Date: 19970613 Docket: CAC 136187

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. McCauley, 1997 NSCA 139
Hallett, Pugsley and Bateman, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN Appellant - and - **NORMAN JOSEPH McCAULEY** Respondent	Kenneth W. F. Fiske, Q.C. for the Appellant S. Clifford Hood, Q.C. for the Respondent Appeal Heard: June 13, 1997 Judgment Delivered: June 13, 1997

THE COURT: The acquittal is set aside, leave to appeal is granted, the appeal is granted and a new trial ordered, per reasons given orally by Pugsley, J.A.; Hallett and Bateman, JJ.A., concurring.

The reasons for judgement of the Court were given orally by

Pugsley, J.A.:

The Crown applies, under s. 839(1) of the **Criminal Code**, for leave to appeal, and if granted, appeals from a decision of Haliburton, J., sitting as a Summary Conviction Appeal Court judge.

Justice Haliburton had dismissed the Crown's appeal from a decision of Judge Nichols of the Provincial Court.

Judge Nichols had determined the respondent, Norman McCauley, was not guilty of the charge that, without reasonable excuse, he failed, or refused to comply with, the demand made to him by a peace officer pursuant to s. 254(5) of the **Criminal Code**.

The key issue is whether, in the circumstances of this case, the Crown must prove that the device in the possession of the peace officer was an approved screening device within the meaning of s. 254(1) of the **Code**.

The evidence of Constable Bourassa-Muise of the Meteghan Detachment of the R.C.M.P., the sole witness at the trial, established that:

- At 2:00 a.m. on March 2, 1996, while on regular highway patrol near Meteghan, she saw Mr. McCauley's stopped van, parked in the intersection of the Comeau Branch Road, completely

blocking one of the lanes of the road. The engine was running and the keys were in the ignition. Counsel for Mr. McCauley admitted his client was the operator of the vehicle.

- There were two occupants in the vehicle. While asking the driver, Mr. McCauley, for his license, the Constable detected an odour of liquor and asked him to return to the police car with her.

- Mr. McCauley was calm and quiet. She gave the following demand to him:

> I demand that you forthwith provide me with a sample of your breath, suitable for analysis by an approved screening device and to accompany me here to the police car, which you have done, for the purpose of obtaining a sample of your breath. Should you refuse this demand you will be charged with the offence of refusal. Do you understand?

- She testified that Mr. McCauley appeared to understand, and responded, "I will not take the test".

She continued:

> I also advised him that he would be charged with refusal if he did not provide me with a sample of his breath for the alcotest and he replied, "I can't" and I took it to mean that he will not take the test.
>
> Q. And did you have an alcotest instrument with you?

> A. I did.
>
> Q. What type of instrument did you have with you?
>
> A. The Draeger Alcotest . . . I'll just refer to it here. The Draeger is the . . . company make . . . I don't have the model number with me . . .
>
> Q. Do you know what, if any, official status that particular instrument has?
>
> A. I know that it's an approved instrument.
>
> Q. Okay. For what purpose?
>
> A. For the purpose of screening the breath.
>
> Q. For what?
>
> A. For alcohol.
>
> Q. . . . and you had that in the vehicle with you?
>
> A. I did have that in the vehicle and it was properly functioning at the time.

In the course of his remarks dismissing the appeal, Justice Haliburton said:

> The officer in testifying about the instrument did not establish that she had with or available to her an approved screening device which was necessary. . .on an interpretation which gives the accused the benefit of the doubt is that the instrument she had was in fact the breathalyzer. If the instrument she had was in fact the breathalyzer, then the demand is not valid.

Counsel for Mr. McCauley expands on this theme and submits that an approved instrument (the words used by the constable to describe the machine) refers to a machine that is used for a breathalyzer test. The demand made on Mr. McCauley was to submit to an approved screening device. There was, counsel continues, no evidence before Judge Nichols

that the alcotest instrument was an approved screening device, only that it was an approved instrument.

In our opinion, this appeal must be allowed. The decision of this Court in **R. v. Delorey** (1981), 43 N.S.R. (2d) 416 is determinative of the issue.

In **Delorey**, Coffin, J.A., on behalf of the Court, agreed with the "common sense" approach of Justice Hughes of the Saskatchewan Court of Queen's Bench, in **R. v. Reimer** (1980), 54 C.C.C. (2d) 127.

Justice Hughes referred to the following comments expressed in a similar case where the trial judge asked:

> How can an accused who refuses to supply a sample of his breath legitimately complain that the Crown failed to establish that the machine into which he refused to blow was one approved for use under the **Criminal Code**?

Justice Hughes then continues with these words:

> Particularly so, in my judgment, when the refusal was made before the device into which he was asked to blow had ever been presented to him.

(See also the decision of the Ontario Court of Appeal in **R. v. Lemieux** (1990), 41 O.A.C. 326). Justice Coffin went on to say in **Delorey** at p. 422:

> In my respectful opinion, when there is a demand under s. 234.1(1), there is no more need for proof that the proposed instrument is an approved instrument than there would be if the respondent had been charged with refusal under s. 235(2). The exact type of apparatus becomes relevant when the Crown is seeking to prove the main offence under s. 234 or s. 236 by means of a chemical analysis as set out in s. 237.

There is no suggestion in the present case that Mr. McCauley's explicit refusal arose out of his knowledge that the machine to be employed by the constable was one not approved for use under the **Code**. His refusal was not based on this ground. In fact, Mr. McCauley gave no reasons for his refusal. He simply advised "I will not take the test".

We agree with the Crown's submission that the gravamen of the offence of refusing (without reasonable excuse) the demand for a roadside screening test is a valid demand, pursuant to s.254(2) of the **Code** and a refusal to comply with that demand.

We would accordingly set aside the acquittal, grant leave to appeal, allow the appeal, and order a new trial.

Pugsley, J.A.

Concurred in:

Hallett, J.A.

Bateman, J.A.

NOVA SCOTIA COURT OF APPEAL

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HER MAJESTY THE QUEEN Appellant - and - **NORMAN JOSEPH McCAULEY** Respondent	)	REASONS FOR JUDGMENT BY: Pugsley, J.A. (Orally)