Cite as: R. v. Drapeau, 1985 NSCA 3

S.C.C. No. 01249

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

MacKeigan, Macdonald and Matthews, JJ.A.

BETWEEN:

MANIEL GREGORY DRAPEAU

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

W. Michael Cooke
for the appellant

Robert E. Lutes
for the respondent

Appeal Heard:
September 20, 1985

Judgment Delivered:

THE COURT: Application for leave to appeal granted, but appeal dismissed per reasons for judgment by Macdonald, J.A.; MacKeigan and Matthews, JJ.A., concurring.

MACDONALD, J.A.:

The appellant, Maniel Gregory Drapeau, was acquitted in the Provincial Magistrate's Court of the charge that he did -

> "unlawfully, without reasonable excuse, refuse or fail to comply with a demand made to him by a Peace Officer, to provide forthwith such a sample of his breath as in the opinion of the Peace Officer, is necessary to enable a proper sample for analysis to be made by means of an approved road-side screening device, contrary to Section 234.1(2) of the Criminal Code of Canada."

The Honourable Ian M. Palmeter, a judge of the County Court of District Number One, allowed a Crown appeal against such acquittal and entered a conviction on the charge. The appellant now applies for leave to appeal and, if leave be granted, appeals against the decision of Judge Palmeter.

The relevant facts are that at approximately 11.30 to 11.45 o'clock on the evening of July 15, 1984 the appellant drove his motor vehicle off the highway and on to the lawn of one Barry Wayne Jollimore, where it came into collision with a gazebo. After the collision Mr. Drapeau called a tow truck from Mr. Jollimore's home. He later went back to where his vehicle was. By this time a crowd of people had gathered. At approximately 11.55 p.m., Constable Ash of the R.C.M. Police arrived on the scene having received a call about the accident, approximately twenty minutes earlier. Constable Ash testified that as a result

of his enquiry the appellant said that he was the driver of the vehicle. Mr. Drapeau then, at the request of Constable Ash, went to the police car. There he was given the ALERT or road-side tester demand because the Constable smelled liquor from him and it appeared that he had been drinking. The demand was given at approximately 12.06 on the morning of July 16. A suitable breath sample was not obtained from the appellant, and in consequence he was subsequently charged with failing or refusing to comply with the demand. It was only after the act of non-compliance that Constable Ash advised the appellant of his Charter guaranteed right to consult counsel.

The charge against the appellant was dismissed by the trial judge on the ground that

> ". . . I don't think the demand was properly made under 234 as the person, as Mr. Drapeau was not driving at the time the officer could form the suspicion and he did not presently have the care and control of the automobile."

On appeal Judge Palmeter found that the appellant had the care and control of his vehicle. He therefore allowed the Crown appeal and entered a conviction.

The appellant has raised three principal issues in his appeal to this Court. They are:

(1) Whether Judge Palmeter generally misinterpreted s. 234.1 of the Code and, particularly, the meaning of the words "has care or control."

(2) Whether the appellant was entitled to be advised of his rights under s. 10(b) of the Charter of Rights and Freedoms, and, if so, was he denied such rights and with what consequences.

(3) Whether the appellant in fact failed or refused to comply with the road-side breathalyzer demand.

Code s. 234.1 provides as follows:

> "(1) Where a peace officer reasonably suspects that a person who is driving a motor vehicle or who has the care or control of a motor vehicle, whether it is in motion or not, has alcohol in his body, he may, by demand made to that person, require him to provide forthwith such a sample of his breath as in the opinion of the peace officer is necessary to enable a proper analysis of his breath to be made by means of an approved road-side screening device and, where necessary, to accompany the peace officer for the purpose of enabling such a sample of his breath to be taken."

Counsel for the appellant contends that s. 234.1, worded as it is in the present tense, only applies if the accused is found actually driving a vehicle or in care and control of it. He relies on the decision of the New Brunswick Court of Queen's Bench in MacLellan v. The Queen (1984), 26 M.V.R. 234. A more liberal interpretation was placed on s. 234.1 by the Saskatchewan Court of Queen's Bench in Letkeman v. The Queen (1983), 24 M.V.R. 273. Judge Palmeter followed the Letkeman approach and found that Judge Oxner erred in law in holding that Mr. Drapeau was

not in care and control of his motor vehicle at the material time.

At the time he was first observed by Constable Ash the respondent was standing in the vicinity of his vehicle and said he was the driver. He had, shortly before, arranged for a tow truck to remove his vehicle from the lawn. These are all facts which indicate immediate care and effective control by the appellant of his vehicle. It is my opinion, therefore, that when the appellant was first observed by Constable Ash he was then in actual care and control of his vehicle. In this case there is therefore no need to rely on any expanded definition of the words "care or control."

I agree with Judge Palmeter that the trial judge erred in interpreting the meaning of the words "care or control" as they appear in the context of s. 234.1 of the Code, and that such error was one of law.

I turn now to a consideration of the second issue.

Section 10(b) of the Canadian Charter of Rights and Freedoms, provides:

> "10. Everyone has the right on arrest or detention
>
> (b) to retain and instruct counsel without delay and to be informed of that right; . . ."

In R. v. Therens (1985), 59 N.R. 122; 45 C.R. (3d)

97 (S.C.C.), the Supreme Court of Canada was unanimously of the view that a demand under s. 235(1) of the Code to accompany a peace officer for the purpose of breathalyzer tests results in a detention within the meaning of s. 10(b) of the Charter. In my opinion it must follow that what amounts to detention under Code s. 235 equally constitutes detention under Code s. 234.1.

In Therens Mr. Justice Le Dain said: (pp. 119-120 C.R.)

> "The fact that a roadside screening test under a s. 234.1(1) demand is generally administered in the back of a police car, whereas the breathalyzer test under a s. 235(1) demand is generally administered in a police station, amounts to a mere difference of degree insofar as the question of detention is concerned. This difference does not in my opinion afford a principled basis for holding that a s. 235(1) demand amounts to a detention if a s. 234.1(1) demand does not."

In R. v. Talbourdet (1984), 39 C.R. (3d) 210 (Sask. C.A.), the Court had for consideration whether detention under s. 234.1 was different than detention under Code s. 235. The Court found that it was not and said: (p. 220)

> "It is true that the two sections differ in immediate purpose, that they raise different sets of legal issues, and that the consequences flowing from a demand for a roadside screening test are appreciably different from those that follow upon a demand for a breathalyzer test, but, in my respectful opinion, these considerations are immaterial to the question of whether or not

> persons who are the subject of these demands are to be regarded as 'detained'.
>
> "The differences between the two sections, particularly the major differences in the consequences of failing a roadside screening test as opposed to a breathalyzer test, have everything to do with whether, as a matter of policy, a person should be accorded the right to counsel but, with respect, I do not think they are relevant to the definition of 'detention'. Considerations of that kind are best left to be taken into account when determining, pursuant to s. 1 of the Charter, whether, in the circumstances, and given the nature of the detention at issue, the right to counsel may be limited. Otherwise we are apt to end up with a word - 'detention' - having any number of meanings, depending upon whether, as a matter of policy, one manner of detention should carry with it the right to counsel, while another should not."

The rights guaranteed by the Charter are not absolute, but by s. 1 thereof are subject to such reasonable limits prescribed by law as can be justified in a free and democratic society. The issue therefore is whether s. 234.1 of the Code contains, by necessary implication, such a prescription. That section requires the recipient of the demand to provide a breath sample forthwith. He therefore cannot comply with the demand and at the same time exercise his right to consult counsel. The section is thus inconsistent with the Charter. To my mind such limitation, indeed denial of the right to consult counsel is for the very narrow purposes of s. 234.1 only a reasonable limit which can be justified and which is therefore permitted by s. 1 of the Charter. I reach this conclusion because of the nature, purpose, scope and effect of s. 234.1.

The ALERT registers a pass, warn or fail. If a person fails the road-side tester such does not give rise to any criminal culpability. The road-side screening device is simply an investigatory aid placed at the disposal of the police to assist them in their ongoing efforts on behalf of the public at large to make our highways safer by detecting the drinking driver. Since it is not an offence to fail a road-side test legal advice whether to comply or not with an ALERT demand is hardly necessary. Compared to the consequences of refusing such a demand a motorist really has nothing to lose by taking the road-side test. The worst that can befall him is that if he fails the test, then such failure can supply the peace officer with the necessary belief required under s. 235(1) of the Code to justify a breathalyzer demand. Before deciding whether or not to comply with a breathalyzer demand, the motorist is entitled to consult counsel, and it may well be in his best interests, at that stage, to do so. See R. v. Fraser (1983), 57 N.S.R. (2d) 91, 6 C.C.C. (3d) 273 and cases therein cited.

In Talbourdet Cameron, J.A., said of the road-side screening device procedure: (pp. 221-222)

> "Its purpose is to resolve the doubt which will often exist between 'suspicion' on the one hand and 'reasonable and probable ground' on the other. When a policeman finds himself in that gray area between suspecting that an offence of this kind is being committed and having reasonable and probable grounds for believing that it is being committed, he may,

providing there is good reason for his suspicion, ask the driver to clarify the position by submitting to a preliminary test conducted by means of a roadside screening device. This is a minor inconvenience and the person upon whom such a demand for clarification has been made runs no risk of being found guilty of any offence by submitting to the test. If he passes the test he is free to go on his way; if he fails it then, of course, there are reasonable and probable grounds to believe that he may be guilty of an offence and, in that event, a peace officer may make a further demand of him, namely, that he submit to a more definitive test by means of a breathalyzer machine. And at that stage he has a right to consult a lawyer: R. v. Therens, supra.

"In my opinion, this is a perfectly defensible scheme of law, and law enforcement, which strikes a sensitive balance between the freedom of the individual on one hand and the legitimate concerns of the collective on the other. Provided a person has a right to counsel following a breathalyzer demand - when a number of complex legal issues rise in relation to which the average person may need legal advice - what legitimate purpose would be served by insisting that there also be a right to counsel at the earlier, screening stage? The worst that can befall a person who fails a roadside test is that he will then be required to submit to a more refined test. And as I see it, the only legal question of any consequence that arises upon a demand being made of a person for a roadside screening test is whether he is obliged to submit. But I do not think a person needs legal advice on that issue; he knows, or must be taken to know, that he has to comply with the demand. This surely is a minimum expectation, particularly in an educated society. Indeed, the law has long carried a number of presumptions of greater importance and complexity. The alternative - having a right to retain and instruct counsel at the roadside screening stage - would seriously cripple, if not destroy, this carefully balanced scheme. As Zuber J.A. said in R. v. Altzeimer (1983), 38 O.R. (2d) 783, 29 C.R. (3d) 276, 17 M.V.R. 8, 1 C.C.C. (3d) 7 at 13, 142 D.L.R. (3d) 246, 2 C.R.R. 119 (C.A.):

'. . . the Charter does not intend a transformation of our legal system or the paralysis of law enforcement. Extravagant interpretations can only trivialize and diminish respect for the Charter which is part of the supreme law of this country.'"

In R. v. Therens, supra, Mr. Justice Le Dain in considering s. 1 of the Charter said: (pp. 126-127 C.R.)

"The limit will be prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements. The limit may also result from the application of a common law rule. Section 235(1) and the related breathalyzer provisions of the Criminal Code do not expressly purport to limit the right to counsel. Such a limit, if it exists, must result by implication from their terms or operating requirements. For example, the Saskatchewan Court of Appeal in Talbourdet, supra, found that such a limit resulted from the requirement under s. 234.1 (1) of the Criminal Code that a sample of breath be provided 'forthwith' into a roadside screening device. The court held that this requirement precluded contact with counsel prior to compliance with a s. 234.1(1) demand. In the case of a s. 235(1) demand, the implications from the terms and operating requirements are somewhat different. A s. 235(1) demand must be made 'forthwith or as soon as practicable' and the person upon whom the demand is made is required to provide a sample of breath 'then or as soon thereafter as is practicable'. Such samples can be used in evidence as proof of an offence under s. 234 or s. 236 of the Criminal Code only if (s. 237(1)(c)(ii)):

> '(ii) each sample was taken as soon as practicable after the time when the offence was alleged to have been committed and in any event not later than two hours after that time, with an interval of at least fifteen minutes between the times when the samples were taken.'

This two-hour operating requirement does not, as in the case of the 'forthwith' requirement of

> of a s. 234.1(1) demand, preclude any contact at all with counsel prior to the breathalyzer test."

For the foregoing reasons, in my opinion, the appellant did not have the right to retain and instruct counsel when Constable Ash gave him the ALERT demand.

The final issue is whether the appellant, in fact, failed or refused to comply with the demand. This issue was not considered by the trial judge because of her finding that Mr. Drapeau did not have the "care or control" of his vehicle when the s. 234.1 demand was given him. Judge Palmeter did not make an express finding that the appellant refused or failed to comply with the demand. However, such finding is implicit in the conclusion he reached and, indeed, is completely supportable by the evidence.

In the result I would grant the application for leave to appeal but would dismiss the appeal.

Angus L. Macdonald

J.A.

Concurred in -

MacKeigan, J.A.

Matthews, J.A.