

SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Basha, 2009 NSSC 345

Date: 20091118

Docket: Ken No. 308407

Registry: Kentville

Between:

Her Majesty the Queen

Respondent

v.

Mohammed Abou Basha

Appellant

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Judge: The Honourable Justice Glen G. McDougall

Heard: July 14, 2009, in Kentville, Nova Scotia

Subject: Appeal from conviction under s. 254(5) of the **Criminal Code** for failing or refusing to comply, without reasonable excuse, with a demand for a breath sample.

Summary: The appellant was stopped at a roadside checkpoint. An odour of alcohol was noticed on his breath. A demand was made for a breath sample. The appellant was given several opportunities to provide a sample. The last few were captured on a video taken by a camera mounted inside the police vehicle. The appellant claimed to have been suffering from a lung condition which caused him to cough. He had previously seen a doctor who prescribed medication to treat the condition but the appellant never had the prescription filled. After being charged the appellant once more went to see his doctor. The doctor was called to testify at the trial. The trial judge was satisfied that the Crown had proved all elements of the offence beyond a reasonable doubt. The appellant failed in his efforts to establish a reasonable excuse for his inability to provide a suitable sample.

Issues: 1. Did the Trial Judge fail to properly consider the issue of credibility of witnesses and in particular, the credibility of the appellant?

2. Did the Trial Judge fail to consider the issue of the requirement for *mens rea* under section 254(5) of the **Criminal Code**?
3. Did the Trial Judge fail to properly consider the evidence of the in-car video camera and what it demonstrated?
4. Did the Trial Judge fail to consider the medical evidence introduced by the defence?

Result: Although the Learned Trial Judge had not specifically referred to the *mens rea* aspect of the offence when delivering her decision, she clearly stated on two occasions that the Crown had proved all elements of the offence beyond a reasonable doubt. A review of the evidence supported this finding. She then went on to consider the evidence led by the appellant and concluded that he had not met the burden of proof to establish, on a balance of probabilities, that he had a reasonable excuse for failing to provide a suitable breath sample. The evidence supports the conclusions of the Trial Judge. No error in law committed. The appeal is therefore dismissed and the conviction and sentence will remain.

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