

1973 CarswellBC 213, [1974] 1 W.W.R. 481, 15 C.C.C. (2d) 323



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R. v. Pederson

Regina v. Pederson

British Columbia Supreme Court

Berger J. [in Chambers]

Judgment: November 1, 1973

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Counsel: *H. F. Turnham*, for accused.

R. G. D. Wilson, for the Crown.

Subject: Criminal

Criminal Law --- Driving offences — Impaired driving/care or control — Proof of impairment — Breathalyzer evidence

Criminal law — Certificate of analysis — Entitlement of accused to a true copy of original — The Criminal Code, R.S.C. 1970, c. C-34, s. 237(5).

The purpose of s. 237(5) of the Criminal Code is to inform an accused person of the case he has to meet; it follows that he is entitled to a true and accurate copy of any certificate which the Crown intends to put in evidence. If any doubt appears whether a "copy" handed to an accused is a true copy of the original certificate, the certificate ought not to be received in evidence.

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Berger J.:

1 The Crown brings this appeal on a stated case, from the judgment of Jorre de St. Jorre Prov. J., acquitting the accused on a charge of impaired driving.

2 The appeal concerns the proper interpretation of s. 237(5) of the Criminal Code, R.S.C. 1970, c. C-34, which reads as follows:

(5) No certificate shall be received in evidence pursuant to paragraph (1)(d), (e) or (f) unless the party intending to produce it has, before the trial, given to the accused reasonable notice of his intention together with a copy of the certificate.

3 In the case at bar the Crown sought to introduce a certificate of analysis under s. 237(1)(d) of the Code. The evidence was that a police constable handed the accused a document which he told him was a copy of a certificate of analysis. The Judge found that the constable did not compare the copy with the original before handing the copy to the accused. The Judge held that the constable could not say that he had served the accused with a true copy of the certificate, and refused to admit the certificate in evidence, and acquitted the accused. He has stated a case, asking whether he erred in law in refusing to admit the certificate.

4 Counsel for the accused challenges the Crown's right to appeal. Under s. 762(1)(a) of the Code the Crown may only bring an appeal on a stated case, if a question of law or jurisdiction is involved. It is said there is no question of law or jurisdiction here, merely a question of fact or of mixed fact and law. I do not think that is right. This appeal turns on the proper construction of s. 237(5). That is a question of law.

5 Then counsel says the ruling below was not essential to the verdict, and that the Attorney General has no right therefore to appeal. Counsel relies on *Regina v. Huot*, [1969] 1 C.C.C. 256, 1 Cr. L.Q. 101, 70 D.L.R. (2d) 703, a judgment of the Manitoba Court of Appeal. Jorre de St. Jorre Prov. J. said in the case at bar:

After considering the submissions made by Mr. Turnham and the said judgment of Judge Tyrwhitt-Drake I am of the opinion that Mr. Turnham's submissions on this point must be given effect to. I might say that apart from this somewhat technical

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point I was not satisfied as to the physical tests indicating that the accused's ability to drive a motor vehicle was impaired. I accordingly dismiss count 1 against the accused.

6 I do not think that what the Judge said made his ruling inessential. He said that the evidence regarding physical tests did not prove the case. But he did not say that, even if he had admitted the certificate, he would still have acquitted the accused. Had the certificate been admitted the verdict might have been guilty. *Regina v. Huot* does not apply.

7 Turning then to the merits, counsel for the Crown says that all the Crown was obliged to do was to adduce evidence that a copy of the certificate was given to the accused, and that, having done so, the proper inference was that it was a copy within the meaning of s. 237(5). That may be so, but the evidence did not stop there. The constable admitted that the copy was not compared to the original. So he could not say it was an accurate copy. It has been said the purpose of this enactment is to let an accused know that the certificate will be used at trial: *Regina v. Goerz*, [1972] 1 W.W.R. 696, 5 C.C.C. (2d) 92 at 93 (Alta. C.A.), per McDermid J.A. But it is more than that. It is to enable an accused to know the case he has to meet and to give him an opportunity to meet it: see *Re Krause*, B.C., 31st July 1973 (not yet reported). Section 237(4) provides that the accused, with leave of the court, may require the attendance of the analyst for cross-examination. What good is that if the accused does not have an accurate copy of the certificate right from the start? The accused is entitled to an accurate copy of the certificate. I think that is what the word "copy" in s. 237(5) means. Otherwise, the purpose of the enactment would be defeated.

8 It is a simple thing to require that a copy be compared with the original. It may not of course be necessary in some cases to make a comparison. If the certificate has been Xeroxed by the officer who serves the copy upon the accused, he can say so. If he has typed it, and the document he serves is a carbon copy, he can say so. If he did not Xerox it or type it, he should compare the copy with the original certificate, so that he will know, and so that he can say, that the copy he handed to the accused is accurate. While it may be sufficient for a witness to say in his evidence in chief simply that he handed a copy of the certificate to the accused — that would be prima facie evidence that it was an accurate copy — it would be necessary for that witness, or for some other witness for the Crown, to be in a position to swear to its accuracy, if the defence were to challenge him on the point. That is not too much to ask.

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9 The appeal is dismissed.

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