SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Sampson, 2009 NSSC 191

Date: 20090617
Docket: Hfx No. 303276
Registry: Halifax

Between:

Kurt Sampson

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Duncan R. Beveridge
Heard:	May 6, 2009, in Halifax, Nova Scotia
Written Decision:	June 17, 2009
Counsel:	Kurt Sampson, self represented Susan MacKay, for the Respondent

By the Court:

INTRODUCTION

[1] This is a drinking and driving case. Members of the Halifax Regional Police Service stopped a motor vehicle being operated by the appellant. A breathalyzer demand was given. Three tests were performed by the appellant. The usual two charges were laid against the appellant of having the care and control of a motor vehicle while the concentration of alcohol in his blood exceeded the permissible amount and of having the care or control of a motor vehicle while his ability to operate such a vehicle was impaired by alcohol or a drug.

[2] At trial the Crown did not proceed with the first charge. The appellant was convicted of the second. He now appeals to this Court alleging a variety of errors by the trial judge. I am satisfied, for the reasons that follow that the trial judge failed to afford to the appellant the presumption of innocence, misapprehended the evidence and rendered a verdict that was unreasonable.

LEGAL PRINCIPLES

Scope of Review

[3] The appellant comes to this Court by virtue of s. 813 of the *Criminal Code*. Section 822 provides that the salient powers of an appellate court in indictable matters (see ss. 683 to 689) apply to appeals to the summary conviction appeal court. Section 686(1) provides:

> 686(1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
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> (a) may allow the appeal where it is of the opinion that
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> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
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> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (iii) on any ground there was a miscarriage of justice;

[4] The appellant represented himself at trial and on this appeal. At the hearing of the appeal, it became clear the appellant's complaint was the conclusion of the trial judge that the Crown had proved beyond a reasonable doubt that his ability to operate a motor vehicle was impaired by alcohol was unreasonable in light of the requirement for the Crown to prove the allegation beyond a reasonable doubt. Also identified at the hearing of the appeal were instances of the trial judge misapprehending the evidence.

[5] The powers of a summary conviction appeal court on appeals from conviction were reviewed by the Nova Scotia Court of Appeal in *R. v. Miller* (1999), 173 N.S.R. (2d) 26; [1999] N.S.J. No. 17. The defendant unsuccessfully appealed his conviction for dangerous driving to the summary conviction appeal court. The summary conviction appeal court dismissed the appeal, but erred in doing so by failing to apply the correct test for appellate review. Hallett J.A. for the court wrote:

> [8] On an appeal from a conviction for a criminal offence on the ground that the guilty verdict is unreasonable, the appellate court judge is required to review, and to some extent, reweigh the evidence to determine if the verdict is unreasonable. Assessing whether a guilty verdict is unreasonable engages the legal concept of reasonableness (*Yebes, supra* at p. 427). Thus, the appellate review, on the grounds set out in s. 686(1)(a)(i) of the *Code* entails more than a mere review of the facts. The appellate court has a responsibility, to some extent, to do its own assessment of the evidence and not to automatically defer to the conclusions of the trial judge which is what the appellate court judge seems to have done in this appeal.

[6] To the same effect is the decision of the Court of Appeal in *R. v. Nickerson* (1999), 178 N.S.R. (2d) 189; [1999] N.S.J. No. 210. The Crown appealed from a decision of a summary conviction appeal court that had quashed the conviction and acquitted the defendant. Cromwell J.A., as he then was, after referring to *R. v. Miller, supra.*, concluded that the scope of review of a trial judge's findings of fact on a summary conviction appeal were the same. He put it thus:

> [6] The scope of review of the trial court's findings of fact by the Summary Conviction Appeal Court is the same as on appeal against conviction to the Court of Appeal in indictable offences: see sections 822(1) and 686(1)(a)(i) and *R. v. Gillis* (1981), 60 C.C.C. (2d) 169 (N.S.S.C.A.D.) per Jones, J.A. at p. 176. Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in *R. v. Burns*, [1994] 1 S.C.R. 656 at 657, the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was <u>some</u> evidence to support the trial judge's conclusions nor a new trial on the transcript.

Impaired Care or Control

[7] There was little discussion at trial by the parties, or by the trial judge, as to what was necessary in order for the court to determine if the Crown had or had not established the elements of the offence.

[8] Much ink has been spilt over what is the appropriate test to assess impairment of ability to operate, and how to assess the evidence called by the Crown in its attempt to overcome the presumption of innocence and prove beyond a reasonable doubt the issue of impairment. It is fair to say that it is a rare case that anything other than circumstantial evidence is available to prove impairment.

[9] For many years it was thought that to establish impairment, the Crown needed to establish that the accused exhibited behaviour that constituted a "marked departure" from what would be considered normal. This approach appears to have originated in the decision of Sissons Dist. Ct. J. in *R. v. MacKenzie* (1955), 111 C.C.C. 317 where he wrote:

> [10] There appears to be no single test or observation of impairment of control of faculties, standing alone, which is sufficiently conclusive. There should be consideration of a combination of several tests and observations such as general conduct, smell of the breath, character of the speech, manner of walking, turning sharply, sitting down and rising, picking up objects, reaction of the pupils of the eyes, character of the breathing.
>
> [11] If a combination of several tests and observations show a marked departure from what is usually considered as the normal, it seems a reasonable conclusion that the driver is intoxicated with consequent impairment of control of faculties and therefore that his ability to drive is impaired.
>
> [12] I do not think that such a finding should be made on a slight variation from the normal.

[10] However, it was eventually recognized that the approach articulated by Sissons Dist.Ct. J. was not a statement on what the Crown had to prove, but simply a useful tool in examining or weighing the circumstantial evidence tendered by the Crown in its attempt to prove beyond a reasonable doubt that the accused's ability to operate a motor vehicle was in fact impaired by alcohol. There is no need to try to set out the exact chronology of case law that made this clear (see, amongst others, *R. v. Bruhjell,* [1986] B.C.J. No. 746; *R. v. Winlaw* (1988), 13 M.V.R. (2d) 112 (Ont. Dist. Ct.); *R. v. Campbell* (1991), 26 M.V.R. (2d) 319 (P.E.I.C.A.).

[11] This issue was reviewed by Labrosse J.A. of the Ontario Court of Appeal in *R. v. Stellato* (1993), 78 C.C.C. (3d) 380, [1993] O.J. No. 18, whose reasons for judgment were subsequently adopted by the Supreme Court of Canada, [1994] 2 S.C.R. 478). Labrosse J.A. concluded as follows:

> [13] The court noted in *Smith* that if Parliament had intended to proscribe any impairment, however slight, it could have done so. On the other hand, if Parliament had intended to proscribe impaired driving only where accompanied by a marked departure from the norm, it also could have done so. With all due respect to those who hold a contrary view, it is my opinion that the interpretation of s. 253(a) which was advanced in *Winlaw, Bruhjell* and *Campbell* is the correct one. Specifically, I agree with Mitchell J.A. in *Campbell* that the *Criminal Code* does not prescribe any special test for determining impairment. In the words of Mitchell J.A., impairment is an issue of fact which the trial judge must decide on the evidence and the standard of proof is neither more nor less than that required for any other element of a criminal offence: courts should not apply tests which imply a tolerance that does not exist in law.
>
> [14] In all criminal cases the trial judge must be satisfied as to the accused's guilt beyond a reasonable doubt before a conviction can be registered. Accordingly, before convicting an accused of impaired driving, the trial judge must be satisfied that the accused's ability to operate a motor vehicle was impaired by alcohol or a drug. If the evidence of impairment is so frail as to leave

> the trial judge with a reasonable doubt as to impairment, the accused must be acquitted. If the evidence of impairment establishes any degree of impairment ranging from slight to great, the offence has been made out.

[12] The decision in *Stellato* led to some confusion and concern on the difference between evidence that shows a slight departure from normal, and the need to prove beyond a reasonable doubt at least some impairment, albeit slight, of a person's ability to operate a motor vehicle. I adopt the analysis of this issue set out by the majority judgment of Conrad J.A. in *R. v. Andrews* (1996), 104 C.C.C. (3d) 392, [1996] A.J. No. 8. His analysis led him to set out a list of general principles as follows (para.29):

> (1) the onus of proof that the ability to drive is impaired to some degree by alcohol or a drug is proof beyond a reasonable doubt;
>
> (2) there must be impairment of the ability to drive of the individual;
>
> (3) that the impairment of the ability to drive must be caused by the consumption of alcohol or a drug;
>
> (4) that the impairment of the ability to drive by alcohol or drugs need not be to a marked degree; and
>
> (5) proof can take many forms. Where it is necessary to prove impairment of ability to drive by observation of the accused and his conduct, those observations must indicate behaviour that deviates from normal behaviour to a degree that the required onus of proof be met. To that extent the degree of deviation from normal conduct is a useful tool in the appropriate circumstances to utilize in assessing the evidence and arriving at the required standard of proof that the ability to drive is actually impaired.

[13] With respect to the correct approach in weighing circumstantial evidence, he cautioned:

> [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.

ANALYSIS

[14] Where an appellant alleges a verdict is unreasonable or a trial judge misapprehended the evidence, some review of the evidence is necessary. In this trial the Crown called two witnesses, Csts. Derek Hood and Kim Robinson. These officers were both members of the Halifax Regional Police Service. They were partners working the night shift from October 26th to the 27th, 2007.

[15] Cst. Hood had been a police officer for five years as of October 27th, 2007. At approximately 6:00 a.m. he and Cst Robinson were heading south on Gottingen Street. At the intersection of Cornwallis and Gottingen Street the light turned red for them. The appellant was in a vehicle heading west on Cornwallis Street. When the light turned green for the appellant, he did not proceed. Hood said he saw that the appellant was slumped over the steering wheel. The light went through its cycle. When the officers got the green light they turned left onto Cornwallis Street, turned around and pulled up behind the appellant. They engaged the van's emergency lights. The appellant made a right turn onto Gottingen Street, left onto

Buddy Daye Lane and then turned southbound on Creighton Street. The police engaged the siren. The appellant pulled over.

[16] Cst. Hood approached the vehicle. He noticed a strong smell of liquor. Hood asked the appellant to shut off the vehicle and hand over the keys. Licence, registration and insurance documentation was requested. Hood said the appellant "kind of fumbled with his license". Hood asked him why he had not pulled over. The appellant replied. Hood said his speech was "somewhat slurred". The appellant was asked to get out of the vehicle and was arrested for impaired driving and given a breathalyzer demand. Right to counsel was given to him, and he requested to speak with counsel. The appellant was taken to the police station where he did speak with counsel. He then agreed to provide samples of his breath and did so. The appellant was cooperative throughout.

[17] Cst. Robinson gave similar evidence, differing in some details. She testified that they saw the appellant at the wheel of his vehicle, he appeared to be falling asleep and trying to wake up. When the light turned red for the appellant and green for the police van, they proceeded to position the van behind the appellant and at that time, he proceeded to leave. The police van followed him, he took a quick left on Buddy Daye Lane and another quick left onto Creighton. He then came to a stop.

[18] Robinson said Cst. Hood approached the vehicle and told him to turn it off and advised him to step out. When the appellant did so, she says she noticed his eyes were bloodshot. He looked very tired. She noticed a strong odour coming

from his breath as he was speaking with Cst. Hood, and “he seemed to be slurring his speech”. Cst. Robinson agreed that falling asleep was consistent with someone that had not slept for some time, as would blood shot eyes. There was nothing untoward about the manner of his driving, and that he stopped shortly after the siren was engaged.

[19] The Crown spoke with Cst. Pluta, the breathalyzer technician. She then decided not to call Cst. Pluta and the s. 253(b) charge was dismissed. The appellant was given the opportunity to speak with Legal Aid duty counsel. He did so, and elected not to call evidence.

[20] The Crown advocated to the trial judge that both officers observed the typical indicia of impairment, including both noticing the strong smell of alcohol. Judge Digby noted that Cst. Robinson only said there was a strong odour, and did not actually describe what that odour was. The Crown suggested that Cst. Robinson nonetheless testified that given the indicia she saw, her opinion was that the appellant was impaired, citing “slurred speech” and bloodshot eyes; and that Hood had noted fumbling by the appellant with his wallet, and further that both officers were of the opinion the appellant was impaired.

[21] The appellant’s submissions were short. He suggested that the observed behaviour was consistent with someone that was suffering from lack of sleep, and that there was no evidence of driving that was suggestive of impairment. The trial judge reserved his decision until Friday September 5, 2008.

DECISION OF THE TRIAL JUDGE

[22] Judge Digby referenced the evidence of the officers with respect to their observations of the appellant sitting at the traffic lights without moving throughout the green cycle, with his head falling to his chest and coming back up again. He concluded that the police thought perhaps something was amiss. Judge Digby appeared to find it was when the officers pulled in behind the appellant that they activated the emergency lights and the appellant started to drive away, somewhat more quickly than they expected. He noted that other than the speed at which the appellant first started away, there was nothing unusual or untoward about the manner of operation other than the fact the vehicle was not stopping. To anyone who was alert, it should have been obvious the police were following the appellant.

[23] Judge Digby seemed to accept the suggestion by the appellant that it was understandable that he had some difficulty getting his license to Cst. Hood due to the tight fit of his wallet in his jacket. Nonetheless, Judge Digby noted that Hood had testified that the fumbling of the license was when he handed it to the officer, after he had retrieved the wallet from his pocket. The trial judge then observed:

> Both officers indicated that Mr. Sampson appeared to them to be suffering from the effects of alcohol. They observed unsteadiness, slurred speech, they noted his eyes were unusual, being consistent with consumption of alcohol.
>
> Appeal Book p.58

[24] In my opinion, the trial judge misapprehended the evidence. Both officers did not testify to slurred speech. Cst. Hood referred to the appellant's speech as "somewhat" slurred. Cst. Robinson testified that the appellant "seemed to be" slurring his speech. Of far greater significance is the judge's reference to the

officers having observed unsteadiness and that his eyes were unusual, being consistent with the consumption of alcohol. Neither officer at any time ever testified to the appellant displaying any difficulty whatsoever with balance, walk or any "unsteadiness". This is despite the fact that the officers had him under observation as he got out of the vehicle, throughout his processing at the scene, and at the police station.

[25] It was only Cst. Robinson who noticed that the appellant's eyes were very bloodshot, a condition that she specifically and readily acknowledged to be consistent with lack of sleep.

[26] Much of the trial judge's decision was about whether or not the Crown had proved that the appellant had actually consumed alcohol. One of the officers had not specifically identified the odour of alcohol. Judge Digby reasoned:

> It is in Mr. Sampson's favour that there was nothing wrong with the manner in which he operated his vehicle as he was followed by the police, however, I am satisfied from the evidence of the police officer that Mr. Sampson had consumed alcohol at the time and that both officers smelled alcohol on his breath. Cst. Robinson indicated that there was a strong odor coming from Mr. Sampson's breath. She did not, in that sentence, identify it alcohol, but immediately thereafter, **she indicated that as a result of that, she concluded that his ability to operate a motor vehicle was impaired by alcohol.** She also, in the context of that, indicated that the purpose of the traffic stop was to determine why Mr. Sampson was nodding or slumped behind the wheel of his vehicle.
>
> I am satisfied, when you put all of her statements in context, that when she refers to an odor, she is referring to odor of alcoholic beverages. The Supreme Court of Canada has dealt with the question of impairment in *R. v. Stiletto* [*sic*], and it can be impairment to some degree that affects the ability to drive.

> I am satisfied, taking into account the entire circumstances, that although Mr. Sampson may have been tired, and I have no direct evidence of that, only suggestions raised through cross-examination by Mr. Sampson, that although Mr. Sampson was tired, that the alcohol obviously was playing a part in that he effectively fell asleep behind the wheel of his vehicle while it was stopped.
>
> In my view, that is impairment to some degree. If Mr. Sampson had fallen asleep while the vehicle was in motion, he certainly would have presented a hazard to himself and to other people using the roadways.
>
> I am satisfied that your ability to operate a motor vehicle was impaired by alcohol or drugs, sir, and I find you guilty of the offence under s.253(a).

[27] There was ample evidence to permit the trial judge to infer that Cst. Robinson's reference to "odor" was to an odour of alcohol. However, Cst. Robinson did not give opinion evidence that the appellant's ability to operate a motor vehicle was in fact impaired by alcohol.

[28] Cst. Robinson testified as follows:

> Q-110. Okay, and what, if any, prior experience do you have in dealing with impaired drivers?
>
> A. Quite a bit.
>
> Q-111. Okay.
>
> A. Quite a bit.
>
> Q-112. And what ...
>
> A. I've had quite a few impaired trials during my eight years.
>
> Q-113. Okay, and based on the observations that you made of Mr. Sampson, what belief, if any, did you form?

A. Once we actually spoke with Mr. Sampson outside the vehicle at that time, I had gained enough evidence that I believed he was driving under the influence of alcohol.

Appeal Book p 41-2

[29] As demonstrated, Cst. Robinson, despite her experience in being involved in quite a few impaired driving trials over eight years, did not conclude that the appellant's ability to operate a motor vehicle was impaired by alcohol. Her evidence was that she believed that the appellant was driving "under the influence of alcohol". No explanation was elicited by the Crown as to what she meant by that opinion. With all due respect, driving under the influence does not equate to an opinion that the appellant's ability to operate a motor vehicle was impaired by alcohol.

[30] The only evidence as to a belief in impairment of an ability to operate a motor vehicle came from Cst. Hood, which evidence was given in the context of what led him to give a breathalyzer demand. Leading up to the time and content of that demand, the following evidence was elicited:

Q-14. Okay. So based on the observations ... as a result of the observations you formed, what suspicion or belief did you form?

A. I believe *[sic]* that he was impaired.

Q-15. Okay, and what time did you form that belief ?

[31] It could very well have been that the trial judge was influenced by the Crown submission that both officers were of the opinion, given what they had seen, the appellant was impaired. Even if the Crown was correct, the formulation

of a belief by a police officer as to impairment is a far cry from proof on a balance of probabilities let alone proof beyond a reasonable doubt.

[32] In my opinion the trial judge misapprehended the evidence. There was absolutely no evidence that the appellant was unsteady. Neither officer, let alone both, testified to that effect. Furthermore, Cst. Robinson did not say it was her opinion that the appellant was impaired, only that she believed he was driving "under the influence of alcohol". Driving under the influence of alcohol is not an offence. It is only an offence where the influence of alcohol has in fact impaired the ability to drive.

[33] Not every misapprehension of evidence results leads to a conclusion that the verdict is unreasonable. In *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), Doherty J.A. explained:

> [88] In my opinion, on appeals from convictions in indictable proceedings where misapprehension of the evidence is alleged, this court should first consider the reasonableness of the verdict (s. 686(1)(a)(i)). If the appellant succeeds on this ground an acquittal will be entered. If the verdict is not unreasonable, then the court should determine whether the misapprehension of evidence occasioned a miscarriage of justice (s. 686(1)(a)(iii)). If the appellant is able to show that the error resulted in a miscarriage of justice, then the conviction must be quashed and, in most cases, a new trial ordered. Finally, if the appellant cannot show that the verdict was unreasonable or that the error produced a miscarriage of justice, the court must consider the vexing question of whether the misapprehension of evidence amounted to an error in law (s. 686(1)(a)(ii)). If the error is one of law, the onus will shift to the Crown to demonstrate that it did not result in a miscarriage of justice (s. 686(1)(b)(iii)).
>
> [89] In considering the reasonableness of the verdict pursuant to s. 686(1)(a)(i), this court must conduct its own, albeit limited, review of the evidence adduced at trial: *R. v. Burns, supra*, at pp. 662-63 S.C.R., pp. 198-99 C.C.C. This court's authority to declare a conviction unreasonable or unsupported by the evidence

> does not depend upon the demonstration of any errors in the proceedings below. The verdict is the error where s. 686(1)(a)(i) is properly invoked. A misapprehension of the evidence does not render a verdict unreasonable. Nor is a finding that the judge misapprehended the evidence a condition precedent to a finding that a verdict is unreasonable. In cases tried without juries, a finding that the trial judge did misapprehend the evidence can, however, figure prominently in an argument that the resulting verdict was unreasonable. An appellant will be in a much better position to demonstrate the unreasonableness of a verdict if the appellant can demonstrate that the trial judge misapprehended significant evidence: *R. v. Burns, supra,* at p. 665 S.C.R., p. 200 C.C.C.

[34] Here there are no issues of credibility. The case was based entirely on circumstantial evidence. In cases based entirely on circumstantial evidence, the appellate court, in assessing whether the verdict is unreasonable, must examine the reasonableness of the verdict keeping in mind the requirement that circumstantial evidence must be consistent with guilt and inconsistent with innocence. The general principles for reviewing a verdict were set out in *R. v. Biniaris* 2000 SCC 15, [2000] 1 S.C.R. 381. Arbour J. in delivering the reasons for judgment for the court, wrote:

> [36] The test for an appellate court determining whether the verdict of a jury or the judgment of a trial judge is unreasonable or cannot be supported by the evidence has been unequivocally expressed in *Yebes* as follows:
>
> > [C]urial review is invited whenever a jury goes beyond a reasonable standard... . [T]he test is 'whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered'.
> >
> > (*Yebes, supra*, at p. 185 (quoting *Corbett v. The Queen,* [1975] 2 S.C.R. 275, at p. 282, per Pigeon J.).)
>
> That formulation of the test imports both an objective assessment and, to some extent, a subjective one. It requires the appeal court to determine what verdict a reasonable jury, properly instructed, could judicially have arrived at, and, in doing so, to review, analyse and, within the limits of appellate disadvantage, weigh the evidence. This latter process is usually understood as referring to a subjective exercise, requiring the appeal court to examine the weight of the evidence, rather

> than its bare sufficiency. The test is therefore mixed, and it is more helpful to articulate what the application of that test entails, than to characterize it as either an objective or a subjective test.
>
> [37] The *Yebes* test is expressed in terms of a verdict reached by a jury. It is, however, equally applicable to the judgment of a judge sitting at trial without a jury. The review for unreasonableness on appeal is different, however, and somewhat easier when the judgment under attack is that of a single judge, at least when reasons for judgment of some substance are provided. In those cases, the reviewing appellate court may be able to identify a flaw in the evaluation of the evidence, or in the analysis, that will serve to explain the unreasonable conclusion reached, and justify the reversal.

[35] Cromwell J.A., as he then was, in *R. v. Barrett*, 2004 NSCA 38, (2004), 222 N.S.R. (2d) 182, specifically addressed the appropriate approach in cases of circumstantial evidence. He analyzed the issue as follows:

> [17] In this case, the evidence of the appellant's guilt in relation to the extortion and aggravated assault charges is entirely circumstantial. The question arises, therefore, of how the reasonable verdict test is to be applied in light of the requirement that where evidence is entirely circumstantial, the accused's guilt must be the only rational conclusion to be drawn from the circumstantial evidence.
>
> [18] *Yebes*, a leading case on the reasonable verdict test on appellate review, was a case of circumstantial evidence. One of the points argued before the Supreme Court of Canada was that the Court of Appeal had failed to apply the correct test in reviewing the reasonableness of a conviction where the evidence against the appellant was entirely circumstantial. Responding to this submission, McIntrye, J. for the Court stated that in applying the unreasonable verdict test, the appellate court must re-examine and to some extent reweigh and consider the effect of the evidence. This process, he said, will be the same whether the case is based on circumstantial or direct evidence. However, he pointed out that the Court of Appeal had "... rejected all rational inferences offering an alternative to the conclusion of guilt" and that it was "... therefore clear that the law was correctly understood and applied.": at 186. In *Yebes* , the Court acknowledged that evidence of motive and opportunity alone could not meet this standard unless the evidence reasonably supported the conclusion of exclusive opportunity: see 186 - 190.

> [19] I would conclude that while the test for whether a verdict is reasonable is the same in all cases, where the Crown's case is entirely circumstantial, the reasonableness of the verdict must be assessed in light of the requirement that circumstantial evidence be consistent with guilt and inconsistent with innocence: see *Yebes* at page 185 where this formulation was said to be the equivalent of the requirement that the circumstantial evidence be inconsistent with any rational conclusion other than guilt. This was summed up by Low, J.A. in *R. v. Dhillon* (2001), 158 C.C.C. (3d) 353 (B.C.C.A.). At para 102, he stated that where the Crown's case is entirely circumstantial, the appellate court applying the unreasonable verdict test must determine "... whether a properly instructed jury, acting judicially, could have reasonably concluded that the only rational conclusion to be reached from the whole of the evidence is that the appellant..." was guilty.

[36] In the case before me, the trial judge at no time indicated that he was applying the criminal burden of proof beyond a reasonable doubt. A trial judge is however, presumed to know the law. But can the verdict be said to be reasonable in light of the misapprehension of the evidence? It is of course not every misapprehension of evidence that can affect the soundness of a verdict. In the course of concluding that the appellant had committed the offence, the trial judge said he was “taking into account the entire circumstances”. The only rational conclusion is that those circumstances he had outlined in his decision included the reference to there having been evidence from both officers of unsteadiness and the opinion the judge believed Cst. Robinson to have offered.

[37] Unsteadiness is an oft relied upon indicia of impairment as it goes directly to the physical effects of alcohol consumption. A properly grounded opinion as to impairment of ability to operate can also be cogent evidence upon which a trier of fact can rely. I conclude that these pieces of evidence referred to by the trial judge were part of the circumstances that he relied upon in his reasons to convict.

[38] As set out above, it is my responsibility under s 686(1)(a)(i) to re-examine and to some extent reweigh and consider the effect of the evidence to determine if on the whole of the evidence the verdict is one that a properly instructed trier of fact, acting judicially could reasonably render keeping in mind the requirement that an inference of guilt must be the only rational result. If that review concludes it is not, then an acquittal should be entered.

[39] The correct approach in impaired care or control cases is well known. The court must look at all of the evidence and not conduct a piecemeal analysis. In *R. v. Landes*, [1997] S.J. No. 785 (Q.B.) the appellant was driving a friend home in the early morning hours. He failed to observe a stop sign and he lost control of his vehicle and ended up against a tree in a yard. The police officer testified to a strong smell of alcohol on his breath, a slight slur to his speech and bloodshot eyes. The officer concluded that the appellant's ability to drive was impaired by alcohol. No breath analyses were conducted but the appellant was convicted at trial . Klebuc J. heard the summary conviction appeal. He cautioned about the need to carefully assess subjective evidence:

> [16] An opinion as to impairment, be it by the trial judge or a non-expert, must meet an objective standard of "an ordinary citizen" or a "reasonable person" in order to avoid the uncertainties associated with subjective standards, particularly when based on inferences. To that end a list of tests and observations has been developed for use by peace officers and courts in determining whether an accused's mental faculties and physical motor skills were impaired by alcohol to the degree of impairing the accused's ability to drive a motor vehicle. Those observations and tests include: (1) evidence of improper or abnormal driving by the accused; (2) presence of bloodshot or watery eyes; (3) presence of a flushed face; (4) odour of an alcohol beverage; (5) slurred speech; (6) lack of coordination and inability to perform physical tests; (7) lack of comprehension; and (8) inappropriate behaviour.

> [17] In my view, a trial judge must carefully review all of the reported tests and observations which inferentially support or negate any impairment of the accused's mental and physical capabilities, and then be satisfied beyond a reasonable doubt that the reasonable inferences to be drawn therefrom establish that the accused's ability was impaired to the degree prescribed by ss. 253 and 255 of the *Criminal Code*. A piecemeal approach supporting or negating impairment is not permissible. See *R. v. Hall* at p. 66.

[40] Klebuc J. noted that bloodshot eyes may be attributable to eye strain or fatigue as well as the consumption of alcohol. That the strong smell of alcohol is only probative to the appellant having recently consumed alcohol. While slurred speech may be viewed as evidence of some degree of physical impairment induced by alcohol. He concluded:

> [24] The conflicting physiological symptoms observed by the witnesses when coupled with the equivocal nature of the accident, in my opinion would cause a properly instructed jury to have a reasonable doubt as to whether the appellant was impaired. The evidence and any inferences to be drawn are as consistent with innocence as guilt. Therefore, I conclude that a properly instructed jury or trier of fact would not have found the appellant guilty as charged. For these reasons the appeal is granted and the conviction set aside. If the appellant has paid the fine imposed, an order will issue directing the repayment thereof to the appellant.

[41] In *R. v. Ryan*, [2002] N.S.J. No. 591 Edwards J. heard an appeal from conviction. He described the sole issue as being whether there was evidence from which the trial judge could conclude beyond a reasonable doubt that the appellant’s ability to operate a motor vehicle was impaired by alcohol. The facts were straightforward. Cst. Ryan found the appellant in care or control of a motor vehicle at approximately 4:30 a.m.. She detected a very strong smell of alcohol from his breath. She said his speech was very slurred and he had watery eyes. In her opinion he was “heavily intoxicated”. No sobriety tests were conducted. No evidence was given regarding his walk or balance.

[42] Edwards J. referred to the legal principles with respect to proof of impairment as set out in *R. v. Stellato, supra.*, and *R. v. Andrews, supra*. He cautioned that impairment must be determined on the evidence and subject to the criminal standard of proof. Edwards J. reviewed and analyzed the three indicia of impairment noted by the police officer, smell, red watery eyes and slurred speech.

[43] With respect to smell, he noted that without volume or timing of consumption, smell of alcohol alone is not probative of impairment of driving ability. Red or watery eyes may signify fatigue or sleep deprivation. The appellant had just been awoken. Other reasonable explanations for having red and watery eyes were not ruled out. The officer could not recall specific words slurred by the appellant, and was unfamiliar with his normal pattern of speech. There was no evidence about any impairment of the appellant's functional abilities. Nothing about coordination or impaired balance. The opinion by the officer that the appellant was heavily intoxicated was without any basis upon which the trial judge could properly evaluate her opinion. Without the evidence upon which to base such an opinion, it was virtually meaningless.

[44] This analysis led Edwards J. to conclude that there was insufficient evidence upon which the trial judge could conclude beyond a reasonable doubt that the appellant's ability to operate a motor vehicle was impaired by alcohol and entered an acquittal.

[45] The Crown appealed to the Nova Scotia Court of Appeal complaining that the summary conviction appeal court judge had erred in his application of the test for appellate review by conducting a piecemeal analysis of the evidence, engaging in speculation and substituting his view of the facts for that of the trial judge. The decision is reported at 2002 NSCA 153, (2002) 210 N.S.R. (2d) 194. Oland J.A., writing for the majority disagreed. She wrote:

> [20] The decision under appeal indicates that the summary conviction appeal court judge was conscious of the role of the trial judge and the scope of appellate review. He reminded himself, citing case law, that criminal impairment is a matter of fact for the trial judge to decide on the evidence and is subject to the criminal standard of proof beyond a reasonable doubt. In addressing the latter, he quoted the Alberta Court of Appeal in *R. v. Andrews*, [1996] A.J. No. 8; 104 C.C.C. (3d) 392 at 404:
>
> > The question is simply whether the totality of the accused's conduct and condition can lead to a conclusion other than that his or her ability to drive is impaired to some degree. Obviously, if the totality of the evidence is ambiguous in that regard, the onus will not be met.
>
> [21] The evidence as to the respondent's ability to drive consisted entirely of the observations made by Constables Clarke and MacDonald. The assessment of impairment thus necessitated the drawing of inferences from that evidence.
>
> [22] In reviewing the trial judge's decision, the summary conviction appeal court judge was not selective. He did not rely upon the evidence negativing impairment and discount or discard that supporting impairment. Nor did he question the trial judge's findings of credibility. He carefully examined, in turn, the indicia of impairment observed by the police officers. Where he had regard to all of the evidence, his looking at each individually does not make his examination piecemeal and thereby objectionable.
>
> [23] The summary conviction appeal court judge identified several possible inferences other than impairment. He was of the opinion that the evidence was reasonably susceptible to more than one meaning. The other possible causes he recounted are not, in my view, so far-fetched or beyond the realm of common knowledge as to be speculative. Some, such as fatigue and sleep deprivation as a possible explanation for red, watery eyes, could relate directly to the

> circumstances in which the respondent was found. No other indicia, such as a lack of physical co-ordination, appeared in the evidence.

[46] As Edwards J. did in *R. v. Ryan*, I must re-examine and to some extent reweigh the evidence to determine if it is reasonably capable of supporting the trial judge's conclusion of criminal impairment.

[47] I have already set out the main aspects of the evidence adduced before the trial judge. There can be no question that the police were right in their decision to stop the appellant and investigate. They observed him falling asleep at the wheel of a car stopped at a traffic light. His head was going to his chest and back up. There was no evidence as to how long they observed the appellant, other than it was for the full cycle of the traffic light. The officers fairly acknowledged that fatigue could have been the cause of his head nodding.

[48] The appellant did not stop until the police engaged the siren. There was no admissible evidence as to why the appellant did not stop promptly. Once stopped there is absolutely no evidence of any difficulty or abnormality in how he walked, stood and moved. The only physical thing mentioned was Cst. Hood's reference to the appellant's having "kind of fumbled with his license". No mention was made of his production of registration and proof of insurance. Presumably he complied with those requests without difficulty. When Hood was asked in cross-examination, re-direct examination, and by the trial judge, to explain what he meant by fumbling, he could not. He agreed that the appellant's wallet was a tight fit in the breast pocket of his jacket. In re-direct he was asked whether the fumbling was to get his license out his wallet or his wallet out of his jacket, Cst.

Hood said "I **believe** it was when he had his wallet out". When questioned by the trial judge he could only say he was "just kind of fumbling it". A momentary fumbling of a document such as a license is hardly indicative of impairment, without some elucidation that it demonstrated difficulty in coordination or fine motor skills. It could equally have been a momentary lapse or one caused by nervousness. The evidence with respect to speech was ambiguous at best. One officer testified that the appellant's speech was "somewhat" slurred, the other that the appellant "seemed to be" slurring his speech.

[49] Smell is not probative of impairment, simply consumption of alcohol. The police acknowledged that the appellant appeared tired and that such could be an innocent explanation for being inattentive and nodding off while waiting at the light, and for having blood shot eyes.

[50] I have no doubt that the police had reasonable and probable grounds to give a breathalyzer demand. However, based on all of the evidence tendered by the Crown, including the absence of impairment of co-ordination or balance, a reasonable trier of fact, properly instructed, and acting judicially, could not reasonably find the appellant guilty.

[51] The appeal is allowed, the conviction quashed and an acquittal is entered.

Beveridge, J.