PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v. Lombard*, 2013 NSPC 133

Date: 2013-11-27
Docket: 2388812, 2388813
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Ryan Lombard

DECISION

Judge:	The Honourable Judge Timothy Gabriel
Heard:	September 25, 2013 and November 27, 2013, at Dartmouth, Nova Scotia
Oral Decision:	November 27, 2013
Charges	Section 253(1)(a), 254(5), Criminal Code
Counsel:	Karen Quigley, for the Crown Philip Star, QC, for the Defence

By the Court: (orally)

[1] Ryan Joseph Lombard stands accused of operating a motor vehicle while his ability to do so was impaired by alcohol contrary to Section 253(1)(a) and of refusal to provide samples of his breath to enable a proper analysis to be made to determine the concentration, if any, of alcohol in his blood, contrary to Section 254(5) of the Criminal Code.

[2] The charges have their origin in events which took place on November 4, 2011. That night Cst. Paul Pottie, a 23 ½ year veteran of the RCMP, was on duty from 9 pm to 3 am the next day. He was engaged in monitoring the speed of motorists on Highway 101, Lower Sackville, HRM, Nova Scotia. A vehicle passed him travelling at a rate of 122 kilometres per hour in a 100 kilometre zone. Its speed was increasing incrementally. When the vehicle reached 128 kilometres, Cst. Pottie engaged in pursuit. He activated his siren and lights, and the vehicle was pulled over without incident at approximately 21:51 hours, or 9:51 pm.

[3] The driver was subsequently identified as the accused, Ryan Lombard, who was the lone occupant of the vehicle. Cst. Pottie observed him to proceed very gingerly while obtaining the information required of him. The jacket containing

his wallet was draped over the passenger seat of the vehicle and appeared to be concealing something. Pottie could detect the odour of alcohol emanating from Mr. Lombard and/or the vehicle.

[4] During the attempts made by Mr. Lombard to extricate his wallet and ID, the officer noticed a half empty bottle of red wine located under the jacket on the passenger seat. When asked to produce it, Mr. Lombard first reached under the jacket and produced an unopened bottle of white wine. Subsequently, he produced the red wine bottle at the officer's insistence.

[5] Mr. Lombard was ordered out of the vehicle. While outside he persisted, despite multiple warnings, in returning to his vehicle while Cst. Pottie was searching it. He was arrested for "illegal possession of liquor" in Cst. Pottie's words, and placed in the back seat of the police vehicle.

[6] While Mr. Lombard was thus situated in the patrol car, Pottie could smell alcohol on his breath. The officer felt that he had reasonable grounds to suspect that Mr. Lombard had alcohol in his body. He read the standard "roadside demand" from the card, and he was satisfied that the accused understood. He then tested the ASD device three times in front of Mr. Lombard to demonstrate that it was working properly.

[7] Cst. Pottie provided the accused with eighteen opportunities to blow into the ASD device. He testified that he observed the accused on some occasions stick his tongue into the air passage (apparently) to prevent or obstruct a sample from entering the machine, and on other occasions he observed what he considered to be tepid attempts by Mr. Lombard to blow into the machine. He felt that the accused was not making a genuine effort to provide a sample of his breath.

[8] While all of this was going on, the accused had advised Cst. Pottie of his career plans to become a heavy equipment operator. Accordingly, Pottie urged Mr. Lombard to comply, and told him that he was jeopardizing his future by behaving this way.

[9] Cst. Pottie then went, in his words "an extra mile" for the accused: he communicated with Cst. Paul McGuire, an 11 year RCMP veteran, who was in the vicinity. He requested that Cst. McGuire attend the scene and bring with him an ASD device. His hope was that, with a new device, and with another officer reiterating the demand to the accused, he may comply.

[10] Cst. Paul McGuire testified by video link with the consent of Counsel. He stated that on November 4, 2011, at 22:31 hours, he attended the scene and brought with him a Dragon 74-10 GLC approved screening device, in response to Pottie's

request. He went over to Cst. Pottie's police car wherein the accused was seated and demonstrated that this device was working. McGuire testified that he departed at 23:08 hours. In between those times, his recollection is that Cst. Pottie stood nearby while he spoke with the accused. Cst. McGuire took no notes during the conversation.

[11] McGuire gave evidence that he provided Mr. Lombard a breath demand. I will refer to this demand in more detail a little further on. He testified that he recalled that the accused once again purported to blow into the device on multiple occasions without a valid sample being provided.

[12] Mr. Lombard was charged following what were considered to be further insufficient efforts to provide or to comply with the request for provision of a sample.

[13] The accused (who has elected to call no evidence) has raised three issues. I have changed the order slightly to reflect a more convenient sequence in which to address them:

(i) has the Crown proven beyond a reasonable doubt that a lawful demand was made;

(ii) was there proof beyond a reasonable doubt that either Constable was qualified to use the ASD in question and able to give opinion evidence with respect to same; and

(ii) is the wording in the Information with respect to the second charge of refusal pursuant to Section 254(5) inadequate in the circumstances? If so, can or should it be amended pursuant to Section 601(3) of the Criminal Code.

[14] These three Defence issues all relate to the Section 254(5) charge. There is, however, another issue:

(iv) with respect to the first charge, has the Crown established beyond a reasonable doubt that the accused operated his motor vehicle while his ability to do so was impaired contrary to Section 253(1)(a).

[15] As the fourth issue may be dealt with relatively quickly, I will proceed with it first. Cst. Pottie testified that the accused vehicle first came to his attention when it was observed to be travelling at a rate of 122 kilometres per hour in 100 mile hour zone. The vehicle accelerated to 128 kilometres per hour before he gave pursuit and the officer able to smell alcohol while the accused was seated in his

own car, and subsequently smelled alcohol emanating from the accused while he sat in the police vehicle. Mr. Lombard had an open, one half consumed bottle of red wine in the car with him.

[16] Pottie also testified as to the possibility of some difficulty experienced by Mr. Lombard in following the Charter caution and the right to counsel that was later administered at the police station, and that he appeared to be nervous. That was essentially it.

[17] It is commonplace to observe that many unimpaired drivers operate their vehicles at excessive rates of speed. Moreover, the mere fact that it was evident that Mr. Lombard had consumed red wine from the open bottle in the car (parenthetically I note that Cst. Pottie specified that he smelled a "red wine odour" on his breath) does not in itself trigger an inference that the amount consumed had impaired his ability to operate the vehicle. No observations were referenced by Cst. Pottie or McGuire as to Mr. Lombard's gait, his demeanor, countenance or other physical indicia to suggest impairment. There is evidence that he was speeding and that he had some alcohol in his body, and that is the most that can be said of the totality of the Crown's case with respect to the 253(1)(a) charge.

[18] I cannot conclude beyond a reasonable doubt that Mr. Lombard's ability to operate his motor vehicle was impaired on the basis of this evidence and I accordingly acquit with respect to this charge.

[19] Next, I turn to the issues that relate to the Section 254(5) (refusal) charge. Preliminarily, I begin with a consideration of the nature of a charge pursuant to that section.

[20] Section 254(5) reads:

> "Everyone commits an offence, who without reasonable excuse fails or refuses to comply with the demand under this Section".

[21] It appears that Section 254(5) creates a number of separate and distinct offences. This is because a peace officer may demand under Section 254(2)(a) that the accused "perform forthwith" physical coordination tests. Alternatively, he may demand (under Section 254(2)(b)) that the accused forthwith provide a sample of breath to enable a proper analysis to be made by means of an approved screening device. He may also demand (under Section 254(3)(a)) that the accused either provide samples of blood to enable a proper analysis of the concentration of alcohol in his blood, or that he provide a sample of his breath so as to enable a proper analysis of his concentration of alcohol in his blood. Finally, under Section 254(3.4) the officer may demand (under the appropriate circumstances) that the

accused provide oral fluid or urine for analysis. A refusal with respect to any one of these demands is a distinct offence, although each is triggered individually by the operation of Section 254(5)

[22] This is further evident when Section 254(6) is considered. This reads:

> "A person who is convicted of an offence under sub section 5 for a failure or refusal to comply with the demand may not be convicted of another offence under that subsection in respect of the same transaction." (emphasis added)

[23] Section 254(6) in its entirety would be superfluous if Section 254(5) merely created one omnibus offence covering all possible transgressions arising out of the same transaction.

[24] Similarly, in *R v. Strong* (1990), 102 N.S.R. (2d) 365 (NS County Court), at paragraph 14, Judge Haliburton noted:

> I would add in passing that in my view, indeed neither the s. 254(2) nor s. 254(3) create an offence. The various offences are created under the provisions of s.254, but it is only the operation of s. 254(5) which constitutes them (sic) offences. A reference to 254(5) in the absence of the particulars of the allegation, would, even so, in all likelihood, be defective as duplicitous, or, at least ambiguous, since several offences are created by that subsection. (emphasis added)

[25] It therefore appears to be clear that a number of different refusal offences are encompassed within Section 254(5). Each and every allegation of refusal

presupposes the existence of a proper demand, one that is appropriate to the specific refusal which is alleged. The onus is upon the Crown to establish that a "proper demand" was made, as well as a failure or refusal by the defendant to produce the sample required, and that the refusal was (of course) intentional.

[26] With this background established, it is possible to consider the issues raised by the Defence in more detail. As we have seen, the defence contends (among other things) that a proper demand was not given. The accused has also reserved the right to make a Charter motion related to the length of time that the accused was detained relative to the ASD demand (without his right to Counsel having been given) depending upon the result of my decision with respect to the three remaining issues.

[27] The first officer on the scene (Cst. Pottie) testified inter alia: "I decided to give him the roadside demand to determine if there was any alcohol in his body". At 10:09 pm Pottie opened the car door, smelled liquor on the accused's breath and at that time he says:

> "I wrote in my notes, ASD demand, also known as RSD, roadside screening device. I read from the card and asked if he understood. I continued to encourage him to provide a proper sample, I tested the instrument three times in front of him and it was working properly. "

[28] The officer then referred to what he considered to be "tepid" attempts on some occasions and other occasions when the accused actually stuck his tongue into the mouthpiece to obstruct or prevent air from going in. He testified that the accused had shared with him that he felt his career and his future was in jeopardy. Hence, Cst. Pottie testified that he called in officer McGuire to assist on the basis that maybe there was a communication issue. He said "I wanted to give him every opportunity."

[29] Cst. McGuire, when he arrived (and as noted) testified that he clearly explained the offence of refusal, that Mr. Lombard had to provide a suitable breath sample or he would be charged with refusal, and that the penalty involved (if convicted) was the same as if he had been convicted of impaired operation of a motor vehicle.

[30] There is no litany or magical formula which an officer must recite. Cst. Pottie (in effect) said that he read the approved screening device demand from the card and watched as the accused made either tepid attempts to blow which were unproductive of any samples entering the machine, or those in which he actively impeded with his tongue the flow of air into the mouthpiece. After watching eighteen such efforts, the officer concluded that the accused was not cooperating.

He had accorded him the benefit of the doubt and called in another officer with another ASD.

[31] The combination of circumstances associated with the "first series" of attempts to blow, and the fact that Cst. Pottie felt it necessary to accord to the accused the "benefit of the doubt" would, I think, on their own, be sufficient to raise a doubt as to whether a proper ASD demand was given with respect to that first series of opportunities. The officer said he wanted to give the accused every opportunity to blow, in case there was a communication issue or something said that the accused may not have understood associated with the instructions that he had been given. That was why he called Cst. McGuire to the scene.

[32] Perhaps Cst. Pottie was just proceeding from an abundance of caution, perhaps he was just trying to be a "good guy". But, if that was all I had to consider, I would have concluded that the Crown had not established beyond a reasonable doubt that a proper demand had been given or that the accused had understood the demand which was made of him, on the basis of Pottie's admission that there was some residual doubt in his own mind on these points.

[33] I therefore return to the evidence of Cst. McGuire and what he testified as to the second ASD demand administered that evening. McGuire did not make notes

at the scene, and those which he later made in the Occurrence Report are sparse. He did not say that he read from the card or that he read the standard ASD demand. What he did say was that he told the accused about the offence of refusal, that he explained what the offence was, and what the penalty was, and that the accused would be charged with "refusal" if he didn't blow. I am satisfied that he told the accused that he had to provide a sample and that if he didn't he would be charged. I am also satisfied that, this time, the accused understood. What McGuire told the accused and the manner in which he described it would not have left the accused with the impression that compliance was voluntary or optional. The circumstances were clear, he had to comply and he was expected to blow right then and there, if he did not, he would be charged.

[34] Therefore, I am satisfied that a proper ASD demand was administered by McGuire as it covered (in pith and substance) the essential features of the demand that must be communicated to an accused in the circumstances in which Mr. Lombard found himself that night. The accused appeared to understand, however, his actions were such that he did not seem to be attempting to comply. It appeared to be a deliberate noncompliance. The fact that the accused understood the demand, was apparently not complying with it, and was in fact, intentionally frustrating it, is the only reasonable inference available to me on the basis of the

evidence. I therefore conclude that his actions were equivalent to a refusal of the valid ASD demand administered by Cst. McGuire.

[35] I have not forgotten about the defence contention that neither officer was qualified to provide expert evidence and therefore each is precluded from offering opinion evidence on the validity of the accused efforts to comply with the demand. The defence cites the case of *R. v. Schimpf*, (1980) ABCA 135 of the Alberta Court of Appeal in support of the proposition that once an accused's breath enters the machine, only an expert, such as an analyst, may give an opinion that what the accused was doing was a mere pretense of giving a breath sample.

[36] The short answer to this contention is that the officers' evidence was to the effect that the accused's breath did not enter the machine. In fact the testimony of Cst. Pottie and McGuire amounted to an assertion that the accused was actively trying to frustrate the test by either making inadequate attempts to breathe into the device, or by blocking the mouthpiece with his tongue. The officers are certainly able to testify as to what they personally observed, and they drew the conclusion on the basis of their observations that the accused was in (effect) intentionally refusing to comply with the ASD demand prior to charging him. I accepted their

evidence on this point, and as I have said earlier, this is the only reasonable inference to be drawn from the totality of the facts to which they testified.

[37] That having been said, Mr. Lombard was charged with having refused:

> "To provide as soon as practical samples of his 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 his blood." (emphasis added)

[38] He was therefore charged with refusal of the breath demand. As we have seen earlier, this is a different offence to one alleging refusal of the ASD demand. A precondition to a conviction for refusal of the breath demand is the proof of a proper demand, namely, one in accordance with Section 254(3)(a)(i), having been previously administered.

[39] Obviously, a breath demand under the auspices of Section 254(3)(a)(i) has components which distinguish it from an ASD demand given pursuant to Section 254(2)(b). These differences are both important and obvious. The Crown bears the onus of proof with respect to all of the elements of the offence charged and it must prove each beyond a reasonable doubt. One of the components of a charge of refusal under Section 254(5) is that a demand commensurate with the specific refusal alleged must be proven to have been made upon the accused. The Crown closed its case, having proved that an ASD demand under Section 254(2)(b) was

made (and refused by the accused), but without proving that a demand in accordance with Section 254(3)(a)(i) was ever made. The defence elected to call no evidence. Therefore, the charge (as framed) alleges that the accused refused or failed to comply with a demand that was never proven to have been made of him.

[40] The Crown, in its closing submissions, argued that if I were to conclude as I have outlined above, then I ought to allow an amendment under Section 601(3) to the Information. This would enable the charge to coincide with the demand which (the evidence has established) the accused actually did refuse, namely, the ASD demand.

[41] As I have explained earlier, the offence of refusal created by Section 254(5) involves a refusal or failure to comply with a demand made under "this section". This section, however, encompasses a number of different types of demands and (therefore) different types of refusal. They include refusal of the breathalyser demand, refusal of an ASD demand, refusal of a demand to provide a blood sample, and refusal of a demand to comply with physical coordination testing.

[42] Section 254(5) creates four separate and distinct offences. When considered from this vantage, it will be seen that what the Crown is, (in effect), seeking is not an amendment at all. Rather, the substance of what it is seeking is to be allowed to

substitute a new charge alleging a different offence. This, after the Crown has closed its case and the accused has elected to call no evidence.

[43] Justice Bastarache, writing for the Supreme Court of Canada in *R v. Daoust*, [2004], 1 SCR 217 at paragraph 70, stated as follows:

> I would point out in closing that the most important point to remember in this regard is that s. 601(3) Cr. C only permits a court to amend a count in relation to a particular of the offence… To allow the Crown to make out a different offence would infringe on the accused's right "to be reasonably informed of the transaction alleged against him, thus giving him the opportunity of a full defence and fair trial." When, as in the present case, the indictment refers to a specific offence, the accused must not be misled. (emphasis added)

Therefore, I deny the Crown's application to amend pursuant to Section 601(3).

Conclusion

[44] For the reasons stated above, I must therefore acquit Mr. Lombard of the charge under Section 254(5), and also of the charge pursuant to Section 253(1)(a). Given my decision, it is unnecessary to hear the defence Charter motion referenced earlier.

Timothy Gabriel, JPC.