

Citation: *R. v. Lucas*, 2020 YKTC 27

Date: 20201007
Docket: 20-00117
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REGINA

v.

DARRIN KEVIN JOHN LUCAS

Appearances:
Leo Lane
Malcolm E.J. Campbell

Counsel for the Crown
Counsel for the Defence

**REASONS FOR JUDGMENT AND
RULING ON *CHARTER* APPLICATION**

[1] RUDDY T.C.J. (Oral): On May 26, 2020, Darrin Lucas was charged with multiple offences in relation to an impaired driving investigation. He has entered not guilty pleas to all counts. At the start of trial, Crown indicated that they would be proceeding only on counts 2 and 3, driving with a blood alcohol concentration of 80 mg in 100 ml of blood contrary to s. 320.14(1)(b) of the *Criminal Code*, and resisting arrest contrary to s. 129(a). Identification has been admitted by Mr. Lucas as has the fact that he was subject to a Release Order on the offence date, which included curfew and abstain conditions. The Release Order, while not relevant to either of the two counts proceeding to trial, has some relevance to the narrative. It was filed by agreement as exhibit 1 in these proceedings.

[2] Count 3, resisting arrest, can be dealt with in a summary fashion. The charge is particularized as resisting arrest “by pulling away to run from police”. The WatchGuard video filed as exhibit 2 captures Mr. Lucas’ arrest. In the video, Mr. Lucas is clearly seen to lunge and try to pull away from police officers at the time of his arrest. Defence counsel concedes that the offence is made out on the basis of the video evidence. I would agree. Accordingly, I am satisfied that the evidence establishes, beyond a reasonable doubt, that Mr. Lucas resisted arrest by trying to pull away from the police, and I would enter the conviction on count 3.

[3] With respect to count 2, driving over 80 mg/%, defence has filed a Notice of *Charter* Application seeking exclusion of the results of the Approved Screening Device (“ASD”), and all evidence collected thereafter, on the basis that Mr. Lucas’ ss. 7, 9, and 10(b) *Charter* rights were infringed. However, in submissions, it became clear that the sole issue to be determined is whether there was unreasonable delay between the investigating officer forming the grounds to make the demand for a sample into an ASD and the time the formal demand was read and the ASD was administered, thereby creating an arbitrary detention.

The Evidence

[4] In terms of the relevant evidence, the WatchGuard video depicts much of what happens at the scene. However, as Cst. Gillis was not wearing a lapel mic, activities outside the police vehicle are limited to video with no audio. There is both audio and video in relation to the events inside the police vehicle. The external video is

supplemented by Cst. Gillis' testimony in which he provides a description of what is seen on the video.

[5] Given the nature of the central argument in this case, timing is crucial. As counsel both referenced the timing of events using the counter on the video rather than using the time of day, all times referenced in this decision similarly refer to the number of minutes into the video rather than the time of day.

[6] On May 26, 2020, Cst. Gillis was doing general duty relief work on night shift in a marked police car. In the early morning hours, he and several other members had been dispatched to the McIntyre area of Whitehorse on an unrelated matter. As he was leaving, he noted an ATV driving on the roadway with three people on it. As none of the three was wearing a helmet as required under the *Motor Vehicle Act*, RSY 2002, c.153, Cst. Gillis initiated a traffic stop at roughly 30 seconds into the video. Other than the lack of helmets, Cst. Gillis did not observe any concerns with respect to the manner of driving.

[7] At approximately 50 seconds into the video, Cst. Gillis advises Mr. Lucas of the reason for the stop, and asks for Mr. Lucas' licence. As Mr. Lucas says he does not have his licence with him, Cst. Gillis asks for his name and age so that he can run a check on license status. Mr. Lucas provides a false name. Two other police officers, Constables Moore and Gardiner, arrive on scene at 00:01:01.

[8] At 00:01:35, Cst. Gillis shines his flashlight on the ATV and sees a partially full bottle of vodka to the rear. Cst. Gillis also noted that one of the two passengers was someone he believed to be Antonio Johnson, the subject of an outstanding warrant in

relation to offences of sexual assault and sexual interference. When he asked the passenger if he was Antonio Johnson, the passenger said no.

[9] While Cst. Gillis is speaking to the passenger, a third police vehicle is seen to arrive at 00:01:49 with two more police officers, one of whom is Cst. Reid. At two minutes, Cst. Reid tells Cst. Gillis that the driver of the ATV is Darrin Lucas and that he may be on conditions. Cst. Gillis runs Antonio Johnson's name at 00:02:25 to check for warrants, conditions and criminal record. At 00:02:40, Mr. Lucas starts to walk away, and is followed by three officers. At 00:02:46, Mr. Lucas is arrested. Cst. Gillis starts a pat down, and tells Mr. Lucas he is under arrest for breach. As Cst. Gillis could smell alcohol on his breath, and had seen alcohol on the ATV, he informally told Mr. Lucas he would also be making an ASD demand.

[10] At 00:02:51, Mr. Lucas lunges forward and attempts to pull away. After a brief struggle, Cst. Reid puts handcuffs on Mr. Lucas at 00:03:09, and he is taken out of camera view to the rear of Cst. Gillis' police vehicle. An exchange is heard regarding whether Mr. Lucas has anything in his pockets. At 00:03:38, Cst. Gillis and Cst. Reid reappear on camera with Cst. Reid placing Mr. Lucas' ball cap and personal effects on the hood of Cst. Gillis' police vehicle.

[11] At this point, Cst. Gillis returns to deal with the passenger he believes to be Antonio Johnson. While he is doing so, Mr. Lucas is seen on the interior camera to shift his cuffed hands from back to front, and he continues to struggle with the cuffs causing them to tighten as indicated by a clicking noise.

[12] At 00:03:54, Cst. Gillis is seen to point at the two passengers. In his testimony, he indicated that he heard a name being queried and wanted to know if the check was in relation to the third passenger or the passenger he believed to be Mr. Johnson. When he learns that they are running the name given to them by the person he believes to be Mr. Johnson, Cst. Gillis is heard at 00:03:58 on his radio telling Dispatch to scrap the request as he believes that Mr. Johnson has given them a false name, and asking them to run Mr. Johnson. There is a response from Dispatch regarding Mr. Johnson starting at 00:04:12, which cannot be heard in its entirety as part of it is drowned out by Mr. Lucas sighing and swearing inside the police vehicle.

[13] At 00:04:25, Cst. Gillis walks off camera to the right to where he says Mr. Johnson is standing. Cst. Gillis indicated that he wanted to stay in proximity in case Mr. Johnson, like Mr. Lucas, tried to run. At 00:04:40, Constables Moore and Gardiner can just be seen departing, apparently escorting Mr. Johnson to their police vehicle.

[14] At 00:04:47, Cst. Gillis walks back to his police vehicle and disappears off camera on the driver's side. He reappears at 00:04:52 and has a brief discussion with Cst. Reid before picking up Mr. Lucas' effects from the hood of his police vehicle at 00:05:02 and disappearing off screen. The discussion with Cst. Reid continues until 00:05:15.

[15] Between 00:05:17 and 00:05:37, there is a discussion between Mr. Lucas and Cst. Gillis about what is going to happen to Mr. Lucas' ATV.

[16] At 00:05:43, Mr. Lucas complains about his cuffs, and Cst. Gillis says, "you shouldn't have tried to run and given a fake name". Dispatch can be heard reading Mr.

Lucas' conditions and outstanding charges until 00:06:34. Cst. Gillis replies briefly to Dispatch.

[17] At 00:06:45, a door is heard opening, which Cst. Gillis says is him getting out of the vehicle to go around to the passenger side to retrieve the ASD from the front passenger side. Due to equipment inside the vehicle between the driver's and passenger's seats, he indicated the ASD could not be accessed from inside. He appears on screen and is seen to walk around the front of his vehicle before disappearing around the right side of the vehicle on the passenger side. Sounds can be heard consistent with Cst. Gillis retrieving the ASD. At 00:06:56 a vehicle door shuts, and Cst. Gillis reappears on screen and walks back around the front of the vehicle to the driver's side.

[18] At 00:07:05, Cst. Reid walks toward the driver's side of Cst. Gillis's police vehicle. Cst. Reid's lips are moving indicating that he is speaking, presumably to Cst. Gillis, but he moves off screen, reappearing at 00:07:27. He turns back almost immediately, again appearing to be speaking to Cst. Gillis and pointing at the ATV. He moves off screen again to the driver's side of Cst. Gillis' police vehicle. Cst. Reid reappears at 00:07:40 walking toward the ATV.

[19] At eight minutes, Cst. Gillis can be heard formally advising Mr. Lucas of the reasons for arrest, namely breach and resist arrest. Cst. Gillis then reads the right to counsel card and asks Mr. Lucas, at 00:08:30, if he understands, followed by a discussion about whether Mr. Lucas wants to call counsel and who he wants to call.

[20] At 00:08:57, Mr. Lucas asks to have his cuffs loosened. At 00:09:02, Cst. Gillis reads the police warning. At 00:09:15, Cst. Gillis reads the ASD demand. Between 00:09:38 and 00:10:09, Cst. Gillis asks Mr. Lucas questions about whether he has anything in his mouth, and the timing of Mr. Lucas' last drink. At 00:10:12, Mr. Lucas complains about the cuffs cutting off his circulation. Between 00:10:20 and 00:11:15, Cst. Gillis explains the ASD and, when asked by Mr. Lucas, explains the consequences of failing the ASD test and of refusing to provide a sample.

[21] At 00:11:20, Mr. Lucas provides a sample into the ASD, resulting in a fail. At 00:11:40, Cst. Gillis advises Mr. Lucas he is now also under arrest for driving at or over 80 mg/%. Cst. Gillis provides Mr. Lucas his right to counsel and police warning again because of the change in jeopardy. At 00:13:25, Cst. Gillis makes the demand for breath samples into an approved instrument.

[22] At 00:14:23, Mr. Lucas asks again to have the cuffs loosened. Cst. Gillis asks him to wait a second. At 00:14:50, Cst. Gillis has Cst. Reid come over, as he wants him nearby in case Mr. Lucas tries to run again. At 00:15:30, Cst. Gillis loosens the cuffs. Cst. Gillis was asked why he had not loosened the cuffs sooner. He says that he did not as he was in the middle of the process of obtaining a breath sample. He says that Mr. Lucas was calm and did not appear to be in obvious pain. Cst. Gillis knows that cuffs are inherently uncomfortable and it is not uncommon for people to complain, so he did not see any urgency. He was unaware that the cuffs had tightened due to Mr. Lucas' movements.

[23] At 00:16:30, Cst. Gillis leaves the scene and drives to the detachment.

[24] At the detachment, Mr. Lucas provides two breath samples, both registering 80 mg/%. The Certificate of Qualified Technician was filed, on consent, as exhibit 6. In addition, the defence concedes that both samples were taken within two hours of the time of driving.

The Law

[25] Section 320.27(1)(b) authorizes a peace officer who has reasonable grounds to suspect that a person has alcohol in their body and that the person has operated a conveyance within the preceding three hours to require the person “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”(emphasis added).

[26] No issues have been raised with respect to the validity of either the ASD or the approved instrument demand. The only issue argued by counsel is whether Cst. Gillis acted “immediately” as required in making the ASD demand and obtaining the breath sample.

[27] It should be noted that s. 320.27 is a relatively recent section, having come into force in December 2018. Its predecessor, s. 254(2), required the sample to be provided ‘forthwith’ rather than ‘immediately’; however, the Supreme Court of Canada in *R. v. Woods*, 2005 SCC 42, held, at para. 13, that “[f]orthwith’ means ‘immediately’ or ‘without delay’”. It is reasonable, therefore, to conclude that the case law with respect to the meaning of ‘forthwith’ is equally applicable to the meaning of ‘immediately’ under the new provisions. In considering the case law, delays of even a few minutes have been

held to be an arbitrary detention contrary to s. 9 of the *Charter* where the reasons for the delay were unnecessary and unreasonable.

[28] In determining what is necessary and reasonable, each case will turn on its own facts. However, the Ontario Court of Appeal offers significant guidance in making this analysis in the oft-quoted decision of *R. v. Quansah*, 2012 ONCA 123. LaForme J. notes at paras. 45 - 49:

45 In sum, I conclude that the immediacy requirement in s. 254(2) necessitates the courts to consider five things. First, the analysis of the forthwith or immediacy requirement must always be done contextually. Courts must bear in mind Parliament's intention to strike a balance between the public interest in eradicating driver impairment and the need to safeguard individual *Charter* rights.

46 Second, the demand must be made by the police officer promptly once he or she forms the reasonable suspicion that the driver has alcohol in his or her body. The immediacy requirement, therefore, commences at the stage of reasonable suspicion.

47 Third, "forthwith" connotes a prompt demand and an immediate response, although in unusual circumstances a more flexible interpretation may be given. In the end, the time from the formation of reasonable suspicion to the making of the demand to the detainee's response to the demand by refusing or providing a sample must be no more than is reasonably necessary to enable the officer to discharge his or her duty as contemplated by s. 254(2).

48 Fourth, the immediacy requirement must take into account all the circumstances. These may include a reasonably necessary delay where breath tests cannot immediately be performed because an ASD is not immediately available, or where a short delay is needed to ensure an accurate result of an immediate ASD test, or where a short delay is required due to articulated and legitimate safety concerns. These are examples of delay that is no more than is reasonably necessary to enable the officer to properly discharge his or her duty. Any delay not so justified exceeds the immediacy requirement.

49 Fifth, one of the circumstances for consideration is whether the police could realistically have fulfilled their obligation to implement the detainee's

s. 10(b) rights before requiring the sample. If so, the "forthwith" criterion is not met.

[29] Local decisions have considered the question of delay applying the *Quansah* decision. In *R. v. Tibbo*, 2020 YKTC 9, a decision of this Court, Chisholm J. held that a delay of eight minutes was reasonable where the officer was assisting medical personnel and ensuring that the accused was medically cleared to provide a breath sample.

[30] In *R. v. Smarch*, 2014 YKSC 27, a decision of the Yukon Supreme Court, Gower J. considered delay occasioned by the officer performing routine background checks, finding at para. 47 that the:

... practice in this regard simply amounts to a prudent police officer doing his duty to identify a suspect for a driving offence, who is not in possession of a driver's licence. As such, it falls squarely within the third consideration in *Quanash*, i.e. the time between the formation of the reasonable suspicion to the making of the demand and then to the detainee's response "must be no more than is reasonably necessary to enable the officer to discharge his or her duty as contemplated by s. 254(2)". Further, as is evident above at para. 22 of these reasons, in quoting from *Megahy*, in *R. v. Oduneye*, (1995), 169 A.R. 353, the Alberta Court of Appeal stated that some short delay will always be necessary. "The police officer must identify the driver. He or she must be allowed at least a brief period of observation to ensure that his/her suspicion is reasonable. ...

[31] Applying the law to the facts in Mr. Lucas' case, counsel agree that the delay at issue in this case is between two minutes and 40 seconds into the video, the approximate time when Cst. Gillis formed his suspicion and eight minutes into the video when Cst. Gillis began dealing with Mr. Lucas' advising him of the reasons for arrest, his right to counsel, and making the formal breath demand. The total delay is five minutes

and 20 seconds. The disputed period includes the arrest of Mr. Johnson and discussions between Cst. Gillis and the other officers present. Counsel disagree on whether all or any of this delay was necessary and reasonable. Defence counsel argues that, given the presence of four other peace officers at the scene, none of the delay can be said to be reasonable, particularly as none of the delay was directly related to the impaired driving investigation. Crown argues that Cst. Gillis was diligent in the exercise of his duties in all of the circumstances and that any delay was reasonable.

[32] In assessing the reasonableness of the delay, it is necessary to break it down into the different steps to consider the reasonableness of each separately before considering the cumulative effect.

From 00:02:40 to 00:03:38 (58 seconds)

[33] This period includes Cst. Gillis forming the suspicion that Mr. Lucas had alcohol in his body, the arrest of Mr. Lucas, his attempt to get away, the efforts to subdue, cuff, search, and secure Mr. Lucas in the back of the police vehicle. I find that all of these activities directly relate to the investigation of Mr. Lucas and were entirely necessary and reasonable from an officer safety perspective when considered in light of Mr. Lucas' attempted escape.

From 00:03:39 to 00:4:46 (1 minute and 7 seconds)

[34] This period is when Cst. Gillis returns to deal with the issue of Mr. Johnson. In some ways, this is the most contentious period from defence counsel's perspective. He

argues that, with four other members present, there was absolutely no reason for Cst. Gillis to delay the formal ASD demand and taking of the breath sample from Mr. Lucas. Cst. Gillis, however, indicated that he was the only officer present who knew Mr. Johnson and was aware of the outstanding warrants.

[35] Defence counsel noted that at trial Cst. Gillis testified that he was initially unsure if the passenger was Antonio Johnson, and it was only later, during this period of time, that he became certain. This is contradicted by his General Occurrence Report in which Cst. Gillis wrote that he recognized the passenger as Antonio Johnson at the outset. Defence counsel argued that this discrepancy should cause me concern about Cst. Gillis' credibility.

[36] In my view, this is a minor discrepancy as it relates to Cst. Gillis' credibility. Overall, I found him to be a very credible witness. This was the only real inconsistency in his evidence, which was otherwise consistent with what was heard and observed on the WatchGuard video throughout. I am satisfied that he was merely mistaken about the timing of when he became certain that the passenger was Mr. Johnson. I cannot say for certain if the mistake was in his testimony or in the Occurrence Report. Defence counsel argues that the Occurrence Report is the better evidence as it was proximate in time with the investigation. He further argues that if Cst. Gillis recognized Mr. Johnson immediately, as indicated in the Occurrence Report, he could have simply advised one of the other officers and left them to deal with Mr. Johnson while he dealt with Mr. Lucas.

[37] If one observes the video, however, nothing turns on whether Cst. Gillis recognized the passenger as Mr. Johnson immediately or not. Cst. Gillis is in the midst of speaking to Mr. Johnson when he is interrupted by Cst. Reid telling him who Mr. Lucas is. This evolves very quickly into Mr. Lucas' arrest. I am satisfied there was no time for Cst. Gillis to inform the other officers about his suspicions until after Mr. Lucas was placed in his police vehicle. The fact that the other officers were unaware is made clear when Cst. Gillis returns and learns that a check is being done on a false name provided by Mr. Johnson. In my view, as Cst. Gillis was the only member who knew Mr. Johnson, and that Mr. Johnson was subject to an arrest warrant on sexual assault and sexual interference charges, it was entirely reasonable for him to return after placing Mr. Lucas in his police vehicle to advise the other officers. I am satisfied that ensuring the arrest of someone facing such serious charges, while not an ongoing offence, nonetheless, is a legitimate public safety issue justifying the slight delay occasioned in this case. It is arguable that once he cleared up the confusion about Mr. Johnson's identity, Cst. Gillis need not have waited while Mr. Johnson was arrested, but I would note that the time from Cst. Gillis returning to deal with Mr. Johnson and Mr. Johnson's arrest is only one minute and seven seconds in its entirety. At best, not remaining for the arrest once identity was established would have saved all of thirty seconds.

From 00:04:47 to 00:05:15 (28 seconds)

[38] This period has Cst. Gillis returning to his vehicle, then, starting at 00:04:52, appears to involve a discussion between Cst. Gillis and Cst. Reid. There is no evidence

before me as to the subject of the exchange, so I am unable to conclude whether it related to the impaired investigation or not, but the duration is brief at only 23 seconds.

From 00:05:16 to 00:06:56 (1 minute 40 seconds)

[39] This period includes a discussion between Cst. Gillis and Mr. Lucas about the ATV, an exchange about the cuffs, Cst. Gillis listening to information from Dispatch regarding Mr. Lucas' conditions, and Cst. Gillis going to retrieve the ASD from the passenger side of the vehicle. In my view, none of this delay is unreasonable. The majority of the time period involves receiving the information regarding Mr. Lucas' conditions, the type of background check found to be prudent and reasonable by Justice Gower in the *Smarch* decision, and retrieving the ASD, an activity that was clearly both necessary and reasonable.

From 00:06:57 to 00:08:00 (1 minute and 3 seconds)

[40] Not everything that occurs over this one minute and three seconds is fully clear, but approximately 35 seconds of it would appear to be discussions between Cst. Gillis and Cst. Reid. As Cst. Reid points to the ATV at one point, it would appear at least some of the discussion related to what would be happening with the ATV; however, I am unable to determine with any degree of certainty the extent to which the discussion and activities during this time frame were necessary or reasonable.

Conclusion

[41] Excluding the time I have found to be necessary and reasonable, the remaining delay in this case amounts to one minute and 26 seconds of unknown conversation

between Cst. Gillis and Cst. Reid, plus perhaps 30 or so more seconds regarding the actual arrest of Mr. Johnson. In total, the cumulative delay, which I cannot clearly conclude to be necessary and reasonable, amounts to just under two minutes. I am hard pressed to conclude that such a brief amount of time could be considered unreasonable delay resulting in an arbitrary detention, particularly not when measured against societal interest in addressing impaired driving offences. In the result, I conclude that Mr. Lucas' has not established a breach of his *Charter* rights.

[42] If I am wrong in my conclusion, a two minute delay, at most, would amount to a technical breach, one that would not, in my view, justify the exclusion of evidence under s. 24(2), in any event.

[43] As Mr. Lucas has not satisfied me that any evidence should be excluded, I conclude that the evidence in this case is sufficient to satisfy me beyond a reasonable doubt that on May 26, 2020, Mr. Lucas operated a conveyance while the concentration of alcohol in his blood was 80 mg/%. I therefore find Mr. Lucas guilty on count 2.

RUDDY T.C.J.