PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Sim*, 2023 NSPC 44

Date: 20230314
Docket: 8485807
Registry: Pictou

Between:

John Howard Sim, Accused

v.

His Majesty the King

Judge: The Honourable Judge Bryna Hatt
Heard: March 3, 2022 in Pictou, Nova Scotia

Written Decision: September 15, 2023
Subject: Refusal to comply with a demand under s. 320.27 of the *Criminal Code* to provide a breath sample

Summary: Accused was stopped at a traffic stop and was observed as having glassy eyes and slurred speech. An ASD demand was made to provide a breath sample. The accused was given four separate attempts to provide the required breath sample. All four attempts were failed attempts. Accused was charged with failure to comply with the demand to provide the breath sample. Accused alleges he has asthma and that is a reasonable excuse for failing to provide a sample.

Issues: Whether *mens rea* has been proven, and if the Accused intended to produce the failure by not providing a suitable sample.

Once the demand is made, it is not right for the Accused to dictate when, where or how many attempts he is entitled to in order to produce a sample.

Whether the Accused had a reasonable excuse for not providing a sample.

Result: Accused did not provide a sample of his breath after it was demanded, despite being properly instructed how to use the testing unit and being given four separate opportunities to do so. Accused intended to avoid giving a proper sample. The Accused was not found to have a reasonable excuse. Accused is guilty of a violation of section 320.15(1) of the *Criminal Code.*

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Judge:	The Honourable Judge Bryna Hatt
Heard:	March 3, 2022, in Pictou, Nova Scotia
Decision:	March 14, 2023
Charge:	Section 320.15(1), *Criminal Code*, R.S.C. 1985, C. C-46
Counsel:	Bill Gorman, Nova Scotia Public Prosecution Ed Patterson, Defence Counsel

By the Court:

Facts

[1] John Howard Sim is charged under section 320.15(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, for without reasonable excuse failed to comply with a demand made to him by a peace officer under s.320.27 of the *Criminal Code*, to immediately provide samples of his breath as in the opinion of the peace officer was necessary to enable a proper analysis of his breath by means of an approved screening device.

[2] This matter appeared for Trial on March 3, 2022.

[3] The Crown's evidence included two witnesses, Cst. MacEwan and Cst. Murnaghan of the Pictou District RCMP.

[4] The Defense called one witness, being the accused, Mr. Sim.

[5] The majority of the facts leading up to the charge are uncontested, including the issue of identity which was admitted by the Defense.

[6] On November 29, 2020, at approximately 9:20pm, Cst. McEwan conducted a traffic stop on Mr. Sim's vehicle on Highway 106, on the Pictou Causeway, after noting that only the day time lights were running on Mr. Sim's vehicle and it was after dark.

[7] Mr. Sim complied with the traffic stop, pulling over to the shoulder of the road and coming to a stop. Ms. Sim's vehicle and Cst. MacEwan's police vehicle were pulled over on the shoulder of northbound lane of the Pictou Causeway, on Highway 106.

[8] Cst. MacEwan approached the Mr. Sim's vehicle and spoke with Mr. Sim and it was noted by Cst. MacEwan that:

1. Mr. Sim did not roll down the window completely;
2. Mr. Sim avoided eye contact with the officer, instead of keeping his eyes forward;
3. Mr. Sim asked to don a mask and Cst. MacEwan agreed;
4. Mr. Sim subsequently rolled down his window fully;
5. Mr. Sim had glassy eyes and

6. Mr. Sim appeared to fumble when looking for his insurance and drivers license.

[9] Cst. MacEwan gathered Mr. Sim's license and returned to his police car to review the documents.

[10] Cst. MacEwan's partner, Cst. Murnaghan, arrived on the scene and interacted with Mr. Sim, while Cst. MacEwan was in his police car reviewing Mr. Sim's provided documents. Cst. Murnaghan also noted Mr. Sim's presentation of glassy eyes, slurred speech and fumbling for items within the car.

[11] Cst. MacEwan testified that after considering how Mr. Sim was presenting, he decided to conduct an ASD demand. Cst. MacEwan returned to Mr. Sim's driver side window and made the ASD demand by reading from the ASD demand card.

[12] Mr. Sim initially agreed to the demand. He exited his vehicle and walked toward Cst. MacEwan's police car with Cst. MacEwan and Cst. Murnaghan. When Mr. Sim arrived at Cst. MacEwan's car, he was informed by Cst. MacEwan of the ASD use instructions. At this time, Mr. Sim verbally refused the ASD.

[13] Mr. Sim then told the two RCMP officers that he was drunk and should not have been driving.

[14] Cst. Murnaghan advised Mr. Sim of the consequences of the refusal. Mr. Sim then agreed to take the test.

[15] Cst. MacEwan testified that he is a certified operator of the ASD and testified that the ASD was fully operational, while also providing information on the ASD unit, itself checking, and its display functions. The ASD unit will not turn on if it is not operational. Further, the display window will advise if a sample cannot be collected for too little or too much breath.

[16] Mr. Sim was advised, initially by Cst. MacEwen how to use or blow into the ASD testing unit. A new straw was placed in the unit for Mr. Sim. Mr. Sim attempted the first time and blew too light, as the ASD advised. Cst. MacEwan and Cst. Murnaghan then coached Mr. Sim for the second attempt.

[17] Mr. Sim tried a second time and the ASD advised he blew too hard. Mr. Sim was coached again. He blew a third time and again blew too hard. Mr. Sim was coached again. On the fourth try, Mr. Sim again blew too hard. New factory seal straws were used throughout.

[18] Following the fourth failed attempt, Mr. Sim was arrested, transported to the Pictou RCMP detachment and charged with a violation under section 370.15 (1).

[19] The above facts are consistent between the Crown and Defense, and unchallenged.

Position of the Parties

[20] The Crown argues that Mr. Sim was aware of the demand, he refused, was provided another opportunity to comply, was properly educated four times on how to use the ASD and failed intentionally, in order to not provide a suitable sample.

[21] The Crown further states Mr. Sim's arguments regarding lack of opportunity to provide a sample and Mr. Sim's argued reasonable excuse, are inconsistent and do not hold up under minimal scrutiny.

[22] Mr. Sim maintains that he did not **refuse** the ASD for three reasons:

1. He wanted to take the test at the police station, rather than on the road side;
2. He should have been able to attempt the ASD more than four times; and
3. He was unable to provide a sample at the roadside demand, because of health issues, specifically asthma, that does not allow him in certain circumstances to breathe properly.

[23] Mr. Sim testified that he wanted to take the test at the police station because he would be less nervous, he felt it would be safer than roadside, and because he was aware of his breathing limitations.

[24] In support of Mr. Sim's position, Mr. Sim exhibited his prescribed "puffer" for which he states he was prescribed for his asthma and that he testified he uses daily as needed to help improve his breathing. Mr. Sim testified that he understood he has asthma, and that circumstances such as his nervousness, the cold and smoky environments (such as gathering he had left that evening) cause breathing problems for him. No further medical information or expert evidence was provided. Mr. Sim testified he did not have the puffer with him on November 29, 2020.

[25] Mr. Sim testified that after he was arrested and placed in Cst. MacEwan's police car for transport to the Pictou RCMP detachment, he told Cst. MacEwan that he "was not refusing" and that "his lungs would not handle it", in reference to doing

the ASD at the roadside. In cross examination, Cst. MacEwan did not independently recall these statements but did confirm the RCMP report had the statements "argued he wasn't refusing" and "said that his lungs would not handle it" within the report. The RCMP report was only referred to in cross examination and was not tendered as an Exhibit.

[26] The Defense maintains Mr. Sim did not refuse to comply with the demand for a breath sample, and only failed to produce a sample due to lack of opportunity and his medical condition.

General Principles

[27] Any accused person is presumed to be innocent unless and until the Crown has established, beyond a reasonable doubt, that the accused is guilty. This onus of proof of the essential elements of the offence rests with the Crown and does not shift to the accused.

[28] In determining any case, the trial judge must consider the evidence in its totality and not in a piecemeal manner, to determine if guilt has been established beyond a reasonable doubt. 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 CanLii 319, [1997] 3 S.C.R. 320 (S.C.C.). Instead, the burden of proof lies "much closer to absolute certainty than to a balance of probabilities" (*R. v. Starr*, 2000 SCC 40 (CanLii), [2000] 2 S.C.R. 144). 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 (CanLii), 2011 SCC 45).

[29] Credibility assessments involve the Court considering the truth of a 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, he 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. (*R. v. Burgess*, 2021 NSPC 34).

Law

[30] The relevant sections of the *Criminal Code* are as follows:

Section 320.27(1): Testing for presence of alcohol or drug

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;

[31] Section 320.27(2) of the *Criminal Code* reads as follows:

Section 320.27(2): Mandatory Alcohol Screening

If a peace officer has in his or her possession an approved screening device, the peace officer may, in the course of the lawful exercise of powers under an Act of Parliament or an Act of a provincial legislature or arising at common law, by demand, require the person who is operating a motor vehicle 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 that device and to accompany the peace officer for that purpose.

[32] The charging section, 320.15(1) of the *Criminal Code*, reads as follows:

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.

[33] The required elements of the offence, can be nicely summarized as follows:

1. The Defendant knows that a demand has been made,
2. The demand was lawful, and
3. There was an intentional failure to comply with the demand.

[34] Once the Crown has established the elements of the offence, Mr. Sim may choose to prove, on a balance of probabilities, that he had a "reasonable excuse"

for failing to comply with the demand. (*R. v. Goleski*, 2015 SCC 6 (CanLii), [2015] 1 S.C.R. 399).

[35] This case focuses on whether *mens rea* has been proven, and case law has considered what that means in the context of this charge. While the wording of the charge has been amended slightly, the older cases are still relevant to defining this element of the offence. The Crown is required to prove Mr. Sim intended to produce the failure. (*R. v. Lewko*, 2002 SKCA 121 (CanLii) at para. 9).

[36] In *R. v. Soucy*, 2014 ONCJ 497, at para. 57, Paciocco J. considered the *mens rea* requirement and concluded the Crown must establish the accused failed to provide a breath sample "on purpose". The Court considered *R. v. Dolphin, 2*004 MBQB 252, adding "as a matter of common sense, if the device was shown to be in good working order, the accused was given a clear explanation of its operation, and a sufficient opportunity to provide a sample was furnished, it can generally be inferred in the absence of evidence raising some question about the ability of the accused to comply, that the accused intended to avoid furnishing a suitable sample". The reasoning in *Soucy*, was endorsed by then Judge Hoskins in *R. v. Bonang,* 2016 NSPC 73 and by Judge Tax in *R. v. Downey*, 2018 NSPC 24.

Findings

[37] In assessing witness credibility and reliability, I found the evidence of Cst. McEwen and Cst. Murnaghan to be credible and reliable. Each presented evidence in a honest and careful manner, and withstood cross examination, especially on the material facts. Any ambiguity in their respective recollections was answered honestly and each relied on contemporaneously made notes, transparently advising when recollection was required.

[38] Mr. Sim testified, and his credibility is assessed using the three-step test in *R. v. W.D.*, 1991 CanLii 93 (SCC), [1991] 1 S.C.R. 742. 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.

[39] I have performed the *WD* assessment in relation to Mr. Sim, his evidence and in relation to all admissible evidence before the Court. In doing so, I make the following findings:

1. The Crown has established and there has been no contest between the Crown and Defense that the ASD demand was made, and Mr. Sim was aware of the demand. This evidence is uncontested. Mr. Sim was aware the demand was made by Cst. McEwan. He initially agreed, then expressly refused and reconsidered after being advised of the consequences of refusal or failing to provide a sample.

2. The ASD demand is lawful per section 320.27, if the Court finds that there were reasonable grounds for Cst. McEwan to engage the ASD demand. The threshold to trigger a "reasonable grounds" is not beyond a reasonable doubt. Based on the uncontradicted evidence of Cst. McEwan's observations, as outlined above, I am satisfied the officer had sufficient grounds to establish reasonable suspicion to make the ASD demand, in particular Mr. Sim driving without night lighting, glassy eyes, fumbling behaviour and avoiding eye contact. Taken together, these form the basis for reasonable grounds.

3. I find that Cst. McEwen provided four opportunities for Mr. Sim to provide a sample, each time with coaching and educating on "how to" provide the sample. There is not a standard number of chances a person gets to perform and ASD. Cst. McEwen testified that his training suggested three (3) attempts, adding it was at the discretion of the peace officer. Cst. McEwen gave 4 attempts.

4. Once the ASD demand is made, it is not a right for Mr. Sim to dictate when, where, or how many attempts he is entitled to in order to produce a sample.

5. Considering the logic as outlined above in *Dolphin*, which was endorsed by the Courts in *Bonang* and *Downey*, where Mr. Sim was given a clear explanation of the ASD's operation, and a sufficient opportunity to provide a sample was furnished, it can generally be inferred the accused intended to avoid giving the sample, unless Mr. Sim can satisfy the Court on a balance of probabilities that he had a "reasonable excuse" of why he was unable to comply.

6. I do not find Mr. Sim to be a credible witness in providing his explanation for his claimed inability to provide a breath sample. Specifically:

    a. Mr. Sim provided no evidentiary support that his asthma in any way would prevent him from providing a sample on

demand. The exhibited puffer does not provide a foundation or alone sustain a reasonable excuse of his inability in provide a breath sample;

b. Mr. Sim provided no evidence to support his inability in specific environments to provide a breath sample, including the "nervous", "cold" or post "smoky environment" he explained in his testimony;

c. Even so, Mr. Sim did provide 1 sample where he blew too little, and 3 samples where he blew too hard on the roadside, which indicates he could provide a sample;

d. At no time prior to Mr. Sim's arrest did he advise officers of (1) his asthma condition or (2) that he was having physical difficulties completing the test. I do not accept that his post arrest statement "my lungs can't handle this" suffices for imputed medical knowledge or triggers for which the peace officers should have inquired further. Mr. Sim wanted to take the test at the police station rather than on the roadside, which again speaks to his ability to provide a sample at his choosing; and

e. Mr. Sim wanted to take more attempts at the ASD, and alleges he was denied the opportunity to do so, which is incongruent with the evidence that he could not provide a sample due to his reported medical condition.

[40] In conclusion, I find that Mr. Sim did not provide a sample of his breath after being demanded, properly instructed and given opportunities to do so. I further find that Mr. Sim intended that outcome. I do not accept his testimony that he was trying and unable to provide a sample due to asthma. In reviewing the totality of the evidence, I am satisfied, beyond a reasonable doubt, that the Crown, has made out its case and Mr. Sim is guilty of the a violation of section 320.15(1) of the Criminal Code, as charged.

Bryna Hatt, JPC.