

The appellant was charged with four offences: having care or control of a motor vehicle while he had a blood alcohol concentration in excess of 80 milligrams of alcohol in 100 millilitres of blood, s. 253(b) of the **Code**; care or control of a motor vehicle while impaired, s. 253(a) of the **Code**; dangerous driving, s. 249(1)(a) of the **Code**; and obstructing a police officer, s. 129(e) of the **Code**.

In June of 1994 he was tried before a provincial court judge. Evidence was heard in relation to the s. 253(b) charge and that evidence was then applied, with consent of the parties, to the other three charges.

The main issue before the trial judge was that of the identify of the accused. The trial judge held that he had a reasonable doubt on that issue and found the appellant not guilty of all four charges.

The Crown appealed to a judge of the Supreme Court. The sole issue was that of identification of the appellant. That judge reviewed the evidence and the trial judge's decision in detail. As to the issue of identification the trial judge stated:

"It is clear to me that the identification of the accused was based almost, if not exclusively, on the color of his shirt or sweater".

The appellate judge stated that the trial judge was "clearly in error" in the "summary of the identification evidence" and that the trial judge "misdirected himself on what the Crown evidence was on the question of identify of the accused". The judge on appeal noted that one of the R.C.M. Police constables, both on direct and cross-examination, was asked if he could identify the accused. The constable categorically declared that he could do so from his contact with the accused when he first stopped the vehicle. He identified the accused at that time by his facial features. He also testified that the driver of the vehicle when it was first stopped was the same man he later apprehended after a chase.

The appellate judge correctly stated that "It is not necessary for a trial judge to

review in his decision all the evidence in a case but he or she must consider all the evidence". A trial judge while "entitled to reject evidence, he cannot disregard evidence particularly if it is on the central issue in the case".

The decision of the trial judge demonstrates that he failed to consider all of the evidence in relation to the identification of the driver as the appellant. It was therefore appropriate for the appellate judge to allow the appeal and order a new trial. A trial judge must consider all of the evidence in relation to the ultimate issue. **R. v. Morin** (1992), 76 C.C.C. (3d) 193 at p. 200. Here it is clear that he did not.

After reviewing the record, the factums of counsel, hearing argument of counsel and considering the applicable law it is our unanimous opinion that the judge on appeal made no error in law in reaching his conclusion.

While leave to appeal is granted we dismiss the appeal.

J.A.

Concurred in:

Clarke, C.J.N.S.

Hallett, J.A.

C.A.C. No. 116938

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

JAMES STEPHEN BOYD)	REASONS FOR
appellant)	JUDGMENT BY:
- and -)	MATTHEWS, J.A.
HER MAJESTY THE)	
QUEEN)	
respondent)	