

 **SUPREME COURT OF CANADA**

|  |  |
| --- | --- |
| **Citation:** R. *v.* Woods, [2005] 2 S.C.R. 205, 2005 SCC 42 | **Date:**  20050629**Docket:**  30395 |

**Between:**

**Her Majesty The Queen**

Appellant

v.

**John Charles Woods**

Respondent

**Coram:** McLachlin C.J. and Bastarache, Binnie, Deschamps, Fish, Abella and Charron JJ.

|  |  |
| --- | --- |
| **Reasons for Judgment:** (paras. 1 to 49) | Fish J. (McLachlin C.J. and Bastarache, Binnie, Deschamps, Abella and Charron JJ. concurring) |

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

R. *v.* Woods, [2005] 2 S.C.R. 205, 2005 SCC 42

**Her Majesty The Queen** *Appellant*

*v*.

**John Charles Woods** *Respondent*

**Indexed as:  R. *v.* Woods**

**Neutral citation:  2005 SCC 42.**

File No.:  30395.

2005:  May 11; 2005:  June 29.

Present:  McLachlin C.J. and Bastarache, Binnie, Deschamps, Fish, Abella and Charron JJ.

on appeal from the court of appeal for manitoba

*Criminal law — Failure to provide breath sample — Accused refusing to provide breath sample following demand by police at roadside — Accused subsequently providing sample at police station following second demand made more than an hour after his arrest — Whether sample obtained forthwith in response to valid demand — Meaning of word “forthwith” in s. 254(2) of Criminal Code, R.S.C. 1985, c. C‑46.*

Police officers stopped a vehicle driven by the accused. They detected a strong odour of alcohol and made an approved screening device (“ASD”) demand for a breath sample. The accused refused, and was arrested under s. 254(5) of the *Criminal Code*. At the station, approximately an hour after his arrest and after speaking with counsel by phone, the accused intimated that he wished to furnish a breath sample. After seven unsuccessful attempts, a police officer told the accused that if he did not provide a proper sample on his next attempt, he would be charged with failure to provide a sample. The accused then provided a proper sample, and he was ultimately charged with, and was convicted at trial for, having operated a motor vehicle with a blood-alcohol ratio exceeding the legal limit. The summary conviction appeal court set aside the conviction and substituted an acquittal. The Court of Appeal affirmed the acquittal, having found that the ASD breath samples obtained by the police were not admissible at trial to prove they had reasonable and probable grounds for a breathalyser demand under s. 254(3) of the *Criminal Code*.

*Held*:  The appeal should be dismissed.

An ASD breath sample is legally obtained where it is either provided forthwith, pursuant to a lawful demand under s. 254(2), or provided voluntarily. While the word “forthwith”, in the context of s. 254(2) of the *Code*, may in unusual circumstances be given a more flexible interpretation than its ordinary meaning strictly suggests, the “forthwith” requirement connotes a prompt demand by the peace officer and an immediate response by the person to whom that demand is addressed. Therefore, drivers to whom ASD demands are made under s. 254(2) must comply immediately — and not later, at a time of their choosing. Here, the second demand for a breath sample made at the police station does not fall within s. 254(2), as it fails the “immediacy” criterion implicit in that provision. To accept as compliance “forthwith” the furnishing of a breath sample more than an hour after being arrested for having failed to comply is a semantic stretch beyond the literal bounds and constitutional limits of s. 254(2). The Crown conceded that the ASD sample in issue here was not obtained voluntarily. [9] [43‑46]

Prosecutorial discretion exists not to lay a charge for failure to comply with an ASD breath sample demand where an initial refusal is later followed by compliance. Neither this prosecutorial discretion nor the right of any person, detained or not, to volunteer self‑incriminating evidence warrants extension of a statutory scheme beyond the constitutional boundaries within which it was meant to operate. [26-28]

**Cases Cited**

**Referred to:**  *Dedman v. The Queen*, [1985] 2 S.C.R. 2; *R. v. Thomsen*, [1988] 1 S.C.R. 640; *R. v. Grant*, [1991] 3 S.C.R. 139; *R. v. Bernshaw*, [1995] 1 S.C.R. 254; *R. v. Cote* (1992), 70 C.C.C. (3d) 280.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, ss. 1, 8, 9, 10.

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 253(*b*), 254(2), (3), (5).

**Authors Cited**

*Canadian Oxford Dictionary*, 2nd ed. Edited by Katherine Barber. Toronto: Oxford University Press, 2004, “forthwith”.

APPEAL from a judgment of the Manitoba Court of Appeal (Philp, Twaddle and Freedman JJ.A.) (2004), 184 Man. R. (2d) 138, 185 C.C.C. (3d) 70, 318 W.A.C. 138, 7 M.V.R. (5th) 10, 118 C.R.R. (2d) 338, [2004] M.J. No. 145 (QL), 2004 MBCA 46, affirming a decision of Nurgitz J., dismissing the Crown’s appeal from a judgment of Everett Prov. Ct. J. Appeal dismissed.

*Ami Kotler*, for the appellant.

*Joe Aiello*, for the respondent.

The judgment of the Court was delivered by

Fish J. —

I

1. The appellant has attempted on this appeal, valiantly but I believe in vain, to overcome the factual, semantic and constitutional barriers to its proposed interpretation of the phrase “to provide forthwith” in s. 254(2) of the *Criminal Code*, R.S.C. 1985, c. C-46. In my view, the appeal fails for that reason and I propose to explain briefly, from the outset, why this is necessarily so.
2. The respondent was convicted at trial for having driven his car with more alcohol in his blood than the law permits.
3. It is undisputed that his conviction was based on a breathalyzer result that depended for its admissibility on whether the respondent had earlier provided a breath sample “forthwith” in response to an approved screening device (“ASD”) demand under s. 254(2) of the *Criminal Code*. The Manitoba Court of Appeal held that he had not. I agree. Like the Court of Appeal, I reject the Crown’s submission that a breath sample has been provided “forthwith” when it is furnished by a motorist at the police station more than an hour after the motorist has been arrested *for refusing to comply with the demand*. That is what happened here.
4. Moreover, I do not share the Crown’s concern regarding the impact of this case on the discretion of prosecutors not to proceed with refusal charges made “unnecessary” by a driver’s subsequent change of heart. Nothing in the decision of the Court of Appeal warrants that concern.
5. I turn now to a more detailed overview of the issues on the appeal and my reasons for concluding that the appeal should be dismissed.

II

1. Parliament has created, in s. 254 of the *Criminal Code*, a two-step detection and enforcement procedure to curb impaired driving. The first step, set out in s. 254(2), provides for screening tests at or near the roadside immediately after the interception of a motor vehicle. The second step, set out in s. 254(3), provides for a breathalyzer test, which is normally performed at a police station.
2. The respondent was convicted at trial for having operated a motor vehicle with a blood-alcohol ratio exceeding the legal limit of .08, contrary to s. 253(*b*) of the *Criminal Code*. His conviction rests entirely on the result of a breathalyzer test. That evidence was obtained pursuant to a breathalyzer demand under s. 254(3) of the *Code.* Its admissibility depends on whether the police had reasonable and probable grounds to make the breathalyzer demand. And it is common ground that the only evidence of reasonable and probable grounds for the breathalyzer demand was the ASD result pursuant to which that demand was made.
3. Accordingly, *the only issue in the case is whether the ASD breath sample was legally obtained.*  If it was, the breathalyzer evidence was properly admitted and the respondent’s conviction was sound. If not, the conviction cannot stand.
4. There are two ways in which an ASD breath sample can be legally obtained. The first is pursuant to a valid demand under s. 254(2) of the *Criminal Code*. The second is voluntarily. At the hearing of the appeal, Crown counsel conceded that the ASD sample in issue here was not obtained voluntarily within the meaning of *Dedman v. The Queen*, [1985] 2 S.C.R. 2. Its admissibility to prove the requisite grounds for a breathalyzer demand therefore depends on whether it was obtained pursuant to a lawful demand under s. 254(2) of the *Code*.
5. The relevant text of s. 254(2) reads:

(2) Where a peace officer reasonably suspects that a person who is operating . . . or who has the care or control of a motor vehicle . . . has alcohol in the person’s body, the peace officer may, by demand made to that person, require the person to provide forthwith such a sample of breath as in the opinion of the peace officer is necessary to enable a proper analysis of the breath to be made by means of an approved screening device . . . .

1. As we shall presently see, the police made *two* ASD demands, one at the roadside and the other at the police station — more than an hour after the respondent had been arrested for failing to comply with the demand made at roadside. Plainly, this second demand, made at the station, was not a lawful demand under s. 254(2) of the *Code*.
2. What we are left with, then, is the respondent’s *refusal* to provide a breath sample forthwith pursuant to the only lawful demand made upon him pursuant to s. 254(2). That is the factual obstacle to the Crown’s appeal.
3. We are left as well with the ASD breath sample provided by the respondent at the police station, approximately 1 hour and 20 minutes after his arrest for refusing to provide a sample at roadside. “Forthwith” means “immediately” or “without delay”: *Canadian Oxford Dictionary* (2nd ed. 2004), at p. 585. Without doing violence to the meaning of the word, “forthwith” cannot be stretched to bring within s. 254(2) of the *Criminal Code* the long-delayed “compliance” that occurred in this case. This semantic obstacle to the Crown’s position, like the factual one, is in my view insurmountable.
4. The constitutional obstacle is no easier for the Crown to overcome. Section 254(2) depends for its constitutional validity on its implicit and explicit requirements of immediacy. This immediacy requirement is implicit as regards the police demand for a breath sample, and explicit as to the mandatory response: the driver must provide a breath sample “forthwith”.
5. Section 254(2) authorizes roadside testing for alcohol consumption, under pain of criminal prosecution, in violation of ss. 8, 9 and 10 of the *Canadian Charter of Rights and Freedoms*. But for its requirement of immediacy, s. 254(2) would not pass constitutional muster. That requirement cannot be expanded to cover the nature and extent of the delay that occurred here.

III

1. The essential facts, as set out in the appellant’s factum, may be summarized as follows.
2. Two police officers stopped the respondent at the wheel of his car, in suburban Winnipeg, at approximately 10:30 p.m. on March 12, 1999. The officers detected a “strong” odour of alcohol in the respondent’s car — there were no passengers  — and they made an ASD demand for a breath sample, pursuant to s. 254(2) of the *Criminal Code*.
3. The respondent refused to comply with the demand. He was thereupon arrested, pursuant to s. 254(5) of the *Code*, for having failed to comply.
4. The respondent was then given his rights and he indicated that he wished to consult counsel. The police had no cellular phone. They informed the respondent that he would be taken to the police station and could call a lawyer from there. A tow truck was called to remove the respondent’s car for reasons of safety and he was then taken to the police station, arriving there approximately an hour after his arrest.
5. At the station, after speaking with counsel by phone, the respondent “intimated”, according to one of the officers, that he now wished to furnish a breath sample and he was provided with an opportunity — in fact, with *seven* opportunities — to do so. On each of those occasions, according to Crown counsel, the respondent “did not blow hard enough or long enough to enable a proper sample to be taken”:

[The police] observed that the Respondent was either providing improper samples or placing his tongue over the end of the mouthpiece to prevent any air entering the ASD. They were at most a foot away from his face and observed his actions in this regard. After each invalid sample, he was informed of the proper way to provide a sample.

Eventually, after a seventh invalid sample, police told the Respondent that if he did not provide a proper sample on his next attempt, he would be charged with refusing to provide a sample. The Respondent immediately provided a valid sample, which was a Fail.

1. On the strength of that result, the respondent was required to provide a breathalyzer sample. Based on the breathalyzer reading, the respondent was ultimately charged under s. 253(*b*) of the *Criminal Code*, and convicted at trial, for having operated a motor vehicle with a blood-alcohol ratio exceeding the legal limit of 80 mg of alcohol in 100 ml of blood.
2. The respondent’s conviction at trial was set aside by the summary conviction appeal court and an acquittal was substituted. The Manitoba Court of Appeal dismissed an appeal by the Crown against that decision and the Crown further appeals to this Court.

IV

1. I turn now to the judgment of the Manitoba Court of Appeal ((2004), 184 Man. R. (2d) 138, 2004 MBCA 46).
2. Speaking for a unanimous Court, Philp J.A. reviewed the relevant case law and concluded that the ASD breath sample given by the respondent was not obtained in response to a valid demand under s. 254(2), nor provided voluntarily. Philp J.A. explained:

. . . the accused’s “agreement” (that is the finding the trial judge made) to provide a breath sample for an ASD test at the Public Safety Building, when he was under arrest and no longer had care or control of his vehicle, was not in response to the demand that had been made at the roadside over an hour earlier. That earlier demand was exhausted when the accused had refused to comply and was placed under arrest for so doing. The ASD sample was not provided “forthwith” even under the broadest interpretation of the word. The fact that the accused’s refusal was the reason why the sample had not been provided earlier does not bring the test within the ambit of the section.

I am further of the view that the demand for an ASD sample that Cst. Billedeau made at the Public Safety Building fell outside the ambit of s. 254(2), both temporally and spatially, and was not authorized by it. . . . [paras. 23-24]

1. Philp J.A. later added:

. . . there was no statutory authority for the demand for an ASD sample that Cst. Billedeau made at the Public Safety Building. The accused had no obligation to comply with that demand and would not have committed an offence if he had refused to do so. The clear inference to be drawn from the seven unsuccessful attempts the accused made is that he was not a willing and consenting participant. A proper sample was obtained only after the accused was told that if he did not provide a proper sample on the next attempt, he would be charged with refusing to provide a sample.

In my view, the actions of the police officers, without consent or statutory authority, resulted in the accused’s self-incrimination. The manner in which they conducted themselves throughout in their interaction with the accused was unremarkable. But, at the same time, courts have recognized “the authoritative and coercive character of police requests” and “the intimidating nature of police action and uncertainty as to the extent of police powers.” In my view, the unauthorized demand for an ASD sample that was made in this case at the Public Safety Building, coupled with the threat of possible criminal liability for failure to comply with that demand, amounted to effective compulsion or coercion. The results of the ASD test provided the police officers with the reasonable and probable grounds needed to make the breathalyzer demand. The principle against self-incrimination was engaged (not to protect against unreliable evidence, but to protect against abuse of state power) and the admission into evidence of the results of the breathalyzer samples resulted in an unfair trial. The accused was denied fundamental justice. [paras. 30-31]

V

1. The Crown urges us to be mindful of the need for prosecutorial discretion in the circumstances of this case. The police, it is argued, should not be required to lay a charge for failure to comply with an ASD breath sample demand where the driver, after an initial refusal, has later complied. And that would be the unfortunate consequence, according to the Crown, if we were to dismiss its appeal. In the words of Crown counsel: “If the Court of Appeal’s decision is upheld then police, at least in Manitoba, will have no discretion in this regard.”
2. In my view, as mentioned earlier, the Crown’s concern is groundless. Nothing in the reasons of the Manitoba Court of Appeal stands for the proposition that an ASD result — or a breathalyzer result — based on a breath sample provided voluntarily by an accused after an initial refusal is inadmissible at that person’s trial. Nor did the Manitoba Court of Appeal decide that the Crown lacks discretion in determining what, if any, offences should be charged where an initial refusal is later followed by compliance, or by the taking of a breath sample that has been voluntarily — or freely and willingly — furnished.
3. But neither prosecutorial discretion nor the right of any person, detained or not, to volunteer self-incriminating evidence warrants extension of a statutory scheme beyond the constitutional boundaries within which it was meant to operate: see, for example, *R. v. Thomsen*, [1988] 1 S.C.R. 640; *R. v. Grant*, [1991] 3 S.C.R. 139, at p. 150; *R. v. Bernshaw*, [1995] 1 S.C.R. 254, at paras. 72-75.
4. The “forthwith” requirement of s. 254(2) of the *Criminal Code* is inextricably linked to its constitutional integrity. It addresses the issues of unreasonable search and seizure, arbitrary detention and the infringement of the right to counsel, notwithstanding ss. 8, 9 and 10 of the *Charter*. In interpreting the “forthwith” requirement, this Court must bear in mind not only Parliament’s choice of language, but also Parliament’s intention to strike a balance in the *Code* between the public interest in eradicating driver impairment and the need to safeguard individual *Charter* rights.
5. As earlier explained, Parliament enacted a two-step legislative scheme in s. 254(2) and (3) of the *Criminal Code* to combat the menace of impaired driving. At the first stage, s. 254(2) authorizes peace officers, on reasonable suspicion of alcohol consumption, to require drivers to provide breath samples for testing on an ASD. These screening tests, at or near the roadside, determine whether more conclusive testing is warranted. They necessarily interfere with rights and freedoms guaranteed by the *Charter*, but only in a manner that is reasonably necessary to protect the public’s interest in keeping impaired drivers off the road.
6. At that second stage of the statutory scheme, where the *Charter* requirements must be respected and enforced, s. 254(3) allows peace officers who have the requisite reasonable and probable grounds to demand breath samples for a more conclusive breathalyzer analysis. Breathalyzers determine precisely the alcohol concentration in a person’s blood and thus permit peace officers to ascertain whether the alcohol level of the detained driver exceeds the limit prescribed by law.
7. *Thomsen* was one of the early cases that dealt with constitutional concerns regarding roadside detention of motorists. The Court held that the absence of an opportunity to retain counsel violated s. 10(*b*) of the *Charter*, but was justified under s. 1 of the *Charter* as a reasonable limit prescribed by law. The “forthwith” requirement of s. 254(2) is in a sense a corollary of the fact that there is no opportunity for contact with counsel prior to compliance with the ASD demand.
8. In *Grant*, the officer who had stopped the accused did not have a screening device in his car. He therefore asked another officer to deliver one to him. The device did not arrive until 30 minutes later. During that time, the accused remained in the police car. Speaking for the Court, Lamer C.J. stated:

The context of s. 238(2) [now, with changes immaterial here, s. 254(2)] indicates no basis for departing from the ordinary, dictionary meaning of the word “forthwith” which suggests that the breath sample is to be provided immediately. Without delving into an analysis of the exact number of minutes which may pass before the demand for a breath sample falls outside of the term “forthwith”, I would simply observe that where, as here, the demand is made by a police officer who is without an A.L.E.R.T. unit and the unit does not, in fact, arrive for a half hour, the provisions of s. 238(2) will not be satisfied. [Emphasis added; p. 150.]

1. In *R. v. Cote* (1992), 70 C.C.C. (3d) 280 (Ont. C.A.), the police officer likewise had no screening device in his car. He drove the accused to a police station nine minutes away and was not ready until five minutes later to take a breath sample. The accused refused to comply with the officer’s demand and was charged pursuant to s. 238(5) (now s. 254(5)) of the *Criminal Code*. The Ontario Court of Appeal set aside his conviction and entered an acquittal instead.
2. Speaking for a unanimous court, Arbour J.A. (as she then was) cited the passage I have reproduced from *Grant*, and explained:

If the accused must be taken to a detachment, where contact with counsel could more easily be accommodated than at the side of the road, a large component of the rationale in *Thomsen* disappears. In other words, if the police officer is not in a position to require that a breath sample be provided by the accused before any realistic opportunity to consult counsel, then the officer’s demand is not a demand made under s. 238(2). The issue is thus not strictly one of computing the number of minutes that fall within or without the scope of the word “forthwith”. Here, the officer was ready to collect the breath sample in less than half the time it took in *Grant*. However, in view of the circumstances, particularly the wait at the police detachment, I conclude that the demand was not made within s. 238(2). As the demand did not comply with s. 238(2), the appellant was not required to comply with the demand and his refusal to do so did not constitute an offence. [Emphasis added; p. 285.]

1. It is for these reasons that we are prohibited on constitutional grounds from expanding the meaning of “forthwith” in s. 254(2) to cover the delays that occurred in this case.

VI

1. The outcome of the appeal depends, I repeat, on the admissibility of the respondent’s ASD result to prove that the police had reasonable and probable grounds for making the breathalyzer demand that yielded the evidence upon which the respondent was convicted at trial. And that depends, in turn, on whether the ASD breath sample furnished by the respondent at the police station was obtained forthwith in response to a valid demand under s. 254(2) of the *Criminal Code*.
2. Here, as we have seen, the police made two separate ASD demands, one at roadside and a second more than an hour later at the station. The respondent, in my view, cannot be said to have provided an admissible breath sample in response to either demand.
3. With respect to the first, this conclusion seems to me inevitable, as I mentioned at the outset, for factual, semantic and constitutional reasons.
4. The plain fact of the matter is that the respondent did not furnish the breath sample in response to the first demand. On the contrary, he expressly declined to do so. And, on the Crown’s own view of the facts, he was arrested for having failed to comply with that demand, an offence under s. 254(5) of the *Criminal Code.*
5. The police later decided not to prosecute the respondent for that offence — but only after he had provided them with evidence to support a breathalyzer charge which, incidentally, is subject to the same punishment.
6. I accept that this was a matter of prosecutorial discretion. But this exercise of discretion did not — in fact or in law — transform the respondent’s failure to comply immediately with a valid ASD demand, as required by s. 254(2), into an option of indefinite duration to comply with that demand later — in this case, more than an hour later.
7. It is true, as I mentioned earlier, that “forthwith”, in the context of s. 254(2) of the *Criminal Code*, may in unusual circumstances be given a more flexible interpretation than its ordinary meaning strictly suggests. For example, a brief and unavoidable delay of 15 minutes can thus be justified when this is in accordance with the exigencies of the use of the equipment: see *Bernshaw*.
8. The “forthwith” requirement in s. 254(2) appears to me, however, to connote a prompt demand by the peace officer, and an immediate response by the person to whom that demand is addressed. To accept as compliance “forthwith” the furnishing of a breath sample more than an hour after being arrested *for having failed to comply* is in my view a semantic stretch beyond literal bounds and constitutional limits.
9. Finally, on this point, the Crown contends that the respondent’s breath sample was obtained “forthwith” in the sense of “as soon as reasonably possible in the circumstances”, since the respondent failed to comply sooner with the officer’s roadside demand. Putting the submission this way is sufficient to demonstrate its incongruity. Drivers upon whom ASD demands are made are bound by s. 254(2) to comply immediately — and not later, at a time of their choosing, when they have decided to *stop refusing*!
10. The second demand, made more than an hour after the respondent’s arrest for having refused, can be disposed of shortly and simply as a basis for admitting the respondent’s breath sample. It does not fall within s. 254(2) for several reasons, but it is sufficient to say that it fails the “immediacy” criterion implicit in that provision. In any event, we are urged by the Crown to disregard this second demand and I see no reason to deal with it otherwise.

VII

1. It is common ground that the results of the ASD test and of the subsequent breathalyzer test were inadmissible against the respondent if the initial breath sample provided by him was neither voluntary nor obtained under the statutory authority of s. 254(2) of the *Criminal Code*.
2. For the reasons given, I have concluded that the respondent’s ASD breath sample was inadmissible on either basis and that the breathalyzer evidence upon which he was convicted was therefore unlawfully obtained and inadmissible as well.
3. I would therefore dismiss the appeal.

*Appeal dismissed.*

*Solicitor for the appellant:  Manitoba Justice, Winnipeg.*

*Solicitors for the respondent:  Phillips Aiello, Winnipeg.*