

IN THE PROVINCIAL COURT OF NOVA SCOTIA
(R. v. Allen Babin, 2004 NSPC 34)

Date: April 19th, 2004
Docket: C 1364118
Registry: Digby

Between:

Her Majesty The Queen

v.

Allen Babin

Judge: The Honourable Judge Jean-Louis Batiot, J.P.C.

Heard: April 19th, 2004 at Comeauville, Nova Scotia

Written Decision : May 12th, 2004

Charge: Contrary to Section 254(5) of the Criminal Code

Counsel: R. Michie, for the Crown

D. MacLeod, for the Defence

Batiot, J.; (Orally)

1. The accused faces a charge of refusal of an approved screening device demand. The Defence argues that the demand was not made in accordance with the **Criminal Code of Canada** and that the accused was unlawfully detained.
2. Corporal Stothart with Sergeant Daley and Constable Pelletier, all of the Western Shore Traffic services, were patrolling Highway 101 on the 3rd day of September 2003. They had left Yarmouth in different cars earlier. Corporal Stothart and Sergeant Daley were doing traffic checks at Exit 31 off Highway 101.
3. At about 2:15 to 2:20 p.m. Corporal Stothart observed a stopped pick-up truck, noted that the license plate had expired in July 2003 and asked for the driving documents. There was no insurance. Corporal Stothart spoke with the driver, the accused, advised him that an SOT would issue and whether he had a preference as to which towing company to take the truck away. During that conversation Corporal Stothart smelled liquor from the breath of the accused. Not a trained screening device technician, he does not make any demand but likely mentions the liquor smell to Sergeant Daley who then contacts Constable Pelletier on Highway 101, not very far from them, who had been delayed with some other matters. From Corporal Stothart's point of view the sole reason for the detention was a vehicle random check and the no insurance and thus the Defendant was waiting for the tow truck to remove the Defendant's truck.
4. Constable Pelletier receives that call from Sergeant Daley about ten minutes before he arrives at Exit 31 and joins the other two officers, at about 14:30 hours. He has a quick conversation with Corporal Stothart, learns of the particulars of the stop, the SOT or Summary Offence Ticket, and the smell of alcohol. He had parked his police car behind the accused's truck. He goes over, invites the accused to come to his own marked police vehicle - he is in uniform - and while sitting in this vehicle the officer notices the odor of alcohol emanating from the accused, the bloodshot eyes and, to some extent, the slurred speech. The accused would speak to him in French or English and he would respond in the corresponding

language. At 14:47 hours, while in the police car, the officer makes the standard screening device demand to the accused "*qui comprend ça*". There is a further explanation as to what it means in plain English or French as they converse in both languages.

5. The accused appeared to be a bit confused, particularly since he mentioned that he had drunk some alcohol in the morning. The officer replied that "*if you are honest at most it will be a warning and there will be no charge*". He also explained to the accused that blowing in the ALERT - he uses the old appellation - and does not pass, there may be a further demand for a breathalyser which may or may not result in a charge. A refusal however or a failure to blow now will result in a refusal charge. He asks him "*do you want to blow into the ALERT*" and eventually the accused says "*Je ne veux point souffler*", I don't want to blow, "*Je comprends bien*", "*Everything is well understood*", as translated by the Officer.
6. No rights were ever given to the accused.
7. The tow truck arrives as the accused is in Constable Pelletier's police car, both Corporal Stothart for the no insurance charge and Constable Pelletier for the refusal issued their respective documents to the accused simultaneously and the accused then left with the tow truck operator.
8. Notice of s. 10(b) rights breach has been served prior to the trial and the issue is whether
 - a. the accused was detained by Corporal Stothart pursuant to a suspicion of alcohol in his body, or;
 - b. simply as a result of a motor vehicle check he was unable to drive because he didn't have any insurance and was waiting for the tow truck.If the former, the detention would trigger the obligation to inform him of his rights and the delay for the screening device test may be unreasonable. If the latter, however, there is no such duty on the part of the police officer.

9. The real issue is whether Corporal Stothart had to make a demand at 14:20 hours or so and

whether there is an unreasonable delay to wait for Constable Pelletier who had the roadside screening device and was qualified to use it, to do so.

10. There is no evidence of impaired driving. There is, however, evidence to justify the police officer's grounds to make a screening device demand; alcohol in the accused's body. Police officers have a right to stop even randomly motorists to check for driving issues including the exercise of that privilege and the physical state of the driver: **R. v. Bent** (1989), N.S.J. 509 and **R. v. Ladouceur** (1990), 56 C.C.C. (3d) 22 (S.C.C.); it is a **breach** of s. 9 of the **Charter** but the detention is justified and there is no requirement to advise an accused of his or her rights to counsel.
11. From the evidence at trial the only reason the Defendant was detained after the stop was that he could no longer drive since he did not have insurance. His truck was to be towed away and he was told that it would be so. He chose to await the tow truck. He was then faced with Constable Pelletier who was aware of the reason of the stop and the additional suspicions.
12. I find that up to that point he was not detained for the purposes of the **Code**; he was not ordered to stay, he was not arrested; indeed he was not told of the suspicions. There is no evidence of psychological compulsion amounting to a detention as defined in **R. v. Therens** (1985), 18 C.C.C. (3d) 481.
13. There is no obligation for the first officer to make the demand. After all, the **Code** does not oblige him to do so. The wording of s. 254(3) is not mandatory: *may by demand*. The officer was not qualified to administer the test; he did not have an instrument with him; only Constable Pelletier could do it; there was no obligation on Corporal Stothart to make the demand and he was not seized with the matter. Any other officer could act if that other officer had the necessary grounds: **R. v. Telford** (1979), 50 C.C.C. (2d) 322 (Alta. C.A.).
14. Until Constable Pelletier's arrival the Defendant was not detained by the police but only waiting for the tow truck. There was very little delay then until the demand was made.

Time was spent to explain the demand and its consequences. The demand was made, as provided by the **Code**, with the sufficient grounds to do so; odor of alcohol, slurred speech and bloodshot eyes. I must conclude that the Crown has established a case beyond a reasonable doubt and I find the accused guilty.

Jean-Louis Batiot, J.P.C.

May 12th, 2004

Digby, Nova Scotia