
CANADA / JUDGMENT

R. v. Walmsley

2008 BCSC 1625

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 1625 R. v. Walmsley

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Walmsley,

2008 BCSC 1625

Date: 20081126

Docket: 138173

Registry: Victoria

Between:

Regina

And

Darryll John Walmsley

Before: The Honourable Madam Justice Ker

Reasons for Judgment

Counsel for Crown/Appellant:

T. Stokes

Counsel for Respondent:

J. Green, Q.C.

Date and Place of Trial/Hearing:

September 19, 2008

Victoria, B.C.

Introduction

- [1] This is a summary conviction appeal brought by the Crown from the respondent's acquittal in the Provincial Court of British Columbia. The respondent was charged that on or about December 16, 2006, at or near Victoria, B.C., he did without reasonable excuse fail or refuse to comply with a demand made to him by a police officer, pursuant to 254(3) of the Criminal Code, R.S.C. 1985, c. C-46 (the "Code"), requiring him to provide a breath sample suitable for analysis, contrary to s. 254(5) of the Code.
- [2] The crown appeals the acquittal and argues the learned trial judge erred in finding that the demand for a breath sample was not made "as soon as practicable" as required by s. 254(3) of the Code.

Facts

- [3] The facts are not in dispute. On December 16, 2006, at approximately 6:50 p.m., the police attended at the residence of the respondent, Darryll John Walmsley, to investigate a report of suspected impaired driving.
- [4] The evidence adduced at the trial was received on a voir dire and consisted of the evidence of Cst. Bevington, Cst. Douglas, and Cst. Dyck, all of the Saanich Police Department. Cst. Bevington and Cst. Douglas were the officers involved with the investigation of the impaired driving complaint and attended at Mr. Walmsley's residence.
- [5] Approximately 20 minutes before arriving at the Walmsley residence, Cst. Bevington received a call from dispatch that a concerned citizen was following a suspected impaired driver who was driving a red Dodge pickup truck. A B.C. license plate number was provided and the police were able to trace the vehicle to the respondent's address in Saanich, B.C.
- [6] When the police officers arrived at Mr. Walmsley's residence they saw the red pickup truck parked in the driveway. The officers went to the front door of the residence and spoke to both Mr. and Mrs. Walmsley.
- [7] Mrs. Walmsley informed Constable Bevington and Cst. Douglas that Mr. Walmsley had been driving the truck that was parked in their driveway, and had returned home a few minutes before the police arrived. Mrs. Walmsley also informed the officers that Mr. Walmsley was in a similar state of intoxication when he came home as when he presented himself at the door to the police officer and that he had not consumed any liquor since arriving home.
- [8] In their dealings with Mr. Walmsley, both Cst. Bevington and Cst. Douglas noted he had unfocused bloodshot eyes, slurred speech, and a strong odour of liquor on his breath.

- [9] As a result of the information Cst. Bevington received from the police dispatcher, coupled with her dealings with Mr. and Mrs. Walmsley at the door of their residence, Cst. Bevington formed the opinion that the respondent had operated a motor vehicle within the preceding three hours while his ability to do so was impaired by alcohol. Constable Bevington formed her opinion at 6:55 p.m.
- [10] Despite forming this opinion Cst. Bevington did not proceed to make a demand for a breath sample from Mr. Walmsley until 7:02 p.m. Before reading the standard demand for a breath sample to Mr. Walmsley, Cst. Bevington elected to arrest Mr. Walmsley for impaired driving. He was handcuffed, escorted out to the police vehicle, searched prior to being placed in the police vehicle, cautioned, and then read his rights under s. 10(a) and (b) of the Canadian Charter of Rights and Freedoms (the "Charter"). At 7:02 p.m., some seven minutes after forming her opinion about the respondent's ability to drive, Cst. Bevington read a breath demand to Mr. Walmsley pursuant to s. 254(3) of the Code from a standard issued card.
- [11] Constable Bevington agreed in cross examination that there was nothing to prevent her from making the demand prior to the arrest, in lieu of the arrest, or at the time she formed her opinion in respect of Mr. Walmsley's impairment and ability to operate a motor vehicle. Mr. Walmsley was co-operative with the officers and did not do anything to prevent Cst. Bevington from making a breath demand earlier than when she did.
- [12] At trial, the Crown conceded that the arrest of Mr. Walmsley was not warranted under the Code although, in the Crown's view, the arrest was not arbitrary.

Issue on Appeal

- [13] The issue on this appeal can be distilled to the following: whether the learned trial judge erred in concluding that the demand for a breath sample in this case was not made "as soon as practicable."

Relevant Statutory Provision

- [14] Section 254(3)(a) of the Code, as it read at the relevant time, provided:

Where a peace officer believes on reasonable and probable grounds that a person is committing, or at any time within the preceding two hours has committed, as a result of the consumption of alcohol, an offence under section 253, the peace officer may, by demand made to that person forthwith or as soon as practicable, require that person to provide then or as soon thereafter as is practicable

- (a) such samples of the person's breath as in the opinion of a qualified technician

are necessary to enable proper analysis to be made in order to determine the concentration, if any, of alcohol in the person's blood, and to accompany the peace officer for the purpose of enabling such samples to be taken.

[15] In order for the Crown to be able to rely upon the evidentiary aid of the presumption contained in s. 258(1)(c) of the Code with respect to the results of breath samples tests, the Crown must establish that a lawful demand has been made within the terms of s. 254(3) of the Code. The provisions must be strictly adhered to, and as *R. v. Whitesell*, [1998] B.C.J. No. 303 (S.C.), requires, the Crown must therefore prove it was not reasonably practicable to make the demand for a sample of breath without the delay that occurred.

Does the issue in this appeal raise a question of law or a question of fact?

[16] The Crown appellant argues that whether the demand for a breath sample was made "as soon as practicable" is a question of law.

[17] Counsel for the respondent argues that while the meaning and interpretation of "as soon as practicable" is a question of law, whether or not the particular circumstances of this case demonstrate that the demand for a breath sample were made "as soon as practicable" is simply a question of fact. Where trial judges apply the correct legal test in their consideration of the evidence before them, the findings of fact are entitled to deference. Only if the Crown can demonstrate there is a palpable and overriding error or if the trial judge is clearly wrong with respect to the facts should those findings of fact be displaced.

[18] In *R. v. Clark*, [2005] 1 S.C.R. 6, Mr. Justice Fish, writing for the Court, reaffirmed the scope of appellate intervention on questions of fact. At ¶9 of the decision Mr. Justice Fish stated:

[19] [] 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: [case citations omitted]

[19] In *R. v. Plonka*, 2008 BCSC 881, a summary conviction appeal addressing the issue of whether the taking of samples of breath pursuant to s. 258(1)(c)(ii) of the Code was done as soon as practicable, the learned summary conviction appeal judge reviewed the jurisprudence on whether an appeal addressing the phrase "as soon as practicable" raised a question of law or fact. The same consideration applies to the circumstances raised in this appeal.

[20] In that case, the court found that the meaning of the words "as soon as practicable" constitutes a question of law (¶18-21). Thus the articulation of the correct test is a matter of law. The application of that test to the evidence and the finding of facts that lead to the conclusion that the demand was made or was not made as soon as practicable, within the correct meaning of that phrase, however, was held to be a question of fact (¶21).

Reasons for Judgment of the learned trial judge

[21] In the course of argument before him and in his Reasons for Judgment, the trial judge referred to the decision of Whitesell and determined that it offered a principled approach to deciding the issue before him. At ¶1 the trial judge stated:

The Criminal Code requires that a demand for a breath sample be taken forthwith or as soon as practicable. Forthwith means right away, immediately. Any delay whatsoever can be justified only if there is a good reason for the delay based upon the impracticality of giving the demand immediately. In such cases, the demand must be made immediately upon it being practicable to do so, and while the Crown need not account for every minute, there must be evidence acceptable to the court that something needed to be done before the breath demand could be made.

[22] The trial judge then made a crucial finding of fact with respect to this case stating at ¶4:

Such being the case, there appears to be no good reason, based upon the practicalities of the situation, why the demand could not have been made prior to the arrest or even in lieu of the arrest. The police officer agreed that there was nothing to prevent her from doing so had she chosen to.

[23] In addition to considering the principled approach developed in Whitesell the trial judge considered the decision of Mr. Justice Taylor R. v. Colbourne, [2002] B.C.J. No. 772 (S.C.), as well as a number of other decisions from the Provincial Court of British Columbia.

[24] The trial judge concluded his reasons by stating at ¶6:

In the case at bar, the time of delay is seven minutes, but the length of time is not important. In my view, the only important fact is that the Crown has failed to justify any delay whatsoever on grounds of practicality. The defendant ought to have been given the demand right then and there on the doorstep, not sometime later after an unnecessary arrest. I therefore rule the demand was not valid. In these circumstances, the defendant had no obligation to comply with it. I do not find it necessary to deal with Charter issues, which have yet to be argued. Based upon my ruling here, the charge cannot be sustained and will be dismissed.

[25] Much of the argument advanced at the hearing of this summary conviction appeal reflected the argument made before the trial judge.

Positions on Appeal

[26] The Crown appellant argues the trial judge erred in his interpretation and application of the decision in Whitesell and that the effect of his decision in interpreting the phrase "as soon as practicable" is to import a standard requiring that breath demands be made "as soon as possible."

- [27] The Crown appellant further argues the trial judge erred in following a line of Provincial Court decisions that strictly apply the principles from Whitesell, instead of adopting the more liberal interpretation of that decision which the appellant argued can be found in Colbourne, as well as a different line of Provincial Court decisions.
- [28] Counsel for the respondent argues the legal issue raised in this case is what is the correct test to apply to the circumstances and submits it is the test contained in Whitesell. He further argues the trial judge properly applied the principles in Whitesell to the circumstances before him. As a result, the real issue the Crown appellant raises is a question of fact as to whether or not the delay between the time that Cst. Bevington formed her opinion and the time that she made the demand was reasonable in light of the admitted unnecessary steps engaged in between forming the opinion and making the actual demand.
- [29] The respondent further argues the facts affirmatively establish that the demand in this case was not made as soon as practicable because the officer engaged in activity the Crown conceded was unnecessary prior to the demand being made.
- [30] Essentially, with respect to whether the demand was made as soon as practicable, the respondent argues that any evidence that shows that it was not practicable to make the demand before the delay occurred will assist in explaining the circumstances. However, if a reason is given for the delay and the reason is not a good one then it is the same as no reason being given at all.
- [31] The respondent argues that the trial judge's finding of fact at ¶4 of his Reasons for Judgment is one that was open to him on the evidence and unless the Crown can establish a palpable and overriding error then it is entitled to deference.

Analysis

- [32] Counsel for the Crown appellant and counsel for Mr. Walmsley agree the leading authority which establishes the test to be applied in determining whether a demand for a breath sample pursuant to s. 254(3) of the Code has been made "as soon as practicable" is the decision of Madam Justice Levine (as she then was) in Whitesell.
- [33] In Whitesell, Madam Justice Levine allowed an appeal against conviction and entered an acquittal for a 26 minute delay between the time the officer formed the opinion that the accused's ability to drive a motor vehicle was impaired by alcohol and the subsequent demand for a sample of breath pursuant to s. 254(3) of the Code.
- [34] In Whitesell, the officer who formed the opinion and made the demand for the breath sample engaged in a number of activities in the 26 minute interval between forming the opinion and making the demand for a breath sample. Those activities included securing Mr. Whitesell's vehicle, arresting him, advising him of his rights under the Charter, placing him in handcuffs and in the police vehicle, contacting the police office to arrange for a tow truck to be dispatched to the location of Mr. Whitesell's vehicle, making his notes, asking the

police officer with him at that time to make notes, completing a 24 hour suspension notice for Mr. Whitesell, searching Mr. Whitesell's vehicle, and waiting for the tow truck to arrive and remove Mr. Whitesell's vehicle all before making a demand for a breath sample.

[35] In examining the jurisprudence, Madam Justice Levine noted that the relevant starting time for making the demand for a breath sample is when the officer forms the opinion that the accused's ability to operate a vehicle is impaired by alcohol. Madam Justice Levine went on to note that the demand is usually made at that time, essentially forthwith, but where it is not, the particular facts of the case must be examined to determine if the demand was made "as soon as practicable" in the circumstances.

[36] In finding that the trial judge erred in applying the wrong test to the evidence before him, Madam Justice Levine held the following at ¶16 of Whitesell:

[] It was not sufficient to determine that the officer was carrying out duties related to the accused's case where the evidence failed to show that carrying out those duties related to or caused the delay. The question is whether the demand was given "as soon as practicable". The answer must be found in evidence that shows that it was not reasonably "practicable" to make the demand without the delay that occurred. The evidence in this case does not disclose any reason why the delay occurred.

[37] Madam Justice Levine concluded that the demand had not been made as soon as practicable because the evidence did not disclose any reason why the delay of 26 minutes was necessary. At ¶24 of Whitesell, Madam Justice Levine stated:

In finding that the evidence in this case does not support a finding that the demand was given "as soon as practicable", the phrase is not interpreted differently than in the context of whether the breathalyzer sample is taken "as soon as practicable". In both cases, it must be determined whether on the evidence there is a reasonable explanation for the delay in the circumstances. To give each section of the Code meaning, the evidence must be examined in the context of what action is required to be done. Where the actions required are different, the evidence required to support a finding that a delay is reasonable may also be expected to be different.

[38] On this appeal, both counsel also referred to a number of cases in which particular circumstances have or have not been found to support the conclusion that a demand for a breath sample under s. 254(3) of the Code was made "as soon as practicable": Whitesell, supra; Colbourne, supra; and R. v. Hedican, 2008 BCSC 754.

[39] Many of the authorities reviewed by both counsel were Provincial Court decisions illustrating the interpretation and application of the principles from Whitesell in the context of failed and accepted delays in breath demand cases. These cases included: R. v. Drohan, 2004 BCPC 329; R. v. Beaulieu, 2006 BCPC 438; R. v. Harniman, 2005 BCPC 359; R. v. Marquette, 2007 BCPC 359; R. v. S.S.B., [2008] B.C.J. No. 306 (P.C.); R. v. Senderek, [2008] B.C.J. No. 362 (P.C.); R. v. Marshall (March 28, 2000), Vancouver C47586-01 (P.C.); R. v. Coldwell (May 29, 2006), Quesnel 22089 (P.C.); R. v. Johnston (September 26, 2003),

Vancouver 13659-1 (P.C.); R. v. Downie, [2005] B.C.J. No. 2989 (P.C.); R. v. Summers (April 28, 2005), Victoria 128760-1 (P.C.); and R. v. Parhar, [2007] B.C.J. No. 1326 (P.C.).

- [40] Each decision is fact specific, with the whole of the circumstances and the context taken into account in order to determine if the delay between forming the opinion about an accused's driving abilities and making the demand for a breath sample was reasonable in the circumstances such that the demand was made as soon as practicable. The import of all the Provincial Court decisions cited above simply demonstrates that sometimes delays between forming the opinion and making the demand for a breath sample are reasonable and sometimes they are not; it is all a matter of context and what the evidence establishes in respect of the circumstances of each case.
- [41] Also included in counsel's review of the jurisprudence interpreting the meaning of the phrase "as soon as practicable" were a number of cases addressing the issue of whether a breath sample was taken "as soon as practicable" as required by s. 258(1) of the Code: R. v. Mudry, [1979] A.J. No. 613 (C.A.); R. v. Rasmussen, [1981] B.C.J. No. 2079 (C.A.); R. v. Pearce, [1984] B.C.J. No. 1612 (C.A.); R. v. Phillips, [1988] O.J. No. 415 (C.A.); R. v. Letford, [2000] O.J. No. 4841 (C.A.); R. v. MacEachern, [1982] B.C.J. No. 979 (Co. Ct.); R. v. Cambrin, [1982] B.C.J. No. 1989 (C.A.); R. v. Carter, [1980] B.C.J. No. 1025 (C.A.); R. v. Kolbe, [1980] B.C.J. No. 979 (C.A.); R. v. Vien, [1981] B.C.J. No. 131 (S.C.); R. v. Plonka, *supra*; R. v. Guray, [1981] B.C.J. No. 1987; and R. v. Vanderbruggen, [2006] O.J. No. 1138 (C.A.).
- [42] While there are some differences between the two provisions of the Code in terms of timing and delay, the phrase itself is not interpreted differently; rather, the evidence must be examined in the context of what action is required. The difference in context can result in different factors being emphasized in the determination of whether or not the requisite test has been satisfied. (R. v. Whitesell at ¶24; R. v. Coldwell).
- [43] What both sets of cases establish in terms of the meaning of the phrase "as soon as practicable" is that the Crown need not account for each minute that elapses. Thus the number of minutes for the delay in making the demand for a breath sample is not the essential criterion (R. v. Colbourne at ¶23). Rather, what matters is the sort of duties and functions being conducted by the police officer that causes the delay and whether they have to be discharged before the demand can be made. The whole chain of events occasioning the delay must be considered in light of the requirements that the demand be made "forthwith or as soon as practicable."
- [44] In some circumstances a delay to affect an arrest will be necessary; in others, depending on the context, it will not. What the Crown must do is lead some evidence from which the trial judge can conclude directly, or by inference, that the demand for the breath sample was made as soon as practicable in the circumstances. In the case at bar, the evidence clearly established that the delay was not necessary, it was not reasonable, and thus the demand for a breath sample was not made as soon as practicable and therefore not a valid demand under s. 254(3) of the Code.

[45] The decision of Her Honour Judge Frame in *R. v. Senderek* at ¶64-65 has been cited with approval by this Court in *Hedican* at ¶11-12. In *Senderek*, Judge Frame concluded that much of the case law from the Provincial Court had misinterpreted and misapplied the decision in *Whitesell* by seeming to require a minute by minute accounting of a police officer's actions between stopping a suspected impaired driver to making a demand for breath samples. At ¶64-65, Judge Frame stated the following:

64 It is my view that *Whitesell* has been misunderstood and misapplied. In *Whitesell*, there was a delay of twenty six minutes from the formation of the opinion of impairment to the point of reading the breath demand. Justice Levine, as she then was, makes this oft cited finding:

15. In *R. v. MacEachern*, [1982] B.C.J. No. 979, and the other "tow truck" cases, there was a logical connection between the duties carried out by the police officer, including waiting for the tow truck, and the delay in taking the breath sample, which provided a reasonable explanation for the delay. In this case, there is no such logical connection: neither waiting for the tow truck nor any of the other duties performed by the officer during the time in question provide a reasonable explanation for the failure to make the demand during that time.
16. The trial judge was correct in considering the particular exigencies of this case to determine if the demand was made as soon as practicable. In doing so, however, he applied the wrong test to the evidence before him. It was not sufficient to determine that the officer was carrying out duties related to the accused's case where the evidence failed to show that carrying out those duties related to or caused the delay. The question is whether the demand was given "as soon as practicable". The answer must be found in evidence that shows that it was not reasonably "practicable" to make the demand without the delay that occurred. The evidence in this case does not disclose any reason why the delay occurred.

[Emphasis added]

65 In my view, this and the other cases referred to by counsel in this proceeding do not mean that the court is to go through an exercise of parsing each and every minute from the time of pullover to the point of making the demand in a nonsensical exercise of reducing the police officer's actions to clockwork precision. The point of *Whitesell* is that if the demand is not made forthwith, then it must be made as soon as practicable in the context of what was transpiring at the time in each case. In other words, there must be an explanation for any delay. If a person suspected of impaired driving creates that delay by their own actions such as pleading for leniency, arguing about whether a breath sample should be provided or other tactics or actions of delay or obstruction, then this "delay" cannot be placed at the feet of the police officers conducting the investigation. Otherwise, every suspected impaired driver could simply obfuscate, argue and delay until precisely the right number of minutes had passed to defeat the purpose of the legislation. That would be an absurd result.

- [46] I agree with Judge Frame's analysis and observation on this point. If the evidence establishes that the delay between forming the opinion and making the demand was precipitated by the conduct of the accused or some other circumstance then the delay occasioned cannot be laid at the feet of the investigating officer. However, that is not the case before this Court.
- [47] Having reviewed the trial judge's Reasons for Judgment, the transcript of the evidence from this trial and considered the submissions of counsel in this case, it is apparent that the real question raised by this appeal is whether the demand made by Cst. Bevington in the circumstances of this case was given "as soon as practicable" as the decision in Whitesell contemplates.
- [48] Based on the principles established in Whitesell and the jurisprudence that has developed since that decision, the answer must be found in an examination of the evidence that shows it was not reasonably "practicable" to make the demand without the delay that occurred. The test of practicability is reasonableness. The court must be satisfied that the conduct of the officer in the interval between the forming the opinion about an accused's driving abilities and the making of the demand for a breath sample was reasonable.
- [49] As in Whitesell, the evidence in this case does not disclose any reason why the delay was necessary. The officer engaged in the steps of arresting the respondent in circumstances where it is conceded by the Crown that the arrest was unnecessary. Although Cst. Bevington may have been engaged in the execution of general duties, they were not of the type that had to be performed and discharged, in the circumstances of this case, before the breath demand could be made.
- [50] Essentially one must ask whether the duties that Cst. Bevington engaged in were the type that had to be discharged before she could make a valid demand. On the evidence before him, the trial found there was nothing that prevented the officer from making the demand at the time that she formed her opinion at 6:55 p.m. While the circumstances of the case would suggest this actually means "forthwith", I do not view the trial judge's Reasons for Judgment as importing a standard of "as soon as possible" into the "as soon as practicable" requirement of s. 254(3) of the Code.
- [51] Given the concession that the arrest of the respondent was unnecessary in this case, one must examine the evidence in that context. Essentially, the question is whether there was any connection between the activity engaged in, that is, the arrest and removal to the police vehicle, and the making of the breath demand. In some circumstances there may well be a connection between the necessity to arrest and removal of an accused from an area that delays making a demand for breath samples. However, this was not one of those cases. In this case the respondent had not engaged in any sort of conduct that raised officer safety issues or the like such that it necessitated the officer delaying making the demand. The officer conceded as much in her evidence.

- [52] The trial judge directed himself as to the appropriate test in terms of the binding authority from Whitesell and found the evidence did not prove beyond a reasonable doubt that it was not practicable to make the demand prior to the unnecessary arrest. To put it in another way, the evidence in this case did not establish that it was not practicable to make the demand at an earlier juncture. Indeed the evidence affirmatively established the contrary.
- [53] The trial judge clearly recognized that the evidence in the unusual circumstances of this case clearly established that it was practicable to make the demand without delay at the time that Cst. Bevington formed her opinion.
- [54] The Crown appellant argues the decision in Colbourne provides a more flexible interpretation of "as soon as practicable" than what has developed in the Provincial Court decisions that the trial judge followed in this case. It was further argued that these cases unduly circumscribe the principles from Whitesell such that "as soon as practicable" has been interpreted to mean "as soon as possible" and almost forthwith.
- [55] I do not interpret the decision in Colbourne as a relaxation of the principles established in Whitesell. Rather, the decision in Colbourne provides a fact specific example of the application of the principles from Whitesell to the circumstances of that case.
- [56] The decision in Colbourne is simply a case where the officer forming the opinion about an accused's sobriety and eventually making a demand for a breath sample took a number of investigative steps before he formed his opinion. Thereafter, the 14 minute delay between forming the opinion and making the demand for the breath sample was caused by conduct of the accused pleading with the officer. Thus the conduct of the accused was the most significant factor impeding the officer from making a demand for a breath sample at a time earlier than he did (see Colbourne at ¶¶30-35).
- [57] Whether the demand in this case was made "as soon as practicable" was an issue of fact for the trial judge. I am satisfied that there was sufficient evidence before the trial judge to conclude that in the unique circumstances of this case the delay between forming the opinion and making the demand for a breath sample, occasioned by Cst. Bevington's unnecessary arrest, resulted in the breath demand not being made "as soon as practicable". As such it was not a valid demand under s. 254(3) of the Code.
- [58] As Madam Justice Levine made plain in Whitesell it is not sufficient to determine that that the officer was carrying out duties related to the respondent's case. Rather the evidence must be examined in the context of what action is required to be done. In the context of what was transpiring at the time in this case, the respondent was being cooperative and provided no cause for a delay in the demand by being obstreperous, uncooperative or anything of the like. In the circumstances of this case the respondent's arrest was unwarranted thus the steps taken to effect the arrest and the duties associated with that procedure cannot be used as a reason for the delay and to suggest the demand was made as soon as practicable.

- [59] In essence, on the facts of this particular case, there was no reason that the demand could not be made forthwith. Examining the evidence in the context of what action was required before the demand could be made it is apparent, again on the facts of this case, that no action or step was required before the demand could be made. There was nothing from the circumstances before her, such as difficult conduct by the respondent or his wife, that required the officer take some sort of investigative steps or fulfill other duties before she could make the demand.
- [60] Thus, what the legislation requires, and the principles from Whitesell make clear, is that if an officer is unable to make the demand forthwith upon forming the opinion, then to be able to rely upon "as soon as practicable" means that as soon as the officer is aware and able to act the demand must be made. Sometimes an officer will be unable to make the demand at the time the opinion is formed as there are other matters that have to be attended to first, such as moving a vehicle to a safer location or subduing an unruly accused or engaging in crowd control. But none of those circumstances arose in the particular constellation of factors that this case provided.
- [61] The learned trial judge reviewed the relevant authorities, properly applied the principles established in Whitesell, and applied those principles to the facts as he found them. There was sufficient evidence before the trial judge on which he could reasonably find that the demand for the breath sample, in the circumstances of this case, had not been made as soon as practicable.
- [62] It follows that no error has been demonstrated with respect to the trial judge's application of the legal test or with respect to the facts as he has found them. Accordingly, the Crown's appeal from the respondent's acquittal is dismissed.

"Ker J."

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