**PROVINCIAL COURT OF NOVA SCOTIA**

Cite as: R. v. Shaw, 2010 NSPC 95

**Date:** 20101206
**Docket**: 1870632 & 1870633
**Registry:** Sydney

**Between:**

Her Majesty The Queen

v.

Deborah Shaw

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| **Judge:** | The Honourable Judge Brian Williston, J.P.C. |
| **Heard:** | December 6, 2010, in Sydney, Nova Scotia |
| **Charge:** | 254(5) Criminal Code of Canada<br>253(a) Criminal Code of Canada |
| **Counsel:** | Darcy MacPherson, for the Crown<br>Tony Mozvik, for the Defence |

**By the Court**:

[1] This is the decision with respect to Deborah Colleen Shaw. Ms. Shaw is present. Mr. Mozvik for Ms. Shaw; Mr. MacPherson for the Crown.

[2] I want to thank Mr. Mozvik and Mr. MacPherson for the way in which the case was conducted. It was thoroughly conducted. The examinations were thorough both from the direct and cross examinations of each witness called, as well as the summations, and I do appreciate that and it did help a great deal with respect to my decision here.

[3] The decision is an oral decision, although I reduced it to writing, but I will read it now into the record.

[4] Deborah Colleen Shaw is charged that she did on or about the 5th day of January 2008, at or near Glace Bay, Nova Scotia, without reasonable excuse refuse to comply with a demand made to her by Constable (amended) Philip Ross, a peace officer - or actually Constable Jason Doyle, the crown was moving to amend it at the end of the case, no it was amended, it was amended to Philip Ross, yes that is

right. And so now reading, Constable Philip Ross, a peace officer, to provide then or as soon thereafter as was practical samples of her breath as in the opinion of a qualified technician were necessary to enable the proper analysis to be made in order to determine the concentration, if any, of alcohol in her blood contrary to s.254(5) of the *Criminal Code of Canada*.

[5] And further, while her ability to operate a motor vehicle was impaired by alcohol, did operate a motor vehicle contrary to s.253(a) of the *Criminal Code of Canada.*

[6] The accused was observed by members of the Cape Breton Regional Police Services on routine patrol, stopped at a stop sign at the intersection of McKeen Street and Main Street in Glace Bay, Nova Scotia at approximately 1:20 in the morning of January 5, 2008. She was the driver and sole occupant of a red Mazda motor vehicle. Constable Philip Ross and Ashley MacDonald, then MacKinnon, police officers with the Cape Breton Regional Police, noted that the directional signal of the Mazda indicated it was about to turn left but instead the vehicle turned right abruptly, drove up over the snowbank and down onto Main Street. The officers observed the vehicle proceed down Main Street, and then take a left turn

onto Official Row where Constable Ross activated the emergency lights of the marked police vehicle and stopped the vehicle driven by the accused. Constable Philip Ross approached the driver's door of the vehicle and noticed an odour of alcoholic beverage emanating from the accused. He also noted that her eyes were glossy and her speech was slurred. Officer Ross characterized the manner of speech as a slower than normal tone, and while he could not characterize the strength of the odour of alcohol from her breath he testified that it was noticeable. Constable Ross further testified that when the accused got out of her vehicle he observed that she was unsteady on her feet and that there was a noticeable sway when she was standing still.

[7] Constable Ashley MacDonald testified that when the accused exited the vehicle she detected a strong smell of liquor coming from her breath, glossy eyes and slow, slurred or mumbled speech. She also testified that the accused was unsteady on her feet when she was standing and that as she was escorted to the police vehicle she was a little unsteady, unbalanced on her feet.

[8] The accused Ms. Shaw testified that she had two drinks of rum and coke the night of January 4th, 2008, the first between eight and eight thirty p.m. and the

second between nine and ten p.m. at the North Street Club in Glace Bay. She testified a man bought her a drink at the bar but she did not drink it and stated that the last drink she had was a coke without any alcohol in it, at 12:45 a.m. on January 5, 2008. She agreed that after leaving the club she was at the intersection with her blinker on signalling a turn one way but instead turned the other because she needed to go to the washroom and wanted to get home. She disagreed that she went up over a snowbank but testified there was ice at the intersection and that the vehicle she was driving fish-tailed a bit and that she got it under control. Shortly after she pulled her vehicle over when the police stopped her using their emergency equipment.

[9] Constable Philip Ross testified that he formed the opinion that the accused was operating her motor vehicle while impaired by alcohol and that he placed her under arrest for impaired driving, along with reading her charter of rights and police caution. Constable Ross did not have the card that he read to her in court but he did testify from memory that he advised her she could contact any lawyer she wished, had the right to apply for legal assistance from the Provincial Legal Aid Program and that he read the after hours duty counsel phone number from that card. The defence does not allege any valuation of the accused's s.10 Charter

Rights. Constable Ross stated that immediately after reading her her rights and police caution he went on to read her a Breathalyzer demand from the same card that he did not have with him when he gave his evidence in court. Constable Ross stated, and I quote, “basically I demanded that she accompany me back to the Cape Breton Regional Police Service Office and provide samples of her breath to enable the, basically to enable if there is any alcohol in her system, to enable provide samples of her breath in order to enable if there is any alcohol in her system, basically and I told her if she refused the demand that she would be charged with refusal.” He testified that she replied that she understood and that she accompanied the officers without any hesitation.

[10] Constable Ashley MacDonald did not have her card in court with her either and testified about the words she heard from the Breathalyzer demand given by Constable Ross in the following way, “Breathalyzer, just that you are being charged with impaired driving and it just asks if you wish to be, I am not very keen on the exact wording for that, but it was the overall gist is that they ask, they state what you are being charged with and ask if the accused would accompany the officer to whether it would be East Division or Central Division to provide a breath

sample. And it says, do you understand, do you wish to provide a sample, yes or no."

[11] After a brief stop at the East Division Station to allow the accused to use the washroom there, the accused accompanied the officers to the Central Division Station, arriving at 1:58 a.m. The accused indicated she wished to telephone lawyer Tony Mozvik and Constable Ross obtained Mr. Mozvik's home number, dialed it and then handed the telephone to her when it was answered by voice mail. The accused, Ms. Shaw, then left a message for Mr. Mozvik on the voice mail requesting contact and leaving the Central Division Interview Room phone number at about two a.m. Constable Ross reminded Ms. Shaw that she could call the Nova Scotia Legal Aid Duty Counsel, toll free number, but she declined indicating she wanted to speak to her own lawyer Mr. Mozvik. At approximately 2:19 a.m. she tried a second time to contact Mr. Mozvik and the same voice mail message was received. Again she was advised that she could call the toll free after hour numbers number for Legal Aid Duty Counsel and she replied that she did not want to talk to a Legal Aid lawyer. Constable Ross aware that no call was being returned from Mr. Mozvik then dialed the toll free duty counsel number himself and handed the phone over to Ms. Shaw and exited the room. The Legal Aid Duty

Counsel called back to the police station shortly after and Constable Ross was led to believe that somehow he and Ms. Shaw got disconnected at about 2:29 a.m. Ms. Shaw in her testimony indicated her dissatisfaction with that telephone call with duty counsel and stated that the duty counsel fell asleep during the telephone conversation before calling her back. That second telephone conversation with duty counsel lasted about three minutes according to notes made by Constable Ross. After Ms. Shaw exited the interview room, Constable Ross told the court that since Ms. Shaw talked to duty counsel he now asked her if she was willing to take the Breathalyzer test. He testified that her response was "I am not taking the test but I am not refusing." Constable Ross testified that he would have said to her "well it is one or the other, you're telling me that you're not taking the test which is a refusal in itself, but then you tell me you're not refusing. So you either are willing to take the test or you're not willing to take the test, it can't be both." He stated that Ms. Shaw become a little upset with that and wanted to call another lawyer, Ms. Candee McCarthy. Constable Ross got Ms. McCarthy on the telephone and the accused had a private telephone conversation with her at 2:45 a.m. until 2:54 a.m. When the accused exited the room Constable Ross testified that the breath tech, Constable Jason Doyle, asked her if she was willing to take the test. Constable Jason Doyle was not called as a witness. Constable Ross stated

that it was like Ms. Shaw was trying to stall as she was kind of smiling and said she wasn't taking the test but she wasn't refusing. She also stated that she wanted her lawyer Ms. McCarthy to attend before she'd take the test. After telling her again that she either had to take the test or be charged with refusal, Constable Ross stated that the accused gave the same response, "I am not taking the test but I am not refusing." The accused was then told she was going to be charged with refusal and was taken to a cell.

[12] Constable Ashley MacDonald also testified that the accused's responses to whether she was going to take the Breathalyzer test was "I am not taking the test but I am not refusing it." And those same words were repeated each time.

[13] During cross examination by Mr. Mozvik, Constable Ashley MacDonald agreed that at one point in her notes, recorded as 2:43 a.m. Ms. Shaw, after being asked if she was taking the test, yes or no, replied she is not refusing. And after that she recorded in her note book "Calling Candee 849-5785, McCarthy, another solicitor in Sampson McDougall firm, states that she cannot refuse as she is not happy with the Legal Aid and wanted her solicitor." And at 2:55 a.m. wrote in her notebook, "Debbie Shaw states that she is still not refusing because, until her

solicitor is with her when she takes the test." And further down in her notes Constable MacDonald wrote "did not answer with clear yes or no answer."

[14] Constable MacDonald agreed in her testimony with defence counsel's assertion that matters ended when she believed Constable Ross made the decision that enough was enough and she was being charged with refusal.

[15] The accused testified that she had, before that night had panic attacks for years and was on medication for them. She testified that police were telling her she had to take the test and she told them she would take it when her lawyer got there. She stated that she didn't know whether the officer could fudge the test and wanted a lawyer to explain the process to her so she could watch what was going on. She testified that Candee McCarthy told her she would come into the police station and be with her. Ms. Shaw further testified that she told the police that she would take the test when Ms. McCarthy got there and that she stated she was not refusing. Neither Constable Ross nor Constable MacDonald could recall any mention by the accused that Ms. McCarthy was coming, although it was acknowledged that Ms. McCarthy did arrive much later and drove Ms. Shaw home.

[16] Ms. Shaw testified that she was put into the cell, that she was never introduced to the Breathalyzer itself and did not even know what the Breathalyzer looked like.

[17] Dealing with the two charges, dealing with the second count in the information first, Sec. 253 (a) after considering the short period of time the accused was observed driving and all of the testimony including the conduct of the accused observed by the police officers, as well as the testimony of the accused, I am unable to conclude that the crown has proven beyond a reasonable doubt that the accused did operate a motor vehicle while her ability to operate a motor vehicle was impaired by alcohol and I enter a verdict of not guilty on that second count.

[18] As to Count No. 1, while the observations of the police officers were not sufficient in my mind to prove impairment to operate a motor vehicle beyond a reasonable doubt, they are such as to most certainly support Constable Philip Ross' belief on reasonable and probable grounds that the accused's ability to operate a motor vehicle was impaired by alcohol.

[19] To constitute an offence under s.254(5) police must make a proper demand and the accused must refuse or fail to comply with the demand. A proper demand requires each of the following conditions: the demand must be clear; the language of the demand must provide the accused with a clear understanding of what is required and the crown has provided me with the two cases of *R. v Nicholson* and *R. v Flegel* which are often quoted and actually are still law with respect to this. They were early decision when the legislation first came out. The phraseology of the demand must not be confusing, technical or too complicated for lay comprehension. That's found in *R. v Nicholson*, 8 C.C.C. (2d), 170:

> Whether or not the demand is sufficiently clear must be determined by the language used and by the ability of the accused to comprehend.

[20] *The Queen v Flegel*, is law for the eh, and that of course is the Saskatchewan Court of Appeal, 1972, 7 C.C.C. (2d), 55, s.223(1) and they indicate now 235 and of course now 254 of the *Criminal Code*:

> does not require any specific form of demand and no particular words are necessary in making a demand as long as the words and surrounding circumstances conveyed to the accused that the demand is being made pursuant to the section and the contents of the demand and the language of now s.254, the demand to be properly constituted must apprise the accused

> (a) that a sample of her breath or samples of her breath were required for analysis of the alcohol in her blood and
>
> (b) the accused must accompany the police officer for the purpose of providing a sample.
>
> If the demand consists of those two elements it is an adequate demand.

[21] In the present case, I am satisfied the demand as recited by Constable Ross, although he did not have his card with him, his testimony with respect to what he did say made it clear that he was demanding that the accused provide samples of her breath for analysis and that she must accompany the police officer for that purpose. You know what constitutes a refusal is the second question, and once a proper demand has been made, a clear refusal by words or actions is sufficient to complete the offence. The accused must be given a reasonable amount of time to consider this position. For instance, and of course this has happened in this case, a prior call to a lawyer may be made before providing a sample, in fact not only may be made it is mandatory with respect to rights being given and the allowing of time to complete those rights.

[22] *R. v Bowman*, 1978, 25 N.S.R. (2d), 716, Nova Scotia Court of Appeal, is authority for the proposition that once the accused has refused, unless he immediately recants so as to render the refusal and acceptance of the demand as one and not two distinct actions the initial refusal will suffice to establish the offence.

[23] First of all it is clearly not a lawful excuse to refuse to provide a breath sample unless a lawyer is present. It is clearly not a lawful excuse to refuse to demand a lawyer be present.

[24] I agree with the statement of Provincial Court Judge Rae in *R. v Dwane*, which is 2007 B.C.J. No. 112, British Columbia and I quote:

> An accused cannot avoid the demand by refusing to make a decision. Provided he is given appropriate access to counsel to address his concerns, a reasonable period of time to consider his options before he makes a final decision, and a clear explanation from the police as to the consequences of refusing, he must eventually make a decision, and a grudgingly given decision not to blow can still amount to a refusal.

[25] However, the refusal must be an unequivocal and clear refusal in order to constitute an offence.

[26] In *R. v Cunningham* , 1989, 49 C.C.C. (3rd) 521, Alberta Court of Appeal, a case that actually dealt with a person's change of mind to provide a roadside sample, the Appeal Court of Alberta in the decision delivered by Cote, J.A. pointed out that:

> what is a refusal depends on all the circumstances of each individual case. A single conversation may contain many twists, turns, or pauses, and one should not dissect it minutely or take a single sentence out of context.

[27] Defence counsel Mr. Mozvik referred the court to the decision of the P.E.I. Supreme Court Appeal Division, the case *R. v Dunn*, 1978, 43 C.C.C. (2d), 519 McQuaid, J. sitting, that's the Appeal Court Judge, stated at para. 12:

> Conviction for an offence under Section 235 of the Code (now 254) is a serious matter. It usually results in the imposition of a substantial fine; the convicted person's driving privileges can be suspended for a material period of time and automobile insurance premiums are increased substantially for the convicted person. The offence must therefore be strictly proved. No room must be left for reasonable doubt with respect to the guilt of the accused. Before a conviction under the Section is warranted, the Crown must be able to establish a specific and definite refusal by the accused to take the test. The making of a demand at the roadside, or even in the police barracks, followed by the failure of the accused to specifically indicate either "yes" or "no" is, in my opinion, no justification for the arresting officer to conclude that the answer is "no". There must be a definite refusal and if the accused does not answer to the demand it is incumbent on the officer to prepare the machine, pass the mouthpiece to the suspected offender and ask him to blow. If he then refuses to respond, it is sufficient to constitute a refusal.

[28] I have examined the evidence as a whole in assessing whether there was a clear and unequivocal refusal by the accused in this case. The responses given by Ms. Shaw were not sufficiently clear that I can conclude that she was unequivocally refusing to provide a breath sample. In my view it would have been easy for Constable Ross, under the circumstances, to ask a more pointed question or otherwise seek clarification of exactly what Ms. Shaw meant by her responses. If that did not clarify what she meant she could have then been presented to the Breathalyzer and asked to blow into the mouthpiece. If she then failed to comply with that demand she could have been said to have constructively refused to provide samples of her breath. Without being overly critical of Constable Ross who conducted himself honourably and with integrity in this case, I believe that he ought to have gone further before taking Ms. Shaw to the cell and concluding that she was refusing to provide breath samples.

[29] This is a criminal charge and as such requires proof beyond a reasonable doubt and as I am unable to find that the responses used by Mr. Shaw were unequivocal and clear I must find her not guilty based on that doubt. So judgment accordingly on both counts.

J.