CANADA
PROVINCE OF NOVA SCOTIA

IN THE PROVINCIAL COURT

HER MAJESTY THE QUEEN

versus

PERRY HALFKENNY

s.254(5) and 253(a) Criminal Code of Canada
[Cite as: R. v. Halfkenny, 2001 NSPC 6]

REASONS FOR DECISION

Before: **The Honourable A. Peter Ross, J.P.C.**

Mr. Wayne Hutchison, for the Prosecution
Mr. Alan Nicholson, for the Defence

Decision: **April 5, 2001**

Sydney, Nova Scotia

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[1] On December the 8th, 1999 at 11:40 p.m. police found the defendant, Perry Halfkenny, in the driver's seat of his 1979 Ford Mustang in a driveway at 616 Rotary Drive, Sydney, Nova Scotia. He was passed out, slouched over the console to the right of the bucket seat. The keys were in the ignition, which was in the "on" position. The vehicle was not running. Police detected an odor which they believed to be from an alcoholic beverage. They had difficulty rousing the defendant whose speech was slurred and incoherent. He was arrested for impaired driving. The police "practically had to carry him" to the police car where he was given his *Charter* rights. The defendant said he did not understand, and then became unresponsive to any further advisements put to him. He was given a standard police caution and at 11:49 read a standard breathalyzer demand. Mr. Halfkenny's only response was "blow yourself". At 23:51 he was prone in the back seat of the police car as police attempted to explain his obligation to respond to the demand. He was described as being "coherent to a degree". At the detachment the defendant did not respond to further mention of his right to contact counsel, nor to further mention of the breathalyzer demand. He was described there as having his eyes semi-shut, exhibiting a "strong smell" and being barely able to talk. Shortly after midnight he was put in the cells. He was later charged with having care and control of a motor vehicle while impaired by alcohol, contrary to s. 253(a) of the Criminal Code and with refusing to comply with a breathalyzer demand, contrary to s. 254(5).

The s. 253(a) charge

[2] While peculiar, the following events are established by the defence evidence, on a balance of probabilities. The evidence come from one Ernie Barron, the owner of 616 Rotary Drive, and the defendant himself. The defendant's wife contributed little beyond the fact that the defendant left their house at approximately 5:00 p.m. to go to see Mr. Barron.

[3] The defendant had consumed three valium tablets that day, one in the morning, one mid-day and one just before going to the Barron residence. It was evidently the defendant's intention to visit his friend and stay for the night as he had done before on occasion. The defendant got the valium from his uncle and took them at the suggestion of friends who said it would help with his depression. Upon arrival at the Barron residence, that evening, the defendant put his car keys on top of the refrigerator. Mr. Barron said "I had possession of his keys", something he claimed as a normal practice when his friend came over the night.

[4] Mr. Barron prepared the defendant a drink of vodka of which the defendant had a few mouthfuls. At this point the defendant got violently sick and went to the washroom. For some reason (it is not clear in the evidence) police arrived at the residence at this point and evidently saw Mr. Halfkenny relieving himself at the toilet. The police left and the defendant napped on Mr. Barron's chesterfield. Unfortunately he also vomited on Mr. Barron's chesterfield. According to both the defendant and Mr. Barron, the defendant wanted to get some fresh air at that point. While this may have been the defendant's idea, Mr. Barron at the very least thought it was a good one and he took the defendant outside, placed him in his car, and tried to start it in order to warm it up. Unbeknownst to Mr. Barron, Mr. Halfkenny's vehicle could only be started if the gearshift was in the neutral position. Mr. Barron was thus unable to start the car but left the keys in the ignition and Mr.

Halfkenny passed out in the driver's seat. A short time later the police arrived and initiated the sequence of events, including the arrest and demand, referred to above.

[5] While the above version of events is rather unusual on its face, and given largely by a friend of the defendant, and while it is far from a certainty that events unfolded in this way, the defence evidence is nevertheless sufficient to rebut the presumption of care and control contained in s. 258(1)(a). The Court is thus required to look at the entire case to see whether the evidence proves beyond a reasonable doubt the offence of care and control. Here one is engaged in a consideration of the well known cases Ford and Toews. These cases speak of the defendant performing some act or series of acts whereby the vehicle may be accidently set in motion, or the defendant engaging in some course of conduct in relation to the vehicle. On the facts here, the defendant's course of conduct in relation to his vehicle ended when he entered the Barron residence and gave up possession of the keys. Mr. Barron stated he later "helped" the defendant down to the car. He said the defendant seemed "uncoordinated, not well". Mr. Barron thought he had a stomach flu. While there was undoubtedly great risk attendant upon placing the defendant in the car and leaving the keys in the ignition, the actions which brought about this state of affairs were those of Mr. Barron, not the defendant. Nor does there seem to be any risk of change of mind as contemplated in the decision in R. v. Hein (1999) SH150081A (NSSC). Here, in effect, the defendant had no mind to change, no intent to go anywhere but outside the house. The element for which the defendant alone was responsible was the state of intoxication, primarily from valium. In the net result, the defendant is entitled to be found not guilty on the charge of impaired care and control under s. 253(a). However, as indicated to counsel at the time of argument, such a finding may be somewhat academic and of no avail to the defendant in light of the outcome which the law appears to dictate for the refusal charge.

The s. 254(5) Charge

[6] What police observed when they arrived on the scene at 616 Rotary Drive gave reasonable and probable grounds to make a breathalyzer demand. The defendant had no recollection of refusing this valid demand. Indeed he has no memory of getting to the police station. While his response to the demand ("to blow yourself") shows some degree of mental processing, the defendant's evidence, and indeed the evidence of the police officer himself, portray an individual who would not adequately understand what was expected of him. His non-compliance would better be described as a failure rather than a refusal. However, the section creates a single offence of non-compliance and there is no question that in this case we have non-compliance with a valid breathalyzer demand. The point on which the Court invited further argument was whether in these circumstances there was a reasonable excuse for failure to comply or absence of *mens rea*. In the case at bar, the breathalyzer instrument was not presented to the defendant. One can only speculate whether he would have been physically capable of providing an adequate sample. However the police appear to have given up on the possibility of procuring samples from the defendant. According to police evidence the defendant was hardly awake and required assistance in getting about. It seems clear that they felt it would be fruitless to go any further with Mr. Halfkenny than they did. This too seems to be reasonable conduct on the part of the police in the circumstances.

[7] In R. v. Myers (1979) 31 N.S.R. (2d) 444 our Court of Appeal held with reference to a refusal charge that the defence of automatism does not apply if the non-conscious state of mind is the result of self-induced intoxication.

[8] In R. v. Herritt (1979) 36 N.S.R.(2d) 84 O'Hearn, CCJ, stated, at paragraph 7

> "The mental element comprised in 'fails or refuses' does not appear to include that ulterior motive or intent that has been described in the cases as 'specific intent'."

[9] Judge O'Hearn heard a summary conviction appeal in the case R. v. Warnica (1980) 39 N.S.R. (2d) 610. The facts are somewhat analogous to the case at hand. The defendant had been found not guilty at trial of both refusal and impaired care and control. Judge O'Hearn begins consideration of the refusal offence at paragraph 5 where he indicated that the trial judge, in dismissing the offence of refusal, was not clear on whether he was dismissing on the basis that such defence went to a lack of *mens rea*, or whether it constituted a reasonable excuse. With respect to the *mens rea* issue, Judge O'Hearn said the Crown would have the burden of establishing beyond a reasonable doubt that the defendant comprehended the demand. However, considering the defendant's voluntary consumption of alcohol, the judge stated

> "A Defendant's failure to conform his conduct to the criminal law because of voluntary intoxication is not a defence, unless it affects the formation of specific intent involved in the crime charged...Since the wording of s. 235(5) does not appear to contemplate any specific or ulterior intent or motive, the defence would not fall within the exception in D.P.P. Beard."

From here Judge O'Hearn concluded that the only basis for considering the defence as a valid one would be that it constituted a "reasonable excuse". Proceeding to a discussion of this issue, the judge concludes his analysis at paragraph 12 as follows

> "Accordingly the issue reduces itself to the question, whether the defence of unawareness of the demand due to intoxication is a valid one. While there is no binding authority on the point in this province, and I, personally, and with respect and deference to those who think otherwise, doubt that it is a defence, as a matter of comity, I propose to follow the decisions in Lutz and Laybolt as well as the *dictum* of Mr. Justice Hart in Phinney. Assuming that there is such a defence, there was evidence upon which the learned trial judge could dismiss the charge..."

[10] The foregoing decision was appealed to our Court of Appeal who's judgement is reported at R. v. Warnica (1980) 42 N.S.R. (2d) 108. Chief Justice MacKeigan frames the

issue at the outset

> "The question in this appeal is whether a person charged with failing to comply with a breathalyzer demand contrary to s. 235(2) of the Criminal Code is entitled in law to an acquittal on satisfying the trial judge that he was unable to comprehend the demand because of voluntary intoxication."

At paragraph 8 he states,

> "The learned judge's conclusion must be accepted as a finding of fact that Mr. Warnica at the time of the demand did not comprehend it."

The judgement considered both aspects of Judge O'Hearn's decision, first on the issue of *mens rea* and second on the issue of "reasonable excuse". The Court of Appeal concluded that Judge O'Hearn had decided correctly on the first issue, i.e. that the law did not permit an acquittal because of the defendant's failure to conform his conduct to the criminal law arose from voluntary intoxication. However, Judge O'Hearn was overruled in his conclusion on the second issue. At paragraph 11 Chief Justice MacKegian states

> "In my respectful opinion voluntary intoxication should not legally or logically be considered an 'excuse' for the commission of an offence under s. 235(2)."

At paragraph 18 of the decision it is stated,

> "The principle applicable to general intent offences, of which this is one, is summarized (as follows)...where the accused's inability to have the requisite knowledge is brought about by his own consumption of liquor or his self administration of a drug, the law is prepared to treat the behavior as tantamount to irrebuttable proof of the requisite *mens rea*."

Further the court states at paragraph 29,

> "I also cannot agree that the respondent's lack of understanding in this case can in law be 'a reasonable excuse'."

The Court drew a distinction with the facts in R. v. King, for there the defendant was administered a drug by a dentist without warning that he should not drive.

[11] In R. v. Bauditz (1981) 48 N.S.R. (2d) 130 (N.S.C.A.) the court states at paragraph 14, referring to the *mens rea* for refusal of a breath demand,

> "...there was no affirmative burden on the Crown to prove this mental element..."

citing Warnica (supra).

[12] In R. v. Assaf [1987] NSJ NO. 482 (Q.L.) the defendant was convicted with failing to comply with a breath demand, which conviction was affirmed on appeal and then considered by our Court of Appeal. The trial judge there had to consider evidence that the defendant had taken a prescribed medication which accounted for her physical symptoms and inability to comply with the demand. A portion of the trial judge's reasons were cited from which it is clear that he considered the argument that there was no *mens rea* (rather than the related issue of "reasonable excuse"). Once again, R. v. Warnica was cited as the governing law. The conviction on the charge of non-compliance with the breath demand was again affirmed.

[13] In R. v. Amero (1989) 92 N.S.R. (2d) 57 this issue was once again before the Summary Conviction Appeal Court. While Judge Haliburton considered the distinction between specific and general intent as it related to the charge of failing to comply with a breathalyzer demand, the gist of his reasons in dismissing the appeal and upholding the acquittal of the defendant appears to lie in the finding that the defendant's condition was not "voluntarily induced". There the defendant had taken prescribed arthritis medication, and the court felt that his conduct could not be described as voluntary intoxication, nor could he have reasonably foreseen the effect of one pint of beer while on such medication. In any event, Amero is not prevailing authority on the point in issue, in light of the Warnica decision.

[14] R. v. Laybolt (1974) 17 C.C.C.(2d) 16, cited by the defence, precedes Warnica as does R. v. Henderson 34 C.C.C. (2d) 40.

[15] It may be that in most cases considering this issue the antecedent behavior of the defendant involves not only voluntary intoxication but the defendant engaging in some course of conduct in regard to a motor vehicle. In the case at hand, while it is clear that the defendant became intoxicated voluntarily, in circumstances where he knew or ought to have known the effect that the drug would have on his state of mind, it is not clear that in the period immediately preceding the time when he was found by the police behind the wheel, that he had taken any active role in putting himself there, although one perhaps should not lose sight of the fact that earlier in the evening had driven the car to his friend's house having knowingly taken an intoxicant, and is to that extent accountable for the presence of the vehicle at the scene. Essentially, the defence position seems to reside in the proposition that it is unfair to visit criminal culpability for this offence upon the defendant where his only wrong doing was getting high on the valium.

[16] I might wonder whether such an argument would hold water under the *Charter*, possibly s. 7, but there is little purpose in doing so here. The arguments are not framed under the *Charter*, there was no notice to the Crown, and of course, even if a breach were found to exist, a remedy would not necessarily lie under s. 24. I only note that Warnica is a pre-charter decision, though applied in post-charter cases.

[17] The rationale in the Warnica line of cases may arise as much from public policy considerations as from any substantive criminal law analysis of specific and general intent, *mens rea*, reasonable excuse, etcetera. In any event, Warnica, and other cases which follow it appear to be clear and governing authority here, as a consequence of which the defendant, Mr. Halfkenny, is found guilty of the offence under s. 254(5).

Dated at Sydney, Nova Scotia, this 5th day of April, A.D., 2001.

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A. Peter Ross, JPC