Citation: *R. v. Toor,* 2024 YKTC 42 Date: 20241210
Docket: 23-05607
24-00006
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Cairns

REX

v.

RAJWINDER SINGH TOOR

Appearances:

K. Koot	Counsel for the Crown
Kelly McGill	Counsel for the Territorial Crown
David Tarnow	Counsel for the Defence

REASONS FOR JUDGMENT

[1] Rajwinder Singh Toor is charged with failing to comply with a demand to provide samples of his breath into an approved screening device ("ASD") contrary to s. 320.15(1) of the *Criminal Code*. He is also charged with an offence contrary to s. 176 of the *Motor Vehicles Act,* RSY 2002, c 153 ("*MVA*") for failing to stop at a red traffic light.

[2] It is not disputed that Mr. Toor failed or refused to provide a breath sample or that he failed to stop at a red traffic light. As a result, the issues before me are:

1. Has Mr. Toor established, on a balance of probabilities, that he had a reasonable excuse for failing to comply with the roadside demand?

2. Has Mr. Toor established, on a balance of probabilities, that he acted with all reasonable care in attempting to stop at the red traffic light?

[3] Cst. Derek Kirstein testified for the prosecution. Both Mr. Toor and his friend, Jenifer Diana, testified for the defence. A video in-car recording ("VICS") of the interaction between Cst. Kirstein, Cst. Isabel and Mr. Toor was filed as an exhibit.

Evidence of Cst. Kirstein

[4] Cst. Kirstein has been a member of the RCMP for 16 and one-half years and based in Whitehorse since November 2020. He has been the lead investigator in approximately 60 impaired investigations, the breath technician in about 100 investigations, and involved in around one dozen investigations into refusals to provide a breath sample.

[5] On December 23, 2023, at approximately 2:40 a.m., Cst. Kirstein was in uniform and travelling in an unmarked police vehicle along Fourth Avenue in Whitehorse, Yukon. Cst. Isabel accompanied him in the police vehicle. They were enroute to respond to a call in the Porter Creek neighbourhood of Whitehorse. As Cst. Kirstein proceeded along Fourth Avenue towards Black Street, he observed a white car failing to stop at a red light and then almost collide with the police vehicle he was driving. In terms of proximity, Cst. Kirstein testified that, if he had been towing a trailer, the white car would likely have clipped the trailer. Cst. Kirstein immediately executed a U-turn,

activated his emergency lights, and pulled the white car over on Black Street. Upon turning on his emergency lights, the VICS was activated. Cst. Kirstein was also wearing his portable microphone, the result being that there is an audio recording of the police interaction with Mr. Toor outside of the police vehicle.

[6] Csts. Kirstein and Isabel approached the white car. The sole occupant was identified as Mr. Toor. Cst. Kirstein spoke to Mr. Toor, asking if he knew what to do at a red light and asking for his driver's license, registration, and insurance three times. He noted Mr. Toor had a blank stare. Mr. Toor could not locate the requested documents. Cst. Kirstein testified that he smelled alcohol from the vehicle. He then asked Mr. Toor if he had consumed alcohol. Mr. Toor denied drinking alcohol and said he had only coffee. At that point, Cst. Kirstein was satisfied that he had reasonable grounds to suspect that Mr. Toor had consumed alcohol, and he asked Cst. Isabel to bring the ASD from the police vehicle. Cst. Kirstein remained by the vehicle to observe Mr. Toor. Cst. Kirstein described Mr. Toor as having a blank stare, slow movements, and a smell of alcohol. He read the ASD demand to Mr. Toor at 2:42 a.m. to which Mr. Toor responded that he understood.

[7] Cst. Kirstein said that when he presented the mouthpiece of the ASD to Mr. Toor and explained how to proceed, Mr. Toor looked away and scrolled on his phone. Cst. Kirstein stated that he tried multiple times to have Mr. Toor provide a breath sample and that Mr. Toor made no effort to do so. When the consequences for not providing a sample were explained, Mr. Toor still made no effort to provide a sample. At that point, Cst. Kirstein advised Mr. Toor that he was under arrest for refusing to comply with the demand. Mr. Toor was told to step out of the vehicle. When he did not immediately do

so, Cst. Kirstein opened the car door, unbuckled the seatbelt, and attempted to pull Mr. Toor out by the arm. Mr. Toor resisted being pulled out and said he would get out of the vehicle. Upon doing so, Mr. Toor was handcuffed and then walked by the officers to the police vehicle. His wallet was located at that time in the pocket of his pants. Once in the police vehicle, Cst. Kirstein blew into the ASD to demonstrate that the device was operational.

[8] With respect to the charge of failing to stop at a red traffic light, Cst. Kirstein estimated that Mr. Toor was travelling at approximately 30 kilometres per hour towards the intersection. He said that he was not sure if Mr. Toor braked but testified that Mr. Toor did not stop at the intersection. Cst. Kirstein later stated that he did not believe that Mr. Toor made any attempt to stop, and that the vehicle was always in a forward motion. Cst. Kirstein also stated that the driving conditions were good with packed snow, and he had no issue braking.

[9] During cross-examination, Cst. Kirstein agreed that he did not return to check the road conditions at the Black Street intersection. Upon viewing the video recording, he also agreed that it appeared that Mr. Toor’s brake lights lit up when he approached the intersection but did not agree that Mr. Toor’s vehicle veered to the right at the intersection, maintaining that it was hard to say for sure. Cst. Kirstein denied being angry after almost being t-boned, saying instead that he was annoyed and had an adrenaline rush. Cst. Kirstein agreed that he did not have to handcuff Mr. Toor but said he did so because he did not know who Mr. Toor was and that 95 percent of the time he put people in handcuffs upon arrest.

Evidence of Mr. Toor

[10] Mr. Toor is 27 years old and moved from India to Canada in 2018. In 2022, he moved to Whitehorse for a position with the Canadian Imperial Bank of Commerce ("CIBC") as a loan officer. Currently, he is employed as a Finance Advisor with the First Nations School Board ("FNSB"). He completed an MBA in Vancouver. He is unmarried but has a girlfriend. Mr. Toor drinks alcohol approximately once a month. He has no criminal record.

[11] The annual party for the FNSB took place on December 23, 2023, and Mr. Toor was involved in setting up for the event. The party involved games and food, but no alcohol was served. After the party, at about 6:15 p.m., Mr. Toor went to Jenifer Diana's house in Riverdale and watched movies with her. There, they had food and coffee but no alcohol. Around 2:00 a.m., he was getting tired and decided to head home.
Mr. Toor was initially intending to drive home along the Alaska Highway but changed his mind as he was concerned about the icy road conditions, choosing to drive along Fourth Avenue instead. Along the way, he left Fourth Avenue and went to a park by the Black Street stairs to look for northern lights as was his habit. Not seeing any lights, he decided to continue home. Mr. Toor proceeded along Black Street towards Fourth Avenue, intending to take Second Avenue and then Mountain View Drive. He testified that it was icy and really cold that night. As he approached the intersection of Fourth Avenue and Black Street, he hit the brakes to stop for the red traffic light, but the car did not stop. He said the wheels locked when he hit the brakes, and he had to turn the car to the right to avoid colliding with Cst. Kirstein's vehicle.

[12] When Mr. Toor saw the lights of the police vehicle behind him after he had crossed the intersection, he immediately pulled over. Two officers approached and asked him to provide his driver's licence. He said his wallet was not in its normal place so he began searching his phone to see if he could find his driver's licence. Mr. Toor described the officers as really angry and aggressive, attributing their mood to the fact he had almost hit their vehicle.

[13] When Cst. Kirstein said he smelled alcohol, Mr. Toor told him he did not drink alcohol. Mr. Toor testified that he said sorry multiple times, but the officers did not listen. When asked during his direct examination why he did not blow into the ASD once the demand was made, he said he thought they would manipulate the device, that he was not being given a fair shot, and that they would frame him. Mr. Toor said that he had never had any dealings with the police in Canada. However, on one occasion, in India, he and his friends were followed by police for five to 10 minutes. The police threatened to beat them up and demanded money to let them go. He said they did give the police money on that occasion.

[14] Mr. Toor explained that this was only the second time he had an encounter with police. Memories of the traumatizing incident with police in India came back. He also said he was in a state of shock because he had almost hit the police vehicle. He thought he would be put in jail and beaten up. Mr. Toor said the handcuffs were put on very aggressively and he asked for them to be loosened as they were tight. He said the handcuffs were painful, that he had marks the next day, and pain for two to three days afterwards.

[15] When asked if he would have blown into the ASD if given another chance to do so in the back of the police car, Mr. Toor said he would not have because the officers had already charged him with a criminal offence.

[16] During cross-examination, Mr. Toor agreed that an ASD demand was made to him, that it was explained to him that he would be charged if he refused, and that he understood. He confirmed that he was a licensed driver, that nobody had been behind or in front of him when he was driving towards the intersection, and that the light at the intersection was solid red when he went through it. He maintained that he put on the brakes when he approached the intersection and that, while he was unable to stop, he slowed down.

Evidence of Jenifer Diana

[17] Ms. Diana is 39 years old, married but separated. She is a Canadian citizen and has no criminal record. She is employed with CIBC and is friends with Mr. Toor, having worked with him when he was employed by CIBC. On December 23, 2023, she invited some friends over after work but only Mr. Toor came. They watched movies together, ate snacks and drank coffee, water, and soft drinks but no alcohol. He left her home around 2:00 a.m. She said Mr. Toor was not impaired and had consumed no alcohol. She further said she would not have let him drive if he was impaired.

[18] Ms. Diana was not cross-examined.

Analysis

Section 176 of the MVA

[19] I start with the charge contrary to s. 176 of the *MVA* for failing to stop at the red traffic light at the intersection of Black Street and Fourth Avenue. The relevant part of s. 176 reads:

> 176(1) When a red light alone is shown at an intersection by a traffic control signal, the driver of a vehicle approaching the intersection and facing the red light
>
> (a) shall stop immediately before entering the marked crosswalk on the near side of the intersection or, if there is no such marked crosswalk, then immediately before entering the intersection; and
>
> (b) shall not proceed until a traffic control signal instructs them that they are permitted to do so…

[20] Section 176 is a strict liability offence. The territorial Crown needs only to prove the commission of the act beyond a reasonable doubt. Here, it is not disputed that Mr. Toor failed to stop at the red traffic light. Cst. Kirstein testified that the traffic light at the intersection was red when Mr. Toor proceeded through it and Mr. Toor did not challenge that evidence.

[21]

Section 268 of the *MVA* sets out the statutory test that must be established to defend against a charge under the *MVA*:

> 268 If a person is charged with an offence under this Act, if the judge trying the case is of the opinion that the offence
>
> (a) was committed wholly by accident or misadventure and without negligence; and

(b) could not by the exercise of reasonable care or precaution have been avoided, the judge may dismiss the charge.

[22] To make out a defence to the charge, Mr. Toor must establish on a balance of probabilities that he acted with reasonable care: *R. v. Sault St. Marie* (City), [1978] 2 S.C.R. 1299. Mr. Toor's evidence is that he braked as he approached the red traffic light at the intersection, but his wheels locked up and his vehicle did not stop. He was therefore required to veer to the right to avoid colliding with what turned out to be Cst. Kirstein's vehicle. Mr. Toor testified that it was icy. Mr. Toor was unshaken during cross-examination, maintaining that he had tried to stop. On this point, I find Mr. Toor a credible witness. The evidence that he braked as he approached the intersection appears to be corroborated by the VICS.

[23] Cst. Kirstein provided evidence that he is trained in estimating the rate of speed a vehicle is travelling. He estimated Mr. Toor's speed to be around 30 kilometres per hour. This is well under the speed limit, which Cst. Kirstein testified was either 40 or 50 kilometres per hour. Cst. Kirstein agreed he did not return to check the road conditions at the intersection. While he initially testified that he did not think Mr. Toor attempted to brake when approaching the intersection, he agreed on cross-examination that Mr. Toor's brake lights appeared to light up when viewed on the VICS.

[24] Having considered the evidence of Mr. Toor and Cst. Kirstein, and having viewed the VICS, I am satisfied that Mr. Toor attempted to brake in a timely manner as he approached the intersection. Cst. Kirstein's evidence of Mr. Toor's speed is also important; namely, as is appropriate in icy conditions, Mr. Toor appears to have been travelling well under the speed limit. I accept Mr. Toor's unchallenged evidence that the

road conditions were icy at the Black Street intersection. In the end, I find that Mr. Toor has proven, on a balance of probabilities, that he failed to stop at the red traffic light through misadventure and not negligence and, further, that he acted with reasonable care.

[25] The Crown also argued that, to comply with s. 176(1)(b) of the *MVA*, Mr. Toor should not have proceeded through the intersection after being unable to stop at the red traffic light. On this point, I accept the submission of defence counsel that it would not have made sense for Mr. Toor to remain in the intersection waiting for the traffic light to change from red to green. I dismiss the s. 176 charge against him.

Section 320.15(1) of the *Criminal Code*

[26] Turning now to the offence contrary to s. 320.15(1), the Crown must establish three elements to prove that Mr. Toor committed the offence: *R. v. Arudselvam*, 2022 ONCJ 445, at para. 90. Those elements are:

i. A lawful demand was made;

ii. The accused knew the demand was made; and

iii. The accused failed or refused to provide the required breath sample.

[27] Once these elements are established beyond a reasonable doubt, the onus turns to Mr. Toor. If Mr. Toor can establish on a balance of probabilities that he had a reasonable excuse for not providing the sample, he will be acquitted.

[28] The lawfulness of Cst. Kirstein's demand was not strenuously challenged by the defence. Cst. Kirstein's evidence was that he smelled alcohol when he was speaking to Mr. Toor by the car and, coupled with Mr. Toor's blank stare and slow movements, he had reasonable grounds to suspect that Mr. Toor had alcohol in his body. In other words, it appears that he thought his authority to make the demand arose under s. 320.27(1). That subsection requires that he have reasonable grounds to suspect that Mr. Toor had alcohol in his body. Given the defence evidence that Mr. Toor had not consumed alcohol, the objective reasonableness of his evidence on this point is questionable. However, I need not decide that point as I am satisfied that Cst. Kirstein had authority to make the demand under s. 320.27(2). The three-part test under that subsection requires Cst. Kirsten to have the ASD in his possession, which he did. It requires the subject of the request to be operating a motor vehicle, which Mr. Toor was. Finally, it requires Cst. Kirstein to be acting in the lawful exercise of his powers under either a federal or territorial statute. I am satisfied that, in pulling over Mr. Toor after observing his failure to stop at a red traffic light, Cst. Kirstein was lawfully exercising his authority under the *MVA*.

[29] As explained in *R. v. Devore*, [2022] O.J. 5833, at para. 39:

> ...With respect to a demand pursuant to section 320.27(2) there is no requirement that the officer have a subjective belief, suspicion or grounds. The grounds for a demand pursuant to section 320.27(2) only require compliance with the statutory three conditions before an officer can make a demand which is that the officer must be acting in the lawful exercise of his powers at the time of the demand, the subject must be operating a motor vehicle, and the officer must have an approved screening device in his possession at the time of the demand. <u>In my view it is not necessarily what grounds, beliefs or suspicions the officer had at the time of the demand, or what section of the Code the officer believed he was making the demand pursuant to, but rather whether the officer was acting lawfully</u>

> in making the demand and entitled to make the demand given the statutory requirements. [emphasis added]

[30] A police officer's lack of knowledge or failure to cite the particular provision of the *Criminal Code* relied upon is not fatal, provided there are otherwise lawful grounds for the officer's actions (*R. v. Makhmudov*, 2007 ABCA 248, at para. 18; *R. v. R.M.J.T.*, 2014 MBCA 36, at paras. 64 to 66). In the circumstances, I am satisfied that Cst. Kirstein's demand was lawful under s. 320.27(2), even though his evidence was that he had reasonable grounds to suspect that Mr. Toor had alcohol in his body, as would be required of a demand being made under s. 320.27(1).

[31] With respect to the remaining elements of the offence, Mr. Toor's evidence was that he understood Cst. Kirstein made an ASD demand of him, and he confirmed that he did not comply with that demand.

[32] Given the above, I find that the Crown has established the elements of the s. 320.15(1) offence beyond a reasonable doubt. Mr. Toor, however, argues that he had a reasonable excuse for failing to comply.

[33] Mr. Toor's evidence was that he believed that the officers would manipulate the results of the ASD and that he would not be treated fairly. He described the officers as being very angry and aggressive towards him, including by not believing him when he denied consuming alcohol, by not listening to his apologies, and by placing handcuffs tightly on him. Mr. Toor stated that the officers were really angry because he had almost hit them.

[34] The VICS video and audio recording was played multiple times during the trial. Having closely reviewed it, I find that the VICS recording does not support Mr. Toor's evidence that the officers were acting angrily or aggressively towards him. While Cst. Isabel did not testify, he looks and sounds calm on the VICS recording. He spoke to Mr. Toor evenly and tried to assist him by explaining what was happening. Cst. Kirstein was somewhat abrupt but did not appear angry or aggressive. While I need not decide the issue, Cst. Kirstein's attempt to pull Mr. Toor out of the vehicle could be characterized as unnecessary and somewhat harsh; however, even if that were the case, Mr. Toor had already refused to comply with the ASD demand by that time. A similar analysis applies to Mr. Toor's testimony that the handcuffs put on him were tight and caused him pain. In the circumstances, those actions do not provide a reasonable excuse for refusing to comply with the demand as the conduct complained of occurred after Mr. Toor's refusal to comply.

[35] Mr. Toor's subjective belief that he was not being treated fairly appears also to flow, in part, from Cst. Kirstein saying that he smelled alcohol when Mr. Toor denied consuming any. Even accepting the evidence of Mr. Toor and Ms. Diana that he had not consumed alcohol, I do not find that Cst. Kirstein's belief that he had smelled alcohol provides Mr. Toor with a reasonable excuse to refuse to provide a breath sample. In fact, I note that Cst. Kirstein can be heard on the VICS recording telling Mr. Toor that, if he had not consumed alcohol, the ASD would confirm that.

[36] Defence counsel filed three cases that stand for the principle that police conduct towards an accused can, at times, provide a reasonable excuse for failing or refusing to comply with a roadside or breathalyzer demand. I draw from these cases below.

[37] The police conduct that led to a finding that the accused had a reasonable excuse for failing to comply with a breath sample in *R. v. Bell*, 2009 BCPC 193, at para. 28, was:

> …[Cst.] Smith grabbed Bell's hair and pulled his head forcefully down onto the counter while Bell's hands were handcuffed behind his back, causing a cut to the bridge of Bell's nose and Bell to fall to the floor. Smith then pushed his knee into Bell's back. After lifting Bell to his feet, Smith pushed Bell towards the bench. At the bench, Smith grabbed Bell's hair and pulled his head back. At the bench, Smith brought his knee with force into the back of Bell's leg in order to force Bell to kneel on the bench. When Bell then fell off the bench onto the floor, Smith applied the pain stimulus to Bell's jaw in order to determine whether Bell was faking unconsciousness. While Bell lay passive on the floor, Smith dragged him into the cell by forcing Bell's left arm up to his shoulder blades and by pulling on Bell's hair. Bell suffered bruising to his arm and back, as well as a cut to the bridge of his nose on account of how he was manhandled by Smith.

[38] In *R. v. Pye* (1993), 46 M.V.R. (2d) 181 (Alta Q.B), the police officer assaulted the accused, throwing his head against the drywall causing a dent in the wall. The Alberta Court of Queen's Bench, in reviewing the trial judge's decision, found that the trial judge's conviction of the accused failed to consider whether the assault of the accused formed objective grounds for refusing. The case was remitted for a new trial.

[39] *R. v. Dawson* (1996), 140 Nfld. & P.E.I. R. 176 (Nfld. S.C.C.A.), at para. 11, sets out examples of cases where police conduct led to a reasonable excuse:

> ...[W]here a technician with dirty hands refused to wash his hands prior to administering the test (R. v. Prout (1971), 5 C.C.C.(2d) 272); where the accused had been assaulted by police officers and was afraid of a repetition of the assault (R. v. Burkitt, [1972] 6 W.W.R. 251; and where the accused had been roughly handled by one police officer and later required to strip naked in front of other officers (R. v. Cristoff (1978), 41 C.C.C.(2d) 406. It has also been held that a reasonable apprehension of a beating if a test disappoints police expectations could in law constitute a reasonable excuse (R. v. Gorrill (1980),7 M.V.R. 141; as could rough handling by the

> police (R. v. Pye (1993), 46 M.V.R.(2d) 181; R v. Wall (1982), 17 M.V.R. 87. ...

And, at para. 12 of *Dawson*:

> It is clear that a reasonably held belief of a threat of unfairness or illegality would support a reasonable excuse.

[40] Based on the cases filed by Mr. Toor's counsel, I acknowledge that police conduct may support a reasonable excuse. In these cases, the concerning police conduct occurred in advance of the accused's refusal to comply. Further, the nature of the police conduct significantly exceeds anything experienced by Mr. Toor. In short, I cannot equate Mr. Toor's experience with Csts. Kirstein and Isabel with the type of the police conduct in the cases filed by the defence. While Mr. Toor has testified to his subjective belief that the officers would manipulate the ASD result and not treat him fairly, the objective evidence does not support the reasonableness of that belief based on the recorded conduct of Csts. Kirstein and Isabel. The VICS video and audio-recording simply do not depict police conduct that objectively supports a reasonable excuse.

[41] Mr. Toor's previous experience with police in India as recounted by him also does not provide objective grounds for his belief that Csts. Kirstein and Isabel would treat him unfairly. There is no nexus between that encounter and the events of December 23, 2023.

[42] Finally, I note that *Pye*, at para. 12, cites *R v. Miller*, (1972) 10 C.C.C. (2d) 467 for the point that: "the excuse … must be reasonable to others than himself." While I accept Mr. Toor's evidence that he had a subjective fear of his treatment by the officers,

the evidence does not support an objective basis for that fear. I find that there is no evidence in this case that would cause a reasonable person in Mr. Toor's situation to believe that the police would have treated him unfairly.

[43] As a result, I find that Mr. Toor did not have a reasonable excuse for failing to comply with the ASD demand. I find him guilty of the offence contrary to s. 320.15(1) of the *Criminal Code*.

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CAIRNS T.C.J.