

PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Chaudhery 2015 NSPC 93

Date: June 17, 2015
Docket: 2610442; 2610443
Registry: Halifax

Between:

Her Majesty the Queen

V .

Abid Ali Chaudhery

DECISION ON VOIR DIRE

Judge: The Honourable Judge Marc C. Chisholm

Heard: April 2, 2015 and May 13, 2015

Decision: June 17, 2015

Charge Sections 253(1)(a); 253(1)(b) *Criminal Code*

Counsel: Brian Cox, for the Crown
Ian Hutchison, for the Defendant

By the Court:

Introduction

Abid Ali Chaudhery is charged that he on or about the 9th day of June, 2013, at, or near Halifax, Nova Scotia, did have the care or control of a motor vehicle while his ability to operate a motor vehicle was impaired by alcohol or drug, contrary to Section 253(1)(a) of the *Criminal Code*; and further at the same time and place aforesaid, did unlawfully have the care or control of a motor vehicle having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood, contrary to Section 253(1)(b) of the *Criminal Code*.

The accused entered pleas of not guilty and the matter was set down for trial.

In advance of the trial date, the accused gave notice of a Charter motion.

The accused submits that the demand/arrest officer lacked reasonable grounds to make a demand pursuant to s. 254 or to make an arrest pursuant to s. 495 of the *Criminal Code*.

Further, the accused submits that the samples of his breath were not taken as soon as practicable thus violating his s. 8 *Charter* right.

Evidence was heard on a Voir Dire.

The Testimony

The Court heard the testimony of one witness.

Cst. Peter Waldorf

Cst. Waldorf has been a police officer with the Halifax police service for 26 years. He has been a uniform officer throughout his career. He stated that he made traffic stops daily. He stated he'd dealt with impaired drivers on "quite a few occasions", which he went on to estimate as 50 times.

He was on duty, in uniform, in a marked police car, on the early morning of June 9, 2013. At approximately 2:30 he was situate at the Armdale rotary (now called roundabout). He testified to seeing a black sedan approach the rotary and proceed through it and off onto the St. Margaret's Bay road at "high speed". He estimated the vehicle's speed as 70 kph.

He decided to pursue and stop the vehicle to warn the driver about his speed. The vehicle had gone out of his sight.

He proceeded to the intersection of St. Margaret's Bay Road and Albert Walker Boulevard, where he did not see the taillights of a vehicle on either street. He guessed that the vehicle he was pursuing had turned onto Albert Walker Blvd. so he turned onto that street.

Cst. Waldorf came upon a "similar" black vehicle stopped at a red light at the intersection of Albert Walker Blvd and the North West Arm Drive. Later he described this vehicle as a sports car. He stated that the vehicle he'd pursued had been out of his sight for 60 to 70 seconds. He testified that when the light turned green, the vehicle took off at a high rate of speed. The car went north on North West Arm Drive towards Dunbrack Street. The vehicle stopped at a red light at Dunbrack Street and Main Avenue. When the light turned green the car proceeded.

Cst. Waldorf then activated his police lights. The vehicle pulled over "right away" and parked normally. Cst. Waldorf did not witness any unusual driving other than the rapid acceleration of the car on Albert Walker Blvd. and the speeding of a car through the rotary. Cst. Waldorf believed them to have been the same car.

Cst. Waldorf went to the driver's door of the vehicle. The accused was the driver and sole occupant. The accused asked why he'd been stopped. Cst. Waldorf testified that he immediately noted that the accused's speech was slurred. He stated that it was obvious and distinctive. He said that each word spoken was not enunciated as it should have been. He said he had noted this speech pattern in the past when dealing with impaired drivers. He acknowledged that he was not familiar with the accused's normal speech pattern. He couldn't say what specific words were slurred.

Cst. Waldorff asked the accused for his papers. The accused got his license from his front pants pocket and other papers from the center console.

Cst. Waldorf described the accused's actions as "slow and deliberate", and "very slow" and "almost in slow motion". Cst. Waldorf testified that the accused's actions were not normal and, given his experience, were indicative of impairment. He agreed that some people stopped by the police can be nervous.

Cst. Waldorf said he had a conversation with the accused which was initially about his speed. It lasted two to three minutes. The accused had no difficulty understanding what was said nor following directions.

Cst. Waldorf testified that he asked the accused if he'd been drinking. The accused said that he'd had one beer.

Cst. Waldorf shone his flashlight on the accused's face. He stated that the white parts of the accused's eyes were red and that in his experience people who have been drinking often have bloodshot eyes. He agreed this could be consistent with allergies or fatigue.

While the accused was still seated in the driver's seat of his car, Cst. Waldorf advised him that he believed he was impaired. He told the accused to turn off his car and turn over his keys. The accused did as directed.

Cst. Waldorf testified that he believed the accused's ability to operate a motor vehicle was impaired by alcohol. The grounds for his believe were: the accused's distinctive and obviously slurred speech, his red eyes and very slow movements.

The accused was asked to step out of his vehicle. He did so.

The accused was escorted to the police car.

Cst. Waldorf observed that the accused seemed a little unsteady as he exited his vehicle and walked to the police car. This observation was recorded in the officer's notes. He could not recall any particulars at the time of his testimony.

Cst. Waldorff stated that there was nothing out of the ordinary in relation to the accused's appearance.

When the accused was seated in the police car, Cst. Waldorf told him he was under arrest for impaired driving.

At 2:43 am Cst. Waldorf read the accused his s. 10 Charter right to counsel. He then read the accused the breath demand.

Cst. Waldorf testified that while advising the accused of his right to counsel and reading him the breath demand he detected a moderate smell of alcohol coming from the accused's breath. He noted that the accused's speech continued to be slurred.

After the accused was arrested and given the breath demand, Cst. Waldorf stated that there was a delay in leaving the scene of "probably" five minutes while Cst. Waldorf waited for a second police car to attend to deal with the accused's vehicle (who was to wait for a friend of the accused to come for his car).

Cst. Waldorf testified that he left the scene with the accused at approximately 2:55 am. He did not make a note of the time. He took the most direct route to the police station. They arrived at the police station at 3:10 am.

Cst. Waldorf testified that the accused would've been taken to a cubicle, the handcuffs removed and been searched.

Cst. Waldorf asked the accused if he wanted to speak with a lawyer. He did.

At 3:16 am, Cst. Waldorf placed a call to legal aid duty counsel. He left a message. He waited, assuming duty counsel was assisting another individual.

At 3:26am Cst. Waldorf called the duty counsel number again. He reached duty counsel and advised him of the accused status. Then he gave the phone to the accused and left the accused in the cubicle with the door closed. The accused completed his phone call at 3:31 am.

At 3:31 am, Cst. Waldorf asked the accused if he would take the test. The accused said that he would.

Cst. Waldorf immediately notified the breath technician, Cst. Hillier. Cst. Waldorf testified that there was about a five minute delay while Cst. Hillier finished up after a prior breath test.

During that delay, the accused fell asleep. Cst. Waldorf agreed that could have been due to fatigue.

At 3:55 am Cst. Hillier advised that he was ready for the accused. That was 24 minutes after the accused indicated that he would take the test. Only about five minutes of the 24 minute period between 3:31 am and 3:55 am was explained by the evidence of Cst. Waldorf.

At 3:55 am, Cst. Waldorf introduced the accused to Cst. Hillier. He remained in the room for the breath testing. He recorded the first test as having been taken at 4:35 am, 40 minutes after the accused was introduced to Cst. Hillier.

At the completion of the testing, Cst. Hillier completed a Certificate of Qualified Technician. Cst. Waldorf gave the accused a copy of the certificate and a notice to introduce it at trial. Cst. Waldorf didn't look at the Certificate that night.

Cst. Waldorf gave no evidence regarding what transpired between 3:55 am and 4:35 am.

I found the evidence of Cst. Waldorf entirely credible. I found his actions entirely reasonable. As to the reliability of his evidence, he acknowledged difficulty remembering some details of the incident due to the length of time between the incident and the trial. In his evidence, on a few occasions, he said he “would’ve” done this or that. This reference raised a doubt whether he was recalling the matter or merely stating his normal or usual practice.

[1] Section 254(3) states:

(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

(a) to provide, as soon as practicable,

a.(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, or

b.(ii) if the peace officer has reasonable grounds to believe that, because of their physical condition, the person may be incapable of providing a sample of breath or it would be impracticable to obtain a sample of breath, samples of blood that, in the opinion of the qualified medical practitioner or qualified technician taking the samples, will enable a proper analysis to be made to determine the concentration, if any, of alcohol in the person’s blood; and

(b) if necessary, to accompany the peace officer for that purpose.

Wording of the Demand

[2]

Cst. Waldorf stated that he read the accused the breath demand from a card. In court, in reading the card, from which he'd read the breath demand to the accused he stated, in part:

“...provide samples of your breath in order to determine the concentration, if any, of alcohol in your breath.”

In s. 254(3) the wording is “to provide...samples of breath... to determine the concentration, if any of alcohol in the person’s blood”.

Defence counsel submitted that the demand was unlawful because the wording did not conform to the authorizing *Code* section.

The Crown submitted that this was likely no more than the officer mis-speaking when reading the breath demand in Court.

The Crown argument called on the Court to speculate. Even if it was “just a slip” in reading the demand in Court, it would not eliminate the prospect of the officer having made the same “slip” when reading the breath demand to the accused. I am left with a doubt on whether Cst. Waldorf, in giving the breath demand said in your breath or your blood.

A Section 254(3) demand need not be in the words of the section. To be valid, the breath demand must communicate to the accused that he is required to provide breath samples and to accompany the officer for that purpose (R. v. Nicholson (1970), 8 CCC (2d) 170 (NSSCAD). I am satisfied the wording of the demand given to the accused was lawful.

As soon as practicable

The law requires that the Crown establish that the breath demand was made and samples taken forthwith or without delay. The trial judge must consider all the circumstances including the reasonableness of the officer's actions. (R. v. Woods, [2005] 2 S.C.R. 205; R. v. Quansah, [2012] ONCA 123).

In the present case the Defence urged the Court to consider several periods of delay.

There was a delay in leaving the scene with the accused which lasted about five minutes. I accept that the delay was to await a second police officer to assume control of the accused's vehicle until a friend of the accused arrived to take possession of the accused's car. In my view, this could not have been done without the accused providing the name of a friend to be contacted by the police.

Cst. Waldorf stated that this was done rather than impounding the accused's vehicle. In my view, this delay was brief and the officer's action reasonable.

At the police station there was a delay in contacting defence (duty) counsel. On the evidence, the first call to the duty counsel was not successful in reaching counsel. A message was left. After waiting ten minutes, with no call back, a second call was placed to duty counsel which was successful.

I find the actions of Cst. Waldorf, in facilitating the accused's right to counsel were entirely reasonable as was the delay occasioned thereby.

After the accused indicated he would take the breath test, there was a delay in the taking of the first breath sample. The accused indicated at 3:31 am that he would take the breath test. The first breath test was taken at 4:06 am. Cst. Waldorf testified that at 3:31 he notified the breath technician, Cst. Hillier, that the accused had decided to take the breath test. Cst. Waldorf stated that Cst. Hillier would be delayed about five minutes as he was finishing up from the testing of a previous subject. Cst. Waldorf testified that the accused fell asleep. Cst. Hillier then asked Cst. Waldorf to continue to watch the accused for the waiting period. He did so. Cst. Waldorf stated that at around 3:57 am the accused was awakened and taken into the breath testing room. The accused sat down and put his head on the table.

I find that the delay between the accused's indication that he would provide samples of his breath and the start of the taking of samples of his breath has been fully and reasonably explained.

Cst. Waldorf's evidence regarding the timing of the first sample is consistent with the information contained in Exhibit 1, the Certificate of Qualified Technician.

Exhibit 1 records three samples of breath having been provided by the accused at 4:06 am, 4:35 am and 4:53 am. Cst. Waldorf testified that there was also an invalid sample.

On the totality of the evidence, I am satisfied that the samples were taken as soon as practicable.

Did Cst. Waldorf have reasonable grounds to make a s. 254 breath demand?

The law in relation to reasonable grounds for a s. 254 demand was succinctly set out by the Ontario CA in R. v. Wang, [2010] O.J. No. 2490 at p. 6

14 The test for deciding whether there are reasonable and probable grounds includes both a subjective and an objective component: (i) the officer must have an honest belief that the suspect committed an offence under s. 253 of the *Criminal Code*, and (ii) there must be reasonable grounds for this belief: *R. v. Bernshaw*, [1995] 1 S.C.R. 254 at para. 48.

15 In the present case, the central issue before the summary conviction appeal judge was whether the trial judge had properly applied the law in assessing whether there was a sufficient objective basis for the officer's subjective belief that he had reasonable and probable grounds to demand breath samples from the appellant.

16 Since the trial and summary conviction appeal proceedings, the Supreme Court of Canada, in *R. v. Shepherd*, [2009] 2 S.C.R. 527, has provided useful guidance on the nature of the test and the test itself in cases where a court is called upon to decide whether a police officer had reasonable and probable grounds to believe that a motorist has committed an offence under s. 253 of the *Criminal Code*.

17 In short, *Shepherd* explains that where a court is satisfied that the officer had the requisite subjective belief, the sole remaining issue is whether that belief was reasonable in the circumstances. The test is not an overly onerous one. A *prima facie* case need not be established. Rather, when impaired driving is an issue, what is required is simply that the facts as found by the trial judge be sufficient objectively to support the officer's subjective belief that the motorist was driving while his or her ability to do so was impaired, even to a slight degree, by alcohol: see *R. v. Stellato* (1993), 12 O.R. (3d) 90 (C.A.), *aff'd* [1994] 2 S.C.R. 478

I accept the evidence of Cst. Waldorf that, based upon his observations of the accused's distinctly and obviously slurred speech, his very slow movements in providing his papers and his red eyes, he formed an honest belief that the accused's ability to operate a motor vehicle was impaired by alcohol. This opinion was formed while the accused was seated in the driver's seat of his vehicle. Several minutes later, when the accused was seated in the rear seat of the police vehicle, he gave the accused a breath demand. In between, he witnessed that the accused was slightly unsteady upon exiting his car.

Was the demand objectively reasonable?

In R. v. Vandal [2009] S.J. No. 153 (Sask Q.B.) the court stated:

“It may well be that during the course of the investigation, from stop to demand, an officer’s subjective belief like the objective circumstances will develop or reduce as more is learned or observed or as exculpatory matters arise. They all crystalize upon the making of the formal s. 254 demand. That, for want of a better phrase is “the moment of truth” – the point at which the officer’s belief falls to be tested against the legal standard.”

I accept the reasoning in R. v. Vandal and find that the time for the trial judge to assess whether or not the demand officer had the requisite reasonable grounds to believe the accused’s ability to operate a motor vehicle was impaired is at the time the officer makes the formal demand.

On the facts of this case, at the point the accused was given a formal s. 254 demand, Cst. Waldorf had observed;

- A vehicle he believed to be driven by the accused proceed at “high speed” through the Armdale rotary. (speed estimated 70 kph);
- A vehicle driven by the accused take off at “a high rate of speed” once the light turned green at the intersection of Albert Walker Blvd and North West Arm Drive;

- The accused obeyed the traffic lights;
- The accused's vehicle was not swerving;
- Other than the speed noted there was no evidence of unusual driving;
- Upon the police lights being activated the accused promptly pulled over and stopped his vehicle in a normal manner;
- Cst. Waldorf, immediately, upon hearing the accused speak noted his speech was distinctly, obviously slurred (not knowing the accused's unusual speech pattern);
- Cst. Waldorf observed the accused's slow and deliberate motions to retrieve his papers. He used terms including, very slow, almost slow motion, and not normal, not like a sober person;
- There was no evidence of the accused fumbling or dropping his papers, or producing the wrong papers;
- The accused appeared to understand what was said to him and complied;
- The accused admitted to having consumed alcohol. He said he'd had one beer;

- The accused's eyes (the white area) were red;
- The accused was slightly unsteady at the time of exiting his vehicle (Cst. Waldorf could not recall the details which prompted his making a note to this effect);
- There was no other evidence of the accused being unsteady on his feet.

Cst. Waldorf indicated that his opinion was based on the accused's red eyes, his distinctly/obviously slurred speech and his very slow and deliberate movements. He made no reference to the accused's manner of driving nor his admission of having consumed alcohol – a beer.

After forming his opinion and deciding to make a demand to the accused, Cst. Waldorf did not indicate how the perceived unsteadiness of the accused upon exiting the vehicle affected his opinion. Because he made a note of this, I conclude that he perceived it to be a relevant observation.

I am not persuaded that it was objectively reasonable for Cst. Waldorf to have believed that the accused's car was the vehicle that he'd seen speeding through the Armdale rotary. Although the vehicles were both black, the positive comparison ended there. Furthermore, the first vehicle had been out of sight for more than a

minute, and although there was very little traffic, the evidence did not preclude the first car turning off onto a side street at some point.

Cst. Waldorf's evidence of the accused's vehicle accelerating at a very fast speed when the light turned green was not a factor he considered in deciding to give the accused a Section 254 demand. In my view, while worthy of very little weight, it is part of the overall circumstances known to the demand officer which can be considered when assessing the reasonableness of his decision to make a s. 254 demand.

Cst. Waldorf did not consider the accused's statement that he'd drank one beer.

In my view, the accused's statement to Cst. Waldorf had two aspects:

- 1) An admission of having consumed alcohol; and
- 2) A claim of having consuming one beer.

Cst. Waldorf did not indicate how he viewed the accused's statement, however, only one conclusion is reasonable based on the evidence of Cst. Waldorf and that is that he did not believe the claim that the accused consumed one beer but did believe that the observations he made of the accused were due to his prior consumption of alcohol.

In my opinion, an admission of having consumed alcohol or a smell of alcohol on the accused's breath, is relevant when assessing the reasonableness of an officer's grounds to give a Section 254 demand because it provides possible support for the officer's belief that the "symptoms" being observed are due to the accused's prior consumption of alcohol.

Therefore, I consider the accused's statement to Cst. Waldorf relevant to the Court's assessment of whether there were reasonable grounds to make a s. 254 demand.

Cst. Waldorf did not refer to the noted slight unsteadiness of the accused as part of the basis for his decision to make a s. 254 demand but, as it was observed prior to the giving of the demand it can properly be considered.

The weight to be given to the evidence of the accused's slight unsteadiness on his feet upon stepping from his vehicle was negatively affected by Cst. Waldorf's lack of recollection of any details of that observation which he'd noted at the time.

Not all observations warrant the same evidentiary weight. Evidence indicating a slight variation from the norm of an individual's thinking or motor functioning may not, alone, support a finding of reasonable grounds (see R. v. Sampson,

[2009] NSCC 191). Evidence of a significant variance provides greater support for a finding that the officer had reasonable grounds to make a breath demand.

In this case, Cst. Waldorf testified that the accused's speech was distinctly and obviously slurred. I interpreted the language used by Cst. Waldorf as meaning: (1) that the slurring of speech by the accused was readily apparent; and (2) that his speech was much more than mildly slurred.

Cst. Waldorf described the pace at which the accused retrieved his papers as very slow and deliberate. Not normal. By his language he communicated a marked variation from the norm but, he conceded that Mr. Chaudhery appeared to be thinking before acting and may have been nervous.

The evidence of the accused having been slightly unsteady on his feet upon exiting his vehicle I find deserving of virtually no weight given the descriptor "slightly" and the officer's inability to provide any specifics of his observation due to the passage of time and the fading of his memory.

It is apparent on the evidence that Cst. Waldorf, a 29 year police officer, in spite of the accused's mostly normal manner of driving, upon observing the severity of the accused's slurred speech and the severity of his slow and deliberate movements

and his red eyes formed the belief that the accused's ability to operate a motor vehicle was impaired by alcohol.

He came to this conclusion after speaking to the accused for 2-3 minutes. I have no doubt his belief was honestly held, however, on the totality of the evidence, I am not satisfied that Cst. Waldorf's grounds were objectively reasonable.

I find that the accused's Section 8 and 9 *Charter* rights were violated by the taking of breath samples pursuant to an unlawful demand.

Legality of the Arrest

The test for the making of an arrest is set out in R. v. Storrey [1990] 1 SCR 241. An officer must have reasonable grounds to believe an offence has been committed. The objective element asks "...whether a reasonable person, standing in the shoes of the officer, would have believed that reasonable grounds existed".

For the reasons expressed previously, I am not satisfied that Cst. Waldorf had reasonable grounds to arrest the accused.

Consequently, I find that the accused's Section 9 *Charter* right was violated.

Charter Remedy

The leading *Charter* case is R. v. Grant, [2009] SCC 32.

In my view, Cst. Waldorf acted entirely in good faith. He assessed the situation and honestly believed that he had reasonable grounds to arrest the accused and give him a breath demand.

There was nothing egregious in the officer's conduct. Cst. Waldorf demonstrated an awareness of the accused's rights and made efforts to advise the accused of his rights and facilitate his exercising of them. This Court has found that his grounds fell short of the objective reasonable standard, albeit minimally.

As a result of his arrest and breath demand, the accused was taken into custody, transported to the police station, and after consulting with counsel, required to give samples of his breath. His detention for a period of a few hours is serious.

I find that the taking of breath samples from the accused was relatively non-intrusive and a relatively minor violation of his Section 8 *Charter* right (see R. v. Grant, *supra*; R v. Lafosse [2010] NSSC 240).

The evidence sought to be excluded is a Certificate of a Qualified Technician. The Certificate is marked, Exhibit 1, on the *Charter voir dire*. The Certificate contains evidence of the accused blood alcohol at the time of the testing, to be related back

to the time of driving. This evidence is vital to the Crown case on the s. 253(1)(b) charge.

In R. v. Grant, supra, at para. 111, the court stated:

“...where the violation is less egregious and the intrusion is less severe in terms of privacy, bodily integrity and dignity, reliable evidence obtained from the accused’s body may be admitted. For example, this will often be the case with breath sample evidence, whose method of collection is relatively non-intrusive.”

I find the Certificate evidence reliable.

Drinking and driving is a matter of significant public concern.

I believe the public have a significant interest in seeing that charges of drinking and driving be determined on their merits. The analysis under s. 24 of the *Charter* requires a balancing of the three factors set out in Grant to determine whether the administration of justice would be brought into disrepute by the admission of the evidence.

On the totality of the evidence, I am not satisfied that the introduction of the Certificate of Analysis would cause the administration of justice to be brought into disrepute.

The motion to exclude the Certificate of Analysis is dismissed.