S.C.C. 02674

NOVA SCOTIA COURT OF APPEAL

Jones, Chipman and Freeman, JJ.A.

Cite as: R. v. Weir, 2003 NSCA 33

B E T W E E N:

LLOYD MURRAY WEIR	) **C. Hanson Dowell, Q.C.,**
	) **for appellant**
appellant	)
- and -	) **Robert C. Hagell**
	) **for respondent**
HER MAJESTY THE QUEEN	)
respondent	) **Appeal Heard:**
	) **February 3, l993**
	) **Judgment Delivered:**
	) **February 5, l993**

THE COURT: Appeal from conviction on charge of refusing breathalyzer demand dismissed per reasons of Freeman, J.A., Jones and Chipman, JJ.A., concurring.

FREEMAN, J.A.:

The issue raised by this appeal is whether an offer to provide a blood sample is a reasonable

excuse for refusing a breath sample demanded by a police officer under s. 254(2) of the **Criminal Code**.

The appellant, Robert Murray Weir, was given the breathalyzer demand by Middleton police on October 19, 1990 when he was stopped while driving a van. He refused to attempt to give a breath sample because he said he had suffered a fractured skull when he was eleven years old which still gave him discomfort when he wore his cap across his forehead. There was no evidence as to his age, but he spoke of an event in his career as a meat cutter some fourteen years earlier. He offered to give a blood sample, and the hospital where one could have been taken was only a short distance from the police station. He was charged with refusal under s. 254(5).

The trial judge, His Honour John Nichols of the Provincial Court, accepted his offer to give a blood sample as a reasonable excuse and acquitted him. At his summary conviction appeal the Honourable Judge Charles Haliburton of the County Court allowed the appeal and entered a conviction on the basis that his excuse was not a reasonable one.

Judge Nichols followed **R. v. Robert Thomas Lewis** (S.C.B.C. unreported--May 30, 1990) in which Wetmore J., then a judge of the County Court in British Columbia sitting on a summary appeal, found such an excuse to be acceptable provided it was bona fide in two senses:

> "It must be a genuine offer and it must be motivated by a genuine concern in the accused's mind of concern (as to the reliability of the Borkenstein breathalyzer) and the inability to have an independent check to determine if he has a full answer and defence."

The latter condition related to the non-proclamation of s. 258(1)(g)(iii)(A) of the **Criminal Code**, a provision requiring that a person taking the breathalyzer be given a sample of his breath taken at the same time for an independent analysis. This court has recently found that the unavailability of that provision does not deprive an accused person of his right to make full answer and defence--see **R. v. Langille** (December 2, 1992--unreported).

The **Lewis** case appears to be contrary to the principles expressed by Taggart, J.A. of the British Columbia Court of Appeal in **R**. v. **Dunn** (1980), 8 M.V.R. 198. After a review of cases from superior courts in a number of Canadian jurisdictions Taggart J. concluded that the reasonable

excuse contemplated in the present s. 254(5) involves difficulty or risk to the person to whom the demand is made. In the event of distrust of the breathalyzer apparatus, the operator, or the process, the safeguard is to bring evidence to the contrary pursuant to s. 258(1)(c). See **R**. v. **Nadeau** (1974), 8 N.B.R. (2d) 703, 31 C.R.N.S. 155, 19 C.C.C. (2d) 9 (N.B.C.A.); **Taraschuk** v. **R**. [1977] 1 S.C.R. 385, 30 C.R.N.S. 321, 5 N.R. 507, 25 C.C.C. (2d) 108, 62 D.L.R. (3d) 84; **R**.v.**Campbell**, [1978] 4 W.W.R. 507, 40 C.C.C. (2d) 570. 9 A.R. 277 (Alta. A.D.); **R**. v. **Frohwerk** (1979), 3 M.V.R. 11, 48 C.C.C. (2d) 214 (Man. C.A.).

Lewis was found to be wrongly decided by Misener J. of the Ontario Court of Justice, General Division, in **R. v. Richardson** (Ont. Ct. Gen. Div.--January 17, 1991--unreported).

Mr. Justice Misener stated:

> "I am of the firm view that a belief, however honestly held, that an instrument, approved by Parliament for use to obtain evidence, is inherently unreliable for that purpose, can never, by itself, under any circumstances, form a foundation for a reasonable excuse for refusing to accede to a demand of a peace officer, made pursuant to the relevant provision of the Criminal Code, to supply samples of breath into that instrument."

The appellant in the present appeal did not profess a disbelief in the reliability of the breathalyzer.

The Honourable Charles Haliburton of the County Court, sitting as a summary appeal court judge, followed **Richardson** and convicted him.

On this appeal the appellant's counsel argued that Judge Haliburton was bound by the findings of fact of Judge Nichols. While his comments to counsel suggested that he believed Mr. Weir, Judge Nichols' reserved decision on that case is repeated here in its entirety:

> "On the Weir matter. Well, I'm prepared to acquit your client based on that, ah, **Lewis** decision."

With respect to the **Lewis** case, Judge Haliburton stated:

> " Even if the Accused brings himself within the parameters of the **Lewis** case by establishing that his offer to provide blood samples was a bona fide one, I find the law to be that enunciated in the **Richardson** case. The

conclusions reached in that case are in accord with the decision of the Saskatchewan Court of Appeal in **R**. v. **Wall** (1974) 19 C.C.C. (2d) 146. Notwithstanding the views express by Wetmore, J., with respect to the changes in the **Criminal Code** which have taken place since the decision was rendered in **R.** v. **Wall**, the comments of Culliton, C.J.S., at pages 148 and 149 of **Wall** remain as valid today as they were in 1974. He said:

> 'The language of s. 235 is clear and unambiguous. It provides for the right under certain conditions of a peace officer to demand from a person a sample of that person's breath. The section further provides that the person to whom the demand is made in accordance with S-S. (1) commits an offence if he or she fails or refuses to comply with the demand in the absence of a reasonable excuse for such failure or refusal.'

"Culliton, C.J.S. goes on to say that the priority of the demand is established and that the respondent will therefore be guilty unless he can establish a 'reasonable excuse' for his refusal. Mr. Justice Culliton was of the opinion that the offer to give a blood sample was not a reasonable excuse, as he says:

> 'The conclusion that such an offer is a reasonable excuse for failing to comply with a proper demand for a sample of breath finds no support either in the language of the section or in any logical interpretation of that language. For the Court to so conclude not only defeats the intent and purpose of the enactment, but is, as well, the virtual exercise of a legislative power which it does not possess. **Moreover, such an interpretation would enable a person to render inoperative the probative provisions of s. 237 by simply refusing to supply a breath sample and by offering a blood sample in place thereof. This the Court should not permit.'**
>
> (My emphasis.)"

After a review of the evidence and the case law Judge Haliburton concluded:

> "There is scant evidence, if any, in the facts of this case to support any thesis that Weir was physically incapable of blowing, that he would have suffered any pain by blowing, or that doing so would have endangered his health. The evidence is not persuasive that he was genuine in his offer to permit blood tests. Judge Nichols, having failed to give reasons other than to say that he was following the decision in **R. v. Lewis,** leads me to conclude in the circumstances that he considered, as did Mr. Justice Wetmore, that the offer of a blood sample, in itself, constituted a reasonable excuse for his refusal to provide a breath sample. Such a proposition is an attack on the legislative scheme and is not and cannot be accepted as a reasonable excuse."

In so holding Judge Haliburton committed no reversible error. Mr. Justice Misener's

reasoning is persuasive. Mr. Justice Wetmore's concern as to the reliability of the breathalyzer test might be best addressed by a blood test taken after the breathalyzer test, but the offer of a blood sample is not an excuse for a refusal under s. 254(2). Mr. Weir's excuse based on his childhood fracture is patently unreasonable in the absence of medical evidence. The burden was on him to establish an objectively reasonable excuse to a balance of probabilities. See **R. v. Phinney** (1979), 49 C.C.C. (2d) 81 (N.S.S.C.A.D.) The appeal is dismissed.

Freeman, J.A.

Concurred in: Jones, J.A.

Chipman, J.A.

S.C.C. No. 02674

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LLOYD MURRAY WEIR	)	**REASONS FOR**
	)	
appellant	)	**JUDGMENT BY:**
	)	
- and -	)	**FREEMAN, J.A.**
	)	
HER MAJESTY THE QUEEN	)	
	)	
respondent	)	