PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Miller*, 2021 NSPC 10

Date: 20210309
Docket: 8361640
Registry: Kentville

Between:

R.

v.

Mary Miller

Judge:	The Honourable Judge Ronda van der Hoek
Heard:	December 23, 2020, January 19, 2021, in Kentville, Nova Scotia
Decision	March 9, 2021
Charge:	Section 320.15 *Criminal Code of Canada*
Counsel:	James Fyfe, for the Crown Mary Miller representing herself

By the Court:

Overview

[1] After a roadside stop and an agreement to provide a sample of her breath for an approved screening device, matters took a turn. While in the police car Ms. Miller either changed her mind and refused to provide a sample, contrary to section 320.15 of the *Criminal Code of Canada,* or she accepted an offered change in test location from the roadside to the RCMP detachment. The truth, or the doubt, is somewhere in the details. Before considering those details, I set out the general principles applicable to any criminal trial.

General Criminal Trial Principles

[2] Ms. Miller benefits from the presumption of innocence and the Crown bears the heavy burden of proving her guilt beyond a reasonable doubt. That onus never shifts to Ms. Miller, asking her to instead prove that she did not commit the offence.

[3] Proof beyond a reasonable doubt "does not involve proof to an absolute certainty, it is not proof beyond any doubt nor is it an imaginary or frivolous doubt" (*R. v. Lifchus*, [1997] 3 S.C.R. 320) Instead, the burden of proof lies "much

closer to absolute certainty than to a balance of probabilities" (*R. v. Starr*, [2000] 2 S.C.R. 144).

[4] Finally, a "reasonable doubt does not need to be based on the evidence; it may arise from an absence of evidence or a simple failure of the evidence to persuade the trier of fact to the requisite level of beyond reasonable doubt". (*R. v. J.M.H.*, 2011 SCC 45)

[5] Evidence is not assessed in a piecemeal fashion, rather the Court considers the whole of the evidence. A trial is not a credibility contest with the Court simply preferring one side to that of the other. Instead, some, none or all of what any witness says can be accepted after assessing the reliability and credibility of their testimony.

[6] Credibility assessments involve the Court considering the veracity or truth of witness testimony, while reliability assessments consider the accuracy of the testimony. More particularly, accuracy requires scrutiny of such things as the ability to observe, recall and recount a situation. If witness testimony on an issue is not credible, she cannot provide reliable evidence on the points in issue. However, a credible witness may give evidence that is unreliable, as in the case of mistaken

eye-witness identification observation, where circumstances such as having only a brief opportunity to observe render an honest belief unreliable.

Findings of Fact

[7] Two witnesses testified, Cst. Curry and Ms. Miller. After considering their testimony, hearing the closing submissions, and reviewing the case law, I make these findings.

[8] Ms. Miller lives in Halifax and was in Kentville on June 21, 2019, hired as master of ceremonies for a comedy show in a local pub. Unfamiliar with the area and travelling home after 11:00 pm, she was stopped by Cst. Curry. Ms. Miller had signalled a few premature and incorrect left-hand turns suggested by the vehicle GPS, and I can certainly take judicial notice that a person unfamiliar with the specific area could encounter such difficulties navigating their way to the highway in the dark.

[9] Cst. Curry stopped Ms. Miller based on her somewhat confused driving pattern. The stop at 11:07 pm was authorized by law.

[10] At the roadside Cst. Curry and Ms. Miller had a brief conversation about where she had been and where she was going, during which Cst. Curry says he

"noticed a smell of alcohol coming from her mouth as she spoke" to him. He also testified that Ms. Miller inexplicably told him a relative was a recent victim of crime. Ms. Miller, on the other hand, says she was weepy at the roadside because she had been reflecting on the situation involving her relative, but did not say anything about this until a later point in time.

[11] Cst. Curry testified that he asked Ms. Miller if she had anything to drink and she said no. Challenged on cross-examination, he accepted Ms. Miller's assertion that she told him she had a single glass of wine at the comedy show. On redirect Cst. Curry testified that he had forgotten to provide evidence about the affirmative answer in direct examination, adding Ms. Miller initially denied consumption but on his second approach said yes. Despite the evidence unfolding in this manner, I am satisfied Ms. Miller furnished the information.

[12] In accordance with Cst. Curry's testimony on redirect, Ms. Miller was pressed about the possibility she initially answered "no" and later changed her answer to yes. Ms. Miller conceded if she had initially answered no it "would have been due to not being a drinker and having consumed the wine a few hours earlier", maintaining there was only one ask and one correct and prompt reply by her.

[13] Cst. Curry asked for her licence and registration and Ms. Miller testified that he made an odd comment when she switched to reading glasses in aid of locating the documents in the glove compartment- “I suppose you’re saying you cannot see?” or words to that effect. Ms. Miller perceived the comment as somewhat rude. The officer recalls none of this.

[14] After collecting her licence and registration, Cst. Curry returned to his car to “do some checks” and radioed a female officer to come from the station a few minutes away bringing an ASD. He thought it took that officer between two and three minutes to arrive at his location.

[15] While in his vehicle, Cst. Curry says Ms. Miller left her car, approached his and they spoke. He told her to go back to her car. She says she approached him and mentioned her relative because she thought it necessary to explain her earlier tears. Cst. Curry does not agree. He accompanied Ms. Miller back to her car and returned to his.

[16] Later Cst. Curry read Ms. Miller the ASD demand from his card while she sat in her car. He said the following: *So, this is the approved screening device demand. So, I demand that you immediately provide a sample of your breath suitable for analysis to be made by means of an Approved Screening Device and*

that you accompany me for that purpose. Should you refuse this demand you will be charged with refusal under the Criminal Code of Canada. Do you understand?

[17] To this, he says Ms. Miller answered, "Yes", and while she appeared somewhat calm, Cst. Curry thought she was still "worked up" about the comment regarding the relative. On redirect, to rather leading questions, Cst. Curry acknowledged omitting to mention in his direct examination that Ms. Miller also said yes when he asked if she would provide a sample.

[18] Since Cst. Curry did not have an ASD in his vehicle during the roadside stop, I conclude he made the demand pursuant to s. 320.27(1) of the *Criminal Code*, and not (2) which requires an on site ASD. Section 320.27(1) reads as follows:

> **320.27 (1)** If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a conveyance, the peace officer may, by demand, require the person to comply with the requirements of either or both of paragraphs (a) and (b) in the case of alcohol or with the requirements of either or both of paragraphs (a) and (c) in the case of a drug: **…**
>
> **(b)** *to immediately provide the samples of breath that, in the peace officer's opinion, are necessary to enable a proper analysis to be made by means of an approved screening device and to accompany the peace officer for that purpose*;
>
> [emphasis added]

[19] I also find Cst. Curry did not specifically testify about why he made the demand; he did not say he had grounds to suspect Ms. Miller had alcohol in her

body. As a result, the Court is left to determine whether he gathered sufficient information prior to issuing the demand, thus supporting an inference he had reasonable grounds to suspect Ms. Miller had consumed alcohol. Since I also assume that he formed the grounds before he contacted the detachment requesting the ASD, the conversation after Ms. Miller left her car the first time need not be considered at this stage.

[20] The evidence, I find, supports Cst. Curry's conclusion that a smell of alcohol came from Ms. Miller's mouth, but there was nothing more specific on that topic, and I have already accepted as fact her acknowledgement of wine consumption at the show. A trial judge is entitled to infer subjective belief on the part of an officer, and the evidence both subjective and objective in support of it. (*R. v. Deitz,* 1993 ABCA 24) In *Dietz*, reasonable suspicion found support where the officer observed Mr. Dietz leave a bar, stumble, urinate outside the building, and noted a smell of alcohol in his car while speaking to him.

[21] The officer's conclusions in *Dietz* were aptly described by Crawford J. in *R. v. Imanse*, 2010 BCSC 446 as "patently obvious", and in *R. v. Cody*, 2015 CanLII 28590 (NL PC) as supported by "evidence on both a subjective and objective basis" allowing the trial judge "to infer the necessary subjective belief on the part

of the officer that there was a reasonable suspicion of the consumption of alcohol". (*Coady, supra*, at paragraph 43)

[22] Continuing with the decision in *Coady* for a moment, at paragraph 81, the Court extended its reach to breathalyzer demands.

> [81] Proving that the police officer held a belief based on reasonable and probable grounds requires meeting both a subjective and an objective test. In the case before me, the officer did not specifically relate the observations and conclusions stated elsewhere in his testimony to his subjective belief in his reasons for making the breathalyzer demand. He did, however, state that he observed purplish lips and teeth which he attributed to wine consumption, bloodshot watery eyes, and a moderate smell of alcohol. He knew she was the driver. … From the fact that the officer made the demand after making these observations and reaching these conclusions, it is reasonable to infer that he had a subjective belief in the reasonable and probable grounds to do so. I conclude that he did.

[23] Finally, it goes without saying while it might be useful to use the words "reasonable suspicion" during testimony, it is not "a magic incantation or formula that must be uttered precisely by the witness". (*R. v. Grubb*, 2011 ONCJ 881)

[24] Having accepted the evidence of the smell of mouth alcohol, I can properly infer that Cst. Curry subjectively believed Ms. Miller had recently consumed alcohol. That she was leaving a pub and acknowledged consuming a glass of wine added to the armament and fully crosses the Rubicon into reasonable suspicion and supports the demand. That said, Cst. Curry's testimony on direct examination where he omitted the latter supporting pillar- acknowledged wine consumption - is

worth considering at a later stage when assessing the overall reliability of his testimony. Finally, I also find the constellation of evidence regarding alcohol consumption also satisfies me that there was an objective basis supporting Cst. Curry's subjective belief and, as result, I find there was reasonable suspicion sufficient to support the ASD demand.

[25] Ms. Miller accompanied Cst. Curry to his car where Cst. Bremner had arrived with the ASD. Before placing her in the police car, Cst. Bremner conducted a pat down search of Ms. Miller, reaching into her rear pockets and attempting to reach into her front false pockets. Ms. Miller testified that she was both shocked and surprised that the officer put hands in her pockets and took things out, explaining she is a tiny woman who did not represent a threat and had done nothing to warrant a body search.

[26] Cst. Curry's testimony on cross-examination suggested such searches are a common occurrence in these cases. I confess to never having heard evidence of such in past trials. It is not, I find, surprising Ms. Miller was "thrown off" by the search.

[27] Ms. Miller also described the dark location of the stop and the rainy conditions.

[28] Cst. Curry says while the pat down was occurring, he readied the ASD to conduct the test, powered it on, and obtained a fresh straw.

The crux of the case:

[29] Once seated in the police car, Ms. Miller says she asked Cst. Curry a number of questions about the device - “Oh, so many questions”. She perceived her questions annoyed Cst. Curry who asked if she was refusing. Ms. Miller testified that she responded, “Can I?”, to which Cst. Curry said “Yes, I will take you to the station”.

[30] Ms. Miller explained that she did not at the time appreciate a difference between an ASD and a breathalyser test, was distracted and concerned about the body search conducted moments earlier, and was uncomfortable about the rainy darkness of the roadside. Ms. Miller says she understood the constable was offering to take her to the police station where she would take “the test”, maintaining she did not refuse to provide a sample, and she agreed to everything asked of her during her interactions with the police.

[31] Cst. Curry’s testimony is very different from that of Ms. Miller. He says while in the police car he told her “we were prepared to administer the test”. Ms. Miller appeared to be having second thoughts and “asked us if she could rest for an

hour before driving to Halifax". She denies this. He says she also mentioned being an RCMP scenario actor and she should know better. Ms. Miller denies this conversation occurred in the police car, instead asserting it occurred at the station where she mentioned holding such a role and he told her she should know better. Because Ms. Miller did not understand that she had been charged with an offence, she did not understand what the comment meant.

[32] In the police car, Cst. Curry says Ms. Miller asked what would happen if she did not provide a sample. He told her she would be charged with failing to provide a sample, her licence would be suspended, and her car towed. She thought more about it and said she would not provide a sample. Cst. Curry testified about his response, "To be clear, I asked are you refusing to provide a sample to me, and she said yes".

[33] During his testimony he did not read those words from his notebook, so I assume he was testifying from memory.

[34] On cross-examination Cst. Curry explained that he asked Ms. Miller if she was refusing because she appeared to be "humming and hawing". He could not describe what that looked like but denied he reached that conclusion because she was asking questions, instead he denies she asked questions.

[35] Cst. Curry says he arrested Ms. Miller for refusal at 11:21 pm and "Chartered her". Ms. Miller says his overall timeline, like the fine points of his evidence, is inaccurate because she texted her husband at 11:23 pm to tell him she had been stopped by police.

[36] She does not deny being arrested but thought it was done for the purpose of taking her to the station for the test.

At the RCMP station:

[37] Arriving at the station a few minutes later, Ms. Miller says she heard that she would be quickly processed and so engaged in a short conversation with Cst. Curry before he left her in the care of other police officers. She says she repeatedly asked them when she was taking the test. They told her she had to wait for Cst. Curry to return, and when he did so a few hours later, Ms. Miller asked to take the test.

[38] Ms. Miller testified that two hours later, while Cst Curry was processing her documents, she asked once again if she was taking the test. Cst. Curry agrees she did so.

Did Ms. Miller's actions constitute a refusal?

[39] Ms. Miller is charged under section 320.15 of the *Criminal Code* that reads as follows:

> **320.15 (1)** Everyone commits an offence who, knowing that a demand has been made, fails or refuses to comply, without reasonable excuse, with a demand made under section 320.27 or 320.28. [emphasis added]

[40] Refusal cases require the Court to "engage in a balancing exercise" recognizing competing interests of the defendant to be free from "unreasonable state intrusions" into her privacy and "the state's interest in law enforcement". Scrutiny takes place in "the context of the totality of the circumstances in which they arise" and each case turns on its unique facts. The constellation of factors to consider include a proper assessment of whether the defendant was "fully and properly informed to the point where it could be reasonably and objectively concluded she understood that her refusal was an offence." In aid, a court may consider the following:

1. the timeline from the moment of the traffic stop through to the arrest…;

2. the reasonableness of the efforts of the police to explain the nature of the demand and the refusal warning before the arrest and any further explanations or comments of the police or the accused that may have followed after the arrest; and

3. the degree of understanding that the accused seemed to demonstrate to the police in response to both the demand and the refusal warning. (*R. v. Hiebert,* 2013 MBQB 240 *infra* at para 26)

[41] In analysing the entire conversation between the officer and Ms. Miller, "no single sentence can be taken out of context or twisted in favour of [an] interpretation that might lead to the conclusion a refusal was made". (*R. v Hiebert* at para 13)

[42] Answering the question whether Ms. Miller's actions constituted a refusal, requires the Court to assess the evidence of both witnesses.

Assessing the Reliability and Credibility of Cst. Curry's testimony:

[43] Cst. Curry's testimony during examination in chief, at times omitted very important information- the acknowledgment of consuming a drink and the verbal agreement to provide a sample. The information was elicited either by Ms. Miller on cross-examination of the officer or under Crown redirect examination.

[44] He often answered "I cannot recall" when questioned about words that may have been spoken. Examples include whether he gave her a card to read herself

rather than reading to her, if she said, “Can I?”, and if she asked questions in the police car.

[45] On examination in chief he testified that his notes were written “at the time” but appeared to backtrack from this position under cross-examination agreeing he did not write them in Ms. Miller’s presence. Ms. Miller also established that a General Report written ten days later contained more detail than the notes used to refresh his memory. Overall, Ms. Miller suggested a difference of between 24 points in the notes and 30 in the Report. Cst. Curry did not disagree.

[46] I find Cst. Curry’s evidence was not overly reliable. I am particularly concerned that he did not record the fine details in his notebook - the exact words of refusal. I do not recall a request to refresh memory or consult his notebook, and while he may have a good memory, I am not certain based on the various omissions during his testimony. His testimony suffered based on these considerations.

[47] To explain, it is a very different thing to say one does “not recall” as compared to saying something did not happen. The former suggests uncertainty, the latter does not. I cannot be certain Ms. Miller’s purported words were not spoken to Cst. Curry. The evidence of refusal is the *actus reus* of the charge, and

therefore vital information that should be recorded accurately in support of a reliability assessment. There will of course be cases where the words are not recorded and the court accepts a memory of same, but as situations become more complicated the nuances take on heightened importance. That is certainly so in a case where an initial clear agreement to provide a sample somehow transforms into a refusal. In such cases the recorded words become an important determinant of accuracy and reliability.

[48] I may also point out, in a situation involving the withdrawal of agreement, an officer should perhaps note the words spoken as well as efforts aimed at ensuring the person clearly understood the consequences of the perceived decision. Doing so in front of the person certainly serves to signify the importance of such a decision.

[49] Finally, I also found odd Cst. Curry's evidence about the conversation involving Ms. Miller's relative and the purported crime, his non-reaction and failure to ask questions seemed somewhat unusual for a police officer. It is suggestive of Ms. Miller's impression the officer was rushing the process and not being as careful as he might have been in the circumstances. While he was not asked about this, Ms. Miller says he served her the release papers at the station,

asked her to sign them, and when she did not respond quickly enough said, “I’ll just mark unresponsive”.

Availability of Clarity Regarding the Conversation:

[50] Without casting aspersions on how the case was called, Cst. Bremner did not testify, and Cst. Curry’s evidence strongly led the court to conclude she was present for much of the conversation with Ms. Miller. I reach this conclusion because Cst. Curry testified he told Ms. Miller “we” are ready for the test. He also said Ms. Miller asked “us” if she could rest before driving to Halifax - the words uttered moments before the purported refusal. Cst. Bremner’s testimony could have added real clarity about vital elements of the offence.

[51] Likewise, but not as important, without testimony from the police officers at the station, the court is left with only Ms. Miller’s testimony that she asked them when she would take the test, all arising from her understanding of the conversation at the roadside.

[52] Overall Ms. Miller did a decent job cross-examining the constable. She pointed out the lack of notes about the search of her person that instead appear in the General Report prepared ten days later. She also spent considerable time and attention on a complaint she filed the next day involving her payment from the

comedy show that was missing from her pockets. She suggested the General Report may have been drafted to cover the loss. She was also concerned that the video recording of her interaction with police, noted in the Report, was determined to be corrupted and therefore unavailable. Cst. Curry satisfied the Court that he did not have any information about her missing money and he only found out the video was corrupted after preparing the Report. His evidence on these points I find credible.

[53] While he was an overall credible witness, I conclude Cst. Curry's testimony was not overly reliable on the relevant points. I can and do accept most of his evidence but am left unsure whether he participated in creating a confusing conversation wherein Ms. Miller understood a simple change in venue was suggested rather than a refusal.

[54] A decision of Moreau J. in *R. v. Kavusa*, 2014 ABQB 360 reminds the court:

> [52]… The refusal must be clear and unequivocal. The trial judge is not limited to considering the immediate words and responses to the specific demand but may consider the entire conversation. Counsel for the Appellant referred to the decision of Jeffrey J in ***R v Ostare***, 2013 ABQB 9, 555 AR 61 at para 60, citing ***R v Dunn*** (1978), 1978 CanLII 2321 (PE SCAD), 17 Nfld & PEIR 17, 43 CCC (2d) 519 (PEISC):
>
> > 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. […] 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 refused to respond, it is sufficient to constitute a refusal.

> [53] Jeffrey J noted, at paras 64-66, that where the Crown is relying on a constructive refusal, there must be no ambiguity. Where there is ambiguity, it should be weighed in favour of the accused.

Assessing Ms. Miller's Testimony:

[55] While Cst. Curry's testimony raised a reasonable doubt on its own, Ms. Miller testified, and I will assess her evidence applying the three-step test in *R. v. W.D.*, [1991] CanLII 93 (SCC), 1 S.C.R.742 to assess her credibility. It is as follows:

1. First, if I believe the evidence of the accused, obviously I must acquit.

2. Second, if I do not believe the testimony of the accused but am left in reasonable doubt by it, I must acquit.

3. Third, even if I am not left in doubt by the evidence of the accused, I must ask myself whether, on the basis of the evidence I do accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[56] The test was clarified in an article by Justice David Paciocco of the Ontario Court of Appeal - *Doubt about Doubt: Coping with R. v. W.(D.) and Credibility*

Assessment" (2017) 22 Can. Crim. L. Rev. 31. At paragraph 72 Justice Paciocco wrote as follows:

> If you accept as accurate evidence that cannot co-exist with a finding that the accused is guilty, obviously you must acquit;
>
> If you are left unsure whether evidence that cannot co-exist with a finding that the accused is guilty is accurate, then you have not rejected it entirely and you must acquit;
>
> You should not treat mere disbelief of evidence that has been offered by the accused to show his innocence as proof of the guilt of the accused; and
>
> Even where evidence inconsistent with the guilt of the accused is rejected in its entirety, the accused should not be convicted unless the evidence that is given credit proves the accused to be guilty beyond a reasonable doubt.

[57] Ms. Miller was a very careful and precise witness. My sense - she is one who thinks before she speaks and is neither rambunctious nor overly excitable. She was confident in an understated manner and testified thoroughly about details of the evening leading up to the roadside stop. She says she felt rushed by the constable and was unsure about the process unfolding at the roadside. She was clear that she did not appreciate a difference between an ASD and a breathalyzer, is not a drinker, and was somewhat unsure about what was happening. These statements colour her understanding of what was occurring, and I find she was not experienced in the matters occurring at the roadside and questioned the officer to the point where he was annoyed.

[58] I found her credible and her evidence fairly reliable. I am not concerned that the arrest and transport to the station is suggestive of her lack of honesty. I do not find that she knew she had been charged with an offence, despite being told so. She was distracted by the body search and the surrounding circumstances. It is not surprising she was also distracted by the situation involving her relative.

[59] In the result, I cannot conclude Ms. Miller's words of refusal in these circumstances were clear and unequivocal in light of her understanding that the test location was merely being moved to the detachment. I reach this conclusion based on the circumstances, their conversation, and her state of mind influenced as it was by the factors at roadside not the least of which was the search. I find her state of mind rendered her unable to appreciate or understand that her words were interpreted incorrectly as supported by her actions at the detachment.

[60] I have a reasonable doubt about the exact words uttered in her conversation with the officer. While Ms. Miller's recollection may not be 100% accurate, I cannot reject it and as a result her evidence leaves me in a reasonable doubt about essential elements of the offence - whether she refused and intended to refuse. I simply find I am in doubt that she intended that outcome, and find it is more than plausible she misunderstood the constable's answer to her question and believed she was complying but had simply accepted an offer to move the test location.

[61] This conclusion is consistent with her appearance as a careful person somewhat overwhelmed by the circumstances at the roadside. She was what is often called a “good witness” and I detected no effort to mislead, and as a result simply cannot rule out her evidence about the conversation with Cst. Curry. Since I cannot reject her evidence on this crucial point, I am in doubt on an essential element of the offence and find her not guilty.

Judgment accordingly.

van der Hoek J.