

CASE NO.**VOL. NO.****PAGE**

THOMAS IAN MCKEEN

- and -

HER MAJESTY THE QUEEN

(Appellant)

(Respondent)

CA163007

Halifax, N.S.

Flinn, J.A.

[Cite as: R. v. McKeen, 2001 NSCA 14]

APPEAL HEARD:

November 14, 2000

JUDGMENT DELIVERED:

January 25, 2001

SUBJECT:

Criminal Code s. 254(5) refusal of breathalyzer demand Charter of Rights s. 10(2) and s. 24 - whether the appellant was denied his right to counsel.

SUMMARY:

At approximately 10:30 in the evening of July 9, 1999 the appellant was arrested by an R.C.M.P. constable. The constable informed him that he was under investigation for impaired driving and causing a disturbance. The appellant became physically and verbally combative. It was necessary for the constable to handcuff him. As the constable was leading the appellant to the police car he gave him a "quick **Charter** warning," not read from a card but from memory. He locked the appellant in the back seat of the police vehicle for 20 minutes while he spoke to witnesses. Subsequently the constable gave the appellant three full **Charter** warnings. He told the appellant that he had the right to retain and instruct counsel without delay and of the availability of Legal Aid. Further he told the appellant that he could provide him with a telephone number for Legal Aid and since it was after hours he could provide the appellant with a 1-800 number. At no time did the appellant give any indication whatsoever that he wished to exercise his right to counsel. Instead the appellant was "intentionally being uncooperative." The constable then gave the appellant the breathalyzer demand. The appellant refused. The constable explained to the appellant "in layman's terms" the effect of refusal. The appellant still refused. The constable accepted the refusal and took the appellant to the cells at the detachment. Upon arrival at the cells the constable, as was his practice, asked the appellant if he wished to contact counsel, the appellant indicated that he did. Following a telephone conversation with his counsel the appellant told the constable that he had changed his mind and he was now prepared to take the breathalyzer test. The constable advised the appellant that he had already accepted his refusal.

The appellant was convicted of refusing a breathalyzer demand contrary to s. 254(5) of the **Criminal Code**. The conviction was upheld by the Summary Conviction Appeal Court Judge.

The issues on appeal were:

1. Whether the appellant's s. 10(b) **Charter** rights were violated;
2. If the appellant's s. 10(b) **Charter** rights were violated whether the evidence of refusal was inadmissible; and
3. Whether the appellant, in law, refused the breathalyzer demand.

RESULT:

Appeal dismissed.

The majority decided that where, as here, the appellant repeatedly refused to invoke his right to counsel, there is no authority for the proposition that the constable is required to wait until he gets the appellant to the detachment before he gives the breathalyzer demand, or before the appellant is required to give a response to the breathalyzer demand.

The **Charter** warnings given to the appellant in the police vehicle, and before the breathalyzer demand, were sufficient compliance with s. 10(b) of the **Charter**.

When the appellant refused the breathalyzer demand, which refusal was accepted by the constable, the offence of refusal was completed.

Under the circumstances of this case the fact that the constable asked the appellant at the detachment cells if he wished to contact a lawyer did not revive a right to counsel which the appellant had, previously, refused to exercise.

Since the appellant's s. 10(b) **Charter** rights were not violated, it is not necessary to deal with the issue of whether the evidence of refusal is inadmissible.

From the facts of this case there is no merit to the appellant's submission that the appellant did not, in law, refuse the breathalyzer demand.

Justice Roscoe in dissent, decided that the time period during which the appellant had to make known his desire to exercise his right to counsel was still running upon arrival at the police detachment, some 12 minutes after first being advised of his rights.

The appellant had not been advised that his refusal had been accepted before he completed his telephone call to his lawyer. By accepting the appellant's initial reaction to the demand for a breath sample, as the foundation for the refusal charge, the duty of the police to provide the appellant with a reasonable opportunity to consider his rights to counsel, before eliciting evidence from him, was breached. By making the breathalyzer demand immediately after receiving no meaningful response to the **Charter** advice, the officer did not provide the appellant with a reasonable opportunity to consider his right to counsel. The appellant was therefore denied his rights granted in s. 10(b) of the **Charter** and it was an error of law to determine otherwise.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 56 pages.