

C A N A D A
PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX

To wit:

C.H. 43707

I N T H E C O U N T Y C O U R T
O F D I S T R I C T N U M B E R O N E

BETWEEN:

HER MAJESTY THE QUEEN, on
the information of Colin
Finley,

Respondent

- and -

GORDON HENRY POWER,

Appellant

E. Anthony Ross, Esq., for the appellant.
Adrian Reid, Esq., for the Attorney General of Nova Scotia.

1984, February 1, O Hearn, J.C.C.: - The appellant appeals a conviction for refusing a Breathalyzer test, contrary to Criminal Code s.235(2).

The testimony revealed that Constable Michael Spearns found the accused in the driver's seat of a van, parked in a no-parking spot on the early morning of June 4, 1983. He had the driver roll down the van window and says he smelled a strong smell of marijuana and saw smoke. He had the driver, the defendant, exit the van and then detected a strong smell of liquor on his breath. He saw an open bottle of ale on the gear box in the front of the vehicle. As a result he summoned another police team in a car, he being on foot, and demanded that Mr. Power go to the station to take a Breathalyzer test. The defendant agreed.

One of the officers who came was Constable Glen Cooper, a qualified technician, and he experienced took the defendant to the Police Station and attempted to administer the tests. On the test for the first sample the defendant appeared to blow on several occasions but had to be admonished to give a proper sample and it was only after two or three attempts that he gave a proper sample.

After the interval required for the second test he again went through the motions of blowing into the machine, but Constable Cooper's evidence was that no air was entering the machine. At that point Cooper who had been holding the tube withdrew it from the mouthpiece in the defendant's mouth, and both officers testified that there was no air forthcoming from the mouthpiece, although the defendant had puffed out his cheeks.

The defendant explained that he was having trouble with an upper denture, holding it in place, and that he had to use his tongue to hold it in place while attempting to blow. This is the explanation he gave the court.

Obviously, it was up to the trial judge to decide on the evidence and his assessment of the credibility of the witnesses whether this was a genuine excuse or whether the defendant was merely going through the motions of giving a sample while effectively preventing himself from doing so. There was ample evidence to support the trial judge's conclusion that the defendant refused or failed to give a sample upon demand, so I don't think that the conviction can be successfully challenged on that basis.

At the trial some evidence was given to indicate that the defendant, while occupying the driver's seat, had no intention to set the vehicle in motion. While that might be pertinent to the second count in the indictment it did not, in fact, have anything to do with the count respecting the refusal, because the circumstances obviously gave the constable reasonable grounds to believe that the defendant was in control of the vehicle and probably with some basis for considering him 'over 80'. Constable Spearns remarked at one point that the defendant appeared 'stoned'.

The appeal will be dismissed with the usual order as to costs.



A Judge of the County Court
of District Number One