NOVA SCOTIA COURT OF APPEAL

Citation: ***R. v. Schofield***, 2015 NSCA 5

Date: 20150120
Docket: CAC 424511
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Aaron Troy Schofield

Respondent

Judges:	Fichaud, Beveridge and Farrar, JJ.A.
Appeal Heard:	November 18, 2014
Held:	Appeal allowed and new trial ordered, per reasons for judgment of Fichaud, J.A.; Beveridge and Farrar, JJ.A. concurring
Counsel:	William D. Delaney, Q.C. for the appellant Curtis Palmer for the respondent

Reasons for Judgment:

[1] Mr. Schofield was charged with operating a motor vehicle while impaired and while his blood alcohol exceeded the legal limit, contrary to ss. 253(1)(a) and 253(1)(b) of the *Criminal Code*. After a *voir dire*, the trial judge concluded that the police officer had no reasonable grounds for his breath demand to Mr. Schofield under s. 254(3). He ruled that the breath sampling violated s. 8 of the *Charter*, the breath sample readings should be excluded under s. 24(2) of the *Charter* and, in the absence of other evidence, Mr. Schofield should be acquitted of the charges under ss. 253(1)(a) and (b).

[2] The Crown appeals. The Crown says that the officer had reasonable grounds for the breath demand, there was no breach of s. 8 and, even if there were a breach, the blood alcohol readings should have been admitted under s. 24(2) of the *Charter*. The arguments focussed principally on the judge's approach to determine whether a police officer has an objective basis to demand a breath sample under s. 254(3) of the *Code*.

Background

[3] Mr. Schofield was charged that, on May 13, 2011, near Hampton, Nova Scotia, he operated a motor vehicle while impaired, contrary to s. 253(1)(a) of the *Criminal Code*, and while his blood alcohol exceeded 80 milligrams per 100 millilitres of blood, contrary to s. 253(1)(b) of the *Code*. He was charged also that he had driven a vehicle while disqualified by order, contrary to s. 259(4)(a). Judge Timothy Landry of the Provincial Court heard the matter on November 22 and December 13, 2013. The judge held a *voir dire* on the admissibility of Mr. Schofield's breath sample readings. The parties agreed that admissible *voir dire* evidence would apply to the charges.

[4] At the *voir dire*, the only witness was RCMP Constable Kenneth Cook. Several exhibits were admitted by consent.

[5] Cst. Cook had 38 years' experience as a police officer, and had conducted some 600 impaired driving investigations. He testified that, on May 13, 2011, at 9:03 p.m., he saw a vehicle headed east on the Shore Road, at Hampton in Annapolis County. Its headlights were dim and its taillights were not functioning. He said "It was dusk but it was dark. There was need for headlights." Cst. Cook

followed, then turned on his emergency lights. The targeted vehicle made a right turn onto a driveway. Cst. Cook said it was a “standard driveway”, eight to ten feet wide. Cst. Cook testified that, while turning, the vehicle “cut at the wrong angle and the rear passenger wheel went over the edge of the shoulder of the road and the driveway but he had sufficient speed with his vehicle that he was able to keep going”. Cst. Cook said “[w]hen he was making the turn it was at this point that I seen motion in the vehicle”. As Cst. Cook pulled up, the driver got out and leaned against the tail of the vehicle, smoking a cigarette. Cst. Cook said:

> **A.** … when I opened my door the first thing I seen was a can of beer and it was still foaming and it still had beer in it and I believed it was the can of beer that the driver threw out the window of his vehicle and the reason why I say that was because the beer can had a tab like on a pop can or anybody that had a beer, you got to pull this tab back. Well, when the beer landed on the driveway, the opening to allow beer out was pointed up and there was beer spilt along the can that was still foaming and if anybody has a beer, that, you know, it foams and there was still beer in the can.

[6] As Cst. Cook approached, he recognized the driver as Aaron Schofield. They had met before. Cst. Cook testified:

> **A.** I had … I had conversation with Mr. Schofield, okay, and while speaking with him I could smell a strong smell of alcohol coming from his breath and I would have been within a foot, a foot and half of him.
>
> **Q.** So you were very close to him?
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> **A.** I was very close to him and it was a strong smell of alcohol coming from his breath and his eyes were glassy. They had that glassy appearance.

[7] Cst. Cook explained his view of Mr. Schofield’s condition and his decision to demand a breath sample:

> **A.** Mr. Schofield and I got into a conversation. I knew Mr. Schofield from … from the past and I was aware that he was prohibited from driving for 18 months and I was aware that that decision was made by the Court probably a month and a half before this incident and that the prohibition was a result of …
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> **Q.** Of something.
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> **A.** Of something, a criminal charge. He offered an explanation as to why he was driving, why he pulled into that particular driveway. Based upon the strong smell of alcohol on his breath; based upon the condition of his eyes; based on the condition of the minor following of his vehicle where he went

> over the edge of the driveway a bit; based upon the fact that there was a fresh can of American beer lying in the driveway; based upon all those …
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> **Q.** What about the lawn …
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> **A.** … I concluded that I had reasonable and probable grounds for reading him the breathalizer demand. …
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> …
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> **A.** My opinion was that he was not going to be permitted behind the vehicle, the driver's seat of that vehicle because I felt his condition was impaired, his ability was impaired.

[8] Cst. Cook's response that he had been aware of "something, a criminal charge" in Mr. Schofield's past, referred to a topic that involved some debate at the *voir dire*. The Crown offered Cst. Cook's evidence of an incident the year before when Mr. Schofield drove with over the legal limit of blood alcohol. The Crown urged that Cst. Cook's knowledge of that event pertained to Cst. Cook's assessment of reasonable grounds for the breath demand on May 13, 2011. Judge Landry's initial response was "That might be a stretch. I think you are going to need some authority on that". Cst. Cook's testimony on the topic was deferred. Later in the *voir dire*, counsel made submissions on the point and cited authority. Then Judge Landry gave an evidential ruling that admitted the evidence subject to weight:

> **THE COURT:** Now, I agree with Mr. Palmer. I think it goes to weight and I think I will permit the Crown to re-call the officer with respect to that issue and the Court will deal with it as it's … the weight that it believed that … that the Court believes that it should be put to. Okay. I mean obviously, the Court is going to have to make a decision. It's no secret the decision the Court has to make and the Court will determine if, in its written decision, whether or I guess what the Court's opinion is of that previous experience.

[9] After that ruling, Cst. Cook testified about his prior experience with Mr. Schofield. On April 3, 2010, he observed a vehicle travelling at 104 kilometers per hour in a 70 kilometers per hour zone at Junction Road, near Middleton, Nova Scotia. He pulled the vehicle over. Mr. Schofield was the lone occupant. Cst. Cook detected a strong smell of alcohol and noticed Mr. Schofield's glassy eyes. He arrested Mr. Schofield for impaired driving. Shortly afterward, Mr. Schofield gave breath samples with readings of 220 and 210 milligrams of alcohol per 100 millilitres of blood. Mr. Schofield was convicted of operating a motor vehicle with over the legal limit of blood alcohol, contrary to s. 253(1)(b) of the *Criminal Code*. As a result, on March 9, 2011, the Provincial Court issued an Order that prohibited

Mr. Schofield from operating a motor vehicle for 18 months following March 9, 2011. The Prohibition Order was entered as Exhibit # VD-3 to the *voir dire*. The Prohibition Order was in effect on May 13, 2011, at the time of the events that led to the current charges.

[10] In evidence (Exhibit VD-4) was another Order of the Provincial Court, also dated March 9, 2011. This Order recited that Mr. Schofield had been convicted of operating a motor vehicle with blood alcohol that exceeded the legal limit, contrary to s. 253(1)(b) of the *Criminal Code*, at Berwick, Nova Scotia on October 15, 2010. The Order prohibited Mr. Schofield from operating a motor vehicle for 18 months from March 9, 2011.

[11] Cst. Cook testified that he had met Mr. Schofield once again, in March 2011 in the parking lot outside the courthouse. This would be on the occasion of the Prohibition Orders. At that time Mr. Schofield was sober.

[12] Cst. Cook was asked how his observations of Mr. Schofield affected his assessment of Mr. Schofield's sobriety on May 13, 2011:

> **A.** I seen him … it would be prior … prior to this I seen him twice, one when his condition was not good and two, another time out in the parking lot when he had no problems.
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> **Q.** When … you mean when he was sober?
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> **A.** That's right.
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> **Q.** Okay. So again, I'll ask … I'll ask you what was his … what were the differences, in your mind, on May 13th when you looked at him …
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> **A.** On May the 13th …
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> **Q.** As compared to when you had seen him in March, a couple of months before?
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> **A.** He clearly indicated to me, from his smell of alcohol on his breath, from his eyes and that … from the fact that he had driven over the driveway, the edge of the driveway and finding the beer in the driveway with the foam still foaming and beer, plus his smell … strong smell of alcohol plus his eyes, based upon all those factors, I felt I had sufficient grounds to demand Mr. Schofield for the breathalyzer.

[13] On the evening of May 13, 2011, Cst. Cook escorted Mr. Schofield to the police vehicle and read him the demand for a breath sample. Mr. Schofield acknowledged that he understood. Cst. Cook then arrested Mr. Schofield for

impaired driving and notified Mr. Schofield of his right to counsel. Mr. Schofield declined to consult counsel.

[14] At 9:24 p.m., they left the scene for the RCMP office in Bridgetown. They arrived at 9:34 p.m.. Mr. Schofield gave breathalyzer samples at 10:01 p.m. and 10:23 p.m., with readings of 220 and 200 milligrams of alcohol in 100 millilitres of blood.

[15] On January 27, 2014, Judge Landry ruled that Cst. Cook did not have reasonable grounds to demand a breath sample under s. 254(3) of the *Code*. Consequently the breathalyzer procedure was an unreasonable search and seizure that offended s. 8 of the *Charter*. The judge excluded the breath sample results under s. 24(2) of the *Charter*. I will review the judge's reasoning later.

[16] Moving to the trial proper, Judge Landry acquitted Mr. Schofield of the charges under ss. 253(1)(a) and 253(1)(b). Applying the admissible evidence from the blended *voir dire*, the judge found that Mr. Schofield had driven while prohibited, and convicted Mr. Schofield of the offence under s. 259(4)(a).

Issues

[17] On February 19, 2014, the Crown appealed the acquittals to the Court of Appeal under s. 676(1)(a) of the *Code*. There is no cross-appeal from the conviction under s. 259(4)(a).

[18] Section 676(1)(a) permits an appeal on a pure question of law.

[19] The Crown submits that the judge erred in law by ruling that Cst. Cook did not have the requisite reasonable basis to demand a breath test under s. 254(3) of the *Criminal Code*, and by his consequent ruling that the breath tests violated Mr. Schofield' rights under s. 8 of the *Charter*.

[20] The Crown says alternatively that, even if there were a breach of s. 8, the judge erred by excluding the evidence of the breath sample results under s. 24(2) of the *Charter*.

[21] In my view, the appeal should be allowed. The officer had reasonable grounds under s. 254(3) of the *Code*. There was no violation of the *Charter*. It is unnecessary to consider s. 24(2) of the *Charter*.

Standard of Review

[22] Section 254(3)(a)(i) of the *Criminal Code* says:

> **254 (3)** If *a peace officer has reasonable grounds to believe* that a person is committing, or at any time within the preceding three hours has committed, an offence under section 253 as a result of the consumption of alcohol, the peace officer may, by demand made as soon as practicable, require the person
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> (a) to provide, as soon as practicable,
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> (i) samples of breath that, in a qualified technician's opinion, will enable a proper analysis to be made to determine the concentration, if any, of alcohol in the person's blood ….
>
> [Emphasis added]

[23] In *R. v. Shepherd*, [2009] 2 S.C.R. 527, the Chief Justice and Justice Charron for the Court described the standard of review on an appeal from a determination of whether an officer had sufficient grounds under s. 254(3):

> [20] While there can be no doubt that the existence of reasonable and probable grounds is grounded in the factual findings of the trial judge, the issue of whether the facts as found by the trial judge amount *at law* to reasonable and probable grounds is a question of law. As with any issue on appeal that requires the court to review the underlying factual foundation of a case, it may understandably seem at first blush as though the issue of reasonable and probable grounds is a question of fact. However, this Court has repeatedly affirmed that the application of a legal standard to the facts of the case is a question of law: see *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 18; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 23. In our view, the summary conviction appeal judge erred in failing to distinguish between the trial judge's findings of fact and his ultimate ruling that those facts were insufficient, *at law*, to constitute reasonable and probable grounds. Although the trial judge's factual findings are entitled to deference, the trial judge's ultimate ruling is subject to review for correctness. [Supreme Court of Canada's italics]
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> …
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> [23] With respect, it is our view that the trial judge erred in finding that the officer's subjective belief of impairment was not objectively supported on the facts. … In our view, there was ample evidence to support the officer's subjective belief that Mr. Shepherd had committed an offence under s. 253 of the *Criminal Code*. We therefore conclude that the officer had reasonable and probable grounds to make the breath demand, and that Mr. Shepherd's *Charter* claim must fail.

See also *R. v. MacKenzie*, [2013] 3 S.C.R. 250, para. 54; *R. v. Hiscoe*, 2103 NSCA 48, para 20; *R. v. Usher* [2011] B.C.J. No. 1061 (C.A.), at para. 30; *R. v. Gunn*, [2012] S.J. No. 503 (C.A.), at para. 8.

[24] The parties agree that the issues on this appeal engage correctness.

Analysis

[25] In *Shepherd*, the Chief Justice and Justice Charron framed the principles that govern an assessment of the grounds for a breath demand under s. 254(3):

> [13] … As this Court explained in *R. v. Bernshaw*, [1995] 1 S.C.R. 254, at para. 51: "The requirement in s. 254(3) that reasonable and probable grounds exist is not only a statutory but a constitutional requirement as a precondition to a lawful search and seizure under s. 8 of the *Canadian Charter of Rights and Freedoms*.
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> …
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> [15] As this Court explained in *Collins* [*R. v. Collins*, [1987] 1 S.C.R. 265], where evidence is obtained as a result of a warrantless search or seizure, the onus is on the Crown to show that the search or seizure was reasonable. A search will be reasonable if it is authorized by law, the law itself is reasonable, and the manner in which the search was carried out is reasonable (*Collins*, at p. 278). No issue is taken with the manner in which the search was carried out or the reasonableness of the breath demand provisions in the *Code*. Rather, the only question is whether the arresting officer complied with the statutory preconditions for a valid breath demand.
>
> [16] As noted above, s. 254(3) of the *Criminal Code* requires that the officer have reasonable grounds to believe that within the preceding three hours, the accused has committed, or is committing, an offence under s. 253 of the *Criminal Code*. The onus is on the Crown to prove that the officer had reasonable and probable grounds to make the demand because the Crown seeks to rely on breath samples obtained as a result of a warrantless search. It would also be impractical to place the burden on the accused because evidence of the presence or absence of reasonable and probable grounds is within the "peculiar knowledge" of the Crown (*R. v. Bartle*, [1994] 3 S.C.R. 173, at p. 210).
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> [17] As this Court noted in *Bernshaw*, there is both a subjective and an objective component to establishing reasonable and probable grounds; that is, the officer must have an honest belief that the suspect committed an offence under s. 253 of the *Criminal Code*, and there must be reasonable grounds for this belief (*Bernshaw*, at para. 48). Here, it is not disputed that the officer had a subjective belief that Mr. Shepherd was intoxicated. The courts below disagreed, however, on whether the officer's subjective belief was reasonable in the circumstances.

…

> [21] In his ruling, the trial judge rightly stated that the totality of the circumstances should be considered in determining whether the officer had reasonable and probable grounds to make the breath demand.
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> …
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> [23] … the officer need not have anything more than reasonable and probable grounds to believe that the driver committed the offence of impaired driving or driving "over 80" before making the demand. He need not demonstrate a *prima facie* case for conviction before pursuing his investigation. …

[26] At the time of the Supreme Court's decision in *Bernshaw*, quoted in *Shepherd*, s. 254(3) required "reasonable and probable grounds". The words "and probable" have since been deleted [S.C. 2008, c. 6, s. 19(3)]. Section 254(3) now requires "reasonable" grounds.

[27] *Bernshaw* and *Shepherd* posit reasonableness from the officer's perspective. Appellate courts have elaborated on how that perspective affects the judge's assessment under s. 254(3).

[28] In *R. v. Bush*, [2010] O.J. No. 3453, the Ontario Court of Appeal comprehensively summarized the law:

> **38** Reasonable and probable grounds have both a subjective and an objective component. The subjective component requires the officer to have an honest belief that the suspect committed the offence. *R. v. Bernshaw*, [1995] 1 S.C.R. 254, at para. 51. The officer's belief must be supported by objective facts: *R. v. Berlinski*, [2001] O.J. No. 377 (C.A.) at para. 3. The objective component is satisfied when a reasonable person placed in the position of the officer would be able to conclude that there were indeed reasonable and probable grounds for the arrest: *R. v. Storrey*,[1990] 1 S.C.R. 241, at p. 250.
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> …
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> **42** What the trial judgment and *Censoni* [*R. v. Censoni*, [2001] O.J. No. 5189 (S.C.)] appropriately examine is the context in which the officer's reasonable and probable grounds obligations operate. Neither advocated a standard of less than reasonable and probable grounds. Both examined reasonable and probable grounds in the context of a roadside investigation, an approach that is consistent with judgments of the Supreme Court of Canada and this court.
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> …
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> **46** In the context of a breath demand, the reasonable and probable grounds standard is not an onerous test: see *R. v. Wang*, 2010 ONCA 435 at para. 17. It

must not be inflated to the context of testing trial evidence. Neither must it be so diluted as to threaten individual freedom: *Censoni* at para. 43.

47 There is no necessity that the defendant be in a state of extreme intoxication before the officer has reasonable and probable grounds to arrest: *R. v. Deighan*, [1999] O.J. No. 2413 (C.A.) at para. 1. Impairment may be established where the prosecution proves any degree of impairment from slight to great: *R. v. Stellato* (1993), 12 O.R. (3d) 90 (C.A.), aff'd [1994] 2 S.C.R. 478. Slight impairment to drive relates to a reduced ability in some measure to perform a complex motor function whether impacting on perception or field of vision, reaction or response time, judgment, and regard for the rules of the road: *Censoni*, at para. 47.

…

55 In assessing whether reasonable and probable grounds existed, trial judges are often improperly asked to engage in a dissection of the officer's grounds looking at each in isolation, opinions that were developed at the scene "without the luxury of judicial reflection": *Jacques* [*R. v. Jacques*, [1996] 3 S.C.R. 312] at para. 23; also *Censoni* at para. 43. However, it is neither necessary nor desirable to conduct an impaired driving trial as a threshold exercise in determining whether the officer's belief was reasonable: *R. v. McClelland*, [1995] A.J. No. 539 (C.A.).

56 An assessment of whether the officer objectively had reasonable and probable grounds does not involve the equivalent of an impaired driver scorecard with the list of all the usual indicia of impairment and counsel noting which ones are present and which are absent as the essential test. There is no mathematical formula with a certain number of indicia being required before reasonable and probable grounds objectively existed: *Censoni* at para. 46. The absence of some indicia that are often found in impaired drivers does not necessarily undermine a finding of reasonable and probable grounds based on the observed indicia and available information: *R. v. Costello* (2002), 22 M.V.R. (4th) 165 (Ont. C.A.) at para. 2; *Wang*, at para. 21.

…

60 There is no minimum time period nor mandatory questioning that must occur before an officer can objectively have reasonable and probable grounds. There is no requirement that a roadside sample be taken. …

61 A trained police officer is entitled to draw inferences and make deductions drawing on experience. Here, the investigating officer had 18 years' experience. The trial judge was entitled to take into consideration that experience and training in assessing whether he objectively had reasonable and probable grounds: *Censoni*, at paras. 36 and 37. In addition, in determining whether reasonable and probable grounds exist, the officer is entitled to rely on hearsay: *R. v. Debot*, [1989] 2 S.C.R. 1140, at p. 1167 and 1168; *Costello*; *R. v. Lewis* (1998), 38 O.R. (3d) 540 (C.A.) at paras. 15 and 16; *Censoni*, at para. 57.

…

> **66** In making his or her determination, the officer is not required to accept every explanation or statement provided by the suspect: *Shepherd* at para. 23. That the officer turned out to be under a misapprehension is not determinative: *Censoni* at para. 35. The important fact is not whether the officer's belief was accurate. It is whether it was reasonable at the time of the arrest. That the conclusion was drawn from hearsay, incomplete sources, or contained assumptions will not result in its rejection based on facts that emerge later. What must be assessed are the facts as understood by the peace officer when the belief was formed: *R. v. Musurichan*, [1990] A.J. No. 418 (C.A.).

…

> **70** The issue is not whether the officer could have conducted a more thorough investigation. The issue is whether, when the officer made the breath demand, he subjectively and objectively had reasonable and probable grounds to do so. That the belief was formed in less than one minute is not determinative. That an opinion of impairment of the ability to operate a motor vehicle can be made in under a minute is neither surprising nor unusual.

[29] Alberta's line of authority is similar. In *R. v. Caruth*, 2009 ABCA 342, the Alberta Court of Appeal said:

> **21** Whether or not the officer's belief was reasonable is based on "facts known by or available to the peace officer at the time he formed the requisite belief.": *R. v. McClelland* (1995), 165 A.R. 332 at para. 21, 98 C.C.C. (3d) 509 (C.A.). Individual pieces of evidence are not to be tested; "the question is whether the total of the evidence offered provided reasonable and proper grounds, on an objective standard." [citing *Huddle*]

…

> **23** No authority was cited which has held that the test requires the officer to obtain corroboration of his belief from another source nor was any authority provided which precludes an officer from relying on knowledge gained from personal experiences. As noted by this court in *R. v. Yurechuk*, (1982), 42 A.R. 176 at 178, [1983] 1 W.W.R. 460 (C.A.), the officer is entitled to rely on the circumstances as understood by the officer at the time, even where it has been established later that the officer was under a misapprehension of facts.

Earlier, in *R. v. Huddle*, 1989 ABCA 318, the Alberta Court of Appeal put it this way:

> In our view, it is an error in law to test individual pieces of evidence which are offered to establish the existence of reasonable and probable grounds. That is similar to the approach which the Supreme Court of Canada condemned in *Morin*.

> True, the smell of alcohol does not show impairment; slurred speech alone does not show impairment by alcohol; glassy eyes may be associated with crying; but, the question is whether the total of the evidence offered provided reasonable and proper grounds, on an objective standard. …

To similar effect: *R. v. Musurichan* (1990), 56 C.C.C. (3d) 570 (A.C.A.), at p. 574 and *R. v. Oduneye*, [1995] A.J. No. 632 (C.A.), at paras. 18-20.

[30] In *R. v. Usher*, *supra*, the British Columbia Court of Appeal said:

> **31** The test for establishing reasonable grounds is not onerous. The Crown need not establish a *prima facie* case; it will be enough to show the findings of fact objectively support the officer's subjective belief that the suspect was impaired, even to a slight degree [citations omitted]. As well, the authorities recognize the reasonableness of the officer's opinion must be judged by reference to the totality of the circumstances, and in the situation in which it was formed; a roadside investigation that demands a quick and informed decision, without the luxury of reflection [citation omitted]
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> …
>
> **38** It is trite law that, in assessing whether the Crown has established reasonable grounds, the *indicia* of impairment must be evaluated in their totality. It is an error of law to test individual pieces of evidence offered to establish reasonable grounds [citations omitted].

[31] In *R. v. Gunn*, *supra*, the Saskatchewan Court of Appeal, paras 7-10, adopted similar principles and added:

> **20** However, notwithstanding the shifting of the evidentiary burden to the Crown, while it would be helpful, the Crown is under no legal obligation to proffer evidence to establish that the arresting officer has *continued* [S.C.A.'s italics] to observe signs of impairment after he or she has formed the subjective belief that the s. 254(3) standard had been met (*i.e.* presumably, prior to the time the officer arrested the accused or made the demand). Axiomatically then, the fact the Crown has not adduced post-arrest or demand evidence of impairment from the arresting officer does not serve to undermine the reliability of the officer's pre-arrest or demand belief. While evidence of the existence of lack of post-arrest or demand signs of impairment may certainly assist in the assessment of the reliability of the officer's belief, the absence of evidence can be of no assistance.
>
> **21** On a similar basis, the mere fact a police officer has not conducted either sobriety tests or a roadside screening test is neither here nor there. … Accordingly, by holding the Crown to either proffer evidence of the results of roadside investigatory tests or to satisfactorily explain why it has not done so, a

> court mistakenly elevates the evidentiary and persuasive burden imposed on the Crown and, thereby, holds the Crown to establish its case on more than a standard of reasonable grounds to believe.

[32] From these authorities, I extract the following principles that are helpful in Mr. Schofield's case.

[33] The question is - did the "totality of the circumstances" known to the officer at the time of the breath demand rationally support the officer's belief? The officer may infer or deduce, draw on experience, and ascribe weights to factors. Parliament expects the officer to do this on the roadside according to a statutory timeline, while informed by the available circumstances, but without either the benefit of trial processes to test the accuracy of his or her belief or "the luxury of judicial reflection". The officer must identify the supporting circumstances at the *voir dire*. But the officer was not expected to apply the rules of evidence at the roadside. So the support may be based on hearsay. The supporting connection must be reasonable at the time, but need not be proven correct at the later *voir dire* that considers s. 254(3).

[34] The judge should not segregate the officer's criteria for piecemeal analysis, then banish each factor might have a stand-alone explanation. From the officer's roadside perspective, the factors may have had corroborative weights that together formed a sounder platform for an inference of impairment. The reductive approach denies that corroborative potential. As this Court recently said, of reasonable and probable grounds for a search warrant, (*R. v. Liberatore*, 2014 NSCA 109, para. 27):

> The body of evidence isn't anatomized for a segregated analysis of each fragment. Viewed as a whole, its bits may be cross-confirmatory.

[35] There is no minimum period of investigation, mandatory line of questioning or legally essential technique, such as a roadside screening. The judge should not focus on missing evidence. Rather, the judge should consider whether the adduced evidence of circumstances known to the officer reasonably supported the officer's view.

[36] I will turn to Judge Landry's reasons in Mr. Schofield's case.

[37] The judge accepted that Cst. Cook had the subjective belief required by s. 254(3) :

> [32] … There is no question in this case that the officer subjectively believed that he had reasonable grounds to make the breath demand. The real question is whether or not, from an objective point of view, did the officer have reasonable grounds to make the breath demand.

[38] The judge held that Cst. Cook had no reasonable grounds to demand a breath sample under s. 254(3).

[39] The judge cited the principles from *Shepherd* and *Bush* and quoted the passage from *Huddle*, set out above, that "it is an error in law to test individual pieces of evidence which are offered to establish the existence of reasonable grounds" (paras. 29-31). His statement of the principles is correct. The concern is whether he applied those principles.

[40] Judge Landry discounted the foaming can of beer:

> [32] …There is no indication that the officer saw the accused throw the beer can out of the car and I conclude that it is a factor that plays little in the court's assessment of whether or not the officer had grounds to make the breath demand.

[41] The judge then discounted Mr. Schofield's driving over the shoulder of what Cst. Cook testified was a "standard driveway":

> [33] … The officer testified that it was dusk and that the driveway was only eight to ten feet wide. There was no evidence presented that the accused had any experience driving into that driveway. It was apparently property owned by the employer of the accused. Due to the narrow width of the driveway and the fact that there was no evidence that the accused had a great deal of experience driving into that driveway, I find that not a great deal turns on that factor.

[42] Having sidelined Mr. Schofield's awkward turn into the driveway, the judge said (para 35) "There was no evidence of the accused's motor skills having been impaired."

[43] Judge Landry's summary of the evidence mentioned, without comment, Cst. Cook's testimony respecting Mr. Schofield's incident of April 3, 2010 (above, para. 9). But the judge's analysis did not consider Cst. Cook's awareness of Mr. Schofield's history of impaired driving as a factor that pertained to the reasonableness of Cst. Cook's breath demand on May 13, 2011.

[44] Cst. Cook had testified that he had met Mr. Schofield sober, two months earlier, and the difference in Mr. Schofield's demeanour contributed to Cst. Cook's

assessment of Mr. Schofield's condition on May 13, 2011 (above, para. 11). The judge's analysis did not mention that point.

[45] Judge Landry's decision said:

> [34] Essentially the court is left with two indicia of impairment, the strong smell of alcohol coming from the accused and the glassy eyes. From an objective standpoint I find that the officer did not have reasonable grounds to make the breath demand.

[46] The judge said nothing to qualify Cst. Cook's reliance on Mr. Schofield's strong smell of alcohol and glassy eyes. Rather, those two factors were excluded because, in the judge's view, reasonable grounds would, as a minimum, require the results of sobriety testing or roadside screening:

> [36] It is the ruling of the court that the officer in this case would have had to have conducted further observation of the accused prior to making the breath demand. The officer could have asked the accused to perform sobriety tests or could have utilized an approved screening device or perhaps spent more time speaking to the accused.

[47] Judge Landry concluded:

> [39] I find that the officer did not have objective grounds for making the breath demand and I find that the accused's rights under s. 8 of the **Charter** have been breached.

[48] In my respectful view, the judge erred in law by misapplying the principles to determine whether an officer has reasonable grounds under s. 254(3).

[49] First, the judge erroneously segregated Cst. Cook's criteria, assessed them in isolation, then eliminated them sequentially before the judge assessed reasonableness.

[50] Second, the judge erred by rejecting the officer's reasonable inferences:

(a) The judge eliminated Mr. Schofield's driving over the shoulder of the driveway because there was no evidence that Mr. Schofield had "a great deal of experience driving into that driveway". The question is whether the officer's cited factor was reasonably inferential of slight impairment. Driving over the shoulder of a "standard driveway" suffices to be in the mix.

(b) The judge eliminated the foaming can of beer because "[t]here is no indication that the officer saw the accused throw the beer can out of the car". Cst. Cook testified that, as Mr. Schofield turned into the driveway, he saw "motion in the vehicle", and then the can "still foaming" on the ground a few feet from Mr. Schofield. Nobody else was in the vicinity. The officer was entitled to draw the reasonable inference that the beer can was "foaming" because it had recently hit the ground, meaning Mr. Schofield had dropped it.

[51] Third, the judge ignored factors cited by the officer. Eleven months earlier, Cst. Cook had arrested Mr. Schofield after a similar incident, for which Mr. Schofield later was convicted of driving with excessive blood alcohol. Two months earlier, at the courthouse, Cst. Cook had met Mr. Schofield when Mr. Schofield was sober. Cst. Cook had the rare opportunity to compare Mr. Schofield's varying demeanours on those two earlier occasions – one inebriated and one sober – before the Constable assessed Mr. Schofield's state on May 13, 2011. Cst. Cook's familiarity with Mr. Schofield belonged in the "totality of the circumstances". The judge's analysis did not mention these factors.

[52] Fourth, instead of weighing the adduced evidence, the judge treated missing evidence as a legal prerequisite. Judge Landry reasoned "[e]ssentially the court is left with two indicia of impairment, the strong smell of alcohol coming from the accused and the glassy eyes." But the judge did not assess the reasonableness of the officer's reliance on those two factors. Instead, the judge said "[i]t is the ruling of the court that the officer in this case would have had to have conducted further observation of the accused", such as a sobriety test or use of an approved screening device.

[53] In summary, on April 3, 2010, thirteen months earlier, Cst. Cook had a similar encounter with Mr. Schofield, that led to a conviction for driving with excessive blood alcohol and a driving Prohibition Order. On May 13, 2011, Cst. Cook was aware of the earlier incident and that the Prohibition Order was still in effect. The officer had met Mr. Schofield twice before, once when Mr. Schofield was inebriated and once sober. From 600 impaired driving investigations over 38 years, the officer was well positioned to recognize the signs of impairment. On May 13, 2011, Mr. Schofield drove over the driveway's shoulder, there was a foaming beer can next to him, he smelled strongly of alcohol and his eyes were glassy. The officer's belief was reasonable. From the facts as found, the judge erred in law by reaching a different conclusion.

Conclusion

[54] I would allow the appeal and order a new trial of the charges under ss. 253(1)(a) and (b). As the breath sampling did not violate s. 8 of the *Charter*, it is unnecessary to consider the Crown's alternative submission that the evidence would be admissible under s. 24(2).

Fichaud, J.A.

Concurred: Beveridge, J.A.

Farrar, J.A.