more thorough.

15 There, Justice Armstrong concluded the notes were woefully inadequate, and it was not up to the defence to supplement them by contacting the officer to obtain more detail, as was here argued by the Crown.

16 I concur with Justice Armstrong's conclusion there that the notes, as here, that the notes were insufficient to enable the Crown to provide proper disclosure, and resulted in a breach of the accused's s. 7 rights.

17 I concur with the observation in Karunakaran that 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.

18 Further, I concur with Justice Armstrong that here, as it was there, it is not satisfactory that the officer, in effect, provided disclosure of the case in court by fleshing out his notes on the witness stand. Justice Armstrong stated,

"Such a practice runs completely contrary to the principles of fundamental justice enshrined in s. 7 of the Charter."

19 In Karunakaran, Justice Armstrong was obliged to conclude that he had to question the reliability of the officer's testimony. That is the conclusion I must come to here.

20 I do not disbelieve what the officer said, but as was the case in Karunakaran, the huge discrepancy between the officer's notes and the testimony in court, of necessity impact on my assessment of this case.

21 I conclude here that there was a violation of the accused's s. 7 right as set out under the Charter.

22 I am satisfied here that the discrepancies between the officer's notes and his evidence in court is significantly large that I cannot be satisfied that the Crown has proven its case beyond a reasonable doubt. The charge will be dismissed.

qp/s/qlloxr/qljxr/qlcas

---- End of Request ----

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