

“Client acquitted of refusing to provide a breath sample after Court accepted argument police did not have enough evidence to demand breath sample.” [COMMENTS BY RICHARD NEARY]

R. v. H____

Between

Regina

v.

N P H____

[2006] B.C.J. No. 3517

2006 BCPC 627

Victoria Registry No. 136271-1

British Columbia Provincial Court

Victoria, British Columbia

Quantz Prov. Ct. J.

Heard: November 29, 2006.

Oral judgment: November 29, 2006.

(25 paras.)

Counsel:

Counsel for the Crown: N. Bali.

Counsel for the Defendant: R. Neary.

1 QUANTZ PROV. CT. J. (orally):— I will give my reasons on the defence application at this time. It would be remiss of me not to thank counsel for the manner in which they have conducted this case and for their submissions. This is particularly so with regard to Ms. Bali, who agreed to take on this case at the last minute. I want the record to be very clear, my decision does not in any way turn on that issue. The evidence was effectively presented to the court.

2 My reasons are as follows. The defence, at the conclusion of the Crown's case and before electing on whether to call evidence, brought an application to exclude evidence pursuant to s. 24(2) of the Charter. The application is brought on two grounds.

3 First, whether or not the officer had the subjective grounds for the ASD demand. Second, even if the officer did have the grounds to make the demand, whether the demand made in accordance with the requirement under 254(2) to provide the sample forthwith.

4 Briefly, the facts as I find them are as follows. The investigating officer attended a two-car motor vehicle accident at approximately 4:25 p.m. In doing so he found the accused to be in the driver's seat of one of the vehicles that had been in the collision.

5 He immediately detected what he described as a fairly strong odour of alcoholic beverage on the accused's breath. He asked the accused to exit her vehicle, and when she did he noted she was a little unsteady on her feet.

6 However, he placed no significance on this observation, given what appeared to have been a fairly significant collision. The damage to the accused's vehicle was such that in the officer's opinion it could not be driven away from the scene of the accident.

7 After the accused exited her vehicle, the officer continued to smell an odour of alcoholic beverage when speaking to the accused. There were none of the other usual symptoms of alcohol consumption, such as watery, bloodshot eyes, dilated pupils, slurred speech, poor eye/hand coordination, or confusion or difficulty in producing documents.

8 However, the officer's evidence is that at this point he formed the suspicion the accused had consumed alcohol quite recently. He later said he suspected the accused had consumed alcohol within the last two hours. He testified the smell was not the odour one would emit if the person had been drinking the day before.

9 The officer did not make the demand immediately. The reason for this was that in his opinion the accused needed to be attended to by the ambulance attendants which had arrived on the scene. This was arranged. In the meantime the officer continued to direct traffic for five to eight minutes until the second officer arrived to assume these necessary duties.

10 The accused did not leave the ambulance until approximately 4:36 to 4:37 p.m., according to the arresting officer. It is possible to find on the evidence that it in fact was earlier, based on the other officer's evidence. However, I accept the evidence of the main investigator and find that she left the ambulance at approximately 4:36 and 4:37 p.m.

11 Once the accused exited the ambulance, the officer asked the accused for her driver's licence. After discussion with the accused, he then retrieved the accused's purse from her vehicle. In obtaining her purse, he found two partly consumed bottles of alcohol in the front seat of the vehicle. One bottle was wrapped in a paper bag.

12 The officer questioned the accused on her consumption of alcohol. The accused denied recent consumption, explaining that she had taken the bottles from her daughter at her residence, and this was due to her daughter's problem regarding alcohol consumption.

13 The officer then read the demand at 4:51 p.m. or approximately 15 minutes after the accused left the ambulance and 25 minutes after the officer first formed the suspicion that he testified to.

14 The first issue is whether in all the circumstances I am satisfied beyond a reasonable doubt the officer had the necessary subjective belief to make a proper ASD demand.

15 Section 254(2) of the Criminal Code requires the officer to reasonably suspect the accused was operating a motor vehicle while alcohol was in her body. The officer did not use these words. It is not necessary that he do so.

16 As was stated by His Honour Judge Palmer in R. v. Piercy, at page 3 in his March 2nd, 1993 decision, and I quote:

These cases and evidence of investigating officers should not be exercises in hair-splitting or word games. Above all, the process must be a fair one and an officer should not be criticized because he has used one word when he meant another and the court can [easily] determine what his actual evidence is.

17 However, it is a matter of common sense, that the fewer the indicia of alcohol consumption, the more important it is that the officer specify precisely what his subjective belief was. The reason for this is that the less circumstantial evidence there is for the court from which to draw a reasonable inference as to his belief, the greater the need for direct evidence from the officer's mouth.

18 At the time the officer formed his opinion, in this case, according to his own evidence, the only evidence of relevance available to him was a fairly strong odour of alcoholic beverage on the accused's breath. He later said he suspected the accused had consumed alcohol recently or within the last two hours. However, he gave no reasons for this conclusion. He also said it was not the odour one experiences on a person who had consumed alcohol the day previous.

19 As was the case in R. v. Hardy [2006] B.C.J. No. 2744, I am not satisfied beyond a reasonable doubt the officer had subjective suspicion the accused had alcohol in her body. All the evidence taken and weighed together, including his own words, is also consistent with him believing that the accused had consumed alcohol in the fairly recent past, without ever putting his mind to the question of whether he suspected she still had alcohol in her body.

20 As a consequence, I am not satisfied this was a valid demand and therefore the refusal is not unlawful. On this basis I find the accused not guilty of the charge.

21 It is not necessary for me to consider further whether the evidence should be excluded pursuant to s. 24(2) for a Charter breach. For these reasons it is also not necessary for me to consider the second aspect of this application by the accused and, as I say, the charge is dismissed.

22 MR. NEARY: Thank you, Your Honour, very much.

23 THE COURT: Thank you.

24 MS. BALI: Thank you, Your Honour.

25 THE COURT: Thank you to both counsel.

(REASONS FOR JUDGMENT CONCLUDED)