Cite as: R. v. MacMaster, 1992 NSCO 21

CANADA CAT2624

PROVINCE OF NOVA SCOTIA

COUNTY OF PICTOU

IN THE COUNTY COURT JUDGE'S CRIMINAL COURT

OF DISTRICT NUMBER SIX

HER MAJESTY THE QUEEN

- and -

FRANCIS W. MACMASTER

HEARD: At Pictou, Nova Scotia, before the Honourable Judge H. J. MacDonnell, a Judge of the County Court of District Number Five, and an Additional Judge of the County Court of District Number Six

DECISION: February 27, 1992

COUNSEL: Ronald J. MacDonald, Esq., of Counsel for the Appellant

Joel E. Pink, Esq., Q.C., of Counsel for the Respondent

D E C I S I O N

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Before the Honourable Judge H. J. MacDonnell, a Judge of the County Court of District Number Five, and an Additional Judge of the County Court of District Number Six

Ronald J. MacDonald, Esq., of Counsel for the Appellant

Joel E. Pink, Esq., Q.C., of Counsel for the Respondent

Pictou, Nova Scotia

D E C I S I O N

1992, February 27, MacDonnell, H. J., J.C.C.:

This is an Appeal by the Crown from a decision of His Honour Judge Clyde F. Macdonald, a Judge of the Provincial Court of Nova Scotia, dated January 17th, 1991, acquitting Francis W. MacMaster of the following charge:

> THAT on or about the 31st day of August, 1990, at or near Antigonish, in the County of Antigonish, Province of Nova Scotia did without reasonable excuse failed or refused to comply with a demand made to him by a peace officer to provide samples of his breath suitable to enable an analysis to be made in order

> to determine the concentration, if any, of alcohol in his blood, contrary to Section 254(5) of the Criminal Code of Canada.

The Crown filed a Notice of Appeal dated January 29th, 1991, the sole ground being:

> that the learned trial judge erred in law in holding that the peace officer did not have reasonable and probable grounds to make a demand for breath samples.

The Notice of Appeal stated that:

> "On the 26th day of February, 1991, at the hour of eleven o'clock in the forenoon, the court or a judge thereof will set down the appeal for hearing."

The Appeal was not set down for a hearing at the date and time mentioned in the Notice of Appeal.

Effective March 6th, 1991, the Honourable Judge H. J. MacPherson, Judge of the County Court for District Number Six, having reached mandatory retirement age, the position of County Court Judge for District Number Six became vacant. To date, a County Court Judge has not been appointed to fill the vacancy in County Court District Number Six, Nova Scotia.

There being no regular sittings of the County Court in District Number Six, this Appeal did not come on for hearing, despite requests by the Respondent to have a date certain set.

By letter dated November 4th, 1991, Crown Counsel advised Counsel for the Respondent that if both Counsel were prepared to proceed by way of written briefs, that County Court Chief Judge Ian Palmeter would assign an Additional Judge of the County Court to hear the Appeal. By letter dated November 8th, 1991, the Respondent Counsel advised Crown Counsel that he was willing to proceed by

way of written submissions.

Section 5 of the Summary Conviction Appeal Rules reads:

> 5. Written arguments: (1) Any party may present his argument in writing to the court or by filing the argument with the clerk of the court, at any time before the hearing of the appeal.
>
> (2) Where both parties submit written arguments the court may dispense with a formal hearing.

At the request of Chief Judge Ian Palmeter, I agreed to hear this Appeal on the basis of written submissions from both parties, and that there would be no formal hearing.

On December 19th, 1991, Counsel for the Crown appeared before me in Chambers in New Glasgow requesting dates for filing memorandums in this Appeal. January 18th, 1992 was set as the date on or before the Appellant's brief was to be filed, and February 15th, 1992, was the date on or before the Respondent's brief was to be filed, and I advised Counsel that my decision would be filed on February 27th, 1992.

The solicitor for the Respondent has filed an Application for a Stay of Proceedings, pursuant to Section 24(1) of the Canadian Charter of Rights and Freedoms, alleging that the Respondent's Charter Rights had been violated in that the Appeal has not been heard within a reasonable time.

The Respondent's Application pursuant to Section 24(1) of the Canadian Charter of Rights and Freedoms was supported by his Solicitor's affidavit, which set out the sequence of events from the time of filing the Notice of Appeal by the Crown on or about January 29th, 1991, to the letter dated January 7th, 1992,

in which he was notified by the County Court Clerk's office of the dates for filing the Appellant's and the Respondent's briefs. The affidavit states that the total delay from the signing the Notice of Appeal to the time of the filing of the Respondent's factum is 382 days.

The first issues to be decided are:

> 1. Does this Court sitting as a Court of Appeal have jurisdiction to hear this Application for Stay of Proceedings pursuant to Section 24(1) of the Charter?
>
> 2. If this Court has jurisdiction to hear the Application, should the proceedings be stayed pursuant to Section 24(1) of the Charter as a result of there being a violation of Section 11(b) of the Canadian Charter of Rights and Freedoms?

Section 11(b) and Section 24(1) of the Charter read:

> 11. Any person charged with an offence has the right
>
> > (b) to be tried within a reasonable time;
>
> 24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may appeal to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Respondent's Counsel cites **R. v. Hudson Bay Company** 58 C.C.C. (3d) 507, and **R. v. Boire et al.** 66 C.C.C. (3d) 216 in support of his submissions that this Court as a Court of Appeal has jurisdiction to hear the Application to Stay.

Crown Counsel does not take issue with the fact that a delay in hearing an Appeal may give rise to a violation of Section 11(b) of the Charter, and thus may give rise to a remedy of a stay of proceeding. He refers to **R. v. Boire**, where

a seven year time elapsed between the date of trial and the date of Crown appeal was held to be unreasonable. As well, he cites **R. v. Ushkowski** (1991) 67 C.C.C. (3d) 422, a case which dealt with a delay of over three years from the date of the charge being laid to the hearing of the Crown appeal.

Following a review of cases cited by both Counsel I find that this Court, sitting as a Court of Appeal, has jurisdiction to hear the Respondent's Application for a Stay of Proceeding pursuant to Section 24(1) of the Charter, alleging that his rights under Section 11(b) of the Charter had been infringed.

There is no dispute about the factual situation which gives rise to this application. It can be summarized as follows:

1. The original Information charging MacMaster was sworn on August 31st, 1990.

2. The matter proceeded to trial before a Judge of the Provincial Court on January 17th, 1991, at which time Mr. MacMaster was acquitted.

3. The Crown filed a Notice of Appeal dated January 29th, 1991, the matter to come before the Court on February 26th, 1991, to be set down for a date for hearing. However, on that date the appeal was not set down for a hearing.

4. On March 6th, 1991, the office of County Court Judge for District Number Six became vacant upon the mandatory retirement of the Honourable Judge H. J. MacPherson. The Federal Government has not appointed a County Court Judge to fill the vacancy in District Number Six as yet.

5. The Appeal was tentatively set down to be heard by the Honourable Judge N. R. Anderson, acting as an Additional Judge of the County Court for District Number 6 on August 9th, 1991, however Judge Anderson was unavailable on that date and the matter did not proceed.

6. With the agreement of both Counsel, the Appeal was set down on December 19th, 1991, to proceed by written submissions without a formal hearing, a decision to be delivered on February 27th, 1992.

7. That approximately thirteen months have elapsed from the time of the filing of the appeal to the date of delivery of the decision.

The Respondent's Counsel submits that the sole issue to be determined is whether or not this Appeal has been unduly delayed as a result of systemic or institutional delays. It is submitted that at no time did the Respondent waive his right to have the Appeal proceed within a reasonable time. Further, that the onus is on the Crown as Appellant to show that the systemic delay was not of an inordinate length. It is pointed out that this is a simple Appeal by the Crown from an acquittal on a charge under Section 254(5) of the Criminal Code. Further, that the Respondent should bear no responsibility for the failure of the Federal Government to appoint a County Court Judge for District Number Six, and that the delay suffered by the Respondent from the date of filing the Appeal to the time that the Appeal is being heard, is both unreasonable and intolerable.

In support of his submissions, Counsel for the Respondent cites **R. v. Askov** (1991) 59 C.C.C. (3d) 449; **R. v. Bennett** (1991) 64 C.C.C. (3d) 449; **Smith v. The Queen** 52 C.C.C. (3d) 97; **R. v. Conway** (1989) 49 C.C.C. (3d) 289, and **R. v. Stapleton** 84 Nfld. & P.E.I. R145.

Crown Counsel submits the appropriate period to be considered is the delay from the date that the Appeal was filed to the date it was heard, and although other factors must be con-

sidered, that this delay is not unreasonable. Crown Counsel admits that the delay is almost totally due to the fact that a County Court Judge had not been appointed to fill the vacancy in District Number Six, and that such delay, although not directly attributable to the Crown will operate to the benefit of the Respondent.

Crown Counsel further submits that the onus is on the party relying on unreasonable delay to call evidence to substantiate that the delay was unreasonable. In support of this argument he cites **R. v. Schell et al.** (1990) 57 C.C.C. (3d) 227 and **R. v. Parks** (1990) 56 C.C.C. (3d) 449.

Crown Counsel agrees that at no time did the Respondent waive his right to an appeal within a reasonable time. However, it is further argued that there is no evidence to indicate that the Respondent at any time suffered prejudice due to the delay.

It is further submitted that the Respondent could have taken steps to apply for a Stay of Proceeding at an earlier date. In support of this submission, he cites **R. v. Bennett** (1991) 64 C.C.C. (3d) 449.

In **R. v. Askov**, Cory, J., at pp.483-84 stated:

> " From the foregoing review it is possible I think to give a brief summary of all the factors which should be taken into account in considering whether the length of the delay of a trial has been unreasonable.
>
> (i) The Length of the Delay.
>
> The longer the delay, the more difficult it should be for a court to excuse it. Very lengthy delays may be such that they cannot be justified for any reason.
>
> (ii) Explanation for the Delay.
>
> (a) Delays Attributable to the Crown.

Delays attributable to the action of the Crown or officers of the Crown will weigh in favour of the accused. The cases of **Rahey** and **Smith** provide examples of such delays.

Complex cases which require longer time for preparation, a greater expenditure of resources by crown officers, and the longer use of institutional facilities will justify delays longer than those acceptable in simple cases.

(b) Systemic or Institutional Delays.

Delays occasioned by inadequate resources must weigh against the Crown. Institutional delays should be considered in light of the comparative test referred to earlier. The burden of justifying inadequate resources resulting in systemic delays will always fall upon the Crown. There may be a transitional period to allow for a temporary period of lenient treatment of systemic delay.

(c) Delays Attributable to the Accused.

Certain actions of the accused will justify delays. For example, a request for adjournment or delays to retain different counsel.

There may as well be instances where it can be demonstrated by the Crown that the actions of the accused were undertaken for the purposes of delaying the trial.

(iii) Waiver.

If the accused waives his rights by consenting to or concurring in a delay, this must be taken into account. However, for a waiver to be valid it must be informed, unequivocal and freely given. The burden of showing that a waiver should be inferred falls upon the Crown. An example of a waiver or

> concurrence that could be inferred is the consent by counsel for the accused to a fixed date for trial.
>
> (iv) Prejudice to the Accused.
>
> There is a general, and in the case of very long delays an often virtually irrebuttable presumption of prejudice to the accused resulting from the passage of time. Where the Crown can demonstrate that there was no prejudice to the accused flowing from a delay, then such proof may serve to excuse the delay. It is also open to the accused to call evidence to demonstrate actual prejudice to strengthen his position that he has been prejudiced as a result of the delay."

In **R. v. Bennett** (supra) the Ontario Court of Appeal reviewed the ramifications of **R. v. Ascov** and Arbour, J.A., in delivering the majority decision at p.464 stated:

> "The fact that a stay of proceedings is the minimum remedy for an infringement of s. 11(b) does not change its nature. A judicial stay is a declaration of disentitlement to adjudication; for all its legitimacy, it remains a judicially created impediment to the completion of the process by which society resolves some of its conflicts. The Attorney-General may decide to withdraw a charge that has not been prosecuted expeditiously. But when the state asserts its right to continue with the prosecution, in the face of an alleged infringement of the right of the accused to be tried within a reasonable time, the judiciary is called upon to act as the constitutional arbiter. In such a case, the granting of a judicial stay of proceedings because of an infringement of s.11(b) of the Charter cannot therefore be reduced to an administrative task, another step in case management, the end of the assembly line for processing cases. It calls for the exercise of judgment by the individual judge who orders the stay.
>
> The Supreme Court decision in **Askov** makes it apparent that a skilful judgment is required to support a conclusion that there has been

> a violation of s.11(b) and that a stay of proceedings must be entered. Judges must balance four factors, one of which - the reason for the delay - requires an analysis, sometimes critical, of a system of which the judiciary is an integral part."

In reaching a decision on the Respondent's Application for a Stay, this Court must consider: (A) The length of the delay. (B) The explanation for the delay. (C) Waiver, and (D) Whether there was prejudice to the Respondent.

(A) Length of delay:

The delay to be considered is that from the filing of the appeal to the delivery of the decision, being approximately thirteen months. Different considerations must apply to the delay between laying a charge and the original trial and as in this case the delay between filing an appeal and the Appeal Court hearing the Appeal and delivering it's decision. Although thirteen months appears to be an inordinate length of time to process a summary conviction appeal in this jurisdiction, it is not so unusual as to be shocking. However, it does require a review of the other factors to be weighed before reaching a decision.

(B) Explanation of the delay:

There is no question that the reason for the delay in processing this appeal is the failure of the Federal Government to fill the vacancy in County Court District Number Six, caused by the mandatory retirement of the Honourable Judge H. J. MacPherson on March 6th, 1991. As stated by Cory, J. in **Astov**: "Delays occasioned by inadequate resources must weigh against the Crown." Although, in this case, there is little if anything that the Provincial Crown officers could do to force the Federal Government to fill

the County Court vacancy in District Number Six, the delay must count against them. In no way can the Respondent be held responsible for the delay in this Appeal being heard.

(C) Waiver:

There is no evidence whatsoever that the Respondent waived his right for the appeal to be heard within a reasonable time.

(D) Prejudice to the Respondent:

The majority of cases seeking a stay due to a violation of Charter Rights are asserted by the Accused at the trial stage. In **R. v. Smith** (1989) 52 C.C.C. (3d) 97, Sopinka, J., at p.106-107 stated:

> " I accept that the accused has the ultimate or legal burden of proof throughout. A case will only be decided by reference to the burden of proof if the court cannot come to a determinate conclusion on the facts presented to it. Although the accused may have the ultimate or legal burden, a secondary or evidentiary burden of putting forth evidence or argument may shift depending on the circumstances of each case. For example, a long period of delay occasioned by a request of the Crown for an adjournment would ordinarily call for an explanation from the Crown as to the necessity for the adjournment. In the absence of such an explanation, the court would be entitled to infer that the delay is unjustified. It would be appropriate to speak of the Crown having a 'secondary or evidentiary burden under these circumstances. **In all cases, the court should be mindful that it is seldom necessary or desirable to decide this question on the basis of burden of proof and that it is preferable to evaluate the reasonableness of the overall lapse of time, having regard to the factors referred to above.** I believe that this is the type of flexibility referred to by my colleague in her reasons quoted above."
>
> (Emphasis added)

In the present case the burden is on the Respondent to prove that he has been prejudiced by the delay in hearing the Appeal.

We are dealing with a situation where the Respondent was acquitted at trial. During the thirteen month period in which the appeal was delayed there is no evidence that he suffered any prejudice. It is possible that if the Crown appeal should succeed, and a new trial is ordered, then the Respondent could be in a position to show by evidence that he had suffered prejudice. However, at that time it would be open to him to again apply for a Stay on the basis that the undue delay prejudiced his rights under Section 11(b) of the Charter to a fair trial. At the present time I can find no evidence that the Respondent was prejudiced by the thirteen month delay in processing this Appeal.

Balancing all of the foregoing factors together, I find that the Respondent's rights under the provisions of the Charter of Rights and Freedoms have not been violated in this Appeal not being processed within a reasonable time. I am satisfied that the thirteen month delay from the filing of the Appeal to the delivering of the decision, taking into consideration the lack of prejudice to the Respondent, is not such an unreasonable delay as to give the Respondent a remedy under the Charter. For these reasons, I deny the Respondent's Application for a Stay of Proceeding pursuant to Section 24(1) of the Canadian Charter of Rights and Freedoms.

Having dismissed the Respondent's Application for a Stay, the issue to be decided by this Court on Appeal is:

Did the Trial Judge err in failing to find that Cst. Michael Burke had reasonable and probable grounds for the giving of the breathalyzer demand to the Respondent on August 31st, 1990?

At the trial the Crown called as witnesses Cst. Michael James Burke and Cst. Bridgette Harris, both members of the Royal Canadian Mounted Police, stationed at Antigonish. The evidence of the two R.C.M.P. constables was to the effect that at approximately 3:30 a.m. on the 31st day of August, 1990, whilst on patrol on James Street in the Town of Antigonish, they met an oncoming truck which appeared to be in their lane of traffic, which had to swerve to avoid them. The evidence of both Constables was that there was only one occupant in the truck. Due to the manner in which the truck was being driven, they turned and followed it. Upon reaching the West Street intersection with James Street, the truck made a U-turn and came back up James Street. Again, only one occupant was noted by the R.C.M.P. officers in the truck. The truck exited James Street, and went behind the building known as the former Canadian Tire building, which was adjacent to T. Bones Lounge. The R.C.M.P. officers exited James Street at the next driveway, and drove in behind the T. Bones Lounge, where they came upon the truck they had met on James Street stopped in a field. They noted one male occupant exit the truck from the driver's side. They gave pursuit into an adjoining wood and came upon the accused, MacMaster. After a struggle, the accused, MacMaster, was taken into custody, and removed to the R.C.M.P. detachment. Whilst in the wood, one Donald Steeves, together with another person arrived on the scene. The evidence of the

R.C.M.P officers was that the accused, MacMaster, wanted to fight, and showed various signs of impairment. When the police officers, together with the accused, MacMaster, arrived at the R.C.M.P. detachment approximately a quarter of a kilometer from where the accused was apprehended, Cst. Michael Burke gave the police warning and Charter Rights to the accused and advised him that he was placing him under arrest for impaired driving. Cst. Burke's evidence was to the effect that he gave a breathalyzer demand to the accused based on his belief that MacMaster was driving the vehicle and that he showed signs of impairment. MacMaster appeared to understand the breathalyzer demand, and indicated in no uncertain terms that he was not going to comply or submit to a breathalyzer test.

The accused, MacMaster, gave evidence to the effect that on the night in question at about 3:15 he left the area of T. Bones Lounge in his pick-up truck. The truck was being operated by Donald Steeves, and MacMaster was in the passenger seat. Donald Steeves was not familiar with the truck and looking for a light swerved to the wrong side of the road just before meeting an R.C.M.P. vehicle. Steeves turned the truck shortly after and proceeded back, heading towards T. Bones Lounge. Noting the R.C.M.P. following them, Steeves drove in behind the Lounge. MacMaster exited the vehicle on the passenger side, and proceeded into the wooded area whilst Steeves exited on the passenger side. His version as to what happened in the woods was somewhat different from that of Cst. Burke. His evidence was that he had injured his leg, and that this was what was giving him difficulty when the R.C.M.P.

officers arrived. He stated that he refused to take the breathalyzer test because he was not operating the motor vehicle and Cst. Burke had been previously told by Donald Steeves that he, Donald Steeves, was operating the vehicle.

Donald Steeves corroborated the testimony of the accused, MacMaster. Steeves told of driving MacMaster's truck in the early morning of August 31st. His evidence was that whilst MacMaster was being roughed up by Cst. Burke in the wooded area, he came to Burke and told him that he had been driving the vehicle.

Lynn Ann Grant, a waitress at the T. Bones Lounge, gave evidence that she was completing her shift at approximately a quarter after three on the night in question when she noted Frank MacMaster's truck going by being driven by Donald Steeves, with the accused, MacMaster, in the passenger seat. She also told of a taxi pulling into the Lounge just after the MacMaster vehicle had left.

Alexander Eugene Purdy gave evidence on behalf of the Defence. Mr. Purdy is a taxi driver, and on the morning of August 31st, 1990, between 3 o'clock and 3:30 in the morning he drove out to the T. Bone Lounge to check if there was anyone looking for taxi service. He noted MacMaster's truck coming out between the Canadian Tire and T. Bone Lounge, and he stopped in front of the truck to check if they knew if anybody was at the Lounge look0ing for a drive. MacMaster was in the passenger side, and Donald Steeves was driving the truck.

Dr. David Cudmore, a family physician practicing in the Town of Antigonish, gave evidence as to treatment on September 2nd, 1990, of MacMaster for a sprained left ankle. The

injury had been treated some two days earlier by another physician.

The Trial Judge in his decision gave a thorough review of all the evidence presented both by the Crown and the Defence. At page 217 of the transcript, he said as follows:

> "As to reasonable and probable grounds and looking at it on the...on the objective basic, I find that Cst. Burke did not have reasonable and probable grounds in order to put the Demand on the Accused in the manner and fashion that he did."

He concluded his decision as follows:

> "This Decision I find, ah, really boils down to the fact that I have found, ah, Cst. Burke did not have the reasonable and probable ground looking at all the evidence on an objective basis to give the Demand to the Accused at the time in question. And I am, therefore, finding Mr. MacMaster not guilty of the charge under Section 255...I'm sorry, Section 254(5) of the Criminal Code of Canada."

Crown Counsel submits the question as to whether Cst. Burke had grounds to make the breathalyzer demand is a question of fact to be determined on a review of the evidence before the Trial Court. As to whether the constable's belief was correct or in error is immaterial.

It is submitted that all of the facts taken together clearly give the officer more than reasonable and probable grounds to believe that the Respondent, MacMaster, had been the operator of the vehicle in question, and that Cst. Burke was correct from these facts in forming an opinion which led him to give the breathalyzer charge to MacMaster.

Crown Counsel cites R. v. **Trask** (1987) 81 N.S.R. (2d) 377 and in particular MacDonald, J.A., at p.379:

> the question of belief based on 'reasonable and probable grounds' involves primarily questions

> of facts. The test is an objective one. As applied to the facts of this case it maybe expressed as being whether a reasonable man having the means of knowledge available to Cst. Boyd at the time might come to the conclusion that the Appellant probably had been drinking or had the control of his motor vehicle within the two hours preceding the time when the Constable first observed him.
>
> The evidence of Cst. Boyd is that because of the Appellant's position in the truck he believed him to be the driver. The subsequent giving of the breathalyzer demand was obviously based on such conclusion. In my opinion the circumstances as testified to by Cst. Boyd support his belief that the Appellant had been the driver of the vehicle. Such belief does not have to be established as correct - indeed it might turn out to be wrong. The test is was it a reasonable belief at the time it was formed so as to justify the giving of the breathalyzer demand. To my mind it was."
>
> (emphasis added)

Respondent's Counsel submits that the Trial Judge properly applied the legal tests required in making a determination that the police officer did not have reasonable and probable grounds to give the breathalyzer demand to the accused. It is submitted that the Trial Judge was correct in finding that the Crown had not met the burden placed upon it, namely that the police officer had reasonable grounds to believe that the Respondent was the one who had care and control of the motor vehicle at the time and place in question.

In support of his submission, he cites **R. v. Murphy** (1971) 3 N.S.R. (2d) 11; **R. v. MacNeill** (1981) 45 N.S.R. (2d) 410; **R. v. Jewers** (1971) 15 C.R.N.S. 64.

As to the power of the County Court in reversing a finding of a Provincial Court Judge, Respondent's Counsel cites **R. v. MacDonald** 10 N.S.R. (2d) 293, where the question was thoroughly

explored, and held that the question whether a peace officer in giving a demand under Section 235(1) of the Criminal Code had reasonable and probable grounds for the specific belief is one of fact, and that an Appeal Court is restricted to questions of law, and is precluded from determining such an issue.

It is difficult to find the R.C.M.P. constables evidence creditable in all respects when you examine their evidence as well as that of the other witnesses. There seems to be no question from the total evidence that Steeves was the operator of the truck in question, and MacMaster was a passenger. It is difficult to understand how the R.C.M.P. officers could have noted only one person in the truck when they met it twice on James Street. A perusal of all the evidence indicates that the two R.C.M.P. officers evidence of noting the accused, MacMaster, exiting the operators side of the vehicle and running into the woods must be mistaken. The Trial Judge in arriving at his decision had to take into consideration the credibility of all the witnesses. He obviously found the evidence of the accused's witnesses more creditable than that of the police officers.

In **Travelers Indemnity Company of Canada v. Kehoe** (1985) 66 N.S.R. (2d) 434, Macdonald J.A., at p.437 said:

> " This and other appellate courts have said time after time that the credibility of witnesses is a matter peculiarly within the province of the trial judge. He has the distinct advantage, denied appeal court judges, of seeing and hearing the witnesses; of observing their demeanor and conduct, hearing their nuances of speech and subtlety of expression and generally is presented with those intangibles that so often must be weighed in determining whether or not a witness is truthful. These are the matters that are not capable of reflection

> in the written record and it is because of such factors that save strong and cogent reasons appellate tribunals are not justified in reversing a finding of credibility made by a trial judge. Particularly is that so where, as here, the case was heard by an experienced trial judge."

The Trial Judge had the advantage of viewing all of the witnesses, and hearing their testimony, and to have concluded that the R.C.M.P. constables were, if not creditable, at least mistaken, in the evidence they gave as to the number of occupants of the truck, and in particular as to the accused, MacMaster, being the operator of the truck at the time and place concerned.

Under all of the circumstances, the belief of Cst. Burke that the accused, MacMaster, was the operator of the motor vehicle was not reasonable, and cannot be justified.

The Trial Judge found that Cst. Burke did not have the reasonable and probable grounds to give the breathalyzer demand to the accused at the time in question. The Trial Judge in thus finding that Cst. Burke did not have the reasonable and probable grounds to give the breathalyzer demand, taking all the evidence on an objective basis into consideration, was making a finding of fact.

Findings of fact must not be disturbed on appeal, unless it can be established that the Trial Judge made some palpable or overriding error.

In **Stein v. The Ship Kathy "K"** (1976) 2 S.C.R. 802, at p.808, ritchie J. states:

> "These authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that they are not to be reversed unless it can be established that the learned trial judge made some pal-

> pable and overriding error which affected his assessment of the facts. While the Court of Appeal is seized with the duty of re-examining the evidence in order to be satisfied that no such error occurred, it is not, in my view part of its function to substitute its assessment of the balance of probability for the findings of the Judge who presided at the trial."

After a thorough review of the transcript of evidence, and giving full consideration to the submissions of Counsel for both parties, I am satisfied that the Trial Judge made no palpable or overriding error in his assessment of the facts, or his application of the law in finding that the Crown had not discharged its burden of proof that Cst. Burke had reasonable and probable grounds to give the breathalyzer demand to the accused, MacMaster, at the time and place in question.

The Appeal of the Crown is dismissed.

H. J. MacDonnell,
An Additional Judge of the County
Court for District Number Six