SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Sears, 2010 NSSC 160

Date: 20100422
Docket: Cr Amh No. 321751
Registry: Amherst

Between:

Floyd William Sears — Appellant

and

Her Majesty the Queen
By Her Attorney General of Nova Scotia — Respondent

DECISION

Judge:	The Honourable Justice Gerald R. P. Moir
Date of Hearing:	April 8, 2010
Counsel:	Jim O'Neil, for the appellant Mary Ellen Nurse, for the respondent

Moir, J.:

Introduction

[1] Mr. Sears was convicted by Her Honour Judge Carole Beaton of refusing, without reasonable excuse, to provide a sample of his breath after a demand was made. He appeals on the ground that the judge erroneously rejected the excuse he put forward at trial.

[2] Mr. Sears' excuse has to do with his job. He is a correctional officer. He claimed that the arresting officer told him that failing the breathalyzer could lead to the police lock-up. Mr. Sears thought that a correctional officer might be harmed by other prisoners in the lock-up.

The Excuse

[3] Mr. Sears drove along the highway from Springhill Junction to the Town of Springhill after midnight one evening last June. He had three passengers, all of whom had been drinking at a party in Springhill Junction. He says that he only had a few beers and he drank them early in the evening.

[4] Constable Charles Smith stopped Mr. Sears. He smelled alcohol. He detected some signs of possible impairment of Mr. Sears but no staggering or other "gross signs of impairment". So, Constable Smith demanded Mr. Sears provide a sample of his breath for a roadside analysis.

[5] Mr. Sears asked Constable Smith about consequences. Constable Smith said he explained the three possible readings:

> One was a pass, the second one was a warn, twenty-four hour suspension, and the third one being a fail, and if he failed the roadside test, I'd be reading the breath demand and we'd be going back to Amherst detachment for a test.

[6] Constable Smith and Mr. Sears provided conflicting evidence on what was said further about the third possibility. This evidence founds the excuse.

[7] Constable Smith said he explained to Mr. Sears the jeopardy he would be in if he did not take the roadside test. He said:

> I instructed him that by not taking the test there was a charge of refusal, and that was the same penalty if he...had...blown and failed the test.

He was asked whether he suggested "a stronger penalty than simply being taken back to the Amherst Police Department" on the third level of readings. He said:

> No. Of course we would have gone back to the detachment, and depending on the test results there's paper work to be done, release papers. But I had no intentions of keeping Mr. Sears in custody.

[8] Constable Smith said in cross-examination that he did not mention jail to Mr. Sears. He did allow that

> ...if we go back to Amherst, there's a procedure, breath test. Then he's locked up in a temporary room because I have to do paper work up to release him, but he would have been released that evening.

In re-direct, the officer said that Mr. Sears "did say he just couldn't be locked up...he may have said it that night in the car."

[9] Constable Smith agreed that a correctional officer, like others in the enforcement field, would have good reason to fear being placed in a lock-up. He did not agree that Mr. Sears told him that Mr. Sears was a correctional officer.

[10] Mr. Sears testified that after Constable Smith made the demand, Mr. Sears asked him how that works. He claimed that Constable Smith said:

> If you pass the breathalyzer you're free to go, and if you fail the breath sample, then I'm going to lock you up in jail for the night.

Mr. Sears said "well, obviously nobody likes getting locked up, but I'm a correctional officer." He explained that correctional officers are under several threats if they are locked up with others. He claimed to have qualified his refusal: " On the grounds you're going to lock me up in jail if I don't pass the breathalyzer, I refuse."

Essential Findings

[11] The trial judge agreed with Mr. Sears' perception of "the difficulties he might have been in being locked up" [para. 24], but she found there was no evidence Mr. Sears told Constable Smith about his fears or the reason for them [para. 17]. She said, "...he never articulated to the officer the underlaying problem about being locked up." [para. 18]

[12] Further, the judge found against Mr. Sears on the subject of what Constable Smith told him about being locked up. She said "...I'm sure that it's reasonable that

could have been offered as one of a menu of possibilities..." [para. 22]. However, at para. 25 she said:

> The court is not persuaded, on the whole of the evidence, that the officer did tell Mr. Sears, "Well, one of the possibilities here is I'm going to lock you up."

[13] These findings are supported by the record, and there is no suggestion of palpable or overriding error.

Trial Judge's Reasons

[14] The trial judge said "I have difficulty in law with the evidence of Mr. Sears." She instructed herself that the issue of reasonable excuse "is going to be driven by the facts", and she asked "If I accept that the refusal happened the way Mr. Sears says...was that a reasonable excuse?" [para. 19]

[15] The trial judge answered her own question at para. 20:

> I don't for a moment, as the trier of facts, fault Mr. Sears for his perception or belief, but the fear of being locked up is not in and of itself, in my view, a reasonable excuse for not taking the test.

This conclusion is explained in para. 20 to para. 24.

[16] Paragraph 22 reads:

> Even if I accept that the officer said, as Mr. Sears says he did, "Well you know you could be locked up" - and I'm sure that it's reasonable that could have been offered as one of the menu of possibilities - is that reason to say, "No, I'm not taking the test"? Just by way of example, would it not have been reasonable for Mr. Sears to say to the officer, "Look, before I take this test, I've got a concern here. I've got a problem here. I do a certain kind of job. If you take me to jail tonight, here's my problem." But the situation just never unfolded in that way. I don't disagree with Mr. O'Neil that it's a lack of communication. I just take a different view of the significance of and the consequences of that lack of communication.

[17] Mr. Sears had met with Constable Smith the day after he was charged. At para. 24, the judge commented on the inadequacy of Mr. Sears' inquiries on both occassions:

> I heard Mr. Sears' explanation today and I agree with his perception of the difficulties he might have in being locked up, but he had all kinds of room to tell them to the officer the night before, and he didn't. It's simply too little, too late the next day, and even the next day Mr. Sears wasn't articulating to the officer why he held the position "I just can't be locked up". He just maintained over and over again to the officer, "You can't do it. You can't lock me up." That's Mr. Sears' reason for refusal.

[18] As I read it, para. 25 provides an alternate reason for finding that the excuse was not reasonable and it also elaborates on the judge's primary reason:

> The court is not persuaded, on the whole of the evidence, that the officer did tell Mr. Sears, "Well, one of the possibilities here is I'm going to lock you up". Even if the court has misinterpreted the evidence and it was that the officer did articulate to Mr. Sears that he might be locked up if he failed the test, that, it seems to me, would have been in the context of the menu of explanations that were being provided to Mr. Sears at his prompting when he asked the officer, "Well, what's going to happen here? How does this work? What do we do? What do you do?" I am satisfied the officer gave him a menu as to how it might go: pass, a warning with a suspension, or a fail. Even if Mr. Sears is correct that the officer did, in the course of giving that menu, identify the possibility of being locked up, I don't accept that Mr. Sears was reasonable in refusing, particularly when he didn't provide any context or rationale for his refusal.

Submissions

[19] Mr. O'Neil argues that a subjective belief of the accused can found a reasonable excuse even if the accused does not communicate the belief to the officer. He says that, by concentrating on what Mr. Sears did, or did not, tell Constable Smith, Judge Beaton found that the accused, rather than his excuse, was unreasonable. As such, her decision is contrary to *R. v. Smith*, [2000] N.S.J. 406 (S.C.).

[20] Ms. Nurse argues that fear of incarceration can never provide a reasonable excuse for refusing a roadside breath test. The excuse has to lie beyond the microcosm of procedures on arrest and detention, in the macrocosm of physical

challenges or the like. She submitted that fear of incarceration is outside the kinds of excuse recognized in *R. v. Phinney*, [1979] N.S.J. 598 (S.C., A.D.). Ms. Nurse also suggests that the defence position is contrary to the objective standard by which reasonable excuse is measured.

Reasons

[21] In *Smith*, the accused was unable to provide a sample of his breath and the officer demanded a sample of his blood. The accused had an appointment for chemotherapy that would be cancelled if his blood count was too low. He believed that giving the blood sample could lead to that result and increase his risk of succumbing to cancer. Mr. Smith did not mention his difficulty to the police.

[22] Mr. Smith was acquitted. The Crown appealed.

[23] Justice Hall referred to para. 28 of *Phinney*:

> In my opinion it would be dangerous for the courts to try to enunciate an all inclusive meaning to the expression "reasonable excuse" because there are always factual situations arising that are novel and do not fit into static categories. This is the approach that most of the court decisions have been taking and the results have been confined to the individual factual situations in the various cases.

> Patterns are arising, however, which should give some guidance to future decisions, and after considering these patterns I have reached certain conclusions.

[24] The subjective belief of the detained person founded the reasonable excuses in both *Phinney* and *Smith*. The failure to inform the police in *Smith* did not stand in the way of a finding of reasonable excuse.

[25] The circumstances of Mr. Sears are substantially different from those of Mr. Smith because Mr. Sears had before him the very person who could control the risk he subjectively supposed and who could give him information that might have disposed of or diminished the perception of risk. The circumstances might have been similar if Mr. Smith's oncologist had been sitting beside him ready to advise on whether the sample demanded by the police could compromise his chemotherapy.

[26] It would have been helpful if the decision under appeal better explained its concentration on what Mr. Sears did, or did not, tell Constable Smith. However, the trial judge's "different view of the significance of and the consequences of that lack of communication" was not made from whole cloth. She did not say that an

uncommunicated fear can never found a reasonable excuse. She said that fear of being locked up is not a reasonable excuse "in and of itself".

[27] Had Mr. Smith explained his fear to Constable Smith, the officer could have told him whether there might be other detainees in the "temporary room", how short his stay there was likely to be, and whether he could be segregated in any case. The fear was unreasonable because Mr. Sears ignored the source that could have alleviated it, if not completely dispose of it. Instead of taking the opportunity to become reasonably informed about the risk, Mr. Smith made his decision based on his uninformed fear "in and of itself". That was unreasonable.

[28] (I do not accept the Crown's submissions. There may be circumstances in which a refusal could reasonably be based on a threat of being locked up. I do not interpret the decision under appeal to have held otherwise. This case is different from *R. v. McCallum,* 2001 ABPC 236 where the fear was of the risk of conviction as stated in para. 20 of that decision.

[29] Further, the objective standard referred to in para. 14 of *R. v. Hadley*, [1989] S.C.J. 312 (S.C., A.D.) is a standard applicable to the reasonableness of the

detained person's belief, and it says nothing against the subjectivity of the belief itself.)

Conclusion

[30] I dismiss the appeal.

J.