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(Winnipeg Centre)
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# COURT OF KING'S BENCH OF MANITOBA

**B E T W E E N:**

| | | |
|---|---|---|
| HIS MAJESTY THE KING | ) | Manoja Moorthy |
| | ) | Thomas Boult |
| | ) | for the Crown |
| - and - | ) | |
| | ) | Eric Wach |
| | ) | for the accused |
| VERNON BUHR, | ) | |
| | ) | |
| (accused) appellant. | ) | Judgment Delivered: February 4, 2026 |

## TOEWS J.

### INTRODUCTION

[1] This is an appeal arising out of a conviction for refusing to provide a sample of breath into an approved screening device ("ASD"). The incident giving rise to the conviction occurred on June 29, 2021. An RCMP officer stopped the appellant's motor vehicle after having received a complaint of road rage from two occupants of another motor vehicle who told the officer that the appellant attempted to hit their vehicle with his.

[2] After stopping the appellant's vehicle, the officer testified he noted various indicia of alcohol consumption including "stale" beer on the appellant's breath, slurred speech and red eyes. The officer gave the appellant a demand to provide a breath sample in the ASD for analysis. Although the officer provided the appellant with instructions and a demonstration as to how to blow properly into the ASD, the officer concluded that the appellant was refusing to provide the sample and therefore he was provided with a warning that he may be charged with refusing or failing to comply with the demand.

[3] On July 5, 2023, following a trial on April 5, 2023, the Learned Trial Judge (the "trial judge") convicted the appellant of an offence under s. 320.15(1) of the ***Criminal Code***, R.S.C., 1985, c. C-46 (the "***Code***"), providing oral reasons for judgment in convicting the appellant.

[4] Section 320.15(1) of the ***Code*** provides:

> **320.15 (1)** Everyone commits an offence who, knowing that a demand has been made, fails or refuses to comply, without reasonable excuse, with a demand made under section 320.27 or 320.28.

[5] Section 327.27 of the ***Code*** which sets out the authority for a peace officer to make the demand for a breath sample on an ASD provides:

> **320.27 (1)** If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a conveyance, the peace officer may, by demand, require the person to comply with the requirements of either or both of paragraphs (a) and (b) in the case of alcohol or with the requirements of either or both of paragraphs (a) and (c) in the case of a drug:
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> **(a)** to immediately perform the physical coordination tests prescribed by regulation and to accompany the peace officer for that purpose;
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> **(b)** to immediately provide the samples of breath that, in the peace officer's opinion, are necessary to enable a proper analysis to be made by means of an approved screening device and to accompany the peace officer for that purpose;

> **(c)** to immediately provide the samples of a bodily substance that, in the peace officer's opinion, are necessary to enable a proper analysis to be made by means of approved drug screening equipment and to accompany the peace officer for that purpose.
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> **(2)** If a peace officer has in his or her possession an approved screening device, the peace officer may, in the course of the lawful exercise of powers under an Act of Parliament or an Act of a provincial legislature or arising at common law, by demand, require the person who is operating a motor vehicle to immediately provide the samples of breath that, in the peace officer's opinion, are necessary to enable a proper analysis to be made by means of that device and to accompany the peace officer for that purpose.

[6] The appellant was acquitted of three other charges arising out of the same incident. The reasons of the trial judge are set out in a transcript forming part of the record on appeal to this court and will be referred to in the course of these reasons for decision.

## GROUNDS OF APPEAL

[7] The appellant's initial ground of appeal is stated as follows:

a) That the Learned Trial Judge erred in law in failing to require that the accused be proven to have made a final and unequivocal refusal of the direction to provide a breath sample.

[8] By leave of the court and with the consent of the Crown, the following ground of appeal was added:

b) That the Learned Trial Judge erred in law by failing to properly apply the burden of proof in the following manner:

a. By failing to require that the Crown prove each element of the *actus reus* of the offence beyond a reasonable doubt; and

b. By failing to apply the reasonable doubt standard when determining whether the *mens rea* of the offence had been proven beyond a reasonable doubt.

[9] The appellant has also raised further arguments in a motion brief filed with the court on November 4, 2025. Those issues are framed as follows in the appellant's motion brief:

> Issue 1: What is the correct statutory interpretation of s. 320.15(1) of the ***Criminal Code***?; and
>
> Issue 2: Did the Learned Trial Judge err in law in failing to address the requisite *mens rea* for the offence?

## JURISDICTION AND STANDARD OF REVIEW

[10] Section 813 of the ***Code*** provides for an appeal against conviction by the appellant to this court. The standard of review has been summarized by the Crown in its supplemental factum filed July 10, 2024, at page 9 as follows:

> While an appellate court must review the underlying factual foundation of the matter, it is well established that absent palpable and overriding error, the factual findings of the trial judge are entitled to great deference. Whether those factual findings can support the trial judge's conclusions are questions of law, and those ultimate rulings are subject to review for correctness.

[11] The parties do not dispute, and I agree with their position, that the standard of review in respect of the matters in dispute here is one of correctness.

## THE POSITION OF THE APPELLANT

[12] The appellant has advanced his position in three different filings with this court, namely the factum of the appellant filed January 2, 2024 (court document 11), the

supplemental factum of the appellant filed May 29, 2024 (court document 26), and the motion brief filed November 4, 2025 (court document 46).

[13] In the January 2, 2024, filing, the appellant submitted that the trial judge fell into error by conflating his analysis of the concepts of *mens rea* and reasonable excuse and did not identify and adjudicate the distinct issues of the *mens rea* of the offence of refusal on the facts before him. He argued that the trial judge impermissibly shifted the onus to the appellant to prove the existence of a reasonable excuse rather than conducting an analysis of whether the appellant failed to provide a sample in a manner that constituted the unequivocal refusal required at law.

[14] In the May 29, 2024 filing the appellant argues that the trial judge failed to determine whether the ASD demand made by the officer was a lawful demand. In this context, the appellant argued there are no reasonable grounds to suspect that the appellant had consumed alcohol. He also argued that the trial judge failed to consider whether the content of the demand was sufficient to constitute a lawful demand and whether the demand itself was properly communicated as well as whether the demand met the "immediacy" requirement.

[15] In the May 29, 2024 filing the appellant argued the trial judge was required to determine whether the Crown had proven beyond a reasonable doubt that the appellant "intended" to cause a failure. The appellant argued that the trial judge did not assess the evidence before the court first in the context of whether the *mens rea* had been proven by the Crown and then whether or not a reasonable excuse had been established by the appellant.

[16] The appellant also submitted that the trial judge applied the lower civil standard of proof in coming to the conclusion that the appellant was guilty of the offence rather than requiring the Crown to prove all essential elements of the offence beyond a reasonable doubt.

[17] The November 4, 2025 filing deals with the statutory interpretation of s. 320.15(1) of the ***Code***, with the appellant taking the position that this court should adopt the reasoning of the court in ***R. v. Emereuwa***, 2025 SKCA 83. The appellant argued that on the basis of the reasoning in ***Emereuwa*** the proper interpretation of s. 320.15(1) of the ***Code*** encompasses a subjective *mens rea* component with the result that the Crown is required to prove both knowledge and intent of the offence beyond a reasonable doubt.

[18] The appellant points out that the ***Emereuwa*** decision differs from the decision of the Manitoba Provincial Court in ***R. v. Sidhu***, 2024 MBPC 65 (CanLII), where the court determined that mere knowledge of a demand is sufficient for the establishment of the *mens rea* element. Applying the reasoning in ***Emereuwa***, the appellant argues that there should be an acquittal here as the Crown has not demonstrated that there was an intentional refusal on the part of the appellant to cooperate with the officer's demand for him to produce a breath sample.

## THE POSITION OF THE RESPONDENT, THE CROWN

[19] The respondent's position in respect of this appeal is found in three separate filings. The first document is the factum of the respondent filed on February 29, 2024 (court document 14). Two further factums were filed July 10, 2024 (court document 34) and November 25, 2025 (court document 48).

[20] The Crown submits that the offence pursuant to s. 320.15(1) of the ***Code*** is made out when the Crown proves that:

a) There was a lawful demand made;

b) The accused knew the demand was made; and

c) A failure or refusal by the accused to produce the required sample.

[21] The Crown submits that the court must look at the entire transaction between the police and the accused. The Crown submits that the evidence demonstrates that there was a valid demand, and that the appellant understood the demand and the warning of potential criminal charges if he failed or refused to provide the sample demanded by the officer. The Crown argued that even though the appellant agreed to provide a sample, he continued to ignore the demonstrations and instructions on providing suitable samples into the ASD.

[22] It is the Crown's position that with the enactment of s. 320.15(1) of the ***Code*** any confusion in respect of the issue of *mens rea* has been settled. The Crown stated that Parliament clearly intended the *mens rea* requirement of s. 320.15(1) of the ***Code*** to be knowledge that a demand had been made. Furthermore, on these facts, the Crown argued that the inexorable inference this court can draw is that the appellant intended to refuse. The Crown stated that once the offence is made out, it is then for the appellant to raise a reasonable excuse and this the appellant failed to do. The Crown submits that the trial judge's factual and credibility findings are owed great deference and no error in that regard requiring intervention has been demonstrated.

## ANALYSIS AND DECISION

[23] In coming to the conclusion that this appeal should be dismissed, I have considered each element of the offence and the findings of the trial judge in convicting the appellant.

[24] In my opinion, the trial judge made no reviewable error in finding that each element of the offence has been proven by the Crown beyond a reasonable doubt.

### *Onus of proof*

[25] Prior to considering each specific element of the offence, it is important to address the issue of the onus of proof and whether the trial judge properly applied the criminal standard of proof in convicting the appellant. In my opinion, he did.

[26] It is clear that the trial judge properly considered and applied the three-step test set out by the court in ***R. v. W. (D.)***, [1991] 1 S.C.R. 742 (S.C.C.). His consideration of the test is found at page T 1 to T 2 of the reasons for judgment delivered on July 5, 2023. I see no error in the manner in which he assessed the evidence in the context of that test.

[27] It is important to note that he was mindful that he not turn this analysis into a credibility contest as to who was more believable at the cost of sacrificing the principle that it is the Crown that must demonstrate its case has been proven beyond a reasonable doubt. He noted that "if the defence evidence, seen in the context of all of the evidence, raises a reasonable doubt then I cannot convict." As he stated at lines 9 to 13 of page T2:

> The onus of proof never switches from the Crown to the accused. In deciding whether the Crown has proven its case to the criminal standard I must consider

> the whole of the evidence, and I may only convict if I am satisfied that the Crown has established the accused's guilt beyond a reasonable doubt.

[28] The appellant takes issue with the trial judge's use of the phrases "it seems entirely possible" and "it also seems likely" in the context of lines 1 to 7 on page T7 arguing that he has imported the civil standard into a criminal proceeding. I disagree. These comments were made in the context of the trial judge describing the demeanour of the appellant in court and weighing the evidence before him. It does not indicate to me that the trial judge was either involving himself in a credibility contest contrary to the concerns raised in ***W. (D.)*** or that he was importing a civil standard when it came to considering the Crown's burden in establishing each element of the offence and the offence as a whole beyond a reasonable doubt.

[29] Indeed, the burden on the Crown to prove its case to a criminal standard is reiterated in the lines that follow almost immediately after his use of the impugned phrases, stating at lines 15 - 17 on page T7:

> Consequently, I believe Officer Kainth, and I find that the Crown has proven beyond a reasonable doubt that Mr. Buhr refused the breathalyser in contravention of Section 320.15(1).

[30] The test in ***W.(D.)*** does not curtail a trial judge's ability to weigh the credibility of witnesses. That function remains crucial to the judicial function in conducting a criminal trial. It does however ensure that the task of evaluating credibility and the weight to be given to any testimony or other evidence remains subject to the principle that it is the Crown who must prove its case beyond a reasonable doubt.

***A lawful demand***

[31] It is the appellant's position that the trial judge did not make a determination as to whether the demand made of the appellant was lawful and in accordance with the provisions of the ***Code***.

[32] In considering the issue of whether the Crown has proven that a lawful demand was made, I have reviewed the transcript as well as the submissions of counsel before the trial judge. It appears to me that the arguments made at trial do not appear to raise the issue of whether the demand made was lawful. The primary focus of the argument raised by counsel for the appellant before the trial judge in respect of the refusal to blow was whether the appellant's asthma was the cause of him blowing an insufficient sample and whether there was a final and unequivocal refusal on the part of the appellant.

[33] In my opinion it was sufficient in this case for the trial judge to state as he did at lines 15 to 17 on page T7:

> Consequently, I believe Officer Kainth, and I find that the Crown has proven beyond a reasonable doubt that Mr. Buhr refused the breathalyser in contravention of Section 320.15(1).

[34] The issue of whether the demand was lawful appears to be an issue first raised by counsel for the appellant on appeal and not by the original counsel acting on behalf of the appellant at trial.

[35] However, the trial judge was mindful of the requirements of s. 320.15(1) of the ***Code***. Section 320.15(1) of the ***Code*** specifically references the requirements of a demand made under s. 327.20. In my opinion the evidence before the trial judge clearly demonstrates the basis upon which a lawful demand was made, including the requisite

immediacy of the demand. In my opinion, in the circumstances of this case, and given the nature of the submissions by counsel before the trial judge, it was not necessary for him to say anything more on the issue of the lawfulness of the demand than he did.

***The element of mens rea***

[36] The issue of what needs to be proven to establish the requisite *mens rea* beyond a reasonable doubt in respect of the offence of failing to comply with a peace officer's demand for a breath sample was squarely addressed in the decision of the Manitoba Provincial Court in ***Sidhu***. In that case the learned provincial judge framed the issue and the respective positions of the parties at paras. 3 – 6 of his reasons:

> [3] For an individual to be found guilty of this offence, the Crown must prove three elements beyond reasonable doubt. First, a lawful demand needs to have been made for a breath sample. Second, an act or a series of acts must have been undertaken by the accused which constitute a failure to provide the required breath sample. Third, the accused must have acted with intention (i.e. the *mens rea* element).
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> [4] Mr. Sidhu and the Crown agree the first two elements have been proven. This case, as framed by the parties, turns on the *mens rea* element of this offence. They differ on what needs to proven beyond reasonable doubt to establish it.
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> [5] Mr. Sidhu's position is that the *mens rea* element turns on whether he intended to generate breath samples insufficient to register a reading in the ASD. He argues that on the facts of this case, he has established reasonable doubt regarding the point, and an acquittal should follow.
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> [6] For its part the Crown argues the *mens rea* element is less factually onerous. It says what needs to be proven is Mr. Sidhu's knowledge of a demand having been made of him to provide a breath sample.

[37] In ***Sidhu***, Judge Guenette sets out the two different lines of reasoning that have emerged over the question of what the Crown needs to prove to establish the mental element of this offence with the enactment of s. 320.15(1) of the ***Code***. In a very

thorough and cogent analysis of the judicial precedents and the legislative history of s. 320.15(1) of the ***Code***, Judge Guenette stated at paras. 19 – 30:

> **SECTION 320.15(1) AND THE *MENS REA***
>
> [19] The question of the *mens rea* element for this offence is not a novel issue. In 2018 Parliament modified the wording of this provision as part of a broader re-enactment of the whole of the *Criminal Code*'s driving offences. At that time, there had been two different lines of reasoning that had emerged over the question of what the Crown needs to prove to establish this offence's mental element.
>
> [20] In one line of cases, it was being held that proof of the *mens rea* requires proof of an intention to provide insufficient breath samples. In the other line of cases, it was being held that the *mens rea* requires only proof of knowledge that a demand has been made.
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> [21] The general re-enactment was Bill C-46. It was first introduced in the House of Commons on April 13, 2017, and eventually received Royal Assent on June 21, 2018, becoming c. 21 of the 2018 Statutes of Canada. Its provisions came into force 180 days later – so, on December 18, 2018.
>
> [22] Until that date, this offence provision had read as follows:

| | |
|---|---|
| **Failure or refusal to comply with demand**<br>**254(5)** Everyone commits an offence who, without reasonable excuse, fails or refuses to comply with a demand made under this section. | **Omission ou refus d'obtempérer**<br>**254(5)** Commet une infraction quiconque, sans excuse raisonnable, omet ou refuse d'obtempérer à un ordre donné en vertu du présent article. |

> [23] As a result of the 2018 revisions, the provision now reads as follows, with underlining added to highlight Parliament's new substantive wording:

| | |
|---|---|
| **Failure or refusal to comply with demand**<br>**320.15(1)** Everyone commits an offence who, knowing that a demand has been made, fails or refuses to comply, without reasonable excuse, with a demand made under section 320.27 or 320.28. | **Omission ou refus d'obtempérer**<br>**254(5)** Commet une infraction quiconque, sans excuse raisonnable, sachant que l'ordre a été donné, omet ou refuse d'obtempérer à un ordre donné en vertu des articles 320.27 ou 320.28. |

> [24] In August 2019, Justice Canada published a document entitled *Backgrounder for former Bill C-46, An Act to amend the Criminal Code (offences*

*relating to conveyances) and to make consequential amendments to other Acts, as enacted*: https://www.justice.gc.ca/eng/cj-jp/sidl-rlcfa/c46b/index.html. It includes the following passage at page 31, which touches on the issue of the mental element of this offence [with emphasis added]:

> There are a number of key changes to the elements of these offences. The simpliciter offence has been amended to clarify the necessary fault element for proof of the offence. Previously, the offence of failure or refusal to comply with a demand did not state the necessary mental fault element required for conviction. The provision now provides that knowledge that the demand had been made is sufficient to prove the mental element.

[25] The Backgrounder does not mention overtly that there had been differing lines of judicial thinking about the mental element for this offence, but it is to be presumed that Parliament was aware of it. Nevertheless, a review of Hansard reveals no express mention by any Parliamentarian specific to the point as framed in the 2019 Backgrounder.

[26] Mr. Sidhu's position is based on the more entrenched line of judicial reasoning from within pre-amendment case law. One particularly notable example is a Manitoba decision, ***R v Dolphin***, 2004 MBQB 252, in which the Queen's Bench held the *mens rea* element requires proof of intention to provide unsuitable samples But at para 22 the court added that proof of that intention "*will flow from the inference that a person intends the natural consequences of his/her act.*" That is, once the Crown proves repeated attempts to provide samples which all result in the same outcome (i.e. unsuitable samples), the intention is proven from the inference it was intentional.

[27] In some cases decided in the wake of ***Dolphin***, some further character is sometimes given to this inference. It is varyingly referred to as an *inescapable* inference, or an *inexorable* inference, or a *natural* inference. See, for example, ***R v Slater***, 2016 ONSC 2161, at paras 9, 10 and 11.

[28] Still, because this is at root an inference, whatever qualifier one might use to describe it does not eliminate the reality that an accused can present evidence in attempting to displace it – as Mr. Sidhu attempts in this case if his position on the *mens rea* element prevails. At para 12 of ***Slater***, for example, it is said the inference proves the mental element "*absent some other evidence being present that would suggest an absence of such an intent, or at least raise a reasonable doubt about it*". ***Slater*** also quotes at para 11 from another decision which held that in challenging the inference, the accused has the burden of raising sufficient evidence to lend an air of reality to the issue raised, and the evidence has to be "*fairly cogent*".

[29] The other analytical approach to the *mens rea* can also be detected in cases decided prior to the 2018 amendment, for example ***R v Porter***, 2012 ONSC 3504, at paras 33 to 37. But for present purposes it is the 2018 amendment that is most particularly notable. The Crown's argument in the present case is that

> with this amendment, Parliament has expressly clarified its intention regarding the *mens rea* element. The mental element of this offence, the Crown argues, is now knowledge that a demand has been made for a breath sample – as suggested in Justice Canada's 2019 Backgrounder.
>
> [30] The Crown also points to a growing chorus of judicial decisions from courts in other provinces which are increasingly holding that the 2018 amendment effectively eclipses the ***Dolphin*** and ***Slater*** line of reasoning.

[38] In reviewing the case law that has developed since the enactment of s. 320.15(1) of the ***Code***, including the decision of the Saskatchewan Court of Appeal in ***Emereuwa***, it is my opinion that the conclusion of Judge Guenette in ***Sidhu*** in respect of the scope of the *mens rea* element in s. 320.15(1) of the ***Code*** is correct. In the course of his reasons Judge Guenette observes and finds:

> **ANALYSIS**
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> [59] The position advanced by Mr. Sidhu and his counsel is that the conclusions reached by the courts in Alberta (***Turnbull***, ***McKinnon*** and ***Daytec***), in New Brunswick (***Bradley***), in Saskatchewan (***Sweet***, in QB) and in Ontario (***Arudselvam***) have not yet become accepted by a court in Manitoba. Their position is essentially along the lines of what Alberta's Provincial Court held in ***Lawton***, and what Newfoundland and Labrador's Provincial Court held in ***Taylor***.
>
> [60] That position is grounded, in a sense, in a discomfort with the notion that Parliament has intended to resolve this issue by formalizing that the *mens rea* does not relate to the providing of insufficient breath samples.
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> [61] Fundamentally, this is a question of statutory interpretation. I must therefore interpret the amended provision in accordance with the well-established principles in paras 21 and 22 of ***Rizzo and Rizzo Shoes***, 1998 CanLII 837 (SCC), [1998] 1 SCR 27. The words of section 320.15 must be interpreted in their entire statutory context, in their grammatical and ordinary sense, harmoniously with the scheme of the ***Criminal Code***, its objects, and the intention of Parliament.
>
> [62] It is to be presumed that in 2017 and 2018 Parliament was well aware that courts were dividing on the *mens rea* element of this offence, and that different trends could be traced through different cases (e.g. the ***Dolphin***, ***Lewko***, ***Slater*** and ***Soucy*** line; or the ***Porte*** line). If Parliament's intention in 2018 had been to maintain analytical uncertainty regarding this offence's *mens rea*, it almost certainly would not have amended the provision in any substantive way. Similarly, if Parliament's intention in 2018 had been to bring certainty to this issue, and to

> do so by codifying the ***Dolphin***, ***Lewko***, ***Slater*** and ***Soucy*** line of reasoning, it could have formalized that intention by writing it directly into the revised section 320.15. But it did neither of those. Instead, it added the words "*knowing that a demand has been made*".
>
> [63] I am particularly persuaded by the reasoning at paras 125 to 136 of the New Brunswick Queen's Bench decision in ***Bradley***, which discusses the purpose and intent of this offence – something ***Rizzo*** directs must be taken into consideration in any statutory interpretation exercise. Section 320.15 is part of a broader regime which addresses the very real and very much continuing problem of intoxicated driving (as that court explains at para 126: the death, destruction and carnage it causes). It recognizes the important role that ASD demands play in addressing that problem, and notes that driving is a highly regulated and licensed activity, and that every driver undertakes a responsibility to others to conduct themselves safely (para 129, citing ***R v Bernshaw***, 1995 CanLII 150 (SCC), [1995] 1 SCR 254). Moreover, the court in ***Bradley*** reiterates that drinking and driving itself is not illegal, but what is illegal is driving with an impermissible amount of alcohol in one's body (para 130, citing ***R v Orbanski***, 2005 SCC 37). All of which requires equipping police officers with the ability to conduct effective roadside screening. The court in ***Bradley*** adds at para 131: "*In the highly regulated field of driving, drivers owe a duty to comply with the detection tools provided*".
>
> [64] I am also cognizant that section 320.15 contains a defence, which is carried over from the prior version. Once the Crown has proven the three elements beyond reasonable doubt, an accused can still assert the defence of having had a reasonable excuse for the failure (or the refusal) in providing a suitable breath sample. The burden of proof for this defence rests on the accused person, and it is on the standard of a balance of probabilities. See, for example, ***Arudselvam*** at para 92, and ***Bradley*** at para 175.
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> [65] I am persuaded that the reasoning in ***Turnbull***, ***Bradley***, ***Sweet*** (QB) and ***Arudselvam*** properly captures Parliament's intention regarding the *mens rea* element of the offence at section 320.15. As such, what the Crown needs to prove as the *mens re*a for this offence, beyond reasonable doubt, is knowledge that a demand has been made.

[39] On the basis of the forgoing analysis by Judge Guenette, it is my opinion that what the Crown needs to prove in order to establish *mens rea* beyond a reasonable doubt, is knowledge that a demand had been made. In my opinion, the trial judge did not err in concluding that what the Crown needs to prove in order to establish *mens rea* beyond a reasonable doubt, is knowledge that a demand had been made.

[40] In reviewing the evidence and the legal issues that the trial judge was required to consider and address, I have come to the conclusion that the appellant has not established there is any basis for this court to intervene with the decision of the trial judge. There is ample evidence to support the trial judge's conclusion that the Crown had proven each element of the offence. In my opinion, the trial judge properly identified and considered the relevant legal principles to the facts here and properly applied them in holding that the Crown had proven its case beyond a reasonable doubt.

[41] In my opinion, the trial judge did not conflate the concept of *mens rea* with that of a reasonable excuse. The trial judge properly applied the concept of *mens rea* in respect of this particular offence. In respect of the issue of whether the appellant had a reasonable excuse, the trial judge considered and rejected the position of the appellant.

[42] Furthermore, the trial judge turned his mind to the issue of whether there was a final and unequivocal refusal on the part of the appellant. At lines 9 – 13 of page T7 of the transcript, the trial judge first rejected the argument of the appellant in respect of the failure or refusal to blow into the ASD and then addressed the issue of whether there was a final and unequivocal refusal on the part of the appellant, stating:

> … there was nothing in the testimony from Officer Kainth to make me think he is not reliable on this particular point regarding the failure to blow into the breathalyser. I also find him to be credible on this point. In my mind, giving him two opportunities to blow into the breathalyser was enough to ground a conviction of failure or refusal to blow.

## **CONCLUSION**

[43] In conclusion, I find that the trial judge has correctly concluded:

a) there was a final and unequivocal refusal by the appellant of the direction to provide a breath sample;

b) the Crown has proven each element of the *actus reus* of the offence beyond a reasonable doubt;

c) the *mens rea* of the offence has been proven by the Crown beyond a reasonable doubt.

[44] Accordingly, the appeal is dismissed.

_____ J.