
CANADA / JUDGMENT

R. v. Furlotte

2013 BCSC 2281

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 2281 R. v. Furlotte

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Furlotte,

2013 BCSC 2281

Date: 20131212

Docket: 29728-1

Registry: Dawson Creek

Regina

v.

David Edward Furlotte

Before: The Honourable Mr. Justice Grauer

On appeal from: An order of the Provincial Court of British Columbia dated September 12, 2012
(R. v. Furlotte, Tumbler Ridge Docket 29728-1)

Reasons for Judgment

Counsel for the Appellant:

David E.M. Jenkins, Q.C.

David Jenkins, Jr. (A/S)

Counsel for the Crown:

Tamera Golinsky

Place and Date of Hearing:

Dawson Creek, B.C.

December 3, 2013

Place and Date of Judgment:

Vancouver, B.C.

December 12, 2013

INTRODUCTION

[1] Mr. Furlotte appeals from his conviction on September 12, 2012, of failing, without reasonable excuse, to provide breath samples in response to a demand made under section 254(3) of the Criminal Code. He was acquitted of a companion charge of obstructing a peace officer.

ISSUES

[2] This appeal raises three issues:

1. Whether the learned trial judge erred in not excluding the evidence that Mr. Furlotte failed to provide a breath sample on the ground that he had been subjected to cruel and unusual punishment and that his guarantee of life, liberty and security of the person had been compromised, contrary to sections 7 and 12 of the Charter of Rights and Freedoms;
2. Whether the learned trial judge erred in fact and law in concluding on the evidence that the Crown had proven the element of mens rea; and
3. Whether the learned trial judge erred in fact and law in finding that the appellant did not have a reasonable excuse for failing to comply with the demand.

[3] The police action that is alleged to have violated Mr. Furlotte's sections 7 and 12 Charter rights is also said to be relevant to the issues of mens rea and reasonable excuse.

[4] For the reasons that follow, I have determined that the appeal must be allowed, the conviction quashed, and an acquittal entered. In arriving at this conclusion, I have focused on the issue of mens rea. I have not found it necessary to consider whether there was any error in the learned trial judge's conclusion that there had been no violation of Mr. Furlotte's Charter rights.

[5] I will begin by reviewing the pertinent facts.

NARRATIVE

- [6] Mr. Furlotte lives in Tumbler Ridge and works as a welder. He weighs between 120 and 130 lbs. At the material time he was working on a job at One Island Lake to which he commuted every day. He testified that he had been working on this job for 27 straight days, getting up at 4:30 AM or 5:00 AM, driving an hour and a half to his workplace, working a 12-hour shift from 7:00 AM to 7:00 PM, and then returning home. Often it was 9:00 PM by the time he got back.
- [7] At the end of this 27-day period, on July 31, 2009, he worked only half a day and then returned home. It was the Friday before the August long weekend, when Tumbler Ridge celebrates Grizfest. Mr. Furlotte later went out to meet up with his uncle to assist him in setting up kids' rides for the festival. While working with his uncle that evening at the Grizfest grounds, Mr. Furlotte consumed two or three beers.
- [8] After they finished, Mr. Furlotte was extremely tired, and left with his wife to drive home. At 11:20 PM, and the time is of some significance, he was stopped at a roadblock by Constable Wedholm and Sergeant Peats of the RCMP.
- [9] Constable Wedholm initially noted glassy eyes, and later a faint odour of alcohol, and when he asked Mr. Furlotte whether he had had anything to drink, was told that Mr. Furlotte had consumed three beers about two hours before. It is not disputed that Constable Wedholm made a valid demand of Mr. Furlotte to provide a sample into an approved screening device. The result was a "fail" reading.
- [10] Given this result, Constable Wedholm formally arrested Mr. Furlotte, read a demand for a breath sample for blood alcohol level analysis, and read him his Charter rights. This all occurred at 11:25 PM. Mr. Furlotte asked to speak with a lawyer, and was taken back to the detachment. In essence, the police had two hours from the time they stopped Mr. Furlotte, that is, until 1:20 AM, to take the breath sample for analysis if they wished to take advantage of the presumptions set out in section 258(1)(c) of the Code.
- [11] It was a busy night at the Tumbler Ridge detachment. The phone room was occupied, so Constable Wedholm put Mr. Furlotte in an unsecured room next door and placed a call to Legal Aid, leaving a message. Legal Aid called right back, and Constable Wedholm gave the phone to Mr. Furlotte before leaving the room.
- [12] Shortly after that, Mr. Furlotte told Constable Wedholm that he had a lawyer in Edmonton and wished to speak to him, but did not have the phone number. The phone number was with his wife at home. Constable Wedholm made three attempts to contact Mr. Furlotte's wife, and then did get a call back with the phone number of the lawyer, Mr. Fontaine, in Edmonton. By this time, it was 12:18 AM, and Constable Wedholm had moved Mr. Furlotte into the Datamaster room. The BAC Datamaster is an approved breath analysis instrument. Constable Wedholm telephoned the number of the Edmonton lawyer, but there was no answer. He called again, and this time was able to leave a message on an answering machine

or voicemail.

- [13] Mr. Furlotte remained in the Datamaster room until he was moved to a cell at 1:07 AM. According to Constable Wedholm, in that intervening time, Mr. Furlotte stated that he did not want to provide a sample until he had spoken with his lawyer, and shortly after that, fell asleep. Constable Harvey, a certified Datamaster operator, came into the room at about 12:50 AM to attend to the machine and to ask Mr. Furlotte for a breath sample. The two officers attempted to wake him up, and had difficulty doing so. They called his name, speaking loudly, and then shook him by the shoulders to get a response. When asked why they moved Mr. Furlotte into the cells, Constable Wedholm testified:

Because if he was sleeping, then he could sleep in cells. And again, as it was a busy weekend, we didn't want to tie that room up for too long.

- [14] According to Constable Harvey:

I entered the room, that being the BAC Datamaster C room, at approximately 00:50 hours, I believe, to speak with Mr. Furlotte and determine if he had heard from his lawyer and to determine if he would be willing to provide a breath sample. Mr. Furlotte was sitting upright in his chair with his head to one side, eyes closed.

I spoke to him several times, each time with a louder voice, receiving no response. I grasped both shoulders, both of his shoulders with both of my hands, standing in front of him at the chair, and gradually shook his shoulders attempting to awake or basically alert Mr. Furlotte that I needed to speak with him.

Eventually, after several attempts, he did open his eyes. There was a discussion about whether his lawyer was available or would call back, or if he was willing to try to speak with another lawyer; also discussion about Legal Aid, if he chose to speak to them, that was also available. And Legal Aid was a service available 24-hours a day, seven days a week. A message could be left with them and certainly a callback would be received.

That was, I would say, fruitless in that he continued to indicate that no, he expected a callback from his lawyer, despite the hour, and he in turn closed his eyes again. From that point on I continue to try and speak to him, again just continuing the same conversation, and he would not respond. I called his name several times. Again, no response.

So I, in turn, escorted him to the cellblock, indicating to him that if he was unable to stay awake or alert for the conversation or to provide breath samples, that maybe he needed to lay down. So he was escorted to the cellblock where he was placed in a cell.

- [15] The appellant points out that conspicuously absent from this discussion was any indication of a time constraint, or any suggestion that if he wanted to speak to a lawyer before providing a sample, it had to be done within the next few minutes. Instead, the appellant was taken to a cell to sleep. Constable Harvey explained what happened next:

At approximately 01:18 I attended the cell, opened the door, went inside. Mr. Furlotte was laying on the bunker with his eyes asleep -- or sorry, eyes closed. I apologize. I spoke to him several times, calling out his name, indicating that the instrument was prepared and we were prepared to take a breath sample from him. No response.

I in turn used the handcuff key, pressed it into his tricep to alert him. He screamed and asked me why I done that. I basically indicated to him that he needed to hear what I had to say. I asked him if he chose to provide a breath sample as his lawyer had still not called back, and he said -- he answered no, he chose to sleep.

I indicated to him that refusing to provide a breath sample was an offence very similar to providing a breath sample over the legal limit. He indicated again that he did not choose -- or sorry. He did not refuse to provide a breath sample. He chose to sleep. And he was waiting on a call from his lawyer and he, in turn, closed his eyes again.

I, in turn, returned to the BAC Datamaster C room and after it timed out, there's a message on the instrument indicating "does the subject refuse?" I, in turn, pressed the response for yes, and printed a ticket indicating same.

[Emphasis added.]

- [16] Mr. Furlotte testified that he was quite prepared to give a sample into the machine at the detachment, but wanted advice from his lawyer first. It was his impression when he was moved from the Datamaster room to the cell that he was told to go have a sleep there. That is consistent with the evidence of the police officers. He got on the bench in the cell and fell asleep, expecting to sleep until he heard from his lawyer.
- [17] His next recollection was being awakened by what he thought was a pinch in the arm that "hurt me like a son of a gun". Photos taken by his wife the next morning showed a baseball-sized bruise to the tricep area, as well as two puncture marks.
- [18] Mr. Furlotte was adamant that he had never refused to blow. He said that no one had ever suggested to him that he had only so many minutes within which to give a sample, and had no idea of any time constraint involved. His response to Constable Harvey's request that he provide a sample was that his lawyer would be calling and he wanted to wait for advice from his lawyer before proceeding. He maintained that if he had known about time constraints, then he would have provided a sample even though his lawyer had not yet called back.

THE TRIAL JUDGMENT

- [19] The first day of the trial was on August 23, 2010. The second day was on February 28, 2012. By then, Mr. Furlotte had changed counsel from Mr. Fontaine to Mr. Jenkins, and Mr. Jenkins raised several Charter arguments, with which the trial judge permitted him to proceed. The delay between the two days, I interject, was due not to any institutional difficulties or problems with either the Crown or the defence, but rather to the need to await the outcome of a constitutional challenge then being undertaken to relevant portions of the

Criminal Code.

- [20] After reviewing the facts much as I have set them out above (I exclude the reference to the charge of obstructing a peace officer, which is not relevant to the matter before me), the trial judge noted that he found Mr. Furlotte to be confrontational while under cross-examination, and inconsistent in the details of his evidence. With respect to Mr. Furlotte's movement from place to place in the detachment, the judge preferred the evidence of the police officers to that of Mr. Furlotte. He also gave little credence to Mr. Furlotte's evidence that if he had known about the time constraint, he would have complied with the demand to provide a sample.
- [21] After dealing with the obstruction charge, concluding that it had not been proven beyond a reasonable doubt, the judge turned to the charge of failing to provide a breath sample, quoting the elements of that offence as described by Bayda C.J.S. in *R v Lewko*, 2002 SKCA 121, 169 CCC (3d) 359 at para. 9:

The elements of the offence that the Crown must prove beyond a reasonable doubt are three. First, the Crown must prove the existence of a demand having the requirements of one of the three types mentioned in ss. (2) and (3). Second, the Crown must prove a failure or refusal by the defendant to produce the required sample of breath or the required sample of blood (the *actus reus*). Third, the Crown must prove that the defendant intended to produce that failure (the *mens rea*).

[22] The trial judge continued:

- [20] The Crown has proven that Mr. Furlotte was operating a motor vehicle, Cst. Wedholm, a peace officer, made a proper demand for such samples of breath as, in the opinion of a qualified technician, were necessary to enable a proper analysis of the concentration, if any, of alcohol in Mr. Furlotte's blood. Mr. Furlotte never approached the instrument in furtherance of providing samples of his breath. The qualified technician was prepared to take the samples and there is no suggestion that the instrument was not capable of receiving samples. The Crown has proven that Mr. Furlotte did not comply with the demand that he provide samples of his breath.
- [21] Upon the issue of *mens rea*, the mental element for this offence is one of intent. It is my view that the Crown has proven that Mr. Furlotte intended not to comply with the demand to give breath sample. The evidence supports that Mr. Furlotte understood what was required of him. By his actions, he offered fatigue and by his words, he offered a failure to contact certain counsel to the officers as reasons for not providing breath samples. As a result of this approach effectively nothing happened in furtherance of the breath demand. Mr. Furlotte was not entitled to avoid the investigation because he was tired. There is no argument that he did not know what he was doing was too tired to blow. A person is presumed to intend the natural consequences of his acts. The Crown has satisfied its persuasive burden on this charge. Mr. Furlotte has raised no reasonable doubt on the mental element. The Crown has proven beyond a reasonable doubt the offence of failing to produce breath sample.

[Emphasis added.]

- [23] The trial judge did not accept the argument that Constable Harvey had violated Mr. Furlotte's section 7 and section 12 Charter rights by, in essence, assaulting him with the handcuff key in order to wake him up. The judge considered section 25 of the Code, and concluded that Constable Harvey used no more force than was proportional, reasonable and necessary under the circumstances, noting that he was required to use means other than a loud voice and shaking to rouse Mr. Furlotte:
- [36] By 1:18 a.m. it was evident that Mr. Furlotte was not interested in pursuing other alternatives for legal advice. It was important for the police officers to continue with the investigation in haste in order to have a first sample of breath taken within two hours of Mr. Furlotte's driving. It was necessary that Cst. Harvey wake-up Mr. Furlotte quickly. Conventional methods to this point had not been productive in rousing him or keeping him awake.
- [24] The judge then turned to the question of whether Mr. Furlotte had established a reasonable excuse for failing to give a sample, spending a considerable time on the thorny question of the burden of proof, which is not in issue before me. The question boiled down to whether, notwithstanding the judge's conclusion that Mr. Furlotte's Charter rights had not been violated, the circumstances still amounted to a reasonable excuse:
- [54] There may be cases where the conduct of the police, falling short of constituting a Charter violation, may provide the accused with the grounds for a reasonable excuse. This case is not one of them.
- [55] I apply the air of reality test to the circumstances which Mr. Furlotte found himself in and offers as a reasonable excuse or reasonable excuses. He was tired and he wanted to sleep. His course of action was to speak to a certain counsel and to declare that to be the case repeatedly before he provided samples. Cst. Harvey woke him with a painful application of force and his response was to become angry and repeat that he was waiting for the same counsel.
- [56] My view of Mr. Furlotte's conduct is that he prevaricated. I accept that he slept when he said he slept, but he argued that his fatigue and sleeping offered with an excuse not to pursue counsel and not to provide samples. He argues that Cst. Harvey's forceful arousal of him and his angry response offered a further excuse not to provide breath samples. It is my view that Mr. Furlotte was more annoyed with his arousal by Cst. Harvey and being put to its decision whether or not to provide samples, than he was by the pain. None of the excuses in my view provided Mr. Furlotte with a lawful reasonable excuse for not providing breath sample. Once the demand had been made of him, he had an obligation to provide sample. He needed to stay awake for that purpose. I agree with the Crown who says that Mr. Furlotte cannot argue that he wanted to blow and would have acted differently but still wanted to talk to his lawyer first. He needed to pursue counsel and legal advice diligently. He was not entitled to rely upon the unavailability of his desired counsel indefinitely before providing samples. None of the circumstances offer Mr. Furlotte a reasonable excuse.

[57] After considering the evidence under the above rubric, I wish to repeat that none of the circumstances further suggest to me that Mr. Furlotte did not have the intent to refuse or fail to provide samples. His tired state, his annoyance with the officers, his upset with the open door of the office and with Cst. Harvey's application of force do not vitiate his mens rea.

[Emphasis added.]

DISCUSSION

[25] The appellant argues that Constable Harvey's application of force to wake Mr. Furlotte up at 1:18 AM could not in law have constituted reasonably necessary force. On Constable Harvey's own evidence (as quoted above), he had done nothing else but speak loudly to Mr. Furlotte in the cell and had not tried to shake him awake as he had in the Datamaster room. Moreover, he was motivated, as the judge found, by time constraints which were of his own making and of which Mr. Furlotte was entirely unaware. In these circumstances, the appellant argues, Constable Harvey's actions not only violated Mr. Furlotte's sections 7 and 12 Charter rights, but they also impacted his capacity to form the necessary intent (mens rea) and contributed to a reasonable excuse.

[26] The test for when an appeal court can overturn the verdict of a trial judge is a stringent one. The key is the reasonableness of the verdict. As our Court of Appeal explained in *R v Ngo*, 2009 BCCA 301 at paras. 64-65, intervention by the appeal court is justified where there has been a misapprehension of evidence that is on a matter of substance, is material to the reasoning process and plays an essential role in the resulting conviction. While the appeal court must to some extent reweigh the evidence in considering the reasonableness of the verdict, the trial judge's findings and inferences of fact are subject to a standard of palpable and overriding error.

[27] Questions of law, on the other hand, are reviewed for correctness. While a trial judge's factual findings are entitled to deference, the application of a legal standard to the facts of the case is a question of law, as is whether particular conduct amounts to a "reasonable justification or excuse": see *R v Barros*, 2010 ABCA 116, 477 AR 127 at para. 29 (rev'd in part on other grounds: 2011 SCC 51), and cases cited therein.

[28] As I see this case, the key to the appeal relates to the manner in which the trial judge approached the issue of mens rea, and applied that part of the legal test to the facts of the case.

[29] It is interesting to note that the charge against Mr. Furlotte was described, both before the learned trial judge and before me, as failing to provide a sample, rather than refusing to do so. As discussed above, the judge quoted the passage from *Lewko* that describes the elements of the offence of failing to provide a breath sample. *Lewko* was a case of a true failure to provide a sample for analysis, which involves the situation where the accused purports or appears to blow into the breathalyser, but does not produce a sample capable of being analysed. Hence the reference of the Chief Justice of Saskatchewan to the need for the

Crown to prove "that the defendant intended to produce that failure".

- [30] In fact, the only actus reus supported by the evidence in this case was a refusal to produce the required sample of breath when Constable Harvey requested it at 1:18 AM. As Constable Harvey testified, Mr. Furlotte's response at that time was to say that he was not refusing, but was waiting on a call from his lawyer first. It may be for that reason that the charge was described as failing to provide a sample instead of refusing to do so. The mens rea required is nevertheless a wilful voluntary refusal.
- [31] I observe that in analysing the reasonableness and necessity of the force applied by Constable Harvey at 1:18 AM, the trial judge weighed Constable Harvey's actions against the time constraints he was facing: Constable Harvey had two minutes to get a breath sample from Mr. Furlotte. Having put him in a cell to nap, he therefore had to rouse him quickly. When Constable Harvey could not rouse Mr. Furlotte easily, he applied force. When Mr. Furlotte woke up in response to the force, Constable Harvey demanded a sample and explained that refusal was a serious offence. When Mr. Furlotte did not respond by immediately agreeing to give a breath sample, Constable Harvey marked him as having refused. All of this occupied the space of a few seconds. When Mr. Furlotte thus failed at that moment to give a sample, the judge concluded, he did so with the necessary intention to justify a conviction.
- [32] Where the judge fell into error, in my view, is in measuring Mr. Furlotte's action by the same yardstick against which he assessed Constable Harvey's actions, a yardstick that made time of the essence. The difficulty is that while Constable Harvey was aware of this, Mr. Furlotte was not. In that sense, contrary to the judge's findings concerning mens rea as quoted above from para. 21 of his reasons, Mr. Furlotte did not understand what was required of him, nor could it be presumed that he intended the natural consequences of his acts. Those consequences were known only to Constable Harvey. There is no dispute that on the evidence, Mr. Furlotte had no idea that the sample would be of very limited use to the police unless given within seconds of Constable Harvey waking him up with a jab to the tricep.
- [33] From the evidence of the police officers, as well as that of Mr. Furlotte, it is abundantly clear that Mr. Furlotte had been given no reason to expect at 1:18 AM that the police officers could not continue to accommodate him in waiting for a response from his lawyer, as they had before. The original demand had been made at 11:20 PM. Giving a sample was discussed twice between approximately 12:20 AM and 1:07 AM, and on both occasions, Mr. Furlotte said that he wanted to wait until he had talked to his lawyer before giving the sample. On neither occasion did either officer say anything about time constraints, or suggest that he better get a move on, or charge him with refusing or failing to give a sample. Instead, he was escorted to a cell to sleep.
- [34] In her able submissions, Crown counsel argued that Constable Harvey's evidence of his discussions with Mr. Furlotte in the Datamaster room and at 1:18 AM in the cell, as quoted above, was capable of supporting the trial judge's findings in relation to both mens rea and

reasonable excuse, so that those findings should be upheld. I disagree that that evidence is capable of supporting the trial judge's findings. Although Constable Harvey did discuss other means of obtaining counsel, he never suggested that there was any time limit that would make it imperative for Mr. Furlotte to avail himself of those other means smartly if he wished to obtain advice before providing a sample. And when Constable Harvey told Mr. Furlotte at 1:18 AM that refusing to provide a breath sample was an offence very similar to providing a breath sample over the legal limit, the response he received was that Mr. Furlotte was not refusing to provide a breath sample, but simply wanted to wait for his lawyer to call back. Even then, on the evidence, Constable Harvey did not tell him that he could not wait.

- [35] Never did either officer say to Mr. Furlotte, "You must give a sample now (or in 15 or 30 or 60 minutes) or you will be charged with failing or refusing to provide a sample". If Mr. Furlotte had been able to contact his lawyer, he might well have received that advice. But there was nothing said or done, on the evidence, that suggested that his time was up and he could wait no longer.
- [36] Consequently, as a matter of law, the evidence could not support the learned trial judge's finding that Mr. Furlotte had the intention required, of refusing outright to provide a sample as the result of their interaction. It is not enough to say that it was not open to Mr. Furlotte to delay or avoid the investigation, or to rely upon the unavailability of his desired counsel indefinitely, when, on the evidence, Mr. Furlotte had no idea that the investigation had to be completed by a certain time. To speculate on what he might have done had he known is not helpful. He did not know.
- [37] It was certainly open to the trial judge not to believe Mr. Furlotte, but to conclude that he "prevaricated", which means that he acted evasively, goes, with respect, beyond what the evidence could support given his lack of knowledge of the time factor. He could not evade what he did not know. Consequently, notwithstanding that the existence of the time constraints was used to justify Constable Harvey's use of force, ignorance of those time constraints was not weighed in favour of Mr. Furlotte's response. With respect, it should have been. In the result, the learned trial judge's assessment of the evidence was unreasonable: see *R v E.R.*, 2002 BCCA 361 at para. 3.
- [38] While it is true that a person in Mr. Furlotte's position is required to exercise reasonable diligence in the exercise of his right to contact counsel of his choice, that reasonable diligence must be determined in the context facing the detained person: *R v Tremblay*, [1987] 2 SCR 435. This is what the trial judge failed to do. As Kovach J. stated in *R v Niles*, 2000 SKQB 63, a summary conviction appeal, in the context of waiving right to counsel:
- [12] Although the learned trial judge correctly pointed out that police officers are not required to be mind readers, in the context of determining reasonable diligence and waiver, neither is the appellant. The officers are aware of the procedures involved in obtaining breath samples, including the time limits prescribed in the Criminal Code. If the appellant's right to

consult counsel of his choice, before providing samples of his breath, is to be limited by factors such as timing or his counsel's immediate availability, he must be made aware of these limitations in order to make an informed decision respecting waiver.

- [39] I consider that the same logic applies here. If the appellant's ability to wait until consulting his as yet unavailable counsel before providing a sample is to be limited by factors such as the timing known only to the police officers, then he must be made aware of those limitations before he can be said, beyond a reasonable doubt, to have formed an intention wilfully to refuse to provide a sample. See also *R v Smillie*, 2001 CarswellBC 3402 (Prov Ct) at para. 37 (aff'd on other grounds, 2003 BCCA 486).
- [40] Thus in *R v Top* (1988), 95 AR 195, 48 CCC (3d) 493 (CA), it was noted that what the police must do or not do in terms of considering a further delay before making a breathalyzer demand depended in part on what the detainee said and did. The police were not there to play "Twenty Questions", and so what the police did must turn on what they knew, not upon hidden facts. Similarly, Mr. Furlotte's intent must turn on what he knew, not upon hidden facts. Constables Wedholm and Harvey had all the facts including the Code's timelines, and knew exactly what Mr. Furlotte was waiting for. It was Mr. Furlotte who was left with only half of the equation.
- [41] Accordingly, the evidence before the judge in this case supported only an intention to delay providing a sample, not a voluntary outright refusal. Given the evidence that Mr. Furlotte was never told about any time constraints, it could not be said that he knew all that he needed to know. It follows that it could not safely or reasonably be inferred that he had an intention either to produce a failure, or wilfully to refuse to provide a sample: see *R v Morrissey* (1995), 22 OR (3d) 514, 97 CCC (3d) 193 (CA) at para. 52. A simple warning from the police that Mr. Furlotte's time to consider his options was limited is all that was needed, but it was never given.
- [42] I conclude that the evidence was not capable of supporting a conviction in this case. The conviction is accordingly quashed, and the appellant is acquitted of the offence under section 254(5) of the Code of failing or refusing without reasonable excuse to comply with the demand made under section 254(3).

"GRAUER, J."

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