IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R.* v. ***Richard Wayne Wadman,* 2004 NSPC 15**

Date: 20040305
Case No.(s): 1284675
1284776
Registry: Halifax

Between:

R.

v.

Richard Wayne Wadman

Judge:	The Honourable Judge C. H. F. Williams, JPC
Heard:	Decision rendered orally on March 5, 2004 in Halifax Nova Scotia
Counsel:	Eric R. Woodburn, for the Crown Thomas J. Singleton, for the Defence

BY THE COURT

Introduction and Summary of Facts

[1] Richard Wayne Wadman is charged with having a blood alcohol level that exceeded the legal limit and with operating a motor vehicle when alcohol or a drug impaired his ability to do so. The accused contests the Crown's position that the police were operating under the doctrine of hot pursuit. In addition, he opposes the admissibility of certain evidence as violations of sections 8 and 9 of the ***Charter*** and urges their exclusion pursuant to section 24 of the ***Charter***.

[2] A voire dire was conducted to determine the constitutional issues and the voluntariness of certain statements. I determined after a voir dire, that the statements in question were voluntary and the issue of admissibility would be determined on the result of the voir dire on the constitutional issues. Further, both parties agreed that the evidence on the voir dire would be the evidence on the case in chief without the necessity to recall the witnesses.

Summary of Relevant Evidence on the Voir Dire

[3] After an evening of socializing and drinking with friends, at about 2300 hours on January 31, 2003, Chris Fields, an ex-bartender, on his way home, stopped at a local Tim Horton's in the Halifax Regional Municipality to purchase a large cup of coffee. Inside and in front of him was an individual, later identified as the accused, Richard Wadman. Fields noted that the accused ordered a cup of coffee and a sandwich. He also noted that the accused slurred his speech and that he emanated a smell of alcohol.

[4] When the accused was leaving the Tim Horton, he had to go through two sets of doors. He had in his hand, the cup of coffee and the sandwich that he had ordered. On his way through the door, Fields noted that he stumbled somewhat and subsequently drove away in a vehicle, bearing a New Brunswick license plate. Because Fields smelled a strong smell of alcohol emanating from the accused and that he appeared to slur his speech, when combined with the stumble as he exited the restaurant, Fields felt, from his experience as a bartender, that the accused was intoxicated.

[5] Earlier in the evening, it had been snowing and the roadway was covered with snow that partly obscured the centre line. Further, as there was a precipitation of freezing rain, the roadway was also slippery. Nonetheless, Fields decided to follow the accused vehicle and when doing so, at 2315 hours, he called 911 to advice of a possible impaired driver. Keeping the accused vehicle in his constant view, Fields noted that it drifted across the centre line about four or five times and then jerked back into its lane.

[6] They arrived at an apartment building and he saw the accused pulled into a parking spot that was about one hundred and sixty feet from the entrance of the parking lot and, for three minutes, remained in the parked vehicle. The parking spot was about forty feet from a side entrance to the building. Fields, however, did not enter the parking lot but remained at the entrance awaiting the arrival of the police. Constable Daniel Roache of the Halifax Regional Municipal Police, at 2319 hours, was the first officer to arrive on the scene. Remaining in their vehicles and speaking briefly to each other Fields pointed to the accused, who was then walking, at a normal pace, toward the side entrance to the apartment building. To arrive at the side entrance door the accused had to walk about forty to seventy feet from his parked vehicle and up three steps, which he executed without any observed difficulties.

[7] Constable Roache, still in his vehicle drove toward the side entrance but on arrival, the person had already entered the building. However, when he was on his approach and seeing that the person whom he wanted to investigate about to enter the building the Constable did not activate his emergency lights, blew his horn, shouted to the person or did anything to attract the person's attention or to indicate that there was a need for the person to stop. The person continued walking and disappeared into the building's interior. Nonetheless, before the person disappeared from his view the Constable, although he did not note any facial features, observed that the person was a white male, medium built, approximately six feet tall with short thick black hair and wearing dark clothing.

[8] Unable to gain entry into the building, Constable Roach returned to speak to Fields who identified the vehicle that he saw earlier on the highway. Fields also then told the Constable that he had seen the suspect who the same person who they saw entered the building, at a local Tim Horton's exhibiting strong signs of impairment and that the suspect had operated his vehicle on the highway in an erratic manner. Constable Roach, at 2322 hours, based on what Fields told him, formed the belief and concluded, without any personal observations that the accused was driving while impaired. He deemed the information that he received to be true and accurate.

[9] Constable Christopher Thomas also responded as a back up unit. Both he and Roach gained entry into the building and went to the building superintendent's apartment where they informed him that a person driving a vehicle bearing a New Brunswick licence plate had entered the building. That person was a suspected drunk driver and as they were doing a criminal investigation, they wanted information on who owned the vehicle and the person's apartment number. On the information the police provided, the superintendent determined that possibly they were looking for the accused whom he knew often drove the described vehicle and who lived in apartment 209.

[10] After speaking with the superintendent, Constables Roach and Thomas went to apartment 209 and, without identifying themselves as police officers, knocked for about three minutes. Receiving no response to their loud knocking the officers returned to the superintendent's apartment and requested that he open the suspect's apartment for them to enter as they were investigating a possible impaired driving offence. The superintendent refused to do as

requested and informed them that he will only comply if it were an emergency or he had the written permission of the tenant. He also informed them that they could take the master key if they so wished. Roache took the key from him, returned to the apartment, inserted the key and unlocked the door.

[11] Before pushing open the door he announced himself as the police who was there to investigate an impaired driving complaint. On entry, he saw the apartment was in darkness and that no one responded to his entry. Using his flashlight to illuminate his way, he walked down a passageway to a darkened bedroom. There, on a bed the Constable discovered the accused, dressed only in his underwear, sleeping soundly as it took him two minutes to shake the accused awake.

[12] Constable Roache then told the accused that they suspected that he was driving while impaired. At the same time he observed that the accused eyes were red and glossy and that when he spoke he slurred his speech and there was a strong smell of alcohol. Because of these observations, he then arrested the accused for impaired driving.

[13] Ten to fifteen minutes later when the police left the apartment with the accused in custody and under arrest, they asked Fields, who had been taken into the building and was standing in the corridor as he had been instructed, whether the person in their custody was in fact the individual whom he had seen earlier. Later in the police vehicle, Fields gave a statement to the police concerning the events as he had observed them.

[14] The police have asserted that they had reasonable and probably grounds before entering the accused apartment to arrest him for impaired driving. Additionally, they had the power and authority to arrest him under the doctrine of hot pursuit. This case therefore raises two important issues:

1. The police arrest powers and the exercise of such powers; and

2. The extent of the doctrine of hot pursuit and its application.

Analysis and Findings of Facts

[15] (a) *Theory of the Crown*

Here, the Crown's theory was that the accused was in effect trying to avoid arrest when he entered the apartment building. As the police had information that he smelled of alcohol and was driving erratically they had reasonable and probable grounds to effect his arrest without a warrant. That being the case, his entry into the building should not impede the ability of the police to arrest him, as this was a case of hot pursuit.

[16] *(b) Theory of the Defence*

On the other hand, the defence posited that the police had no reasonable and probable grounds to arrest the accused. Admittedly, they had information of a probable impaired driver but they were in effect conducting an investigation to confirm this report. As they had no personal knowledge of the events, in their efforts to obtain probative evidence, the police violated the accused protected rights to privacy, unreasonable search and seizure and arbitrary detention by entering his apartment without a warrant and arresting him.

[17] *1. The police arrest powers and the extent of such powers*

To begin with, the power to arrest without a warrant is set out in the ***Criminal Code***, s. 495. Basically put and in its application to this case. Constable Roache could lawfully arrest without a warrant a person whom he finds committing a criminal offence, any person whom he believes on reasonable and probably grounds has committed or is about to commit an indictable offence or any person whom he reasonably believes is the subject of a warrant of arrest or committal. In addition, pursuant to the ***Criminal Code***, s. 529.3 he could in exigent circumstances enter a dwelling house to effect an arrest without a warrant and to preserve critical evidence. See also, ***R.*** v. ***Feeney***, [1997] 2 S.C.R. 13.

[18] However, he cannot arrest without a warrant hybrid offences that can be prosecuted by indictment or summary conviction. Neither can he, without a warrant, arrest someone to be charged with a summary conviction offence. Notwithstanding, there are specific exceptions to this prohibition. He can arrest, without a warrant, a suspect in order to establish his or her identity, preserve evidence, or to prevent the continuation or repetition, of an offence and, on any reasonable grounds that he may have, that the person will fail to attend court. The term "public interest" was considered constitutionally vague and the section was read down. See ***R.*** v. ***Fosseneuve***, 1995 CarswellMan 420, 43 C.R. (4th) 260, 101 C.C.C. (3d) 61, 104 Man.R. (2d) (Man.Q.B.).

[19] This court also considered the powers of arrest in ***R.*** *v.* **Peniston**, [2003] N.S.J. No. 29, 2003 NSPC 2 at paras. 22 to 24:

> 22 In R. v. Storrey, [1990] 1 S.C.R. 241, the court ruled that for an arrest to be lawful it is not sufficient for the police to believe subjectively that he has reasonable and probable grounds to make the arrest. The arrest must also be justifiable from an objective viewpoint. This means that the officer must show that a reasonable and probably person placed in his position would have believed that reasonable and probable grounds existed for the arrest.
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> 23 Further, for a peace officer to have reasonable and probable grounds to arrest, his belief in the person's guilt must take into consideration all the information then available to him. He is, however, entitled to disregard only information that he has good reasons to believe is not reliable. Chartier v. Quebec (Attorney General), [1979] 2 S.C.R. 474.

> 24 If the arrest were based upon information received from a third party civilian unknown to the police, as here, the police are not required to confirm the third party's report in order to have reasonable and probable grounds. However, where the circumstances reasonably permit, the officer must conduct an inquiry, to determine whether there indeed exist reasonable and probable grounds to make the arrest. Again, the officer must take into consideration all the information then available to him and is entitled only to disregard information which he has good reasons to believe is unreliable. R. v. Golub (1997), 117 C.C.C. (3d) 193 (Ont. C.A.), leave to appeal to the S.C.C. refused, [1997] S.C.C.A. No. 571, 128 C.C.C. (3d) vi.

[20] In the case at bar, I accept and find that Fields saw a person in the Tim Horton's whom he felt, from his experience as a bartender, was intoxicated. He formulated this view from the demeanour of the person who slurred his speech when he spoke and smelled of alcohol. Additionally, the person stumbled as he was going through the exit doors with a cup of coffee and a sandwich in his hands. I accept and find that Fields followed the individual who had entered a motor vehicle and was operating it on the highway. Further, I accept and find that the roadway was partly covered with snow and was slippery because of a recent fall of freezing rain. Additionally, I accept and find that Fields called 911 and informed that he was following a suspected impaired driver.

[21] When Constable Roache arrived on scene at the apartment building, where the accused had parked his vehicle, I accept and find that the only conversation that initially transpired between him and Fields was a quick inquiry as to the location of the suspect. Thereupon, I accept and find that Fields responded by pointing to a person who was walking normally and about to enter the building through a side door.

[22] I conclude and find that this person was not aware that anyone wanted him to stop before he entered the building. I say that because, on the evidence, the police did not activate his emergency light, blew his horn or shouted at the person to stop. Additionally, the person was not walking hurriedly or acting as if he were attempting to avoid contact with anyone, much less the police. It would appear, and it is reasonable to conclude, and I so conclude and find that for all intent and purposes the person who was entering the building was oblivious to the presence of the police.

[23] At that point in time, I conclude and find that the information available to Roache was that the person whom he saw walking normally and entering the building was a suspect for driving while impaired. Then, he was not aware of the details of the allegations and he neither knew the person's name or whether, in fact, the person lived at an apartment in the building. He had an opportunity to see the person walking to the door as he had time to be impressed with his description. However, notwithstanding this keen observation, the nature of the complaint, the need to personally assess the general information and his stated experience as a breathalyser technician did he note anything unusual about the person's gait or walking.

[24] At this point, no offence has been established. The Constable did not find the person committing a criminal offence. As he had only a third party report alleging a criminal offence he knew that he had a responsibility to conduct an inquiry to determine whether indeed there existed reasonable and probable grounds to make an arrest. Subjectively, he might have believed that the report was true and accurate. However, objectively there were factors such as the slippery roads with some snow on the roadway that could have affected a person's driving and the observed uneventful walking of the suspect to the building.

[25] It therefore seems to me that, in the circumstances, a reasonable person placed in the position of the Constable would believe that a reasonable person would require more information before that person could conclude that reasonable and probably grounds exited for an arrest. That was precisely what the Constable set out to do as supported by his subsequent conduct. He went to the building superintendent and informed that the police were conducting a criminal investigation and required information. Receiving some information, they went to the suspect's apartment and on gaining entry announced that they were investigating an impaired driving complainant. If, however, as posited by the prosecution, that the Constable had a subjective belief that he had grounds for arrest under s. 495(1) for the impaired offence alleged to have been committed outside his presence, he should have arrested immediately the accused. Instead, he told the accused that he was a suspect in a drunk driving offence. His failure to arrest immediately the accused, in my opinion, remained an irreconcilable deficiency in his postulation of the belief of reasonable grounds to enter and effect an arrest. Objectively, no grounds also existed. It was only after he was in the suspect's apartment, woke him up and made several observations did the Constable learn and in fact concluded that reasonable and probable grounds exited for an arrest.

[26] Consequently, in my view, before the police entered the accused's apartment, they had merely a suspicion that the occupant of the apartment could be the suspect in an impaired driving report. I conclude and find that they were still investigating the report and their entry into the apartment was to further their investigation. Significantly, they did not know who was in the apartment as no one saw who entered it and when, or even if it were, in fact, occupied. Further, there was no evidence that any of the exceptions available to the police such as, in the public interest, the occupant of the apartment, whoever it might be, had to be arrested, without a warrant, in order to establish identity, preserve evidence or prevent another offence.

[27] Therefore, on the issue whether the police had reasonable and probably grounds to effect an arrest before they entered the accused apartment, on the evidence that I accept, and on the analysis that I have made, I conclude and find that, in the circumstances, they did not have reasonable and probable grounds.

[28] *2. The extent of the doctrine of hot pursuit and its application*

The doctrine of "hot pursuit" or "fresh pursuit", a creature of the common law is concerned only with the arrest of a person and not with search and seizure. As was put by Lamer C.J.C. in ***R.*** v. ***Macooh***, [1993] 2 S.C.R. 802, at para. 13:

> it is well settled at common law that police officers have the power to enter private premises to make an arrest in hot pursuit.

[29] In the course of his historical review of the doctrine the learned Chief Justice at para. 14 (***Macooh***) quoted with approval the statement of Donaldson L.J. in ***Swales*** v. ***Cox***, [1981] 1 All E.R. 1115 at p. 1118 (Q.B.Div.) concerning the power to enter private premises in four cases: (a) to prevent murder; (b) following a felon after a felony had been in fact committed and a police or citizen followed the felon to a house; (c) to prevent a felony; and (d) if a felon was running away from an affray and was followed by the police.

[30] The learned Chief Justice also noted that the doctrine has been recognized as an exception to the principle of the sanctity and security of the home in ***Eccles and Bourgue*** (1974), 19 C.C.C. (2d) 129, (S.C.C.) and ***R.*** *v.* ***Landry*** (1986) 25 C.C.C. (3d) 1 (S.C.C.) At para. 17, (***Macooh***) he quoted from LaForest J., in ***Landry***, at p. 179, a summary of the common law on the power of the police to enter:

> As has been seen the common law sets a high value on the security and privacy of the home. The situation where it permitted entry by the police without the consent of the owner or occupier were all demonstrably compelling. For example, entry to prevent murder is obviously justified. So too is entry on hot pursuit. Apart from the obvious practicality of that approach, in the case of hot pursuit the police officer is himself cognizant of the facts justifying entry; he acts on the basis of personal knowledge. Obviously, too, entry on the basis of a warrant is essential to a properly functioning system of criminal justice. The state must in the end have power to prevent criminals from eluding justice by retreating to a private home.

[31] It is comforting that here although they disagree with its interpretation, both the Crown and the defence rely on the definition of hot pursuit given by Lamer C.J.C. in ***Macooh*** at para. 24:

> In general, and subject to further clarification which may be necessary in the particular factual situations before the courts, I consider that the approach suggested by R.E. Salhany in Canadian Criminal Procedure (5th ed. 1989), at p. 44, adequately conveys the meaning of hot pursuit:
>
> > Generally, the essence of fresh pursuit is that it must be

> continuous pursuit conducted with reasonable diligence, so that pursuit and capture along with the commission of the offence may be considered as forming part of a single transaction.

[32] In ***R.*** v. ***Feeney***, [1997] 2 S.C.R. 13, Sopinka J., after declaring "warrantless searches in dwelling houses are in general prohibited" (para. 49), he summarized the current state of the law at para. 51:

> To summarize, in general, the following requirements must be met before an arrest for an indictable offence in a private dwelling is legal: a warrant must be obtained on the basis of reasonable and probably grounds to arrest and to believe the person sought is within the premises in question; and proper announcement must be made before entering. An exception to this rule occurs where there is a case of hot pursuit.

[33] He further declared at para. 147 (***Feeney***):

> ... in a real sense, "hot pursuit" is actually nothing more than a variety of exigent circumstances, and not really a separate doctrine.

[34] Because of the ***Feeney*** decision Parliament enacted section 529.3 ***Criminal Code*** that states:

> 529.3 (1) Without limiting or restricting any power a peace officer may have to enter a dwelling-house under this or any other Act or law, the peace officer may enter the dwelling-house for the purpose of arresting or apprehending a person, without a warrant referred to in section 529 or 529.1 authorizing the entry, if the peace officer has reasonable grounds to believe that the person is present in the dwelling-house, and the conditions for obtaining a warrant under section 529.1 exist but by reason of exigent circumstances it would be impracticable to obtain a warrant.
>
> (2) For the purposes of subsection (1), exigent circumstances include circumstances in which the peace officer:
>
> > (a) has reasonable grounds to suspect that entry into the dwelling-house is necessary to prevent imminent bodily harm or death to any person; or
> >
> > (b) has reasonable grounds to believe that evidence relating to the commission of an indictable offence is present in the

> dwelling-house and that entry into the dwelling-house is necessary to prevent the imminent loss or imminent destruction of the evidence.

[35] In his direct examination, the Constable gave his rationale for entering as follows:

> And too at the time, I didn't consider that this was a hot pursuit, not necessarily saying that the accused was intentionally fleeing the police to clarify, but I was making an effort to apprehend the accused and it was my belief that he had gone inside his apartment and I am aware that under the guidance ... or the common law that there is a certain right for police to enter a dwelling without warrant in fresh pursuit. I felt that the criteria for a warrant as entry into the apartment was met and only for the purpose of arresting the suspect.

[36] He also felt that to obtain a Feeney warrant would take too much time and police resources. In addition, there was also the possibility that in a prosecution for impaired driving the Crown might not be able to rely on the presumption established in section 256(1)(c) or (d), ***Criminal Code***. In my view, his concern that the time to obtain a "Feeney Warrant" would be too long in order to preserve evidence of impairment; that it would utilize too much police resources and deprive the Crown of the use of the legal presumption of impairment, as factors governing his decision to enter a dwelling-house to arrest a person without a warrant is unacceptable. Moreover, if there is no risk of the loss or destruction of evidence, it does not justify entry into a private dwelling pursuant to the doctrine of hot pursuit. See ***R.*** v. ***Rowe***, [2000] Q.J. No. 1075 (Q.S.P.) (Crim. Div.)) at para. 42.

[37] It therefore appears that the Constable believed that he had a common law right based on the doctrine of hot pursuit to enter the accused apartment and to arrest him. He suggested that there existed exigent circumstances that would justify his conduct. However, as I heard and assessed carefully his testimony, I got the impression that he felt he had a very difficult decision to make and realized that he was engaging in a questionable process.

[38] I consider that he did not know whether the suspect had in fact gone to apartment 209. I concluded that he assumed that because he had information that the person who normally drove the vehicle lived in apartment 209 that the suspect did enter that apartment. On the evidence, no one in fact, saw where the suspect went after he entered the building. Further, he himself saw a person whom the witness pointed out to be the suspect driver walked for a distance of about forty feet to the side entrance, walked up some steps, took keys out of his pocket and opened the door. All these physical activities were executed normally and without any unpropitious observations or comments by himself or anyone. In addition, as it had been snowing and freezing rain, I can reasonably infer that this perambulation was on a snow covered and slippery ground.

[39] Therefore, objectively, it is difficult to conclude and find that the officer could firmly

believe, on his own limited observations, that the information concerning the accused impairment was beyond a reasonable doubt, true and accurate. He was conducting an investigation and was determined to obtain evidence to support a possible charge of impairment. However, he had no right to enter to conduct an investigation. See, ***Macooh***, at para. 13, ***R.*** v. ***Williams***, [2001] B.C.J. No. 1357 2001 BCPC 149.

[40] Moreover, I found that the Constable's recollection of material facts was too often interspersed with "I don't recall", "I believe" and I would have" that made it imprecise, vague, lacking internal coherency and thus conviction. In addition, it would appear from his whole testimony, that rather than concentrating on proper and accepted investigative protocols he was exploring the novelty of the law and any anticipated court challenges to his conduct. Thus, I think that, as I deduced from the total evidence, he was framing his approach and was operating with a set of assumptions of the law into which he thought he could mould the whole enterprise.

[41] Therefore, in light of the historical backdrop to the doctrine of hot pursuit it is my view that here, it has no application. First, Constable Roache was not "himself cognizant of the facts justifying entry". Second, he was acting on the information of a witness and had no personal knowledge of the events in issue. Third, he was attempting to obtain confirmatory evidence and when outside the building he did not believe that the accused was fleeing from him as the accused entered the building. Further, the Constable did not witness the commission of the crime and he did not see the accused leaving the scene or at anytime thereafter until he saw him asleep in his apartment.

[42] As I earlier reasoned, there also was no evidence of exigent circumstances. There is no evidence that there was imminent bodily harm to anyone inside the apartment and the claim that he had to enter to preserve evidence, in my view, has no merit. If, as I think that he meant that what was inside the body of the accused was evidence, that evidence, if it did exist, would have been "conscripted evidence" as it would not have existed apart from the accused. In short, it was not something tangible that the Constable could enter and retrieve.

[43] Consequently, because the police had no reasonable and probably grounds and there existed no exigent circumstances, I find that the accused was unlawfully arrested in his apartment without a warrant. It follows that the demand for a sample of his breath was improperly made.

[44] In my consideration of section 24 of the ***Charter*** and the requisite tests for the possible admissibility of evidence obtained by the police, I cite and adopt the words of Sopinka J., in ***R.*** v. ***Kokesch*** (1990), 61 C.C.C. (3d) 207 (S.C.C.), at p. 227:

> Where the police have nothing but suspicion and no legal way to obtain other evidence, it follows that they must leave the suspect alone, not charge ahead and obtain evidence illegally and unconstitutionally. Where they take this latter course, the Charter

violation is plainly more serious than it would be otherwise, not less.

[45] Constable Roach had a suspicion that the accused was inside the apartment and had committed the offences for which he has been charged. He "charged ahead" and obtained evidence illegally thereby aggravating the ***Charter*** breach. When he entered the apartment if he did not know that he was trespassing, because the bounds of hot pursuit has long been established, he should have known. See, ***R.*** v. ***Westrum***, [1996] B.C.J. No. 336 (B.C.S.C.).

[46] In my opinion the damage to the reputation of the administration of justice would be far greater in these circumstances if I were to admit the evidence than if I were to exclude it. In support of my view I adopt the words of Wood J.A. in ***R.*** *v.* **Martin** (1995), 97 C.C.C. (3d) 241 (B.C.C.A.) At paras 67 and 68:

> [67] Automatic judicial acceptance of evidence obtained in violation of constitutional values, in order to ensure criminal convictions, will eliminate the incentive for the state to adhere to the mandate of the Constitution. The balance struck through the application of s. 24(2) of the Charter must be such as to ensure that does not happen. If that balance is to be preserved, serious violations of the individual's constitutional rights must have serious consequences for the state.
>
> [68] The fundamental right of the individual to privacy in our society, free from unreasonable state intrusion, is protected by s. 8 of the Charter. If an unsubstantiated, and therefore unreasonable, concern for the well-being of the occupants of private property is all that is necessary to legitimize the fruits of an otherwise unlawful and therefore, constitutionally unreasonable search, the protection afforded by s. 8 will be rendered nugatory. The protection afforded to individual privacy by s. 8 will be no protection at all unless it serves effectively to prevent the very intrusions it proscribes. There will be no incentive for the state to abstain from unreasonable searches, if the results obtained in such searches are automatically admitted in evidence whenever that is necessary to obtain a conviction.

[47] In further addition, as stated by Smith J., in ***Westrum*** at para. 38:

> 38 Police officers must understand that the Charter forbids them to violate the sanctity of the home unlawfully for the purpose of obtaining evidence against the occupant, even if that understanding is conveyed at the cost of an acquittal of an obviously guilty person.

[48] In the case at bar I find these words to be apposite. Therefore, I conclude and find that any statements made by the accused whether voluntary or not, and any evidence obtained

including the certificates, following his unlawful arrest, are excluded as a violation of section 8 and 9 of the ***Charter*** as urged upon me by defence counsel. In the event, I conclude and find that there is no evidence to support the section 253(b) charge.

[49] I now turn to the issue of whether the accused ability to operate a motor vehicle was impaired by alcohol as is prohibited by section 253 (a) ***Criminal Code***. In ***R.*** v. ***Andrews*** [1996] A.J. No. 8 (C.A.), Conrad J.A., stated at para. 31:

> The test of weighing circumstantial evidence of conduct in support of an inference of impairment of ability to drive has not changed to mean that equal weight should be attributed to conduct which indicates a marked departure from normal conduct and conduct which indicates a slight deviation from normal conduct. That would have the practical effect of lowering the standard of proof of the offence. It is not deviation from normal conduct, slight or otherwise, that is in issue. What is in issue is the ability to drive. Where circumstantial evidence alone or equivocal evidence is relied on to prove impairment of that ability, and the totality of that evidence indicates only a slight deviation from normal conduct, it would be dangerous to find proof beyond a reasonable doubt of impairment of the ability to drive, slight or otherwise.

[50] Additionally, as this court opined in ***R.*** v. ***Lozano*** [1997] N.S.J. No. 581 at para. 18:

> ... impairment is a question of fact. However, I think that I must be careful not to conclude without the proper supporting evidence, that because [his] consumption of alcohol may have affected [his] functional ability in some degree that it means automatically that [his] ability to operate [his] vehicle was also impaired. It seems to me that the smell of alcohol, because consumption is admitted, is not without more, proof beyond a reasonable doubt that [his] ability to operate a motor vehicle is impaired. In my view, the sole issue, as here, is the effect that the consumption of alcohol has on his ability to drive and not the fact that [he] has consumed alcohol.

[51] However, as the effect of alcohol consumption is subjective, I think that from a practical point of view, we must rely largely upon objective observations such as the general conduct of the accused, the manner of his driving and the speed of the vehicle, the smell of his breath, his manner of speech, his manner of walking and his eye condition. (R. v. McKenzie (1995), 111 C.C.C. 317).

[52] The observations of Fields pointed to an individual who slurred his speech, smelled of alcohol and when driving on a slippery roadway swerved his vehicle several times.

[53] However, apart from the stumble going through the doorway at Tim Horton's, neither he nor Constable Roache commented on anything unusual in the accused walking from his vehicle

to the building. There was no evidence of swaying or unsteadiness on his feet and there was no evidence of the speed of the vehicle or his eye condition.

[54] I must say that the manner of his driving, as described by Fields, does cause me some concern. However, I think that, given the road conditions, there could be other rational conclusions other that it was only impairment by alcohol that could have caused the manoeuvres as observed by Fields. Given the total evidence, particularly of his uneventful walking before and after the observed driving, in the absence of any of the other usual indicia of impairment, the observations concerning the manner of driving and the parking of his vehicle are equivocal and, overall, in my opinion, does not, without doubt, confirm behaviour that deviates from the norm to the degree that would provide a useful tool to assess impairment generally and, in particular, whether alcohol impaired his ability to drive. ***R.*** v. ***Stellato*** (1983) 78 C.C.C. (3d) 380.

Conclusion

[55] I therefore conclude on the total evidence and on my assessment of the witnesses as they testified that it would be unsafe to conclude beyond a reasonable doubt that the accused ability to operate his vehicle was impaired by alcohol. Put another way, I am not satisfied beyond a reasonable doubt that alcohol impaired the accused's ability to operate his motor vehicle. I therefore find the accused not guilty as charged and will enter an acquittal on the record.

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