

ONTARIO COURT OF JUSTICE

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HER MAJESTY THE QUEEN

v.

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RG

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REASONS FOR JUDGMENT

BEFORE THE HONOURABLE JUSTICE M. HENSCHEL

on June 19, 2018

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at NEWMARKET, Ontario

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APPEARANCES:

K. Hutchinson

Appearing for the Crown

D. Genis

Appearing for Ms. RG

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TUESDAY, JUNE 19, 2018:

R E A S O N S F O R J U D G M E N T

HENSCHER, M - (Orally):

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Ms. RG is charged that on or about the 13th day of June, 2015, in Richmond Hill that she, without reasonable excuse, failed to comply with a demand made to her by a peace officer to provide a sample of her breath as was necessary to enable a proper analysis to be made by means of an approved screening device, contrary to Section 254(5) of the *Criminal Code*.

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The defence contends that there was no unequivocal refusal and also has raised a Section 7 issue, alleging that there was a breach of Section 7 as a result of the failure of the police to record the incident by the in-car camera recording system. The following is a summary of the relevant facts in the proceedings.

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On Saturday, June 13th, 2015, at about 2:26 a.m. Constable Jason Macedo and Constable Morris were dispatched to investigate a possible impaired driver that was being followed by a civilian witness. The witness was following the vehicle, which was described as a four door sedan, travelling northbound in the area of Yonge Street and Major Mackenzie Drive, in Richmond Hill. The witness indicated that the vehicle

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5 was swerving into oncoming traffic. At about 2:32 a.m. Constable Morris located the complainant and learned that the witness had last seen the vehicle in the area of 19th Avenue and Delisle Street. Delisle Street runs north and south between 19th Avenue and Falling River Boulevard.

10 At 2:32 a.m. Constable Macedo arrived in the area of Delisle Street and Falling River Drive. Not far from the intersection of Delisle Street and Falling River Drive Constable Macedo saw a sedan parked in the driveway of the residence of 59 Falling River Drive, facing the garage. The vehicle was running and had its light on. There was a single female occupant in the driver's seat, later identified as Ms. Golparvar. The vehicle was the only running vehicle in the area and matched the general description of the vehicle provided by the complainant. As a result Constable Macedo believed the vehicle may be the one related to the impaired driving call. Constable Morris also arrived in the area of Delisle Street and Falling River Drive at approximately the same time as Constable Macedo. Constable Rudolf and Constable Richards were following Constable Morris. Constable Morris also noticed the running vehicle in the driveway of 59 Falling River Drive and he also concluded that it was related to the impaired driving call. Constable Macedo and Constable Morris both arrived at 59 Falling River Drive in

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separate cruisers at around the same time and approached the vehicle together. They were both in uniform.

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Constable Macedo went to the window on the driver's side and Constable Morris went to the passenger side. Ms. RG put down both her driver and passenger windows simultaneously. Constable Macedo told her that he was responding to a complaint about a possible impaired driver. He testified that at this point Ms. RG became argumentative when she spoke with him, saying 'are you serious?' after almost every question. Constable Macedo said that he could smell the odour of alcohol coming from her breath. He noted that her eyes were glossy and red and said that at 2:32 a.m. he formed the suspicion that she had alcohol in her body and asked her to exit the vehicle. He said when she did so he again noticed the smell of alcohol coming from her face at that point. After exiting the vehicle Ms. RG denied having consumed alcohol to the officer.

At 2:38 a.m. he read her an approved screening device demand and she indicated that she understood. Constable Macedo indicated that he obtained the approved screening device from Constable Rudolf, who had also responded to the scene shortly after Constable Macedo. Constable Macedo explained that a sample is provided into the device by blowing into a disposable

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mouthpiece attached to the ASD. The subject must put the mouthpiece in their mouth and make a firm seal and breathe continuously into the device for a few seconds. After the subject provides a continuous breath the device will analyse the breath and provide a reading of 'zero', 'alert' or 'warn', or 'fail', which indicates that the subject is "over 80".

After reading Ms. RG the approved screening device demand Constable Macedo testified that he explained how to provide a sample into the ASD. He told her to take a deep breath, to continue blowing until he told her to stop and to make sure that she kept a tight seal around the mouthpiece with her lips. He felt that Ms. RG understood him. After explaining how to provide a sample Constable Macedo tested the approved screening device at 2:40 a.m. He indicated he demonstrated how to provide a sample into the device. Constable Macedo testified that he passed the test and he then obtained a new mouthpiece and inserted it for Ms. RG to provide a test.

#### THE FIRST ATTEMPT

At 2:42 a.m. Ms. RG made a first attempt to provide a breath sample into the approved screening device. Constable Macedo believed that Ms. RG did not make a firm seal over the mouthpiece and that air was escaping and that as

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a result the device registered an interruption. As a result of the interruption Constable Macedo reset the device and Ms. RG made a second attempt. Constable Macedo testified that Ms. RG made a loose seal at the rim of the mouthpiece and provided only very quick breaths, contrary to his instructions that she provide a continuous breath until he told her to stop. The device again registered an interruption. On the third attempt Constable Macedo testified that Ms. RG made a firmer seal but blew for only a second or less, rather than blowing continuously for a few seconds. The device again registered an interruption. Constable Macedo testified that after each failed attempt he explained the problem with the sample to Ms. RG and emphasized that there needed to be a long continuous breath until he told her to stop. On the fourth attempt Constable Macedo testified that Ms. RG again did not blow long enough. Following the fourth attempt Constable Macedo told Ms. RG that she was only going to be given two more attempts because he believed that she was purposely not providing a sample into the device.

#### THE FIFTH ATTEMPT AND SIXTH ATTEMPTS

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Constable Macedo testified that on the fifth attempt Ms. RG formed a loose seal on the mouthpiece and provided only a one second breath into the device. The sample was not sufficient

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and he told her that the next attempt would be her last try. Prior to the sixth attempt Constable Macedo had Ms. RG blow into the mouthpiece before attaching it to the device. She was able to do so without difficulty. When Ms. RG made the sixth attempt he said that she again formed only a loose seal over the mouthpiece and he believed that only air was escaping. She blew for only one second, stopped and then provided another quick breath. The ASD again registered an interruption. Constable Macedo testified that at no point did Ms. RG appear to suffer from shortness of breath and that when speaking she appeared boisterous and vocal. Constable Macedo inspected the mouthpiece and saw no issues with it. He said that he did not believe that there was any language barrier that impacted Ms. Golparvar's ability to understand. He acknowledged in cross-examination that he did not warn Ms. RG that it was a criminal offence to fail or refuse to provide a sample.

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Constable Morris testified that he also did not believe that Ms. RG was properly blowing into the ASD. Rather, she was providing short quick breaths and was not making a tight seal around the mouthpiece. He testified that during the four initial unsuccessful attempts Ms. RG was arguing with the officers between the breaths. He said that at the outset Constable Macedo provided Ms. RG with an explanation of how to

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provide a breath sample and that after the initial four attempts Constable Macedo cautioned Ms. RG about the criminal consequences of failing to provide a sample and that charges might flow from failing to do so and that he made a note of it at the time. Constable Morris said that after she was cautioned Ms. RG continued to blow in the same manner she had previously, failing to provide a proper sample. He said that she was not paying attention, constantly arguing and was stating that she was not drunk. He indicated that she was given six opportunities to provide a sample prior to her arrest. He testified that during the attempts he could hear air escaping and believed that she was not blowing long enough. He believed that she was placing her tongue over the mouthpiece and that her cheeks were filling with air. He did not think she had any difficulty in understanding, in part because she was able to clearly relate her upset to the officers.

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Constable Macedo and Constable Morris testified that as a result of Ms. Golparvar's failure to provide a proper sample, at 2:47 a.m. Constable Macedo placed Ms. RG under arrest for failing to provide a breath sample into an approved screening device. This was approximately five minutes after she made her first attempt. Following her arrest Constable Macedo placed Ms. RG in Constable Rudolf's cruiser and Constable Morris read her the rights to counsel.

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Constable Macedo said he could not recall Ms. RG requesting another opportunity to provide a sample after she was arrested and placed in the cruiser. Constable Morris, when cross-examined about whether Ms. RG asked for another opportunity to provide a breath sample indicated that it was possible. Constable Morris testified that as they were dealing with Ms. Golparvar, several of the occupants of 59 Falling River Drive began yelling at the police officers. He said that multiple requests were made for the residents to stop communicating with Ms. RG and to stop yelling at the police and that they were cautioned with obstructing the police. He indicated that a male individual was the most vocal.

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Constable Morris indicated that Ms. RG was released from the scene at 3:30 a.m. on an Appearance Notice and he said that at the time of her release she was still irate with the police and returned to her residence.

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There were numerous officers that became involved in the investigation of Ms. RG. Constable Macedo and Constable Morris primarily dealt with Ms. RG. Constable Rudolf arrived in a separate cruiser at approximately the same time as Constable Macedo and Constable Morris and provided the approved screening device. Constable Richards and Constable Hodges were also present at points in the area of 59 Falling

River Drive.

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Constable Hodges was alone in his police cruiser. He responded to the call at about 1:38 a.m. He did not believe that he had any direct involvement with Ms. RG. His primary involvement was to take a statement from a civilian witness who had originally contacted police in the area of Devonsleigh and 19th Avenue. During the investigation there were five officers at the scene and five cruisers. Constable Hodges was not present for all of the investigation.

None of the officers activated their in-car camera systems when they were dealing with Ms. RG prior to her arrest. Constable Rudolf's in-car camera system was activated when Ms. RG was placed in the rear of Constable Rudolf's cruiser.

In cross-examination Constable Macedo acknowledged that he did not engage his in-car camera recording system and as a result his dealings with Ms. RG prior to the point that she was placed in the rear of Constable Rudolf's cruiser were neither audio nor video recorded. Constable Macedo testified that the in-car camera system will engage automatically when a cruiser's emergency lights are activated but in this case he did not utilize his emergency lights. The in-car camera recording system can

also be manually activated by pushing a button and in this case he said that he did not engage the in-car camera system because he accidentally forgot to manually activate it.

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Constable Macedo was cross-examined with respect to the York Regional Police Command Directive for use of the in-car camera system. The parties agreed that the directive provides as follows: "In addition to any investigative contact the in-car camera system should be used to record significant events or where video evidence would be useful, such as a) impaired operation investigations, b) when conducting approved screening device interviews, c) when conducting standardized field sobriety tests, d) when engaged in suspect apprehension pursuits or e) any situation where, based on the officer's experience and judgment an audio/visual record of the event would be beneficial to the investigation or officer and public safety."

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Constable Macedo testified that he was aware of the command directive and understood that it indicates that the in-car camera recording system should be activated for impaired driving investigations when practical or possible. He understood the wording to be permissive rather than mandatory since it references that an officer should utilize the in-car camera system rather than requiring that an officer shall utilize it for impaired driving and related

investigations.

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Constable Macedo was asked about his general practise regarding activation of the in-car camera manually. He responded that it is fact-dependant and that each case is different. He also indicated that sometimes in dynamic situations he may forget to activate the in-car camera system and that he has forgotten to do so in the past. He agreed that it would have been best for the video to be engaged but that he forgot to do so.

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Constable Morris testified that he also forgot to engage the in-car camera system by mistake. He explained that the ICC is normally activated by engaging the emergency lights and he forgot to engage the ICC because of everything that was going on. He indicated that he wished he would have engaged his in-car camera system. He also advised that at the time that he approached the vehicle in the driveway he did not know for certain what the problem was and that the issue may involve a medical difficulty or situation that may have been urgent. As a result he forgot due to other things on his mind. Constable Morris testified that he was also aware of the York Regional Police Policy Directive on the use of the in-car camera system.

In terms of his general use of the in-car camera

system he indicated that where the system is not activated by emergency lights then if he is close enough to the cruiser he will activate it during an investigation. He was not sure how far away he was in this instance.

Constable Rudolf also testified that she was present at 59 Falling River Drive when Constable Macedo and Constable Morris were dealing with Ms. RG and attempting to obtain a breath sample into the approved screening device. Constable Rudolf attended in a separate cruiser. She testified that she did not activate her in-car camera system because she did not think to do so at the time. Constable Rudolf explained that typically in an impaired driving investigation the investigation starts with a traffic stop and in those cases the in-car camera system comes on automatically with activation of emergency lights. Constable Rudolf did manually activate the in-car camera system when Ms. RG was placed in her cruiser.

Constable Richards testified that she also responded to 59 Falling River Drive on June 13th, 2015. She was alone in a marked cruiser and was present at the scene during Constable Macedo and Constable Morris' interactions with Ms. RG. Constable Richards testified that she did not turn on her in-car camera system because she forgot to do so and she was not dispatched specifically to the call. She heard the call and decided to attend to offer assistance.

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Constable Hodges also indicated that he did not engage his in-car camera system. Although he was not certain of the wording of the York Regional Police directive with respect to use of the in-car camera system where there are ASD tests and whether it refers to 'an officer shall' or 'may use' the in-car camera system, he was confident that he was not required to do so because his primary involvement was to take a witness statement.

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Ms. RG testified that on June 13th, 2015, she was sitting in the car in the driveway at 58 Falling River Drive, listening to music and talking on her cell phone when she was suddenly approached by the police from all directions. She said that a flashlight was shone on her face and at first she did not realize that it was police officers approaching her. Although she initially testified that the officers did not tell her why they were there and she did not understand why she had to provide a breath sample a short time later in her evidence she said that the police did tell her that they had received a call about an impaired driver. She said that she had not been drinking and that any smell noted by the officers may have been attributable to perfume or cigarette smoke. Ms. RG said that there were at least five officers present at the scene and indicated that it included those who had testified, at that time

referring to Constable Macedo, Constable Morris and Constable Rudolf and Constable Richards. She said there was also a fifth officer present.

Ms. RG testified that when Constable Macedo demanded that she provide a sample of her breath into the approved screening device that she did her best to provide a sample. She said that she had difficulty understanding the instructions because there were multiple officers around her, giving her instructions and talking at the same time and it was very noisy around her. She said that the officers were being rude to her, using bad words and making fun of her. She said that while she could not recall the specifics of the instructions she was given, the only instructions were essentially to hold on to the device and blow and she did not know how to blow properly. She testified that she had problems blowing continuously due to breathing problems and the fact that her throat gets irritated. She also later added that she had bronchitis the previous year and that her throat was irritated and that she told the officer that it was hard for her to blow. She said this is why she stopped between the blows. She believed that the length of time from her first attempt to the last attempt was about two minutes, as opposed to five minutes, and that she was given four opportunities rather than six. She said that she was not warned that it was a criminal offence to refuse to provide a sample or that

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she would be suspended for 90 days.

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Initially in her examination in-chief she said that had she been told about the criminal consequences she would have acted differently and would have blown properly into the device. She also testified that she felt that with every attempt she was improving and would have been able to successfully provide a sample if given further opportunities. Later in cross-examination she acknowledged that she knew she had to blow into the device. She testified that following her arrest she asked for another opportunity to provide a sample but the police refused to allow her another opportunity.

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The defence also called a friend of the accused by the name of Isman Shahariari. Mr. Shahariari lived in the basement apartment of 59 Falling River Drive and was a family friend of Ms. RG. He owned the vehicle that she was driving on the night in question. He testified that that night he was home and at around 2:30 a.m. heard noises that he believed was screaming or crying. He went to the front door and saw about six cruisers parked in front of the house. He said that police officers were talking to Ms. RG. He saw two officers that were by his vehicle and approached them and asked what was going on. He said that the officer that he approached asked him who he was and what his relationship was to Ms. RG. He said that the officer told him that

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the matter did not concern him and he should go in the house. He told the officer that he lived there and wanted to know what was going on. He asked why Ms. RG was being arrested and the officer told him that he should go back in the house or he would be arrested. He said that at that point a female officer pulled him aside and explained to him why they were there. He also testified that he saw the officers trying to obtain a breath test from Ms. RG. He said that he believed that the officers made four attempts and it was at that point that they placed her under arrest. He said that Ms. RG was screaming and repeating that she wanted to try again. He said that he thought the officers were aggressive, that they were not professional were using unnecessary force he said what he saw scared him. He felt that what was taking place was not right.

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#### SUMMARY OF THE LAW

Section 254(5) of the *Criminal Code* makes it an offence to fail or refuse to comply with a demand under Section 254(2) of the *Criminal Code*. The section provides that "Everyone commits an offence who, without reasonable excuse, fails or refuses to comply with a demand made under this section." To establish the offence of refusing to comply with an approved screening device demand the Crown must prove that 1) a proper demand has been made, 2) a

failure or refusal to provide the required breath sample occurred and 3) the detainee intended to fail or refuse to provide the required sample. See Grant, 2014 ONSC 1479, at para 81.

There is division in the law regarding whether the offence should be treated as a specific intent or a general intent offence. Section 254(5) is silent as to the *mens rea* and as a result there is a strong line of authority which suggests that where the *actus reus* is the doing of some immediate act without any ulterior consequence, then knowledge or recklessness as to the doing of the prohibited act, is a sufficient *mens rea*. For the reasons articulated by Justice Code in R. v. Porter 2012ONSC 3504 I am satisfied that Section 254(5) is a general intent offence.

As a general intent offence what the Crown must prove is knowledge or cognitive awareness of the doing of the act. The accused must perform the *actus reus* consciously and be aware of refusing to comply with a police demand but an additional subordinate criminal intent to break the law or refuse unlawfully is not required. There must be a general or basic intent in relation to the prohibited act. Knowledge is the basic *mens rea* and is distinct from an accused's motives and excuses. The Crown need not establish the reason why the accused refused.

In reaching the conclusion in Porter that failing to provide a breath sample is a general intent offence Justice Code observed that parliament included the term "wilfully" in the old Section 666(1) offence of "fails or refuses to comply" with a probation order. The use of the word "wilfully" caused the Supreme Court of Canada to conclude in R. v. Docherty (1981) 51 CCC 3d(1) the language was indicative of a legislative concern for a relatively high level of mens rea that was akin to purpose. Subsequent to Docherty parliament enacted the modern offence of fails or refuses to comply with a probation order in Section 733.1 and removed the old "wilfully" requirement while adding "a reasonable excuse" defence. This was a legislative reversal of the Supreme Court's finding that failing to comply with a probation order was a specific intend offence. Section 254(5) tracks the language of the amended offence of fail to comply with probation, language which points to the offence being one of a general rather than specific intent. The defence of reasonable excuse is engaged only after the Crown has proven a proper demand and a failure or refusal to comply with that demand. A reasonable justification or excuse refers to some matter that is extraneous to the existence of the essential elements of the offence that justifies or excuses actions that would otherwise constitute the crime. An accused who

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relies on a reasonable justification or excuse admits that he committed the prohibited act with the requisite culpable mental state but argues that the circumstances in which he did so justify or at least excused what he did. A reasonable excuse may involve some circumstance which renders compliance with the demand either extremely difficult or likely to involve a substantial risk to the health of the person on whom the demand has been made. In Goleski the Supreme Court of Canada established that the accused must establish a reasonable excuse on a balance of probabilities.

I do not accept Ms. RG's evidence that she was incapable of providing a breath sample into the approved screening device for health reasons. I am not satisfied that a reasonable excuse has been established on the evidence. There is no evidence that the provision of a sample would involve a substantial risk to her health or that she was incapable of doing so.

This case involves a constructive rather than an express refusal. The Crown alleges that the accused feigned the attempts to provide a breath sample, that she understood the demand given, the consequences of refusing and intentionally failed to provide a proper sample. The defence submits that there was not a clear and unequivocal refusal. Because the matter involves a constructive refusal I must consider

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explanation advanced at the time of the attempt  
or in court in determining whether the Crown has  
established the failure or refusal to provide a  
sample beyond a reasonable doubt and the  
necessary mens rea beyond a reasonable doubt.

10 Factors relevant to this determination include  
1) the words and actions of the detainee from  
which the officer concluded that he or she  
intended to refuse to provide a sample, 2) the  
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the detainee and the length of time over which  
the opportunities were provided or testing was  
conducted and the reasons of the officer for  
terminating the testing, 3) the instruction  
20 provided to the detainee by the officer,  
including any reference to the applicable law,  
how to provide the sample and whether the  
consequences of the failure were explained,  
including that it was a criminal offence to  
25 refuse and whether the detainee was told they  
were being given one last chance to provide the  
breath sample. Although a last chance warning  
is a factor for consideration there is not an  
obligation on the demanding officer in every  
30 case to tell the driver that it is his or her  
last chance to provide a suitable sample, 4)  
evidence of language difficulties or other  
problems that might interfere with the accused's  
understanding of instructions or warning by the  
officer, 5) the detainee's state of intoxication

and attitude, 6) the availability of the approved screening device and 7) where the detainee has been told that he or she has refused to provide a suitable sample and will be charged and indicates they want another opportunity, the time between being told of the charge and the offer and the number of opportunities to provide a breath sample and previous last chances offers and the manner in which the offer is made. Where the accused has made an offer to comply with the demand after an apparent refusal, the Court must consider whether the subsequent agreement is effectively part of a single transaction of the motorist responding to the demand and should consider whether the subsequent request to blow is genuine. (R. v. Tavangari [2002] OJ No.3173 at para 16, R. v. Grant, 2014 ONSC, 1479, at para 82)

In assessing the credibility and reliability of the witnesses on these issues I have considered and applied the principles of W.D., bearing in mind that exculpatory evidence can arise not only from the evidence of the accused but also from the witnesses called by the Crown. The Crown at all times bears the onus of proving the essential elements of the offence beyond a reasonable doubt. In deciding whether the Crown has proven the accused to be guilty beyond a reasonable doubt, I have approached the task as follows. If I accept as accurate evidence that

cannot coexist with a finding that the accused is guilty, I must acquit. Secondly, if I am left unsure whether evidence that cannot coexist with a finding that the accused is guilty as accurate, then I have not rejected it entirely and I must acquit. Thirdly, even where evidence inconsistent with the guilt of the accused is rejected in its entirety the accused cannot be convicted unless the evidence that is given credit proves the accused to be guilty beyond a reasonable doubt.

#### FINDINGS OF CREDIBILITY AND RELIABILITY

I do not accept the evidence of Ms. RG. There were numerous difficulties with her credibility, including inconsistencies regarding whether the police told her the reason why they were at her residence, she initially testified that the officers did not tell her why they were there and that she did not understand why she had to provide a breath sample, but a short time later she testified that the police did tell her the reason they were there, that they had received a call about an impaired driver I find that she knew why it was the police were asking her to provide a sample.

Secondly, I do not accept her indication that she was not drinking that night. It is contradicted by the evidence of Constable Macedo and Constable Morris that they smelled alcohol

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coming from her breath. She suggested that the police may have been confused because of the smell of perfume or smoke. In my view it is not plausible that the officers would have confused smoke or perfume for alcohol. In addition, she showed other signs of intoxication, including red glassy eyes and behaviour as described by the officers as well as reflected on the in-car camera video that was on at the time that Ms. RG was placed in the rear of the cruiser.

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Most significantly during her evidence Ms. RG provided three very different explanations as to why she could not provide a proper sample. She indicated she could not provide a proper sample because of problems with her throat, which evolved to a complaint of a history of bronchitis, suggesting she was physically incapable of providing a sample. She also said that she could not understand what she needed to do because she did not receive proper instruction and everything happened too quickly. And, finally, she initially suggested that she was not trying properly because she did not know the consequences of failing to provide a sample and that if she had, she would have provided a proper sample. This could be understood as an admission that she made a conscious decision not to provide the sample and is directly and materially contradictory to her other explanations that she was not capable of providing the sample or that she was trying to

do her best to blow but did not know how to properly provide the sample because of insufficient instruction.

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In addition, I do not accept her evidence about the manner in which the police were behaving towards her. It is contradicted by the in-car camera video engaged by Constable Rudolf after she was arrested and placed in the rear of the cruiser. The in-car camera video shows the police interacting with Ms. RG in a professional manner and shows that it was Ms. RG that was emotional, angry and difficult at that point in time.

However, that does not end the determination of the issues. Her evidence, when combined with the evidence of the other witnesses in the case, including the other civilian witness called by the defence, the in-car camera video and the evidence of the officers leaves me in a state of reasonable doubt as to whether there was an unequivocal refusal. I have reached this conclusion for the following reasons.

I am satisfied that initially Ms. RG was feigning her attempts to blow and was not properly trying to provide a sample. I reach this conclusion based on the evidence of Constable Macedo and Constable Morris that she was not forming a proper seal around the mouthpiece and was not providing a continuous sample. However, the entire transaction in

those initial stages occurred very quickly. Approximately five minutes passed from the time that Constable Macedo first read the demand to Ms. RG, to the point that she was arrested and placed in the cruiser. I accept Constable Macedo's evidence that Ms. RG was provided with six opportunities rather than four to provide a sample, however each opportunity occurred within a very short timeframe. Each attempt likely took only seconds. Ms. RG was angry, emotional and upset. And while I do not accept that the officers were swearing at her or overtly acting unprofessionally, I do accept that she was scared by what was occurring, given the number of officers present, the number of cruisers present, and that she was very emotional and may have perceived the officers to be acting aggressively towards her. This was also the perception of the other civilian witness called by the defence, whose evidence I found to be credible. He confirmed Ms. RG's emotional state. Given the swiftness with which the events unfolded, in my view Ms. RG had little time to collect herself and to unequivocally refuse to provide a proper sample.

Although Ms. RG was told after four attempts that she would be given only two more attempts, I am not satisfied that Ms. RG was informed of the consequences of failing to provide the breath sample or that it was a criminal offence to fail to provide the breath sample. Constable

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Morris testified that he believed that Constable Macedo advised Ms. RG of the consequences, however Constable Macedo himself testified that he did not do so and Ms. RG indicated that she was not advised of the consequences of failing to provide a sample. Once Ms. RG was arrested and the seriousness of her circumstances were brought home to her, Ms. RG immediately requested another chance to blow, both prior to being placed in the cruiser and once in the cruiser. I accept the evidence of the civilian witness called by the defence that he heard Ms. RG crying and repeating that she wanted another chance. The in-car camera recording confirms that once in the cruiser she made repeated requests for another opportunity to blow, indicating "I do not mind blowing into anything. You want me to blow right now, I will blow." This was a very short time after the six attempts and, in my view remained part of the same transaction. I am satisfied that at this point, despite her earlier behaviour her requests were genuine.

Although perhaps not necessary to determine the matter and while I accept Constable Macedo's evidence that he gave six opportunities and told Ms. RG that she would only have two further attempts after the initial four, I do have some concerns about the reliability of his evidence as to the details of the explanations that were given during the course of his interaction with

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Ms. RG. I have these concerns in part because Constable Macedo had no independent recollection of Ms. RG making a subsequent request upon arrest to be given another opportunity to provide a sample. This was a significant event in the course of the transaction and he had no recollection of it. It is something that clearly happened, based on the in-car camera video recording, which clearly shows her on the recording making those requests to provide a further sample.

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In addition, the civilian witness called by the defence testified to hearing her crying and requesting to be given another opportunity. In addition, Constable Morris had no recollection of that taking place.

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In all of these circumstances, because I am not satisfied that the Crown has proven the unequivocal refusal beyond a reasonable doubt, I have concluded that the accused must be found not guilty and the charge dismissed because the Crown has failed to establish an unequivocal refusal.

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Before concluding, I must address the fact that the defence also alleged that Ms. RG's rights under Section 7 of the *Charter* were breached because the police failed to utilize available in-car camera recording systems to record the transaction and that this failure deprived Ms.

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RGof the opportunity to tender reliable evidence to defend herself, interfering with her right to a fair trial. The applicant sought exclusion of the failure or refusal evidence under Section 24(2) as a remedy.

Due to my findings that the Crown has not proven the essential elements beyond a reasonable doubt, it is not necessary that I determine the Section 7 application. However, in my view the failure of five officers at the scene who had arrived in separate cruisers with five separate recording devices to ensure that at least one in-car camera audio/video system was activated at the scene to record an impaired driving investigation and ASD testing at least on audio if not video is deserving of comment.

Constable Macedo, Constable Morris and Constable Rudolf each indicated that they simply forgot to engage the in-car camera recording, noting that unlike many impaired driving investigations, this case did not involve the activation of emergency lights to pull the car over so it did not happen automatically.

It was Constable Macedo and Constable Morris that were the investigating officers dealing most directly with Ms. RG. They knew when they arrived on the scene that they were investigating an allegation of impaired driving. An in-car camera system has the ability to

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create reliable evidence of what has transpired during an impaired driving investigation and, where as in this case there is an allegation of failing to provide a breath sample, it has the potential to record the actual *actus reus* of the offence. In this case there was an allegation of constructive refusal and a recording of exactly what happened during these attempts to obtain a breath sample into the device would have been extremely helpful in determining whether there was an unequivocal refusal. It would be the best evidence. Clearly, where there is a dispute as to whether or not an accused was given a sufficient opportunity to provide a sample into an ASD and whether the accused has made bonafide efforts to provide a sample in the context of an alleged failure to provide a sample into an approved screening device an in-car camera video could be critical to the determination of the issues. The potential value of such evidence became apparent on the facts of this case. As noted, neither Constable Macedo nor Constable Morris had any memory of Ms. RG requesting a further opportunity to provide a sample following her arrest. The in-car camera recording that was engaged by Constable Rudolf's cruiser clearly established that she did, something a Court might have concluded never happened but for the recording.

Each of the five York Regional Police marked

cruisers involved in this case were equipped with an in-car camera recording system. There is a York Regional Police policy in place. While recognizing it is an agency policy and not a legal requirement, nonetheless the policy provides that the in-car camera system should be used to record significant events, including impaired driving investigations, when conducting approved screening device interviews and field sobriety tests. The policy also provides that the in-car camera system should be used where, based on the officer's experience and judgment, an audio/visual record of the event would be beneficial to the investigation.

The fact that five officers forgot to turn on the in-car camera recording system is concerning. All that needs to be done is for the officers to push a button to activate the recording system. Given the potential significance of such evidence and the availability of the in-car camera system in an impaired driving investigation such as the present one, engaging the in-car camera system and thereby creating an audio and video recording or at least an audio recording should be routine. It should be a routine investigative step and the failure to do so would be comparable to an officer forgetting to take notes of their involvement in an investigation at this point in time, given the widespread use of in-car camera systems.

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I recognize there is no obligation on the police to create evidence and that is not the law and, as noted, there is no requirement for me to determine the Section 7 issue in this case. But, in the future officers need to be diligent to ensure that where there is a recording system available to capture events such as the provision of samples into an approved screening device in the context of a known impaired driving investigation, steps should be taken to ensure that the in-car camera system is activated where practical and possible.

In all the circumstances in this case, for the reasons set out, there is a finding of not guilty.

MR. GENIS: Thank you very much, Your Honour. I thank my friend.

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FORM 2

I, Helena Tsapoitis Barbesin, certify that this document is a true and accurate transcript of the recordings of Regina v. RG in the Ontario Court of Justice held at 50 Eagle Street, Newmarket, Ontario, taken from recording No. 4911\_204\_20180619\_090641\_\_6\_HENSCHMA.dcr which has been certified in Form 1.

October 29, 2018

Date

Helena Tsapoitis Barbesin

Signature

Photostatic copies of this transcript are not certified and have not been paid for unless they bear the original signature of Helena Tsapoitis Barbesin.

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