NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Andrea*, 2004 NSCA 130

Date: 20041028
Docket: CAC 212243
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Martin Michael Andrea

Respondent

Judges:	Glube, C.J.N.S.; Chipman and Cromwell, JJ.A.
Appeal Heard:	October 12, 2004, at Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Chipman, J.A.; Glube, C.J.N.S. and Cromwell, J.A. concurring.
Counsel:	Daniel A. MacRury, for the appellant Brian Casey, for the respondent

Reasons for judgment:

[1] This is an appeal from a decision of the summary conviction appeal court reversing a decision in provincial court entering a conviction against the respondent on the charge that he operated a motor vehicle while he had a blood alcohol level greater than 80 milligrams of alcohol in 100 millilitres of blood contrary to s. 253(b) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46.

[2] The respondent was arrested at approximately 2:00 a.m. on November 16th, 2002, on Quinpool Road in the Halifax Regional Municipality by Constable Christopher Thomas. He was taken to the Police Station and duly cautioned, given his *Charter* rights to counsel and a demand for a breath sample. He consulted counsel. Following this, the two breathalyzer tests were performed, resulting in readings of a blood alcohol content greater than that permitted by s. 253(b) of the **Criminal Code**.

[3] At the respondent's trial in Provincial Court, it was agreed that the only issue to be determined was whether the officer had reasonable and probable grounds to give the breathalyzer demand to the respondent. The only witness at the trial was Constable Thomas. The circumstances under which the demand was made appear from the decision of the trial judge:

> [4] Cst. Thomas of the Halifax Regional Police testified that at approximately 2 a.m. on November 16, 2002 he followed the defendant's vehicle for a distance of approximately one kilometer from McDonald's on Quinpool Road in Halifax Regional Municipality to a point on the same road between Horseshoe Island and the Rotary. The defendant was speeding at seventy kilometers per hour in a fifty kilometer zone and did not stop at either of two flashing red lights. After he went through the second flashing light, the officer engaged his emergency lights and it took the defendant a distance of five blocks to react to the lights and stop.
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> [5] When the officer first approached the defendant, he noted that the defendant was eating a package of McDonald's french fries. After he had finished eating, the officer observed a light smell of alcohol from the defendant's breath. He also noted that the defendant's eyes were glassy with enlarged pupils, and that he fumbled with his papers and that he seemed thick tongued in his speech.
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> [6] At this point, while the defendant was still in his own vehicle, Cst. Thomas reached the conclusion that the defendant was impaired by alcohol while operating a motor vehicle and advised him that he was under arrest. He placed the defendant in his police car, not noting any irregularities in his walking. ...

[4] After stating that the burden was on the Crown to prove that the police officer had reasonable and probable grounds to make the demand, and after reviewing the evidence relating to the grounds on which he acted, and the submissions of the respondent with respect thereto, the trial judge concluded:

> In the present case, although some or all of the indicia recited by the police officer may have had other explanations, I find that when taken together they are more than sufficient to meet the required standard of "reasonable and probable grounds to believe that an offence had been committed."...

[5] The trial judge thereupon admitted the results of the breathalyzer test, convicted the appellant, fined him $800.00 and stayed a second charge of driving while impaired.

[6] On appeal to the summary conviction appeal court, the appeal court judge referred to the case law, including comments of Cromwell, J.A. in **R. v. Nickerson** (1999) 178 N.S.R. (2d) 189; [1999] N.S.J. No. 210 (Q.L.) that absent an error of law or a miscarriage of justice, the test to be applied by the summary conviction appeal court is whether the findings of the trial judge were unreasonable or could not be supported by the evidence.

[7] The appeal court judge then addressed what constitutes reasonable and probable grounds to support a demand for a breath sample pursuant to s. 254(3) of the **Code**, referring to the judgment of Sopinka, J. in **R. v. Bernshaw,** [1995] 1 S.C.R. 254; 95 C.C.C. (3d) 193.

[8] The appeal court judge then set out the following *indices* of impairment listed by the trial judge in referring to the Crown's submission:

1. Speeding at 70 kilometres/hr in a 50 km zone;

2. Fast rolling stops through 2 flashing red lights;

3. Light odour of alcohol on the breath after eating french fries;

4. Fumbling with papers;

5. "Glossy" eyes;

6. Large pupils; and

7. Thick-tongued speech.

[9] I note in passing that this list omits any reference to the following part of the trial judge's narrative:

> ... and it took the defendant a distance of five blocks to react to the lights and stop.

[10] The appeal court judge then, after observing that it would be wrong to test only the individual pieces of evidence offered to establish the existence of reasonable and probable grounds, said that the proper approach was to assess all of the *indicia* appearing from the evidence to determine if, when taken together, they are sufficient to meet the required standard of reasonable and probable grounds. After reviewing the *indicia* and the submissions of the respondent's counsel with respect to them, the appeal court judge concluded:

> [13] The appellant argues that all of the indices taken together are equivocal, equivocal in the parts, equivocal in the sum. The sum of the indices testified to by the demanding officer, says the appellant does not justify his conclusions on the objective test. I agree. I do not understand on this evidence how the trial judge concludes that the indicia taken together provides more than sufficient evidence to establish reasonable and probable grounds to give the breathalyzer demand. The trial judge points out that it is the totality of the indicia that causes her to come to that conclusion, but does not explain what it is about the totality, how the totality overcomes the equivocal nature of the parts. If one accepts that the individual indicia are equivocal as the trial judge apparently did, then in this case, in this case, the totality of the evidence, I find, no more convincing. There is no clear evidence of lack of coordination here, nor did the officer make any effort to test for coordination problems. ...
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> [14] ... I am mindful of the standard of review applicable. I believe that I am re-weighing the evidence rather than substituting my own conclusions. I conclude that the finding by the trial judge, that the officer had reasonable and probable grounds to make the breathalyzer demand in this case, cannot be supported by the evidence. These are exactly the type of indicia that the roadside screening device was invented to address. This is why the alert was invented. ...

[11] The conviction under s. 253(b) and the stay of the impaired driving charge were set aside and an acquittal entered on both charges.

[12] The Crown appeals to this Court, contending that the appeal court judge erred in law in reversing the decision of the trial judge.

[13] The standard of review in a summary conviction appeal was summarized by Cromwell, J.A. in **R. v. Nickerson, supra** at para. 6:

> [6] ... Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge

> are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in **R. v. Burns**, [1994] 1 S.C.R. 656 at 657, the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was some evidence to support the trial judge's conclusions nor a new trial on the transcript.

[14] The standard of review on a further appeal from the summary conviction appeal court to this Court requires that this Court place itself in the same position as that court and ask whether the findings of the trial judge were unreasonable or could not be supported by the evidence. In **R. v. Biniaris**, [2000] 1 S.C.R. 381, the Supreme Court of Canada affirmed that the test in **R. v. Yebes** , [1987] 2 S.C.R. 168, continues to be the binding test that appellate courts must apply in determining whether a verdict is unreasonable or cannot be supported by the evidence: see paras. 37 - 42. In **R. v. Yebes, supra**, the Supreme Court of Canada, in addressing its role as the second appeal court in appeals from a trial decision, said at paras. 25 and 26:

> 25 In my view, the majority of the Court of Appeal did not fail to apply the correct principles relating to the treatment of circumstantial evidence. The function of the Court of Appeal, under s. 613(1)(a)(i) of the *Criminal Code*, goes beyond merely finding that there is evidence to support a conviction. The Court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the Court must re-examine and to some extent reweigh and consider the effect of the evidence. This process will be the same whether the case is based on circumstantial or direct evidence. In the Court of Appeal, the majority clearly found that there was sufficient evidence to justify the verdict and both Macdonald and Craig JJ.A. rejected all rational inferences offering an alternative to the conclusion of guilt. It is therefore clear that the law was correctly understood and applied.
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> ¶ 26 This Court, in considering an appeal where the sole issue raised is the application of s. 613(1)(a)(i) of the *Code*, must put itself in the place of the Court of Appeal and, pursuant to the powers given in s. 623(1) of the *Code*, consider the matter anew, and if error be found make such order as the Court of Appeal should have made. ...

[15] The appeal court judge’s decision is therefore reviewable by this Court using a standard of correctness.

[16] In **Bernshaw, supra**, Sopinka, J. said at para. 48:

> 48 The Criminal Code provides that where a police officer believes on reasonable and probable grounds that a person has committed an offence pursuant to s. 253 of the Code, the police officer may demand a breathalyzer. The existence of reasonable and probable grounds entails both an objective and a subjective component. That is, s. 254(3) of the Code requires that the police officer subjectively have an honest belief that the suspect has committed the offence and objectively there must exist reasonable grounds for this belief: *R. v. Callaghan*, [1974] 3 W.W.R. 70 (Sask. Dist. Ct.); *R. v. Belnavis*, [1993] O.J. No. 637 (Gen. Div.) (QL); *R. v. Richard* (1993), 12 O.R. (3d) 260 (Prov. Div.); and see also *R. v. Storrey*, [1990] 1 S.C.R. 241, regarding the requirements for reasonable and probable grounds in the context of an arrest.

[17] Our responsibility is therefore to determine whether in finding that these requirements were met, the trial judge's decision was reasonable and could be supported by the evidence. In so doing it is appropriate to consider the reasons advanced by the appeal court judge to the contrary.

[18] As to the subjective component of reasonable and probable grounds, Constable Thomas testified as to his honest belief, saying that he arrested the respondent for "impaired driving and over 80" and that the respondent was, in his opinion, impaired by alcohol. This was not challenged.

[19] As to the objective components, I am satisfied that the appeal court judge erred in assessing the various *indicia* on which the constable formed his belief in isolation, rejecting each on the grounds of consistency with other explanations. The *indicia* must be evaluated in total: see **R. v. Huddle**, [1989] A.J. No. 161 (Q.L.)(Alta. C.A.). Specifically the appeal court judge reviewed the respondent's submissions that each of these *indicia* were equivocal or consistent with the behaviour of a driver who was not impaired. Although acknowledging that the circumstances must be taken together, in effect he weighed them separately, and concluded that the totality of the evidence did not overcome the equivocal nature of the parts. In doing so he also omitted reference to the respondent's failure to respond to the flashing lights of the following police car while driving five city blocks.

[20] The trial judge's conclusion that the officer had reasonable and probable grounds was reached on the basis of the respondent speeding on a major artery in Halifax at about 2:00 a.m. in the morning; (when traffic was light), failing to stop as required at two flashing red lights, being oblivious to the flashing lights of the following police car for five blocks; upon being approached by the police officer, finishing his french fries before speaking to

the officer, exhibiting a light odour of alcohol on his breath, fumbling for his papers, having “glossy” eyes, large pupils and thick tongued speech. The trial judge’s conclusion was not unreasonable.

[21] I would allow the appeal, and set aside the decision of the summary conviction appeal court and restore the conviction on the charge under s. 253(b), set aside the acquittal on the impaired driving charge and restore the stay on that charge.

Chipman, J.A.

Concurred in:

Glube, C.J.N.S.

Cromwell, J.A.