

SUPREME COURT OF NOVA SCOTIA

Citation: R. v. MacCulloch, 2010 NSSC 48

Date: 200100204

Docket: Hfx 316678

Registry: Halifax

Between:

Patricia B. MacCulloch

Appellant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice Arthur W.D. Pickup

Heard: January 27, 2010, in Halifax, Nova Scotia

Final Written Submissions: December 15, 2009 (Appellant's Factum)
January 13, 2010 (Respondent's Factum)

Written Decision: February 4, 2010

Counsel: Patricia B. MacCulloch, Self-Represented Appellant
Robert P. McCarroll, for the Respondent Crown

By the Court:

[1] This is an appeal from a decision of the Honourable Chief Judge Patrick Curran, of the Provincial Court, dated August 13, 2009 finding the appellant, Patricia MacCulloch, not guilty of a charge contrary to s. 253(a) of the *Criminal Code*, but guilty of a charge contrary to s. 254(5). She was sentenced to pay a fine of \$1000 and prohibited from driving for one year.

[2] The appellant was charged in an information sworn on June 18, 2009 that she:

on or about the 31st day of May, 2009 at, or near Enfield, Nova Scotia, did without reasonable excuse refuse to comply with a demand made to her by Colin Miller, a peace officer, under Section 254(2)(a) of the *Criminal Code* to provide forthwith a sample of her breath as in the opinion of Colin Miller was necessary to enable a proper analysis of her breath to be made by means of an approved screening device contrary to Section 254(5) of the *Criminal Code of Canada*.

And furthermore that Patricia MacCulloch on or about the 31st day of May, 2009, at or near Enfield, Nova Scotia, did while her ability to operate a motor vehicle was impaired by alcohol did operate a 2002 Volkswagen Cabrio, contrary to Section 253(a) of the *Criminal Code of Canada*.

[3] The Crown proceeded summarily on both counts and the appellant pleaded not guilty. Her trial was heard in the Shubenacadie Provincial Court on August 10, 2009.

[4] The Crown called one witness, Cpl. Colin Miller and the appellant testified in her own defence.

[5] Cpl. Miller, then stationed at the Enfield Detachment of the RCMP, testified that around midnight on May 30, 2009, or in the very early morning of May 31, 2009, he saw a vehicle ahead of him which seemed not to come to full stop at a stop sign. The appellant's vehicle, a white Volkswagen, then proceeded towards a bridge over Highway 102 which was under repair at the time. The bridge was blocked on the right or south side and had only one lane open. Bridge traffic was controlled by temporary traffic lights and traffic flow was limited to one direction at a time.

[6] According to Cpl. Miller, as the appellant approached the bridge, the light facing her was red, and she came to a stop but her vehicle was close to the repair barricade, rather than at the point where a stop was apparently supposed to have been made. When the light turned green the appellant proceeded, but nearly hit the left shoulder just before entering the bridge. Cpl. Miller testified that after passing the barricade, the appellant's vehicle stayed in the left lane for another 100 - 150 feet and did not return to the right side of the highway. Cpl. Miller then put his vehicles emergency lights on and pulled the appellant over.

[7] Prior to engaging the appellant, Cpl. Miller called the RCMP Communications office to notify them of what he was doing. While doing so, the appellant started to get out her vehicle, but got back into the car to stop it as it began to roll. After her vehicle was stopped, according to Cpl. Miller, the appellant got out of her vehicle a second time and came back towards the police car, and she and Cpl. Miller spoke to each other at that point. The appellant asked Cpl. Miller why he had stopped her and he told her it was because of the apparent problems that he had seen with her driving. The appellant believed her driving had been fine and said so.

[8] During this discussion Cpl. Miller noted a smell of alcohol from the appellant. He asked the appellant if she had consumed any alcohol and she replied that she had a drink of rum and coke with her dinner, as well as a glass or two of wine. At that point Cpl. Miller read the appellant the standard demand that she provide him forthwith with a sample of breath suitable for analysis with an approved screening device and told her if she did not do so that she would be charged with the offence of refusal. Cpl. Miller asked twice if she understood the demand and on the second inquiry she said she most certainly did.

[9] When asked whether she would provide breath samples, the appellant said she would not, at which point Cpl. Miller arrested her for refusing the demand and for impaired driving. It was at this point that Cpl. Miller informed the appellant of her right to counsel.

[10] The appellant is self represented. She has filed a notice of Summary Conviction Appeal, wherein the grounds of appeal are listed as follows:

a) Abuse of power

- b) Failure to properly caution
- c) Dereliction of duty
- d) Wrongful accusation

[11] In her factum, the appellant says “my appeal is based in part on the Canadian Charter of Rights and Freedoms 1982”. The appellant refers to s-ss. 24(1) and (2) of the *Canadian Charter of Rights and Freedoms*.

[12] The appellant recites the facts, as she sees them, as to the events of May 31, 2009. Some of the comments in her brief could be considered as being complaints as to how she was treated by Cpl. Miller on that night. For example, she complains that Cpl. Miller left her in the police vehicle for approximately 55 minutes while he chatted with two other police officers and, in her view, was “waiving to the Legion clients”. The latter comment refers to the location where she was stopped, which was close to a Royal Canadian Legion, which apparently was closing and several persons were leaving at the time.

[13] The appellant complains that at no time did Cpl. Miller offer her a container for a sample of her breath. She complains that “If indeed I was in a dreadful alcoholic state, later stated in the court, I contend that Cpl. Miller was in dereliction of his duty in not taking me immediately to the Enfield Police Station for care”.

[14] In particular, at the end of her factum, the appellant requests:

I respectfully submit that the police, in demanding I take the Breath Test, were enforcing a procedure that violates my Charter Right to defend myself. I request that this Court rule that the Breath Law contravenes our rights under the Canadian Charter of Rights and Freedoms, as the Parliament of Canada surely had clearly intended. I respectfully request that the Court rule that the Breath Law violates the Charter of Rights and Freedoms by denying the Right to defend oneself, as indeed the Parliament of Canada had surely intended. It also fails to protect against the possible abuse and misuse of the Breath Test.

Issues

[15] From a review of the appellants' notice of appeal and factum, it is not readily apparent what her grounds for appeal are. However, the appellant's issues for this appeal might be summarized as follows:

1. That Cpl. Miller did not provide the appellant with her right to counsel.
2. That Cpl. Miller did not offer the appellant a container with a sample of her breath.
3. That Cpl. Miller did not warn the appellant that she would lose her license if she refused to give a sample of her breath and was convicted.
4. That the breathalyzer provisions of the *Criminal Code* in general should be struck down because they contravene the *Charter* by preventing the right of those charged thereunder to make full answer and defence.

Standard of Review

[16] The following sections of the *Criminal Code* provide authority for an appeal from a summary conviction:

813 Except where otherwise provided by law,

(a) the defendant in proceedings under this part may appeal to the appeal court

(I) from a conviction or order made against him ...

[17] Section 822(1) of the *Criminal Code* provides that:

Where an appeal is taken under Section 813 in respect of any conviction, acquittal, sentence, verdict or order, Sections 683 to 689, with the exception of subsections 683(3) and 686(5), apply, with such modifications as the circumstances require.

[18] Section 686(1) of the *Criminal Code* governs the powers of the Appeal Court on a summary conviction appeal. It provides:

On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

- (a) may allow the appeal where it is of the opinion that
 - (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
 - (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
 - (iii) on any ground there was a miscarriage of justice;
- (b) may dismiss the appeal where
 - (i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,
 - (ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (a).
 - (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a) (ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, or
 - (iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;
- (c) may refuse to allow the appeal where it is of the opinion that the trial court arrived at a wrong conclusion respecting the effect of a special verdict, may order the conclusion to be recorded that appears to the court to be required by the verdict and may pass a sentence that is warranted in law in substitution for the sentence passed by the trial court, or

...

- (2) Where a court of appeal allows an appeal under paragraph (1)(a), it shall quash the conviction and
 - (a) direct a judgment or verdict of acquittal to be entered; or
 - (b) order a new trial.
- (3) where a court of appeal dismisses an appeal under subparagraph (1)(b)(i), it may substitute verdict that in its opinion should have been found, and
 - (a) affirm the sentence passed by the trial court; or
 - (b) impose a sentence that is warranted in law or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.

[19] In *C.E. v. Her Majesty the Queen*, 2009 CarswellNS 400, the Nova Scotia Court of Appeal made the following comments in respect to the standard to be applied by a summary conviction appeal court to a decision of a trial court:

30 In *R. v. Nickerson*, [1999] N.S.J. No. 210, 1999 NSCA 168, Justice Cromwell described the standard to be applied by a Summary Conviction Appeal Court to a decision of a trial court:

[6] The scope of review of the trial court's findings of fact by the Summary Conviction Appeal Court is the same as on appeal against conviction to the Court of Appeal in indictable offences: see sections 822(1) and 686(1)(a)(i) and *R. v. Gillis* (1981), 60 C.C.C. (2d) 169 (N.S.S.C.A.D.) per Jones, J.A. at p. 176. Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in *R. v. Burns*, [1994] 1 S.C.R. 656 at 657, the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was

some evidence to support the trial judge's conclusions nor a new trial on the transcript.

...

31 In *R. v. Clark*, [2005] 1 S.C.R. 6, Justice Fish for the Court stated a similar principle to govern the review by appellate courts of factual findings by trial courts:

[9] ... Appellate courts may not interfere with the findings of fact made and the factual inferences drawn by the trial judge, unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. The imputed error must, moreover, be plainly identified. And it must be shown to have affected the result. "Palpable and overriding error" is a resonant and compendious expression of this well-established norm: see *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *Lensen v. Lensen*, [1987] 2 S.C.R. 672; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33.

...

Credibility - Trial Judge's Resolution

[20] The learned trial judge's findings that the appellant's rights under the *Charter* were not breached are intertwined with general findings of fact and of mixed law and fact. Therefore, the standard is palpable and overriding error. Cpl. Miller and the appellant have different views as to whether or not the appellant's driving was erratic on the night of the offence prior to her being stopped. It is necessary, therefore, to consider the learned trial judge's approach to the credibility of Cpl. Miller and the appellant and his resolution of those issues.

[21] In his decision, the learned trial judge resolved the discrepancies between the evidence of Cpl. Miller and that of the appellant as follows:

In her testimony during the trial, Mrs. MacCulloch said she had refused to comply with the demand because the officer had pulled her over for a false reason. She said she had stopped at the stop sign and that the officer had concocted the whole storey in order to meet a quota. She said the officer had not been following her,

stating that if he had been as bad as he stated it was, he would have been obliged to stop her vehicle.

The officer's testimony was that he had been some distance behind Mrs. MacCulloch's vehicle and that he did take steps to stop the vehicle after making his observations. I do not know whether Mrs. MacCulloch used the word 'arbitrarily', but certainly her evidence and her submissions following the evidence were to the effect that she was so stopped; that is, arbitrarily not as a result of her driving, but because of the alleged quota. There is no evidence apart from the allegation by Mrs. MacCulloch of any such quota.

There is some question in my mind about whether the differences in the testimony of Mrs. MacCulloch and Cpl. Miller about what Cpl. Miller had been doing, or had been observing raise the issues referred to by the Supreme Court of Canada in the case of *W.(D.)*. That is a case, which, generally speaking at least, says that if an accused person testifies, that the Court must begin by examining that person's testimony. If the Court believes the person or finds that the person's testimony raises a reasonable doubt about guilt of the offence, or offences charged, then that is it. There is no need to go any further.

If the Court either does not believe the accused person's version of events or does not find that that testimony raises a reasonable doubt, the Court must still go further and examine the entirety of the evidence to determine whether, on the entirety of it, the Crown has established beyond a reasonable doubt that the accused person is, in fact, guilty of the offence of the offences charged.

As I say, I am not entirely clear about whether *W.(D.)* applies in these circumstances, at least as they relate to the differences that there were in the testimony of Mrs. MacCulloch and Cpl. Miller, because, of course, this is, in particular, in relation to the charge of refusing to comply with a demand because what the Crown is required to prove in relation to such a charge is not that circumstances which have been proved beyond a reasonable doubt existed but, rather, that there were things that caused the officer to have a reasonable suspicion that a person was the operator of a vehicle and had alcohol in her or her system. That is all that is needed with respect to the officer's right, if we can put it that way, to give a demand for a person to provide a sample for purposes of testing by means of an approved screening device.

In order to make that demand, once again to reiterate, the officer must satisfy the Court that he had a reasonable suspicion that a person was the driver and had alcohol in his or, in this case, her system, that and nothing more. Of course, there is some issue about when it is that a police officer may stop a vehicle, and I will deal with that momentarily. But, to go back the question of whether or not *W.(D.)*

applies, as I see it and as I heard it and understood the evidence, Mrs. MacCulloch was saying that, well, the officer must not have seen her. I believe that was really the effect of her evidence, because if he had and if he had seen the things that he alleged, he would have had an obligation to have stopped her somewhat sooner than he did.

It was, by everybody's estimation, the middle of the night. It was undoubtedly dark, apart from whatever limited street lighting there was and whatever limited lighting there was from nearby buildings, but, basically dark. Mrs. MacCulloch was on her way to her home on the South Shore of Nova Scotia, having spent an evening after having eaten dinner with friends, working on the home that she has not far from Enfield. One would not expect a driver in those circumstances to be particularly conscious of other vehicles unless they came in close proximity to them. And, in any event, there is no evidence from Mrs. MacCulloch about when it was that she first took notice of the police car, and I take it from all of the evidence that she first took notice of the police car when the officer activated his emergency equipment. She did respond to that and, clearly, when that equipment was activated, the police car was behind Mrs. MacCulloch's vehicle.

Mrs. MacCulloch has alleged that all of the officer's testimony about the things that he had seen was concocted, that he had not been behind her and all the rest. I see absolutely no basis to reach that conclusion, absolutely none ...

[22] I find no palpable and overriding error in the learned trial judge's determination of the credibility issue between Cpl. Miller and the appellant.

That Cpl. Miller did not provide her with her right to counsel

[23] At pg. 2 of her factum the appellant states:

... Constable Miller had 3 hours in which to state in the presence of his fellow officer, my Rights, to ask me to walk a straight line, follow his finger with my eyes etc., properly caution me etc., but non (sic) of this took place because the situation did not merit it.

[24] At pgs. 21 and 22 of the transcript Cpl. Miller testified:

At pg. 21

Q. Okay. Now other than the demand that you read from that card, did you make any other direction to Ms. MacCulloch in relation to rights or anything like that?

A. Yes, I did.

Q. Okay. What did you do in that regard?

A. I advised her at that point that she was under arrest for refusing to provide a sample, refusing the approved screening device, and I read her ... provided her with her *Charter of Rights* and police caution.

Q. *Charter of Rights* being what?

A. Sorry. Right to counsel.

Q. Right to counsel.

At pg. 22

A. Yes.

Q. And did you read that from a card, as well?

A. Yes, I did.

Q. And just then, for the record, could you .. so you know what your communication was for the entire event?

A. Certainly.

You have the right to retain and instruct a lawyer without delay. You also have the right to free and immediate legal advice from duty counsel by making free telephone calls to 1-866-638-4889 or 902-420-8825 during business hours and 1-800-300-7772 or 902-420-6581 during non-business hours.

Do you understand? Do you wish to call a lawyer?

You also have the right to apply for legal assistance through Provincial Legal Aid Program. Do you understand?

Q. Okay. And was the level of understanding communicated to you as ...

A Yes, it was. And Ms. MacCulloch advised that she would act as her own lawyer.

[25] The appellant testified at pg. 41 of the transcript:

... Never at any time did Cst. Miller in front of another policeman warn me or evidence to anyone that he'd read me my rights properly, because I absolutely state to this Court that he did not. When he sat in the front of the police car, he was speaking with his face turned away from me. And I was so stunned, I did not read ... because I didn't have my reading glasses with me, I did not read the small print on this. I was just, you know, devastated to be in the situation I was in.

[26] The learned trial judge determined at pg. 83 of the transcript that Mrs. MacCulloch was informed of her right to counsel:

As I have noted, Mrs. MacCulloch was not advised of her right to counsel until after she had refused to comply with the demand and after the officer told her she was being charged with that refusal, as well as with the offence of operating a motor vehicle while impaired by alcohol.

[27] I am satisfied that the judge's conclusions on this issue are reasonable and supported by the evidence.

[28] Is there an issue because the appellant was not read her right to counsel until after she was given the demand for a roadside screening device?

[29] The learned trial judge commented on this issue in his decision and concluded as follows:

pg. 83

As I said, my reason for reserving decision was to consider possible issues that might arise on the evidence. I have referred to some of them already, but there is also at least one other *Charter* - related issue which, it seems to me, I do have to address, although I think it has been already addressed by the Supreme Court of Canada. But in these circumstances, it is highly appropriate for me to refer to it.

...

The Supreme Court of Canada has decided that because of the immediacy needed for the approved screening device process, that that immediacy is inconsistent

with the right to counsel as well as the rights not to be arbitrarily detained or searched. And because of the need to limit and investigate possible instances of impaired driving, that that limitation on a person's right to be informed of those various *Charter* rights is justifiably limited. That was in a case called *Urbanski*.

In most circumstances, a police officer who is in the course of investigating an actual person for an apparent offence has to advise that person of their right to counsel and certain other things before beginning to question them about the precise events involved. Here, we have the officer asking Mrs. MacCulloch whether or not she had anything to drink. She said she did. And, as I say, by virtue of the decision of the Supreme Court of Canada, I am satisfied that there was not, in fact, a breach of Mrs. MacCulloch's *Charter* rights such as to render the answers that she gave inadmissible.

That is because, of course, those answers are for a limited purpose. Those answers are only related to the issue of providing the roadside test or the approved screening device test. The answers cannot be used otherwise against the person. So if a person says, I had something to drink, in response to that question, according to the Supreme Court of Canada, the Court cannot turn around and then rely upon that very statement in determining, or attempting to determine, whether the person is guilty of impaired driving. But it can be relied upon by the officer for the purpose of determining whether or not to give the roadside demand.

[30] In *R. v. Thomson*, [1988] 1 S.C.R. 640, 1988 CarswellOnt 53, an accused was charged with having failed or refused to comply with a demand made to him by a peace officer to provide forthwith a sample of his breath suitable for analysis by means of an approved roadside screening device contrary to what was then s. 234.1(2) of the *Criminal Code*. The trial judge dismissed the charge on the basis that the accused had been detained and denied his right to retain or instruct counsel without delay guaranteed by s. 10(b) of the *Charter*. A County Court judge set aside the acquittal on the basis that the accused had not been detained. The Ontario Court of Appeal confirmed the decision of the County Court. The accused appealed. The Supreme Court of Canada dismissed the appeal, holding that a person who receives a demand is detained within the meaning of s. 10(b) of the *Charter*. The court held that the roadside test result would not be admissible at trial, the purpose of the legislation was preventative, and if there was an infringement of s. 7 of the *Charter* it was justified under s. 1 of the *Charter*.

[31] I am satisfied that the learned trial judge's conclusion as to credibility is supported by the evidence and I am not persuaded that there is any error in respect to his decision regarding the timing of the right to counsel.

That Cpl. Miller did not offer the appellant a container with a sample of her breath

[32] The appellant argues that she was not provided with a sample of her breath and, therefore, deprived her of her right to make a full defence and the right to be innocent until proven guilty.

[33] She says when the breathalyzer laws were passed, that Parliament failed to include a provision requiring that an accused be provided with a sample of their breath should they elect to give a sample of their breath to be tested. In particular, she says at pg, 3 of her factum:

... The effect of the change is to deprive an accused of the Right to be provided with a sample of their breath for his or her use and thuly (sic) deprive him or her of the Right to make a full defence, the Right to Be Innocent Until Proven Guilty in a Court of law. Immediate guilt without trial violates the Canadian Charter of Rights and Freedoms.

[34] The appellant refused to give a breath sample and, therefore, the appellant's argument is moot but, I note in the legislation, there is no requirement for a police officer to provide a sample in any event.

That Cpl. Miller did not warn the appellant she would lose her license if she refused to give a sample of her breath and was convicted

[35] At pg. 39 of the transcript the appellant testified:

I state emphatically at no time did this person make it clear to me that if I didn't take the breathalyzer, I would lose my license. I claim to not be a stupid person. Of course, I would have taken it, if that was the situation...

[36] The learned judge said in his decision at pg. 81:

The second reason Mrs. MacCulloch advanced for refusing to comply with the demand was that the officer did not tell her that if she refused, she would be

prohibited from driving or lose her license. Now there is no doubt about those things being extremely significant. They would be significant to anybody. But I accept they are even more significant to someone who lives in rural areas, nowhere near bus services and really nowhere near other services, for that matter. However, the law does not require that a police officer inform a driver of what the consequences of that sort are, of failure to comply. The officer was required to inform Mrs. MacCulloch; in fact, it is part of the demand, the standard demand, that failure to comply with the demand will result in a charge of refusal and the officer did inform Mrs. MacCulloch of that. He met the obligation on him at that point.

[37] I am not persuaded that the learned trial judge has erred in his conclusion.

That the breathalyzer provisions of the Criminal Code in general should be struck down because they contravene the Charter by preventing the right of those charged thereunder to make full answer and defence

[38] The appellant did not raise this *Charter* issue at trial.

[39] The appellant, in her submissions to the learned trial judge, states her position as follows:

Ms. MacCulloch: Your Honour, if I was in the condition stated, how is it that the two officers involved, the other two, did not come here to corroborate what Cst. Miller states? The fact is I was stopped for something I didn't do and because I dared to challenge Cst. Miller, he threw the book at me, and that's the top and the bottom of it.

[40] The appellant, however, articulated her *Charter* concerns, on appeal, in her factum as:

... In effect, by obliging me to take the Breath Test, the police officer was asking me to comply with a Law that I (sic) in violation of the Canadian Charter of Rights and Freedoms.

[41] And further in her factum:

I respectfully submit that the police, in demanding I take the Breath Test, were enforcing a procedure that violates my Charter Right to defend myself. I request that this Court rule that the Breath Law contravenes our Rights under the Canadian Charter of Rights and Freedoms, as the Parliament of Canada surely had clearly

intended. I respectfully request that the Court rule that the Breath Law violates the Charter of Rights and Freedoms by denying the Right to defend oneself, as indeed the parliament of Canada had surely intended. It also fails to protect against the possible abuse and miss-use of the Breath Test.

...

in the light of the Canadian Charter of Rights and Freedoms (1982) I am persuaded that the (sic) CONTINUED absence of the Right to defend myself, contravenes the Charter provision guaranteeing (sic) me the long standing Common Law Right of self-defence. I submit that the Breath (sic) Law AS IT IS IN FORCE TODAY, ...

[42] In *R. v. Thompson*, 2001 CarswellOnt 340 (Ont. C.A.), the accused was convicted of refusal to comply with a roadside breath demand. The Ontario Court of Appeal dismissed the accused's appeal finding that the criminalization of the refusal to comply with the demand under s. 254(2) of the *Criminal Code* does not infringe s. 7 of the *Charter* and, if there was an infringement, it was justified under s. 1 of the *Charter*. The court held that the right against self-incrimination was not infringed as a roadside test would be not admissible at trial.

[43] In *R. v. Milne*, 1996 CarswellOnt 1627 (Ont C.A.), (application for leave to appeal dismissed, [1996] 3 S.C.R. XIII (Note)), the head note explains the basis on which the court arrived at its conclusion that a driver can be asked to perform co-ordination tests in order to determine if there are reasonable grounds to demand a breath sample from a driver:

Generally, self incriminating evidence obtained in breach of an accused's right to counsel contrary to ss. 7 and 10(b) of the *Charter* will be excluded. Section 48(1) of the *Highway Traffic Act* authorizes police to stop a driver in order to conduct roadside co-ordination tests, in order to determine if there are reasonable grounds to demand a breath sample from the driver, under s. 254 of the *Criminal Code*. When police stop a driver, pursuant to s. 48(1) of the Act, the driver is detained within the meaning of s. 10(b) of the *Charter*. Therefore, when police conduct the tests without cautioning the driver of the right to counsel, they do so in breach of the driver's s. 10(b) right. However, if cautioned, a driver could be advised by counsel not to perform the tests, and the officer would be required to let him go. That approach would undermine the legitimate purpose of s. 48(1), to remove impaired drivers from the road. Therefore, as long as the tests are used for a limited purpose of determining if there are reasonable grounds to demand a breath sample, the tests are a reasonable limit on driver's s. 10(b) right, and saved by s. 1

of the *Charter*. However, the tests were not meant to provide police with the means to gather evidence that could later be used to convict a driver of impaired driving. Tests used in such a manner would be for too broad a purpose, impair the right to counsel more than necessary to achieve the purpose, and have too severe a deleterious effect to be saved by s. 1 of the *Charter*. Therefore, admission of the evidence of M's test results rendered the trial unfair and the evidence should be excluded. The appeal should be allowed and M should be acquitted.

[44] The learned trial judge referred to this issue as follows:

I think it is significant that the approved screening device process does not, in and of itself, put a driver in any jeopardy. So stopping a driver for that purpose could not fill any quota and I want to refer to the comments of Justice Fuerst in a recent Ontario decision, *R. v. P.D.*, initials "P.D.", in which Justice Fuerst relied upon an Ontario Court of Appeal judgement (sic) in the case of *R. v. Milne* and said the following. And this is at paragraph 22.

The Court (that is the Court of Appeal) accepted that the roadside screening device is not meant to provide the police with a means of gathering evidence that can later be used to incriminate and convict a motorist of impaired driving at trial. Rather, it is an investigative tool intended to provide the police with a means to remove impaired drivers from the road immediately. The Court pointed out that the worst that can happen is that if the subject fails the roadside screening device test, he or she will be required to submit to a more refined test, the breathalyzer. The person upon whom a roadside demand is made, run no risk of being found guilty of any offence by submitting to the test. Evidence provided by the roadside screening test cannot be introduced against the driver at trial, nor does the motorist's submission to the test, of itself, render him or her liable to a criminal charge.

[45] I am not satisfied that the learned trial judge has erred in reaching his conclusion that the breathalyzer provisions of the *Criminal Code* do not infringe the *Charter of Rights* by preventing the right of those charged thereunder to make full answer and defence.

[46] Not having found any reversible error in the trial judge's reasons, I dismiss the appeal for all of the above reasons.

Pickup, J.