SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Morris-Poultney, 2013 NSSC 343

Date: 20131114
Docket: Hfx No. 415145A
Registry: Halifax

Between:

D'Arcy Morris-Poultney

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Michael J. Wood
Heard:	October 9, 2013, in Halifax, Nova Scotia
Written Decision:	November 14, 2013
Counsel:	Donald C. Murray, Q.C., for the Appellant Susan MacKay, for the Respondent

By the Court:

[1] On the evening of December 16, 2011, the appellant was involved in a single vehicle accident near the Armdale Rotary, in Halifax. He suffered personal injuries and was taken to the QE II Hospital in Halifax for treatment.

[2] Constable Daniel Roache of the Halifax Regional Police Service investigated the accident. Based upon his interaction with the appellant, Cst. Roache concluded that there were reasonable grounds to believe that he had consumed alcohol in excess of the permissible limit. Since the appellant was hospitalized, Cst. Roache determined that he should request a blood sample for analysis rather than a breath sample.

[3] After advising the appellant of his right to consult legal counsel and his right to remain silent, Cst. Roache made a demand that he provide a sample of his blood for analysis in accordance with s. 254(3) of the *Criminal Code*. In response, the appellant indicated that he was willing to provide such a sample. The appellant was taken to another part of the hospital for a CT scan and x-ray before the sampling could take place.

[4] Upon the appellant's return to the emergency department, Cst. Roache repeated his request that the appellant provide a blood sample for analysis. The appellant's response was "very well then", which Cst. Roache interpreted as an agreement to provide the sample.

[5] Approximately thirty minutes later, the emergency room physician, Dr. Carl Jarvis, arrived for purposes of taking blood for analysis. He advised that he needed the appellant's consent to the procedure. There was a four minute discussion among Cst. Roache, Dr. Jarvis and the appellant, at the conclusion of which the appellant was charged with refusal of Cst. Roache's demand for a blood sample, contrary to s. 254(5) of the *Criminal Code*.

[6] Following a trial which took place on November 23, 2012 and January 23, 2013, the appellant was convicted of the offence of refusing the demand to

provide a sample of his blood for analysis. He has appealed that conviction to this Court.

ISSUES ON APPEAL

[7] The Notice of Appeal filed by the appellant sets out the following grounds of appeal:

> The grounds of appeal pursuant to s. 830(1)(a) of the *Criminal Code* are as follows:
>
> > 1. The trial judge erred in law by finding that "it is not an element of the offence . . . that the Accused has been adequately assured by the a [sic] qualified medical practitioner that the accused's health or life is not going to be endangered by the taking of a blood sample pursuant to a lawful demand" (para. 75);
> >
> > 2. The trial judge erred in law by deciding that a legal and evidentiary burden had shifted to the appellant to provide a medical or other excuse in the absence of evidence that the appellant had been advised by the qualified medical practitioner that his health or life will not be endangered by the taking of a blood sample (para. 76);
> >
> > 3. The trial judge erred in law by deciding that the appellant was required to be satisfied that any blood sample could be drawn without endangering his life or health based on the advice of a police officer rather than the attending physician (paras. 83 - 84);
> >
> > 4. The trial judge erred in law by deciding that a lack of explanation by the qualified medical practitioner as to how the blood sample was to be taken in response to a specific inquiry by the appellant, "does not raise or amount to a reasonable excuse to provide the demanded blood sample pursuant to s. 254 of the **Criminal Code**" (para. 101).

STATUTORY PROVISIONS

[8] The applicable subsections of s. 254 of the *Criminal Code* are as follows:

> (3) If a peace officer has reasonable grounds to believe that a person is committing, or at any time within the preceding three hours has committed, an

offence under section 253 as a result of the consumption of alcohol, the peace officer may, by demand made as soon as practicable, require the person

(a) to provide, as soon as practicable,

(i) samples of breath that, in a qualified technician's opinion, will enable a proper analysis to be made to determine the concentration, if any, of alcohol in the person's blood, or

(ii) if the peace officer has reasonable grounds to believe that, because of their physical condition, the person may be incapable of providing a sample of breath or it would be impracticable to obtain a sample of breath, samples of blood that, in the opinion of the qualified medical practitioner or qualified technician taking the samples, will enable a proper analysis to be made to determine the concentration, if any, of alcohol in the person's blood; and

(b) if necessary, to accompany the peace officer for that purpose.

. . . .

(4) Samples of blood may be taken from a person under subsection (3) or (3.4) only by or under the direction of a qualified medical practitioner who is satisfied that taking the samples would not endanger the person's life or health.

(5) Everyone commits an offence who, without reasonable excuse, fails or refuses to comply with a demand made under this section.

TRIAL EVIDENCE AND DECISION

[9] The Crown called four witnesses at trial, including Cst. Roache and Dr. Jarvis. The defence called no evidence.

[10] According to his testimony, Dr. Jarvis determined that there was no medical need to draw blood from the appellant. As a result, before taking the blood sample requested by Constable Roache, Dr. Jarvis wanted to ensure that he had informed consent from the appellant. That was the purpose of the discussion which occurred shortly before Constable Roache decided to charge the appellant with refusing his demand.

[11] Dr. Jarvis could not recall any particulars of the discussion, but his chart note indicated that the appellant would not consent to him drawing blood for purposes of the police request.

[12] Cst. Roache had a better recollection of the interaction with the appellant. In his direct examination, he described the events as follows:

> **CST. ROACHE**: Well, that he had not been fully explained, is what was his statement. He had made other utterances to that -- to that effect. Some of his -- I can only state that some of his comments started with "but," "however," things of that nature. He was making -- it was more than just stating that he was fully explained -- fully -- that -- not fully explained, but being not fully explained was the comment that I noted the most.
>
> **BY MR. WOODBURN**:
>
> Q. Okay. And as a result of that, what did you do?
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> A. I explained to him again, as I had testified earlier, again about refusal and . . .
>
> Q. Okay. Well, this is -- we'll need -- this the time when we're going to go -- details. Tell us what you did at the particular point.
>
> A. Again, I explained to him that he -- that we required his consent to provide a sample of his blood and that a -- that not providing his consent was against the law and that was refusal. And, again, that the blood would be analyzed by a lab and if anything over .0 -- or over 80 milligrams percent would be a criminal charge and, of course, anything under would not. And that he was, by law, required to give consent. And I did remind him that he had already been explained that. I witnessed Dr. Jarvis state that -- remind Mr. Poultney-Morris (sic) that he was here to take his blood again, and that he could only do so with his consent, and that he was a very busy man, the doctor referring to himself and his duties that night.
>
> Q. Continue.
>
> A. And at that time, Mr. Poultney-Morris (sic), his response was convoluted. Again, not being fully explained. Some of his comments again started with "but." And in making some comment --I don't recall exactly all of

those comments, what they were at this time, but they were not --they clearly were not, "Yes, I consent to give my blood." That was never stated by Mr. Poultney-Morris (sic). I explained again to Mr. Poultney-Morris (sic) within this time when Dr. Jarvis is present, because he was just stating that he had not been fully explained and I'm explaining it to him the best that I can. His responses, again, were much the same. He was not giving a yes or no answer to the issue of the blood demand. I had read him the demand. I had explained it at the time of the demand. I explained it when we returned from the x-ray. I now explained it twice with Dr. Jarvis present. I wanted Mr. -- my --I really wanted Mr. Poultney-Morris (sic) to provide a sample of his breath --I mean, rather, his blood.

However, he was not giving his consent, and without that there is nothing we can do at this moment. He's cognitive, he is awake, in my opinion he was capable of making that decision. He was intoxicated from alcohol clearly.

And, anyway, so at that point I stated to Mr. Poultney-Morris (sic), I stated that -- to summarize it all up and just to get a clear-cut answer from him, I again asked for his consent, if he's going to provide a sample of his blood. And I stated that any other answer other than yes would be taken a no, which means that I --we -- I -- the doctor is not going to, on his own or under my direction, take blood from him and commit a technical assault on him unless he has consented to provide samples of his blood. And Mr. Poultney-Morris (sic) did not --at 0007 hours, after approximately four minutes of this conversation, and -- I declared it to be a refusal.

Q. Okay. After you said that any other answer but a yes would result, what would it result in? Did you tell him what it would result in if you -- any other answer but a yes to consenting to his blood being drawn?

A. Well, at that moment in time, I believe I said, "Any other answer other than -- if you're going to provide -- in order to take your blood, any other answer other than yes will be considered a no. Are you going to provide samples of your blood?" And then, of course, his response was much the same as it had been. He did not state yes. He stated --again, asking questions, again starting with "how". At that point, I declared it a refusal.

Q. Did you tell him that?

A. Yes. yes, I did. I did declare it a refusal and he was advised that this was a refusal.

Q. Okay. And what was his response to that?

A. I don't recall his response at this time. He -- I told him it was a refusal and I'm -- and I don't recall what he stated afterwards.

Q. Did -- was there consent given after?

A. No. No. That was clearly not given. I don't recall his -- if I can specifically state that he did not give consent. After I declared it a refusal, he did not turn around and say, "Hold on a second here. I want to give blood now." He made no statement to that effect whatsoever. Absolutely not.

[13] In cross-examination, Cst. Roache provided some additional details. His testimony was as follows:

Q. Okay. And that's when you observe Mr. Morris-Poultney starting to ask some questions?

A. Yes, that's correct.

Q. All right. Is he asking those questions to you or asking those questions to Dr. Jarvis?

A. Well, to both of us at different points. He does -- he does address the doctor at some point. But I guess -- I guess -- and the doctor does respond to him but it is my investigation.

Q. Yeah.

A. The purpose of the blood sample is from -- is for me and, I guess, in that respect, I probably do know a little bit more about that particular issue than what the ER physician would. I mean, he certainly knows how to take the blood, but I guess it's my job what to do with it when it's turned over to me.

Q. Um-hmm.

A. And so Mr. Poul . . .

Q. Morris-Poultney.

A. . . .Morris-Poultney does respond to the physician. But then I interject and I explain, you know, what -- you know, again what I've already

explained to him about, you know, providing the blood sample with his consent, etc. And then, of course, he does make some responses to me.

Q. Um-hmm.

A. And then the doctor does, you know, step in again and reminds him that he's very busy and again I witness the doctor tell him that he can only take his blood with his consent and that, you know, he's a busy man and he's here to take the blood and he's here to take it now. And, of course, Mr. Morris-Poultney responds again and then, of course, I then interject again and explain it again, and that's how the conversation went down at that time.

Q. And I realize that that conversation is going on for probably three or four minutes?

A. That's correct, yes.

Q. All right. You did note down a specific phrase from Mr. Morris-Poultney, a quote from Mr. Morris-Poultney, during that period of time in your notes?

A. Yes. If I may refer to my notes?

Q. And what was that specific comment?

A. Well, one comment is that he's not been fully explained.

Q. Um-hmm.

A. Another utterance that Mr. -- or statement that Mr. Poultney -- or Mr. Morris-Poultney makes is, "What are you going to do?" Some of his utterances, I didn't recall the entire text of them, but they sort of started with "but" and . . .

Q. Um-hmm.

A. And then he would make an utterance that was, you know, not to the effect of giving his consent to the -- to the blood -- to the blood demand.

Q. Okay. Well, we'll talk about that in a moment. But the question of, "What are you doing (sic) to do," is that one of the questions that was directed towards Dr. Jarvis?

A. At this point in time I do not recall if it was towards Dr. Jarvis or towards me. I don't -- I do not know.

Q. I mean, you had already explained to him twice that, depending on the results, this was what you were going to do?

A. Yes.

Q. All right. In your presence, was any -- did anyone ever take the time to explain where the blood was going to get drawn from, by what means?

A. No. I don't believe that the specific mannerisms of -- or the specific method of taking the blood was explained to Mr. Morris-Poultney.

Q. Okay. So anyway, after the three or four minutes, your perception, probably correct, is that this conversation seems to be going nowhere?

A. That's correct. Yes.

Q. So you're going to bring it to an end by reducing it to a yes or no question for Mr. Morris-Poultney, correct?

A. That's correct. Yes.

Q. And unless he says yes, you're going to treat that as a refusal?

A. That's correct, yes.

Q. At which point Mr. Morris-Poultney says "but" or something like that?

A. Yes. And . . .

Q. And you treat that -- and say, "Okay, that's a refusal, we're done here"?

A. That's correct, yes.

[14] In his written decision following trial, the trial judge described the discussions as follows:

> [86] On two earlier occasions in the evening, after the initial demand for a blood sample, Mr. Morris-Poultney indicated that he would agree to provide a sample of his blood. Cst. Roache called upon Dr. Jarvis to take the sample. Dr. Jarvis indicated to Mr. Morris-Poultney that he required the patient's consent to draw the blood sample from him. Mr. Morris-Poultney then prevaricated stating "but" and "however" and indicated that he had not been fully explained. We do not know specifically as to what he thought had not been fully explained. Cst. Roache also recalled that Mr. Morris-Poultney asked either Dr. Jarvis and/or Cst. Roache himself words to the effect "what are you going to do?". Again we can not be certain as to what that inquiry is in relation to.
>
> [87] We do know that Cst. Roache confirmed that neither he nor Dr. Jarvis explained to Mr. Morris-Poultney the specific manner or method that Mr. Morris-Poultney's blood was going to be taken.
>
> [88] It is also clear that when Mr. Morris-Poultney was faced with an ultimatum to take the test or not, his lack of positive response amounted to an unequivocal refusal. At no subsequent time did he agree to provide a blood sample.

[15] In his analysis, the trial judge rejected the appellant's argument that it was a necessary element of the offence, to be proven by the Crown beyond a reasonable doubt, that the appellant had been adequately assured by a qualified medical practitioner that his health or life is not going to be endangered by the taking of the sample. He also concluded that the appellant had not established a reasonable excuse for not providing the requested blood sample. His analysis on this issue was as follows:

> [96] The onus is on Mr. Morris-Poultney on a balance or (sic) probabilities to demonstrate that he had a reasonable excuse to <u>not</u> provide a sample of his blood.
>
> [97] Mr. Morris-Poultney has not provided any explicit explanation as to why he refused to supply a sample of his blood. One can speculate as to a multitude of reasons. A religious aversion to giving or dealing with blood, an allergy to metal, a pathological aversion to needs of any sort, hemophilia etc.

> [98] At the most one can suppose that the lack of description as to how the blood sample was to be drawn was the reason why Mr. Morris-Poultney refused to provide his consent. We must presume even that possibility because Mr. Morris-Poultney has not testified as to his reason for not consenting to the taking of a blood sample.
>
> [99] Mr. Morris-Poultney was explained on several occasions that the blood sampling that was going to be carried out by the medical practitioner would not endanger Mr. Morris-Poultney's health or life. The doctor taking the sample, not the person giving the sample, determines if the life or health of the person being sampled will be endangered.
>
> [100] There is no requirement on the part of the medical practitioner to explain the procedure to the person being sampled other then on assurance being given that the health or life of the person will not be endangered. The only time that a more detailed explanation perhaps ought to be given is in response to further and more specific information being provided by the person about to be sampled which could change the opinion of the medical practitioner.
>
> [101] At the most in this case we have a general inquiry as to procedure by Mr. Morris-Poultney. A lack of explanation as to how the blood sample was to be taken, in this circumstance, does not raise or amount to a reasonable excuse to provide the demanded blood sample pursuant to s. 254 of the **Criminal Code**.

ANALYSIS

[16] The thrust of the appellant's submissions on appeal is that Dr. Jarvis was required to obtain informed consent from the appellant prior to extracting the blood sample. As part of that process, the appellant says that he was entitled to request and be given information concerning the procedure to be followed before making his decision. He relies on case authority from appellate courts across Canada, as well as the Supreme Court of Canada, for the proposition that the individual autonomy to grant or withhold a medical consent is a fundamental right and an issue of security of the person. The Crown did not dispute that assertion.

[17] Where the parties to this appeal differ is how the issue of informed consent impacts on the provisions of s. 254 of the *Criminal Code* authorizing police to demand blood samples for analysis.

[18] The appellant says that because of the fundamental requirement for informed consent, it must be considered to be an element of the offence to be proven by the Crown beyond a reasonable doubt. The response by the Crown is that this issue will only arise where the accused person attempts to establish that they have a reasonable excuse for their failure to comply with the demand.

[19] By its nature, the process by which a physician will satisfy themselves that a person is consenting to a particular procedure will vary with the circumstances. It will depend upon the nature of the procedure in question, the knowledge and experience of the person and their medical status. In some cases, the person may request information or assurances prior to making a decision. The physician will have to assess the nature of the response which can or should be provided.

[20] If the appellant's argument is accepted, it would mean that the Crown would have to call evidence concerning the specific discussions between the physician and the accused person because they would have to prove beyond a reasonable doubt that the physician had obtained an appropriate and informed consent. If it is an element of an offence, this would have to be done in each and every case, whether the accused person was raising an issue of consent or not. The only way to avoid this exercise would be to obtain a formal admission from the accused that their consent was properly given.

[21] Adding medical consent as an element of the s. 254 offence would necessitate police becoming much more actively involved in the physician/patient discussions relating to consent. It could even lead to officers providing direction to the physician about what steps they need to take in order to properly obtain the consent.

[22] I reject the appellant's argument that the necessity for informed medical consent should be read into the provisions of s. 254 of the *Criminal Code*. Doing so would inject the police into the physician/patient relationship which is clearly undesirable.

[23] I agree with the appellant and the Crown that a person's right to make informed decisions about their personal autonomy is fundamental. Anyone is entitled to decide what is to be done to their own body. If a person who is subject to a demand for a blood sample by a police officer has a legitimate reason why

they will not consent to the extraction of the blood sample, they should not be labelled a criminal as a result of refusing the demand. I am satisfied that the balancing of this individual right with the authority of a police officer to demand blood for analysis is adequately addressed through the concept of reasonable excuse found in s. 254(5) of the *Criminal Code*. In this case, the trial judge examined the discussions between Cst. Roache, Dr. Jarvis and the appellant in the context of determining whether a reasonable excuse for refusal had been established. I believe he was correct in taking that approach and he should not have elevated the issue of medical consent to an element of the offence requiring proof by the Crown.

[24] The trial judge's decision makes it clear that he was not satisfied on the evidence before him that the appellant had established a reasonable excuse on a balance of probabilities. He suggests, and I agree, that this would have been difficult to do without the appellant explaining what information he was looking for and why it was important for him to have it before making a decision.

[25] An excuse for refusal must be objectively reasonable and established by evidence. If it is based on an unwillingness to consent to a common procedure, such as blood sampling, the person will need to show that this was reasonable in the circumstances. This might be accomplished by proving an unfulfilled request for information needed in order to decide whether to agree to the procedure.

[26] It appears that Cst. Roache interpreted the appellant's comments to Dr. Jarvis as an attempt to stall for time and that is why he gave a final ultimatum to consent or be charged with refusal. Although Dr. Jarvis did not recall the details of the conversations one would expect that a reasonable request for information would have been answered without any objection.

[27] The trial judge considered all of the evidence and found that, at most, there was a general inquiry as to procedure by the appellant, but that this did not raise a reasonable excuse for failure to provide the demanded blood sample. Such a finding is not a question of law, but rather one of fact, or possibly mixed fact and law. In either case, it is not to be reviewed on a standard of correctness and should only be overturned if the findings are unreasonable.

[28] I believe that the trial judge was correct in deciding that the question of medical consent should be considered in determining whether the appellant had established a reasonable excuse for his refusal. I also find that his conclusion that such an excuse was not established on the facts of this case was reasonable in light of the lack of clarity concerning the discussions in question and the evidentiary onus on the appellant to establish a reasonable excuse.

CONCLUSION

[29] The trial judge was correct in his conclusion that informed medical consent does not form an element of an offence under s. 254 of the *Criminal Code*. The Crown does not have to prove the advice given by the qualified medical practitioner to the accused. This finding disposes of the appellant's first three grounds of appeal.

[30] With respect to the fourth ground of appeal, the trial judge made no error in law in deciding that the appellant had not established a reasonable excuse for the refusal. To the extent that the appellant's complaint related to findings of fact, or mixed fact and law, the trial judge's conclusion that a reasonable excuse had not been established on the evidence was reasonable.

[31] For the above reasons, I dismiss this appeal.

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Wood, J.