

Ontario Court of Justice

Her Majesty The Queen

Against

Luis Esquivel-Moran

Reasons for Judgment

Before the Honourable Justice M Speyer  
At Hamilton, Ontario, on June 27, 2013

Appearances:

V. Reid  
M. Rombis

Counsel for the Crown  
Counsel for the Accused

## Reasons for Judgment

THE COURT: Mr. Rombis, you're here on that matter, the Esquival case?

MR ROMBIS: I am, yes. Good morning Your Honour.

THE COURT: Good morning. Is your client here?

MR ROMBIS: Yes, he is.

THE COURT: Oh, there he is.

MR ROMBIS: Come forward.

THE COURT: Come forward, sir.

THE COURT: Thank you. All right. Mr. Esquival is charged with failing or refusing to comply with a demand made by a peace officer under section 254(2) of the Criminal Code to provide a sample of his breath into a approved screening device.

Just before three in the morning of April 15, 2012, Constable MacCarron of the Hamilton Police Service stopped the accused as he drove his car the wrong way on Duck and Bay streets. After forming the requisite suspicion that Mr. Esquival had alcohol in his body, she made an approved screening device demand pursuant to section 245(2) of the Criminal Code. She testified that the device was in proper working order, that she demonstrated to Mr. Esquival how to provide a proper sample and gave him three opportunities to do so. She testified that on each occasion he would blow for a short time and stop. On each occasion, the machine failed to register a reading and an error message was displayed. She testified that she changed the mouthpiece with a new one after each attempt. She warned Ms.

Esquival that he was not providing suitable samples but notwithstanding her entreaties to keep blowing, he would stop after a short time and the same error message would display. After the third failed attempt, she arrested him for the charge before the court.

Mr. Esquival testified that he did as he was instructed and blew into the device as best he could. He testified that the officer did not demonstrate how to use the machine, but only explained verbally how to use it. He testified that she told him to blow into the mouthpiece until the light came on, and he did this. Mr. Esquival denied that the officer changed the mouthpiece after each attempt.

Before turning to the evidence in more detail, it is helpful to review the law with respect to this offence. The Saskatchewan Court of Appeal in *R v. Lewko* (2002), 7 CR (6<sup>th</sup>) 71, 169 CCC (3<sup>rd</sup>) 359, outlined the four elements necessary to make out the offence under section 254(2) of the Code: 1. There must be a proper demand; 2. There must be a failure or refusal to produce the required sample; 3. There must be an intention to produce the failure or refusal; and 4. Once raised by the evidence, there must be an absence of reasonable excuse.

The first two elements set out the *actus reus* and are not in issue in this trial. The third constitutes the *mens rea* or mental intention to fail to refuse to produce a sample of his breath. On the evidence before me Mr. Esquival did not out and out refuse to provide a sample. The evidence establishes that he attempted but failed to produce an adequate sample into the approved screening device to permit an analysis of his breath.

As was help by Justice Howden of the Ontario Superior Court of Justice, in *R v Gutierrez* [2001] O.J. No. 3659, section 254(1) of the Code permits the admission into evidence the officer's opinion of the suitability of the sample provided by the accused pursuant to the demand. The weight to be attached to this opinion is for the trier of fact and will depend on the circumstances of each case. In the case before

me, Constable MacCarron was clearly of the opinion that the inability of the machine to register a reading was due entirely to the accused's failure to provide a suitable sample of his breath and that his failure to do so was intentional.

On the other hand the accused testified that he did his best to provide a suitable sample and he denied deliberately trying to thwart the proper functioning of the machine. I remind myself that in assessing credibility, I am bound by the principles in *R v W (D)* [1991] 1 SCR 742. The Crown has the onus of establishing the mens rea of the offence to the standard set out in *R v Lifchus* [1997] 3 SCR 320. I am also mindful that direct evidence from an officer that an accused appeared not to be blowing properly must be carefully evaluated as it is inherently unreliable: see *R v Dolphin*, [2004] MJ 433 (Man Q B)

On all of the evidence before me, I am not satisfied that the Crown has met the ultimate onus to prove beyond a reasonable doubt that the machine did not register a reading because Mr. Esquival intentionally failed to provide a proper sample of his breath. I come to this conclusion based on the following shortcomings in the Crown's evidence.

First, Constable MacCarron testified that notwithstanding the fact that she had been involved with hundreds of RIDE programs, she had never once read the user's manual of the approved screening device. She has been trained by other officers on how to use the ASD but was not able to give any evidence on what that training involved. She was aware that the machine can produce different types of error messages. She testified that one of the error messages indicates that the test subject has not blown enough air into the machine. However, Constable MacCarron did not know what the code for that message was, and she testified that after each attempt by Mr. Esquival, she observed an error message, but gave no evidence of what that message was, nor did she make a note of the message in her notebook. The absence of such evidence leads me to have a reasonable doubt about the exact cause of the error message. As indicated above, the court must be satisfied that the machine was,

at the material time, functioning properly and that the failure to obtain a proper reading was due to the deliberate actions of the accused and not some other cause.

Second, there was no evidence before me so to the length of time that the accused was required to blow into the machine to obtain a proper sample. Constable MacCarron's evidence on this issue was that the accused blew for a short time; that the machine would beep and then he would stop. In the absence of any evidence of how long a subject must blow into the machine to obtain a proper sample, the court is unable to determine whether the accused's performance was up to the standard. There must be some evidence upon which the court can independently assess the officer's opinion that Mr. Esquivel's attempts to blow were too short.

I agree with the observations of Justice Duncan in R v Persaud [2005] OJ No. 129, OCJ, at paragraph 11 that it is not always necessary for the officer to have more than a rudimentary knowledge of the functioning of the ADS. However, where, as in this case, there is an allegation that the accused has attempted and failed to provide a suitable sample, more may be required to support the officer's opinion that the lack of a proper reading from the machine is due entirely to the accused's willful failure to provide a suitable sample of his breath and not any other reason.

Third, the officer testified that she changed the mouthpiece after each attempt and that the mouthpieces were not obstructed in any way. Leaving aside for the moment that the accused's evidence that the officer did not change the mouthpieces, there is no evidence before me on how Constable MacCarron ensured herself that the mouthpieces were unobstructed. There is no evidence of what the mouthpieces look like, if they are opaque or clear, if they are capable if being visually inspected, and if she did visually inspect them. Constable MacCarron testified that she did not have the accused blow into mouthpieces first to ensure they were unobstructed. Yet she gave no evidence of what steps she did take to satisfy herself that the mouthpieces were in fact unobstructed. Moreover, there is no notation in her notebook about

changing the mouthpieces after each attempt, which undermines her evidence that she did change them.

Fourth, I have a concern about whether the accused understood the instructions he had been given by Constable MacCarron. He testified that he was told to blow until the green light comes on. Constable MacCarron testified that she demonstrated to the accused how to provide a sample by blowing into the machine herself. She testified she blew into the machine until the light went off and a reading of "00" was displayed. Mr. Esquival was not cross-examined on his understanding of the instruction given to him. If he believed he had to blow only until the light came on, it might explain why he stopped blowing after a short time. This aspect of Mr. Esquival's evidence raises a reasonable doubt in my mind about whether he had the requisite mens rea or mental element to fail or refuse to produce a sample of his breath.

In conclusion, on all the evidence before me, the Crown has not met its burden of proving this offence beyond a reasonable doubt, and the charge is dismissed.

MR REID: Thank you, Your Honour.

MR ROMBIS: Thank you very much, Your Honour.

THE COURT: Okay, thank you.

MR ROMBIS: Thank you, Your Honour. If I may be excused, please?

THE COURT: Yes. Thank you, Mr. Rombis. Mr. Esquival, you are free to go.

MR ROMBIS: Thank you.