

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R . v. Green*, 2021 NSPC 53

**Date:** 20211129

**Docket:** 8358772, 8358773

**Registry:** Bridgewater

**Between:**

Her Majesty the Queen

v.

Martin Vincent Green

<b>Judge:</b>	The Honourable Judge Paul Scovil,
<b>Heard:</b>	August 13, 2021, in Bridgewater, Nova Scotia
<b>Decision</b>	November 29, 2021
<b>Charge:</b>	320.15(1) and 320.14(1)(a), Criminal Code
<b>Counsel:</b>	Keavin Finnerty, for the Crown Nicklaus Fitch, for the Defendant

**By the Court:**

[1] On a warm summer evening on June 28, 2019, the RCMP responded to an anonymous 911 call that Martin Green had driven an ATV to a wharf in Western Shore, Lunenburg County, Nova Scotia. Further that he had staggered into a described boat. As a result of attending the scene, the RCMP charged Mr. Green with the impaired operation of the conveyance as well as the refusal of a breath demand.

**FACTS**

[2] John Mosher was fishing for mackerel off the wharf in question on the evening of June 28, 2019. He was approached by an RCMP officer and asked if he had seen anyone else on the wharf.

[3] Mr. Mosher advised the RCMP that he had not seen anyone else on the wharf but said that one of the boats tied up to the wharf had started its motor for a few minutes. In his evidence Mr. Mosher indicated that he thought he could see someone in the boat through one of the windows, but he could not identify anyone. He also noted that there was a sailboat that had tied up at the front of the wharf.

[4] In cross-examination Mr. Mosher indicated that the wharf was privately owned. He further advised that he saw no one get on or off the sailboat, and he agreed that he told the police that he did not see anyone on board. Mr. Mosher also agreed that a bilge pump could come on automatically in a motor vessel, but that he did not feel that the motor he heard was that of a bilge pump. He also indicated he saw a person leave in a blue car.

[5] Constable Vladimir Dounin testified for the crown as well. He has been employed with the RCMP as a peace officer since 2014. Constable Dounin was working on the Friday evening in question just prior to 7:00 pm. He was advised by 911 dispatch that an anonymous caller had reported that Martin Green was driving an ATV to the government wharf in Western Shore and that he had gotten off and staggered to a boat.

[6] When Constable Dounin arrived at the wharf some six minutes after getting the dispatch call, he saw a red ATV and a boat which matched the description that he had been provided by dispatch.

[7] He had a quick look at the vessel in question and could not see anyone on the boat. The cabin door was open. He noted Mr. Mosher at the end of the wharf. Thinking that that was Mr. Green, the officer went to speak to him. Mr. Mosher identified himself and indicated he was not Mr. Green and that he was just fishing. He advised Constable Dounin that he had not seen anyone get on or off the boat since he had been there, and that he was fishing for about 20 minutes. Constable Dounin testified that he was told that the engine on the boat was turned on and then turned off. This conversation took place approximately 20 to 30 feet away from the vessel in question.

[8] During the conversation that was ongoing with Mr. Mosher a second officer, Constable Hirsch, arrived. After conferring with Constable Hirsch, Constable Dounin decided to enter the vessel in what he termed as "fresh pursuit".

[9] Several photos that were taken at the time were entered into evidence as exhibit number one. These photos were taken at the time of the offence and show the vessel in question moored to the wharf and a smaller boat, commonly known as a Boston Whaler tied up right behind Mr. Green's vessel.

[10] Constable Dounin confirmed that the main cabin door to the boat was open and that there was a jacket on the bench. No one was in the main compartment. There was a compartment beyond the cabin door. He felt that there was an operator of the vehicle somewhere on the vessel.

[11] Constable Dounin confirmed again his belief that this was a public Government wharf.

[12] Constable Dounin stepped down on board the boat and at some point, Constable Hirsch from the wharf said in a loud voice "RCMP". Mr. Green came out of the sleeping quarters where he was lying asleep. This area can be viewed in one of the photos in Exhibit 1. At that point Constable Dounin could smell stale alcohol on the breath of the accused and, as he said, "that was enough to read the demand."

[13] Constable Dounin read a roadside screening demand to the accused from a card. It was a standard roadside demand for a sample of the individual's breath.

[14] Mr. Green's response was a brief pause and then stated he was going back to sleep. Green then went back into the sleeping compartment and laid down.

[15] Mr. Green's response caused the Constable to arrest Green, read him his Charter Rights and the standard Police Caution.

[16] Several photos were introduced by the crown through Constable Dounin. These showed an ignition key in the ignition in the vessel's wheelhouse, Mr. Green lying in the sleeping compartment and the picture of the boats at the wharf.

[17] When asked in direct as to why he did not get a warrant to enter the boat Constable Dounin stated he did not require one as he was in fresh pursuit.

[18] In cross-examination Dounin stated there may have been another person on the wharf when he approached Mosher, but he was unsure of that. Mosher also advised the officer that someone fishing on the wharf had left in a blue Volkswagen.

[19] While he testified in direct examination that he arrested the accused for refusal of the Screening Demand. On cross-examination the officer agreed his notes indicated he arrested Green for being drunk in public.

## **LAW**

[20] What is abundantly clear here, like all cases before our courts, proof of guilt must be found to be beyond any reasonable doubt on all essential elements before a conviction can take place.

[21] Section 11(d) of the **Canadian Charter of Rights and Freedoms** provides that a person charged with an offence has the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." Mr. Green is presumed innocent of the charge unless the Crown proves each element beyond a reasonable doubt.

[22] Cory J., speaking for the majority in **R. v. Lifchus**, [1997] 3 S.C.R. 320, summarized the principles of reasonable doubt, as it should be explained to a jury:

... It should be explained that:

the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;

the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;

a reasonable doubt is not a doubt based upon sympathy or prejudice;

rather, it is based upon reason and common sense;

it is logically connected to the evidence or absence of evidence;  
it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and

more is required than proof that the accused is probably guilty -- a jury which concludes only that the accused is probably guilty must acquit. [Emphasis in original.]

[23] Iacobucci J., for the majority, said in **R. v. Starr**, 2000 SCC 40, that "an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities." (Para. 242). Mere probability of guilt is never enough in a criminal matter. The Crown must prove the guilt of an accused person, in this case Martin Green, beyond a reasonable doubt - which lies somewhere between probability and absolute certainty, but closer to absolute certainty.

## **IMPAIRED OPERATION**

[24] Section 320 states:

320.14 (1) Everyone commits an offence who:

(a) operates a conveyance while the person's ability to operate it is impaired to any degree by alcohol or a drug or by a combination of alcohol and a drug;

[25] In relation to the charge of Impaired operation of a conveyance the crown must prove beyond a reasonable doubt that this accused operated a conveyance while his ability to do so was impaired.

## **FAILURE OR REFUSAL TO COMPLY WITH DEMAND**

[26] Section 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.

[27] Section 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:

(a) to immediately perform the physical coordination tests prescribed by regulation and to accompany the peace officer for that purpose;

(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;

## **OPERATION OF THE CONVEYANCE**

[28] There is no direct evidence that the accused operated either the ATV or the motor vessel. No witness observed the accused while he might have been in the course of operating the ATV. In relation to the motor vessel, again there is no evidence that he was operating the motor vessel. The evidence given by Mosher of an engine being turned on could have been from an automated bilge pump, the sailboat, or the Boston Whaler. It may have also originated from the blue Volkswagen. All of this certainly raises a reasonable doubt and I accordingly acquit him of the impaired charge.

## **THE REFUSAL CHARGE**

[29] The accused argues that Section 8 and 9 of the **Canadian Charter of Rights and Freedom** were violated by the actions of the police and that an appropriate remedy would be an exclusion of the evidence regarding his refusal pursuant to s.24 (2) of the Charter. Correspondingly the Crown argues that no rights were violated.

[30] Section 8 and 9 of the Charter states:

Section 8 states everyone has the right to be secure against unreasonable search or seizure.

Section 9 states, everyone has the right not to be arbitrarily detained or imprisoned.

[31] Similar to the case before this court was **R. v. Hamilton**, [2017] O.J. No. 5801.

[32] There Mr. Hamilton was charged with operating his boat while impaired. The police in *Hamilton* found the accused there passed out partially in the sleeping area of the vessel and protruding into the open area of the boat. Hamilton was heavily

intoxicated. The Court in *Hamilton* found that the accused's rights under s. 8 were violated but not those under s. 9.

[33] Justice Konyer in *Hamilton* said the following:

The Supreme Court provided the following useful guidance on this question in *Feeney, supra*, at para. 26:

a. *Eccles*, [1975] 2,S.C.R. 739 *supra*, set out the following requirement for announcements prior to entry of private premises without permission: except in exigent circumstances, police should give notice of presence by knocking or ringing the doorbell, give notice of authority by identifying themselves as law enforcement police officers and give notice of purpose by stating a lawful reason for entry. Furthermore, before forcing entry, police should, at minimum, request admission and have admission denied.

Para. 16:

In my view, Sgt. Gravelle was entitled to continue his investigation by speaking to Mr. Hamilton to determine whether there was any basis for the suspicion reported to him by the lockmaster that Mr. Hamilton might be impaired. I accept that Mr. Hamilton had a reasonable expectation of privacy while on his boat, and I also accept that his privacy interests were higher when the boat was docked and he was asleep on it as compared to when the boat was in motion. In my view, however, he could not have the same reasonable expectation of privacy on his boat as he would have in his home because of the character of the vessel.

Para. 17

Mr. Hamilton's boat was capable of being used both as a motorized vessel and a temporary residence. It was also capable of being quickly converted from one use to the other. In my view, the reasonable expectation of privacy attached to the vessel must be dependent on its use at the time. Boats when in motion on public waterways are highly regulated, just like motor vehicles on public roadways, and would attract a lessened expectation of privacy at such times. They are subject to regulation, inspection, and random stopping by law enforcement personnel, and one would reasonably have a lower expectation of privacy in a vessel being operated as a pleasure craft. On the other hand, had Sgt. Gravelle approached Mr. Hamilton's boat in the middle of the night while he was asleep on it docked in his slip at the Lakefield Marina, Mr. Hamilton's reasonable expectation of privacy would be heightened, and would approach that of a private dwelling.

Para.18:

In *R. v. Nolet*, 2010, SCC 24, the Supreme Court reached a similar conclusion with respect to the sleeping compartment in a long-transport truck. The court held that while even

rudimentary and temporary living quarters are "not *Charter-free zones*", the reasonable expectation of privacy is lessened because the truck is also used as a commercial vehicle on public roads, a highly regulated industry: see *Nolet, supra*, para 31.

Para. 19:

In the circumstances of this case, Mr. Hamilton's boat was tied off at a public dock in the early afternoon. The boat could have been easily and quickly been untied and set back in motion. The operator and lone occupant, whose behaviour and speech had led to the lockmaster calling the police, was apparently passed out aboard the boat in a strange position, less than a half hour after being told by the lockmaster that police had been called. In those circumstances, in my view, Mr. Hamilton could not reasonably expect the same degree of privacy as he would have been entitled to had he been inside his residence.

Para.20

Having said this, I still find that Sgt. Gravelle was required to announce his presence before boarding the boat. Although lessened, Mr. Hamilton nevertheless had an entitlement to a reasonable amount of privacy in the circumstances. In my view, this required Sgt. Gravelle to announce his presence, give notice of his authority and purpose, and request permission to board the boat. Mr. Hamilton was entitled to notice of the officer's presence and his intention to conduct a criminal investigation. I find that Sgt. Gravelle's failure to comply with the announcement requirement constitutes a breach of Mr. Hamilton's rights to be secure from unreasonable search and seizure. Although Sgt. Gravelle undoubtedly had grounds to conduct an investigation and to collect evidence for this purpose, any search had to be conducted in a reasonable manner. By failing to announce himself, I find that the officer failed to carry out the search in a reasonable manner. Mr. Hamilton's s.8 rights were therefore infringed.

Para. 21

I am not persuaded, however, that Mr. Hamilton has proven a breach of his right not to be free from arbitrary detention or arrest. In my view, Sgt. Gravelle had a lawful basis to briefly detain him for investigative purposes, which is precisely what occurred. Once he formed grounds for arrest, which were not challenged on this application, then it cannot be said that Mr. Hamilton's continued detention was arbitrary. The s.9 application is therefore dismissed.

[34] As can be seen, *Hamilton* identifies the sliding scale of expectation of privacy. Here the accused was at a private wharf and the vessel was secured to the wharf. The accused was entirely in the sleeping quarters of the boat and asleep. Here the

expectation of privacy was at least that, as described by Justice Krunger in para.7 of *Hamilton*, and likely higher.

[35] Cst. Dounin's testimony regarding the announcement of the RCMP presence as well as announcing the reason for the intrusion into the sleeping compartment causes concern. I find as a fact the only announcement was that of Cst. Hirsh who may have said police from the wharf after Dounin was already on the boat. The notes of Dounin stating the initial arrest was for being drunk in a public place are to be presumed accurate. The arrest for being drunk in public was ill conceived, as was the claim by the officer of having in been in hot pursuit.

[36] Given the above, I find that Mr. Green has proven that his s. 8 rights under the charter have been violated

[37] I turn to the analysis under s. 24(2) as to whether the facts above bring the administration of justice into disrepute. Under the regime set up by the Supreme Court of Canada in **R. v. Grant**, 2009 SCC 32, I must assess and balance the admitting of evidence regarding society's confidence in the justice system. Further I must consider the seriousness of the state infringing conduct, the impact of the infringement on Mr. Green's charter protected interest and finally I must consider society's interest in adjudication of the case on its merits.

[38] I find the conduct of the officer to be a major violation of Mr. Green's rights. The actions of the officer which he termed "hot pursuit" was anything but. The officer had no idea if Green was the only one on the boat and he also knew a motor vehicle had departed recently which may have carried the person who operated the ATV away. An arrest for being intoxicated in public while on a private vessel, in the sleeping quarters, moored to a private wharf would by any measure seriously erode public confidence in the administration of justice.

[39] Mr. Green's expectation of privacy on the vessel, while arguably not as high as a residential bedroom, was none the less at the very high range. The impact on his privacy rights by the arresting officer was profound.

[40] The public does have a strong societal interest in the trying of impaired operation cases. Here, in these facts, that interest does not save the case.

## **CONCLUSION:**

[41] I therefore exclude the evidence and acquit the accused.

Paul B. Scovil, JPC