PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R v Sasha D'Entremont-O'Connell*, 2024 NSPC 11

Date: 20240129
Docket: 8540114, 8540115
Registry: Yarmouth

Between:

His Majesty the King

v.

Sasha d'Entremont-O'Connell

Judge:	The Honourable Judge Burrill
Heard:	November 7, 2023, in Yarmouth, Nova Scotia
Decision:	January 29th, 2024
Charge:	CC 320.14 (1) (A) CC 320.15 (1)
Counsel:	Kiel Mercer, for the Plaintiff Phil Star KC, for the Defendant

By the Court:

Introduction

[1] The accused was stopped while driving a motor vehicle by a police officer. She was given an Approved Screening Device (ASD) demand. After being given several opportunities, she did not provide a suitable sample. She was charged with the offences of refusal or failure to comply and impaired operation of a conveyance.

[2] The only issue in the case is whether the Crown has proven the requisite mens rea for the offence of failure to comply.

[3] There is little evidence of impairment and certainly none that could satisfy the high standard of proof beyond a reasonable doubt. The prosecution did not press for a conviction on that offence, and she is found not guilty of the charge contrary to s. 320.14(1)(a).

The Facts

[4] Corporal Terry Burridge was the arresting officer. He testified that he read the accused a proper demand for a sample of her breath. She was told how to blow into the instrument. The device was presented to her. He testified that she only puffed her cheeks and nothing happened. There was no movement of her cheeks nor her body during this time. If she was introducing air into the instrument he testified you would have been able to hear it. There was no sound.

[5] After two attempts he gave her instructions, a second time, about how to blow. The result was the same. After a fourth attempt, she was advised that she would be charged with the offence of refusal if she did not comply. The officer gave her a total of 8 attempts. There was no difference. Her cheeks were puffed, but there was no additional movement of her cheeks and body. There was no sound of air flowing into the instrument.

[6] During the process of attempting to obtain a sample another officer arrived on the scene. Cpl. Burridge testified this officer took what was described as a fresh straw and demonstrated to her how a proper sample should be introduced. It made no difference and after the eighth attempt she was arrested for failure to

comply with the demand. He said that he had checked the device and that he had no operational concerns about it.

[7] The officer had described the accused as argumentative throughout, but clarified on cross examination that she was simply being steadfast that she was releasing air into the instrument. He did not notice that she had been crying.

[8] The accused testified that she had been at two parties that night. She had consumed very little alcohol before being stopped. At the second party she said she had become upset and had been crying. She testified that she had tried to provide a proper sample and couldn't have blown harder into the instrument. She testified that she suffers from depression and anxiety. She testified that she panics sometimes but was otherwise in good physical health. She also stated that she gets a nervous around the police. On cross examination she testified that she was very anxious but had tried to provide a proper sample and “didn't know why it would not work”.

The Issue

[9] The defence submits that the *mens rea* for the offence has not been established beyond a reasonable doubt. It is argued that the evidence at least raises a reasonable doubt as to whether the accused intended to fail to comply with the demand.

The Law in Nova Scotia

[10] At the conclusion of the evidence both the Crown and the Defence took the position that the *mens rea* for the offense of failure to comply with a breath demand was set out in the case of *R. v. Bain*,[1985] N.S.J. No. 215 (N.S.C.A.D.)

[11] In that case the Court set out the distinction between the lack of *mens rea* and what might be a reasonable excuse. The court held that if the failure to comply with the demand was not deliberate or intentional it was unaccompanied by the necessary *mens rea*. The decision confirmed that the defence of lack of *mens rea* existed independently of any defence encompassed by the words “without reasonable excuse”.

[12] That case has been the binding law in Nova Scotia since that time. The Supreme Court of Canada never considered the issue even though it had been

invited to do so by intervenors in the case of *R. v. Goleski*, [2015] 1 S.C.R. 399 (S.C.C.).

[13] After having made initial submissions, counsel for the defence brought to this court's attention cases that raise the issue as to whether *R. v. Bain* is still binding precedent.

[14] The wording of the Criminal Code was changed on December 18, 2018 and the bulk of subsequent jurisprudence (none of which is binding on this Court) has decided that the change altered the elements of the offence that the Crown must prove beyond a reasonable doubt.

The Amendments

[15] Prior to the amendments of 2018, the offence of failure to comply with a breath demand read as follows:

> **254(5)** Everyone commits an offence who, without reasonable excuse, fails or refuses to comply with a demand made under this section.

[16] After December 18, 2018, the section now reads:

> **320.15(1)** Everyone commits an offence who **knowing that a demand has been made**, fails or refuses to comply, without reasonable excuse, with a demand made under section 320.27 or 320.28. [emphasis added]

[17] The difference between the two sections is the addition of the emphasized phrase. In all other respects the words of the offence essentially remained unchanged.

[18] Did this added phrase alter the requirement that the Crown's requirement to prove that the accused intentionally failed to comply or did the *mens rea* requirement remain the same?

Analysis

[19] In the case of *R. v. MacIntosh*, 2023 NSPC 60 my sister Judge van der Hoek overruled her previous decision in *R. v. Burgess*, 2021 NSPC 34 and held that the *mens rea* requirement has indeed been altered. In the case of *R. v. Houlan*, [2023] N.S.J. 426 my brother Judge Sarson ruled the same.

[20] In the unreported oral decision of *R. v. Gittens* (Provincial Court case number 8307437, November 24, 2020) I decided that the decision in *R. v. Bain* was still the law and that the December 2018 amendments had not altered the *mens rea* requirement.

[21] When I considered the amended wording of the section, I was left wondering why Parliament changed the wording at all. It seemed that they may have just wanted to clarify that before a person could be convicted of the offence, they needed to know that a demand had been made of them. Surely Parliament didn't need to specify this since under the old provision no one would have been found guilty unless they knew a sample was being demanded of them.

[22] The wording change seemed subtle, and I essentially found that had Parliament wished to make such a fundamental change to the law they would have done so in a much clearer manner. My view was similar to that expressed by Gorman J. in *R. v. Taylor*, [2021] NJ 33 (Nfld.P.C.) where at paragraph 80 he said;

> " I am unable to accept the proposition that the wording of section 320.15(1) has resulted in the Crown no longer having to prove that the failure or refusal to comply was intentional (see R. v. Daytec, 2021 ABPC 48). In my view this proposition is untenable because it effectively removes mens rea from a criminal offence. In addition, in my view the wording of section 320.15(1) is not so significantly different from the former section 254(5), which was defined as incorporating a mens rea element (i.e., that the failure to or refusal to comply was intentional), so as to result in the removal of such a basic element (see R. v. Sweet, 2021 SKPC 12, at paragraph 38)."

[23] After reviewing *MacIntosh*, *Houlan* and other cases that I will discuss I have concluded my decision in *Gittens* was wrong. I find the 2018 amendments to the section did alter the mens rea requirement for this offence. The Crown no longer needs to prove beyond a reasonable doubt that the accused intended to fail to comply with the demand.

[24] After reviewing the decision of Gregory J. in *R. v. Bradley, 2022* NBQB 31 I am no longer left wondering what Parliament's intention was in making the amendment. In this case Gregory J. sets out a careful analysis of the conflict in the cases prior to December 18, 2018. She also sets out the proper method of determining *mens rea* for the current offence. I can not improve on her analysis. While this case is not binding on me, I find her reasoning to be persuasive and I adopt her conclusion that the *mens rea* element is satisfied once the accused

knows that a demand has been made and that they have failed to provide a sample. The Crown is not required to prove that the accused intended to fail to produce a breath sample.

[25] Leading up to the amendment of the section, while the law applicable in Nova Scotia had been settled by *Bain* for over thirty years, there was a divide across several provinces about the *mens rea* requirement. Many cases such as *R. v. Lewko*, 2002 SKCA 121 had essentially adopted the analysis in *Bain* while a number of cases adopted the analysis in *R. v. Porter*, 2012 ONSC 3504 (Ont. S.C.) which held that the *mens rea* was established with evidence that the accused knew or was aware that they failed to provide a sample as requested.

[26] As I previously mentioned, the Supreme Court of Canada was invited by intervenors in *R. v. Goleski* to clarify the issue, but they declined to do so. This meant that leading up to the amendments of December 18th, 2018, the law nationally was in a state of uncertainty.

[27] In *Bradley* at paragraphs 168-170 Gregory J. writes;

> "The introduction of the word "knowing" is likely in response to this apparent divide in the jurisprudence and to questions raised by Paciocco J, as he then was, in Soucy, in which he adopted the Lewko position. Clearly, in light of the long-standing conflict, whether real or apparent, between Lewko and Porter, Parliament intended to clarify that the mens rea for the offence of failing or refusing to comply is a minimal one. The offence requires only knowledge of a demand and the fact of non-compliance. There is nothing in the legislative context, purpose, text or scheme suggestive of a need for the Crown to establish as part of the mens rea that the accused intended to fail "on purpose".
>
> By inserting the words "knowing that a demand has been made", it has eliminated any uncertainty as to the intent required. The only elements of the offence the Crown must prove beyond a reasonable doubt is that the accused knew a demand had been made and she failed to supply a suitable sample of her breath... Once the Crown has proven the elements of the offence, there must be a conviction entered unless the accused presents a reasonable excuse.
>
> Given this minimal mens rea for the offence, I do not find that the Crown is required to establish the factual working order of the device as part of the mens rea of this offence."

[28] In *Gittens* while I understood that there was a divide in the cases I failed to appreciate how significant the word "knowing" was to the issue.

[29] The proposition that Parliament intended to clarify the applicable standard of *mens rea* for the offence is also supported by the legislative backgrounder produced by the government and quoted at paragraph 142 in *Bradley;*

> "There are a number of key changes to the elements of these offences. The simpliciter offence has been amended to clarify the necessary fault element for proof of the offence. Previously, the offence of failure or refusal to comply with a demand did not state the necessary mental fault element required for conviction. The provision now provides that knowledge that the demand had been made is sufficient to prove the mental element."

[30] This is of assistance in understanding the legislative intent in amending the section and helps bring reason to what I had thought in *Gittens* was an inconsequential and needless change in wording.

[31] I have not been made aware of any cases that have ruled opposite to the conclusions in *Bradley* since that decision was released in 2022.

[32] In reaching the same conclusion as my sister and brother judges in *R. v. MacIntosh* and *R. v. Houlan* I do note that they relied, in part, on the reasoning in *R. v. Sweet*, 2022 SKQB 126. While I find no fault in the reasoning in that case, nor their reliance on it, I do note that it was overturned on appeal by consent and without reasons by *R. v. Sweet*, [2023] S.J. No. 154 (Sask.C.A.).

Application to this case

Mens Rea

[33] The accused clearly knew that a demand had been made and she also knew that she had not provided a proper sample. That was the mental element that the Crown was required to prove, and it has been proven beyond a reasonable doubt.

Reasonable Excuse

[34] The accused testified that she had become upset at the party she had attended. She had a negative interaction with another person, and she had been crying. She called her mother for a drive. She had asked her mother to take her from the party back to where she had left her car.

[35] She testified that she was very anxious when dealing with the officer. She said she had tried to blow into the instrument but was not sure why it did not work. She testified that she gets nervous around police.

[36] The accused's mother also gave evidence that since her daughter was 12 years old she had to be medicated different times because she can become anxious and nervous when scared or upset.

[37] I accept the evidence about her anxiety but do not find in the circumstances that it provides proof of a reasonable excuse for failure to provide a proper sample to the requisite standard of proof on the balance of probabilities. In fact, that evidence was not linked specifically to her failure to provide any air into the instrument which I find was the case.

Proper Functioning of the Instrument

[38] In argument the defence raised the issue of whether or not there was sufficient proof of the proper functioning of the ASD. While the defence conceded that there was no requirement to prove the proper fuctioning of the device it was argued that lack of such evidence can have an impact on the assessment of the credibility of the accused.

[39] Cpl. Burridge testified that when he began his shift, he checked the device and that he believed it was working properly. He checked that it was properly calibrated for that date. He had no concerns about the operational capacity of the device. He turned it on and inserted the tube into the device. He described it as white plastic. Although he testified that he had no concerns about the operational capacity of the device he did not, as is common in such a case, give evidence that the device was capable of receiving a sample and that the mouthpiece was unobstructed. The accused, however, never said the instrument would not accept air she was trying to blow.

[40] In case there is any uncertainty, I find that the Crown was under no obligation to provide proof of proper functioning of the instrument. Again, I rely on the decision in *Bradley* at paragraphs 170-177.

> "Given this minimal mens rea for the offence, I do not find that the Crown is required to establish the factual working order of the device as part of the mens rea of this offence.

Given the legislative context surrounding impaired driving offences, I find that s. 320.15, like the presumption of care or control in s. 320.35 per Whyte, is as close to absolute liability as possible in the criminal law context. This is permissible only because the offence allows for "a way out" for an accused by way of a reasonable excuse for the non-compliance which may include an allegation and evidence that the device was not working properly.

The difference between Paciocco J and my thinking is that the mens rea of the offence does not, as Paciocco J suggests, depend on the factual working order of the device having first been established by the Crown.

I find the factual working order of the device is only relevant if raised by the accused as a reasonable excuse. It is thus not part of an essential element of the offence but rather an issue to be raised by the accused and established on a balance of probabilities that there was some factual problem with the machine. This could be as simple as saying to an officer, "I am following your directions and if my breath is not registering maybe something is wrong with your machine." I repeat, this could be raised at the scene or at trial.

Of course, raising this question about the factual working order of the machine would require defence counsel to put related the questions on cross-examination to the officer to allow a response to avoid a Brown v Dunn violation.

If an accused credibly (as opposed to speculatively) raises the factual functionality of the machine with evidence to that effect after the close of the Crown's case, this would no doubt raise the possibility of a reasonable excuse and reasonable doubt. Without notice of such an excuse in advance, it seems to me that the Crown should be permitted to call rebuttal evidence to establish the fact of functionality. This would put the factual functionality of the machine into question and possibly provide a basis for a reasonable excuse for non-compliance. But it is for the accused to raise it as a reasonable excuse and not for the Crown to prove it as an essential element of the offence.

In R. v. Goleski an accused was convicted of failing to comply with a demand for breath and the Court confirmed the persuasive burden of establishing a reasonable excuse is on the accused. This remains the law despite the repealing of s. 794(2) of the Criminal Code which provided that "burden of proving that an exception, exemption, proviso, excuse or qualification prescribed by law operates in favour of the defendant is on the defendant".

> In the case before me, Ms. Bradley contends the obligation is on the Crown to positively establish the "factual" working order of the device as part of their proof of the mens rea of an offence. I disagree. Unless it is put in issue by the accused as a reasonable excuse, the factual functionality of the device is assumed."

Ruling

[41] I realize that the ruling in this case results in a substantial change of the *mens rea* requirement for this offence, but I am satisfied that this is what Parliament intended by amending the law in 2018.

[42] I find that the Crown has provided proof beyond a reasonable doubt on the essential ingredients of the offence of failure to comply with the ASD demand and the accused has not established a reasonable excuse for this failure. Accordingly, she is found guilty.

Burrill, JPC