SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. LaFosse*, 2010 NSSC 240

Date: 20100624
Docket: Hfx No. 318185A
Registry: Halifax

Between:

Justin Guy MacLeod LaFosse

Appellant

v.

Her Majesty The Queen

Respondent

Revised decision: The text of the original decision has been corrected according to the erratum dated July 12, 2010. The text of the erratum is appended to this decision.

Judge: The Honourable Justice M. Heather Robertson

Heard: February 10, 2010, in Halifax, Nova Scotia

Decision: June 24, 2010

Counsel: Stanley W. MacDonald, Q.C., for the appellant
Christopher Harmes, for the respondent

Robertson, J.:

[1] The appellant, Justin LaFosse, has been convicted of the offence of operating a motor vehicle with an illegal blood alcohol content. He was sentenced to a fine of $1,000.00 and one year driving prohibition. The appellant submits that his *Charter* rights were breached by Halifax Regional Police officers during their investigation and arrest relating to these charges. The appeal is against the trial judge's findings regarding the alleged breaches of Sections 8 and 10(b) of the *Charter*. The appellant submits that the trial judge made irreversible errors and that a new trial must be ordered.

SUMMARY OF FACTS

[2] On November 1, 2008, the appellant was observed operating his motor vehicle on University Avenue in Halifax. Constable Charles Bruce was on foot patrol at the time. He noticed that the appellant's vehicle was parked in the wrong direction on University Avenue, which is divided by a median. There were three other people in the vehicle. Constable Bruce radioed to a nearby police vehicle that Mr. LaFosse's vehicle should be detained. It was. Mr. LaFosse was then dealt with by Constable Bruce.

[3] Constable Bruce observed the indicia of impairment, that the appellant's eyes were red, his pupil enlarged and that he had the smell of alcohol on his breath. However, he also testified "I didn't notice anything unusual, note anything unusual about his walk, a sway or anything like that that I recall. . . . I could smell alcohol from him."

[4] Constable Bruce arrested the appellant. He advised him that he was being arrested for impaired driving. He advised him of his right to "free and immediate legal advice" and the telephone numbers to access the advice, read to him from a card he kept for that purpose.

[5] Mr. LaFosse then provided a sample of his breath into an approved roadside screening device. Mr. LaFosse indicated that he wished to speak with a lawyer and Constable Bruce told him he could do so as soon as they arrived at the police station.

[6] Both Mr. LaFosse and Constable Bruce travelled to the Halifax Police Station on Gottingen Street where Mr. LaFosse made efforts to reach his father, who is a lawyer. Approximately four to five minutes after initiating his attempts to reach a lawyer, which were unsuccessful, Mr. LaFosse was taken to the breath room where he provided samples of his breath for analysis into a Datamaster instrument. Mr. LaFosse was subsequently charged with impaired driving and operating a motor vehicle with an illegal blood alcohol content.

[7] Mr. LaFosse plead not guilty and his trial was held before the Honourable Judge William Digby on May 20, 2009. On that date, the charge of impaired driving was dismissed as the Crown did not pursue a conviction on that charge.

[8] The trial proceeded by way of a blended *voir dire*. The Crown called Constable Bruce, Constable Winnell Jackson and Constable Alex MacAdam. Justin LaFosse testified on his own behalf on the *voir dire*.

[9] Judge Digby reserved his decision until September 9, 2009, at which time he determined that Mr. LaFosse's *Charter* rights were not breached and, consequently, found him guilty of the offence of operating a motor vehicle with an illegal blood alcohol content. Mr. LaFosse was sentenced to a fine of $1,000.00 and a one year driving prohibition.

[10] Mr. LaFosse filed a notice of appeal on October 9, 2009. This is the appeal hearing of that decision.

[11] The issues before the court are:

(a) Did the trial judge err in his determination that the appellant's right to be secure against unreasonable search and seizure, pursuant to s. 8 of the *Canadian Charter of Rights and Freedoms* was not infringed; and

(b) Did the trial judge err in his determination that the appellant's right to counsel, pursuant to s. 10(b) of the *Canadian Charter of Rights and Freedoms* was not infringed.

[12] Standard of review is well established. In *R. v. Nickerson*, [1999] N.S.J. No. 210 (NSCA), Cromwell, J.A. (as he then was), states the appropriate standard of review for a Summary Conviction Appeal Court, at para. 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 some evidence to support the trial judge's conclusions nor a new trial on the transcript.

[13] In *R. v. S.D.D.*, 2005 NSCA 71 (NSCA), Cromwell, J.A. attributed the principles relating to a miscarriage of justice at paras. 9 – 12:

> [9] This Court may allow an appeal in cases such as this if persuaded that there has been a miscarriage of justice: see s. 686(1)(a)(iii) of the Criminal Code of Canada, R.S.C. 1985, c. C-46. A trial judge's misapprehension of the evidence may result in a miscarriage of justice, even though the record contains evidence upon which the judge could reasonably convict.
>
> [10] What is a misapprehension of the evidence? It may consist of "... a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to evidence ...": R. v. Morrissey (1995), 97 C.C.C. (3d) 193 (Ont. C.A.) at p. 218. A trial judge misapprehends the evidence by failing to give it proper effect if the judge draws an "unsupportable inference" from the evidence or characterizes a witness's evidence as internally inconsistent when that characterization cannot reasonably be supported on the evidence: Morrissey at p. 217; R. v. C.(J.) (2000), 145 C.C.C. (3d) 197 (Ont. C.A.) at para. 11. In Morrissey, for example, the trial judge stated that the evidence of two witnesses was "essentially the same", a conclusion not supported by the record. This was held to be a misapprehension of the evidence. In C. (J.), the trial judge was found to have erred by characterizing the accused's evidence as "internally inconsistent" when this conclusion was not reasonably supported by the record: at para. 9.
>
> [11] Not every misapprehension of the evidence by a judge who decides to convict gives rise to a miscarriage of justice. A conviction is a miscarriage of

> justice only when the misapprehension of the evidence relates to the substance and not merely the details of the evidence, is material rather than peripheral and plays an essential part in the judge's reasoning leading to the conviction: see Morrissey, supra at 221; R. v. Lohrer, [2004] 3 S.C.R. 732; S.C.J. No. 76 (Q.L.) at paras. 1 - 2.
>
> [12] It follows, therefore, that to succeed on appeal, the appellant must show two things: first, that the trial judge, in fact, misapprehended the evidence in that she failed to consider evidence relevant to a material issue, was mistaken as to the substance of the evidence, or failed to give proper effect to evidence; and second, that the judge's misapprehension was substantial, material and played an essential part in her decision to convict.

Ground 1 of the Appeal – Section 8 – The appellant's right to be secure from unreasonable search and seizure

[14] In order to make the demand for a breath sample in a Datamaster instrument, Constable Bruce was required to have both a subjective and objective belief that the appellant had operated the motor vehicle while his ability to do so was impaired by alcohol. The defence properly relies on *R. v. Sheppard*, 2009 SCC 35, at paras. 13–17:

> [13] The central issue on this appeal is whether the officer had reasonable and probable grounds to demand breath samples from Mr. Shepherd. Section 254(3) of the *Criminal Code*, R.S.C. 1985, c. C-46, requires that an officer have reasonable grounds to believe that the suspect has committed an offence under s. 253 of the *Code* (impaired driving or over 80) before making a breathalyzer demand. As this Court explained in *R. v. Bernshaw*, [1995] 1 S.C.R. 254, at para. 51: "The requirement in s. 254(3) that reasonable and probable grounds exist is not only a statutory but a constitutional requirement as a precondition to a lawful search and seizure under s. 8 of the *Canadian Charter of Rights and Freedoms*."
>
> . . .
>
> [15] As this Court explained in Collins, where evidence is obtained as a result of a warrantless search or seizure, the onus is on the Crown to show that the search or seizure was reasonable. A search will be reasonable if it is authorized by law, the law itself is reasonable, and the manner in which the search was carried out is reasonable (Collins, at p. 278). No issue is taken with the manner in which the search was carried out or the reasonableness of the breath demand provisions in the Code. Rather, the only question is whether the arresting officer complied with the statutory preconditions for a valid breath demand.

> [16] As noted above, s. 254(3) of the *Criminal Code* requires that the officer have reasonable grounds to believe that within the preceding three hours, the accused has committed, or is committing, an offence under s. 253 of the *Criminal Code*. The onus is on the Crown to prove that the officer had reasonable and probable grounds to make the demand because the Crown seeks to rely on breath samples obtained as a result of a warrantless search. It would also be impractical to place the burden on the accused because evidence of the presence or absence of reasonable and probable grounds is within the "peculiar knowledge" of the Crown (*R. v. Bartle*, [1994] 3 S.C.R. 173, at p. 210).
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> [17] As this Court noted in *Bernshaw*, there is both a subjective and an objective component to establishing reasonable and probable grounds; that is, the officer must have an honest belief that the suspect committed an offence under s. 253 of the *Criminal Code*, and there must be reasonable grounds for this belief (*Bernshaw*, at para. 48). . . .

[15] The appellant says Constable Bruce did not testify as to his subjective belief that the appellant operated the motor vehicle while impaired by alcohol. The Crown concedes this. Consequently, one of the legal requirements for a demand was absent and therefore a fatal defect in a successful prosecution. The issue becomes the trial judge's acceptance or assumption that Constable Bruce had a subjective belief, no matter how poorly stated.

[16] What Constable Bruce testified to is found at Tab 3 of the appeal book at pages 33–34 as follows:

> Q. Just prior to giving the demand, did you – – as a result of your investigation, did you come to any conclusions with regard to this matter?
>
> A. Well, just based – – based on the totality of – – of everything, the observations that I had made as a police officer, the accused being on the – – the vehicle being on the opposite side of the road, it just grew my suspicions, the time of night, in the university campus area where it's notorious for – – for alcohol-related offences, I – – drew to the conclusion after speaking with the operator of the vehicle and seeing the other persons being impaired in the vehicle and then being in close proximity to the – – to the accused outside the said vehicle, I came to the conclusion that he was impaired.
>
> Q. I see. And when you say impaired what was your belief? Impaired by . . .

> A. That he was impaired by alcohol, that he had consumed alcohol or alcoholic beverage of some type and that it was – – it would have an effect on his motorized skills.

[17] I agree with defence counsel that the best that can be said of Constable Bruce's evidence is that he believed that the appellant was impaired by alcohol and that it would have an effect on his motorized skills. He did not testify to a subjective belief in the impairment of his ability to operate a motor vehicle.

[18] The trial judge dealt with the evidence as follows:

> [15] The test has both a subjective and objective basis. When one reads the transcript there is an objective basis for making the demand: What the officer referred to, plus the "Fail' results on the SL2 roadside screening device.
>
> [16] It is somewhat surprising that Constable Bruce did not refer to the SL2 as part of the basis for making the breathalyzer demand. I have no doubt that it had to be in his mind because he had just done it and the whole purpose of conducting that test is to screen people from those who are impaired, from those who aren't. It was logical for him to do so in this particular case. Mr. LaFosse had been cooperative, had provided license, registration and identification. There had been no difficulty with Mr. LaFosse from getting out of his vehicle or walking back to the police car.
>
> [17] I am satisfied, that although the grounds for the demand were articulated poorly by Constable Bruce, I am satisfied that he did in fact have a subjective belief when one factors is that he had to have the "Fail" result from the SL2 in his mind. It is my belief that he simply, for whatever reason, forgot to articulate that in giving his answers to Mr. Harmes.
>
> [18] The presence of the SL2 device, in my view, distinguishes this case from the situation in ***Christianson and Baines***. In this case, there was an objective basis for the request, whereas in those cases it was lacking.
>
> [19] For these reasons, the s. 8 argument fails. The defence has failed to persuade me on a balance of probabilities that there has been a breach of Mr. LaFosse's ***Charter*** rights.

[19] The trial judge appears to forgive Constable Bruce for failure to articulate his subjective belief and projects that this was the evidence he intended to give but

failed to do so. The trial judge, in my view, has fallen into error with this approach.

[20] In *R. v. Christianson*, 2003 BCSC 1824, a police officer testified that the accused's ability to drive a motor vehicle was "affected by alcohol." While expressing some doubt as to the difference between "affected" and "impaired," the appellate court judge concluded that the testimony of the officer did not meet the requirements of the *Criminal Code*. In particular, Justice Owen-Flood stated at para. 15:

> It is clear that the arresting officer was required to have a subjective belief that the accused had committed the offence of impaired driving. I have considered that the arresting officer gave evidence of number of indicia of impairment. While these indicia of impairment might support the objective requirements for a breath demand, the subjective branch of the test must still be satisfied.

[21] The court in *Christianson*, supra, referred to the decision of the British Columbia Provincial Court in *R. v. Baines*, 2002 BCPC 627, where the court held that a police officer's testimony that the accused's ability to operate a motor vehicle had been affected by alcohol was not sufficient to satisfy the requirements of the *Criminal Code* for a breathalyzer demand.

[22] In *R. v. Steeves*, 2008 ABPC 41, the accused argued that the police officer's articulation of his opinion regarding the grounds for his demand was defective. While the judge concluded that it was not, the following was stated at para. 13:

> Is this a fatal defect? Certainly, a failure to articulate the belief that an offence under s. 253 had been committed would be fatal, as it was in Christianson, [2003] B.C.J. No. 2764 and Nott, [2000] O.J. No. 437, where the problem was a failure to express a belief as to impairment. . . .

[23] In *R. v. Shewchuk,* [2006] S.J. No. 51 at para. 15:

> 15 The courts have been hesitant in requiring an officer to state specific words when articulating his subjective belief that an offence under s. 253 is being or has been committed. For example, in R. v. Maxwell, 2004 ONCJ 140, [2004] O.J. No. 3343, the officer testified that he believed the accused was impaired by alcohol but did not expressly state that he believed the accused's ability to "operate a

motor vehicle" was impaired. Justice Brown made the following comments at paragraphs 19 and 21:

> [19] Pursuant to R. v. Bernshaw, (1995) 95 C.C.C. (3d) 193, the Supreme Court of Canada held that s. 254(3) requires that the officer both subjectively have an honest believe [sic] that the suspect has committed the offence, and also objectively have reasonable grounds for this belief. This follows the earlier Supreme Court of Canada judgment in R. v. Storrey (1990), 53 C.C.C. (3d) 316. In relation to the necessity of the officer having the requisite subjective belief, I find that the officer did honestly believe that the defendant's ability was impaired by alcohol. The question then is whether the failure of the officer to use the words tying the impaired ability to the "operation of a motor vehicle" at this point is problematic. In R. v. Clarke, [2000] O.J. No. 804 (Ont. Sup. Ct.), Durno, J. considered the scenario where an officer had not recited all of the "magic words" in relation to the opinion of impairment of the ability to operate a motor vehicle. In this case, Durno, J. noted that there had not been any reference to any argument as to any Charter breach. The court followed R. v. Andrews (1996), 104 C.C.C. (3d) 392 (Alta. C.A.) As well, the court in R. v. Hall, [1995] O.J. No. 544 (C.A.) held that there is no requirement that an officer use particular words to satisfy the subjective component of reasonable and probable grounds for an arrest. The critical two part test is whether the officer believes he or she has reasonable and probable grounds to arrest the accused (subjective test), and the second test as to whether there are objectively discernible facts which give the arresting officer reasonable cause to believe that the accused is criminally involved in the matter for which he is arrested (objective component).
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> ...
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> [21] In the subject case, the officer arrested the defendant for impaired driving. I find, following the reasoning in R. v. Clarke, supra, that there is no need for the officer to say the "magic words" in relation to the reasonable and probable grounds for the breathalyzer demand, and that the court can infer from circumstantial evidence the officer had the requisite belief in the absence of stating the "magic words". As well, I also find that the evidence in this case does not necessarily even fall short of the magic words where the officer arrests the defendant for impaired driving, after forming the opinion that the defendant was impaired by alcohol. I find that the officer subjectively believed he had the requisite reasonable and probable grounds.

[24] Clearly, a failure to express the required opinion can be fatal defect. This was explained and employed in *R. v. Nott*, [2000] O.J. No. 437 (Ont. S.C.). In that case, the Supreme Court Appellate judge found that there were, in fact, reasonable and probable grounds to arrest the accused and to demand a breath sample from him. However, the arresting officer who made the demand did not give any testimony with respect to his subjective belief that the accused had committed an offence pursuant to s. 253 of the *Criminal Code*. Justice Stortini stated at para. 9:

> With the benefit of the transcript of the trial proceedings which, of course, was not available to the learned trial judge, it is revealed that the police officer did not testify that in his opinion the accused was impaired. It would be incorrect to infer that the police officer must have held that opinion, otherwise, he would not have arrested the accused and demanded a breath sample from him. Clearly, the police officer had reasonable and probable grounds to arrest the accused and demand a breath sample from him. It is also clear that the same officer could have been asked at trial to give his opinion about the accused's condition: Graat v. the Queen 2 C.C.C. (3d) 365. This was not done. The reasonable and probable grounds (opinion) at the scene of the arrest do not translate ipso facto at the trial, to an opinion of alcohol impairment. He must be asked to express such opinion and allowed to give the basis for it.

[25] The failure of Constable Bruce to testify as to his subjective belief as to the appellant's impairment cannot be cured by an assumption made by the trial judge. Therefore, the s.8 challenge succeeds in these circumstances.

[26] With respect to Ground 2 of the appeal, that the trial judge erred in not finding the appellant's right to counsel pursuant to s. 10(b) of the *Charter* was in infringed. Defence counsel submit there were three separate errors in this regard:

(a) the appellant's right to counsel was not conveyed to him in a full, clear and comprehensive manner by Constable Bruce;

(b) the appellant was not allowed a reasonable opportunity to exercise his right to counsel of choice; and

(c) the Crown did not establish a clear and unequivocal waiver of the appellant's right to counsel and the trial judge did not address this issue.

[27] The principles relating to right to counsel are articulated in *R. v. Luong*, 2000 ABCA 301 (ABCA) at para. 12:

> For the assistance of trial judges charged with the onerous task of adjudicating such issues, we offer the following guidance:
>
> 1. The onus is upon the person asserting a violation of his or her Charter right to establish that the right as guaranteed by the Charter has been infringed or denied.
>
> 2. Section 10(b) imposes both informational and implementational duties on state authorities who arrest or detain a person.
>
> 3. The informational duty is to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of Legal Aid and duty counsel.
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> 4. The implementational duties are two-fold and arise upon the detainee indicating a desire to exercise his or her right to counsel.
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> 5. The first implementational duty is "to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances)". R. v. Bartle (1994), 92 C.C.C. (3d) 289 (S.C.C.) at 301.
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> 6. The second implementational duty is "to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger)". R. v. Bartle, supra, at 301.
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> 7. A trial judge must first determine whether or not, in all of the circumstances, the police provided the detainee with a reasonable opportunity to exercise the right to counsel; the Crown has the burden of establishing that the detainee who invoked the right to counsel was provided with a reasonable opportunity to exercise the right.
>
> 8. If the trial judge concludes that the first implementation duty was breached, an infringement is made out.
>
> 9. If the trial judge is persuaded that the first implementation duty has been satisfied, only then will the trial judge consider whether the detainee, who has invoked the right to counsel, has been reasonably diligent in exercising it; the detainee has the burden of establishing that he was

reasonably diligent in the exercise of his rights. R. v. Smith, (1989), 50 C.C.C. (3d) 308 (S.C.C.) at 315-16 and 323.

10. If the detainee, who has invoked the right to counsel, is found not to have been reasonably diligent in exercising it, the implementation duties either do not arise in the first place or will be suspended. R. v. Tremblay (1987), 37 C.C.C. (3d) 565 (S.C.C.) at 568; R. v. Ross (1989), 46 C.C.C. (3d) 129 (S.C.C.) at 135; R. v. Black (1989), 50 C.C.C. (3d) 1 (S.C.C.) at 13; R. v. Smith, supra, at 314; R. v. Bartle, supra, at 301 and R. v. Prosper (1994), 92 C.C.C. (3d) 353 (S.C.C.) at 375-381 and 400-401. In such circumstances, no infringement is made out.

11. Once a detainee asserts his or her right to counsel and is duly diligent in exercising it, (having been afforded a reasonable opportunity to exercise it), if the detainee indicates that he or she has changed his or her mind and no longer wants legal advice, the Crown is required to prove a valid waiver of the right to counsel. In such a case, state authorities have an additional informational obligation to "tell the detainee of his or her right to a reasonable opportunity to contact a lawyer and of the obligation on the part of the police during this time not to take any statements or require the detainee to participate in any potentially incriminating process until he or she has had that reasonable opportunity" (sometimes referred to as a "Prosper warning"). R. v. Prosper, supra, at 378-79. Absent such a warning, an infringement is made out.

[28] In *R. v. Chisholm*, 2001 NSCA 32, Saunders, J. A. addressed the right to counsel issue at para. 17:

> The informational component of the right to counsel must be provided to detained or arrested persons in a clear and comprehensive manner. This point was emphasized by Lamer, C.J.C. in Bartle, supra at pages 301-302 as follows:
>
> > Under these circumstances, it is critical that the information component of the right to counsel be comprehensive in scope and that it be presented by police authorities in a “timely and comprehensible” manner: *R. v. Dubois* (1990), 54 C.C.C. (3d) 166 at p. 190, 74 C.R. (3d) 216 [1990] R.J.Q. 681 (C.A.). Unless they are clearly and fully informed of their rights *at the outset*, detainees cannot be expected to make informed choices and decisions about whether or not to contact counsel and, in turn, whether to exercise other rights, such as their right to silence: *Hebert*. Moreover, in light of the rule that, absent special circumstances, indicating that a detainee may not understand the s.

> 10(b) caution, such as language difficulties or a known or obvious mental disability, police are not required to assure themselves that a detainee fully understands the s. 10(b) caution, it is important that the standard caution given to detainees be as instructive and clear as possible: *R. v. Baig* (1987), 37 C.C.C. (3d) 181 at p. 183, 45 D.L.R. (4th) 106; [1987] 2 S.C.R. 537, and *Evans*, at p. 305. (Underlining in original)

And at para. 21:

> With respect, I disagree. Before any obligation falls upon an arrested or detained person, he/she must first be fully and clearly informed of the informational component of the right to counsel, including provision of the telephone number for duty counsel. . . .

[29] Constable Bruce had informed the appellant of his right to counsel, when he first detained him on University Avenue, using the card he maintained in his notebook.

[30] However, once at the police station, and having provided the appellant with a private room and telephone from which he could phone counsel, as he had requested, a mere three-five minutes passed and it became apparent to Constable Bruce who was observing the appellant, that he had not been successful in reaching counsel by phone.

[31] Constable Bruce did not repeat the information on the card he had earlier read from and did not repeat the phone numbers through which he could access legal advice.

[32] Constable Bruce did testify that he said:

> At that time he indicated that there was no answer, that there was no answer. I took that to mean that he wasn't speaking with anybody. I believe at some point, I can't say with surety, but I believe at some point that he had told me that he left a message on an answering machine and that was it. I then asked him if there was someone else that he would like to speak to. "Is there another lawyer? Is there anybody that you wish to speak to?" And he indicated, "If I -- yes, if I could see a phone book." I then pointed again, because the phone books are there on the bench, they're still not even five feet away. I said, "The phone books are there." I presented the phone book. And I -- I made it clear to him -- I -- I said, "Do you want me to call somebody? I can call somebody for you. I could help you look in

> the phone book for a number or I can contact Legal Aid for you if you wish. Legal Aid can give you free and immediate legal advice at no cost to yourself."

[33] In response Constable Bruce says the appellant:

> "picked up the phone book, I can't say with surety, but we were only there not even moment and he -- he simply said, "No, I'm not going to" -- he said, "Forget it." He just said, "Forget it. I'm not going to call anybody."

[34] The appellant testified that he did not understand he could speak with duty counsel immediately and free of charge. He testified that he believed a Legal Aid lawyer would be made available to him, "for further down the road" and "I didn't understand that they would be contacted that night for me to respond to . . . to get information or it get legal advice for that particular situation that night."

[35] In his decision the trial judge found:

> [37] One can suggest that Constable Bruce by referring to "Legal Aid" as opposed to 'Duty Counsel' may have confused Mr. LaFosse. However, in view of the fact that he didn't know what 'Duty Counsel' was, it's hard to understand how Mr. LaFosse would have been confused by that.
>
> [38] In particular, with the paragraph 42 of the **Mood** case -- sorry, paragraph (1) page five, Mood -- sorry, I correct myself again. Paragraph 14 or the **Mood** case:
>
>> "With only slight alterations such as the name of the accused and the name of the police officer or the name of the police officer, the name of the accused and the counsel they sought is entirely appropriate in this particular case."
>
> [39] There was nothing that Mr. LaFosse did or said that would communicate or would have communicated to Constable Bruce that he misunderstood.
>
> [40] I am satisfied that Constable Bruce was doing his best to facilitate Mr. LaFosse speaking to counsel. The police can't force counsel down an accused's throat, so-to-speak. Police officers can't read what's in the mind of the accused.
>
> [41] I'm satisfied that there was no way that Constable Bruce could know of the misunderstanding that Mr. LaFosse says that he was operating under. Unfortunately for Mr. LaFosse it was a misunderstanding and he wasn't aware that he had an incorrect understanding.

> [42] The onus is on Mr. LaFosse to satisfy me on a balance of probabilities that he was not advised of his right to counsel. In my respectful opinion, Mr. LaFosse has failed to do that.

[36] However, the trial judge did make a finding that Mr. LaFosse was under a misunderstanding about his immediate right to counsel.

[37] Having made this finding I have difficulty with the trial judge's reasoning that:

> [37] One can suggest that Constable Bruce be referring to 'Legal Aid' as opposed to 'Duty Counsel' may have confused Mr. LaFosse. However, in view of the fact that he didn't know what 'Duty Counsel' was, it's hard to understand how Mr. LaFosse would have been confused by that.

[38] In my view, when the possibility of confusion exists, with respect to right to counsel, it is for the police officer to cure the confusion, not the responsibility of the person being detained.

[39] Constable Bruce observed that in this very brief period the appellant was unable to reach a lawyer to speak with.

[40] Had he then explained that 1-800 numbers again and that counsel would be available immediately, the appellant would likely have availed himself on this opportunity. Instead, he gave up, believing Legal Aid would be available to him at trial if he qualified financially.

[41] In my view, Constable Bruce had not fulfilled the informational component of his duty to inform the appellant of his immediate right to counsel.

[42] He was too quick to allow the appellant to submit to the breathalyser test, in the mere three to five minutes that had passed since he entered the interview room with the telephone.

[43] In the case of *R. v. S.L.H.,* 2004 BCSC 410 (BSSC), even though the police officer did not contribute to the misunderstanding as to right to counsel the fact of the misunderstanding because the detainee was emotionally distraught resulted in a finding that her right to counsel was breached and the breath samples were thus

excluded. The Crown appealed to the British Columbia Supreme Court, which upheld the trial judge's decision, referring to *R. v. Averill*, [1988] B.C.J. No. 2414, a case very similar in circumstance.

[44] At para. 24, Melnick J. stated:

> 24 The Supreme Court of Canada recognized in Baig that an accused has a responsibility to bring forth evidence of circumstances to prove that he or she did not understand his or her right to retain counsel. But putting that responsibility on an accused, in my opinion, does not restrict the types of circumstances that can, in any given case, result in a finding of a genuine lack of understanding. As Judge Prowse noted in Averill, whatever the police officer says to a detainee, "it must succeed not only in giving the rights to the accused in a way that can be understood, but it must also ensure that <u>in fact</u> the rights have been understood" (emphasis added).
>
> 25 Mr. Justice Vancise in Mohl said this about a breach of s. 10(b) at 440:
>
>> The obligation or duty owed must be discharged by the person detaining or arresting, in order to ensure compliance with s. 10(b). The right is violated by his actions or conduct, not the actions or conduct of the person detained or arrested.
>
> A failure of the person detained to understand is not an "action" or "conduct" in that sense. Rather, it is the essential disconnect between the giving of advice and the appreciation of that advice that creates the problem. Cpl. Maze failed to make Ms. S.L.H. understand her Charter right to counsel. That is because of the special circumstances the provincial court judge found existed. Although Ms. S.L.H. did not articulate her emotional upset to Cpl. Maze, this upset nonetheless existed and impacted on her capacity to understand what was being said to her. While no criticism can be levelled at Cpl. Maze in these circumstances, the reality was such that Ms. S.L.H. did not understand her rights.

[45] In the circumstances of this case, it is my view that the appellant was not allowed a reasonable opportunity to exercise his right to counsel. The burden of establishing that the detainee had that reasonable opportunity rests with the Crown. See *Luong, supra.* para. 12.11.

[46] Here the trial judge erred in his application of the burden of proof on this issue.

[47] The last issue before me is that of the exclusion of evidence under s. 24(2) of the *Charter*.

[48] The appellant's counsel argues that a new trial should be ordered and that a trial judge will then be in the best position to address the considerations that must be determined under s. 24(2). They argue that given the seriousness of the violation and the conduct of the police, a judge deciding this issue should have the opportunity to see the witnesses testify.

[49] The respondent submits that the Supreme Court of Canada decision in *R. v. Grant* [2009] S.C.J. No. 32 provides clear direction as to the proper analysis to be undertaken when considering admissibility of evidence where a *Charter* breach may have occurred.

[50] The Supreme Court of Canada provided a comprehensive analysis to determine whether the evidence in question should be excluded due to the *Charter* breach. This analysis was briefly outlined at para. 71.

> 71 A review of the authorities suggests that whether the admission of evidence obtained in breach of the Charter would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective. When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the Charter-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. These concerns, while not precisely tracking the categories of considerations set out in Collins, capture the factors relevant to the s. 24(2) determination as enunciated in Collins and subsequent jurisprudence.

[51] The reference to Collins is *R. v. Collins,* [1987] 1 S.C.R. 265.

[52] The majority in *Grant*, *supra,* directs courts to determine the admissibility of seized bodily substances under its analytical framework by examining, under the second branch, the degree to which search and seizure intruded upon the privacy bodily integrity and human dignity of the accused.

[53] At para. 111, the court stated:

> 111 While each case must be considered on its own facts, it may be ventured in general that where an intrusion on bodily integrity is deliberately inflicted and the impact on the accused's privacy, bodily integrity and dignity is high, bodily evidence will be excluded, notwithstanding its relevance and reliability. On the other hand, 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.

[54] Three other cases: *R. v. Mejia,* [2009] A.J. No. 1169; *R. v. Mudryk,* [2009] A.J. No. 1072; and *R. v. Rego,* [2009] O.J. No. 5492, followed the reasoning in *Grant,* finding that although *Charter* breaches had occurred, the minimal intrusion of taking the breath samples and society's interest in having drinking and driving offences tried on their merits, precluded *Charter* relief.

[55] I agree with the reasoning in *Grant* and these three latter decisions. The evidence of the certificate of analysis should not be excluded. It is not in the interests of justice to require a retrial of the evidence to determine the seriousness of the *Charter* breach, in circumstances where the obtaining of a breath sample was relatively non intrusive and the certificate otherwise met the tests of admissibility. The certificate was therefore properly admitted by the trial judge.

[56] The appeal is accordingly dismissed.

Justice M. Heather Robertson

SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. LaFosse*, 2010 NSSC 240

Date: 20100624
Docket: Hfx No. 318185A
Registry: Halifax

Between:

Justin Guy MacLeod LaFosse
Appellant

v.

Her Majesty The Queen
Respondent

Revised decision: The text of the original decision has been corrected according to the attached erratum dated July 12, 2010.

Judge: The Honourable Justice M. Heather Robertson

Heard: February 10, 2010, in Halifax, Nova Scotia

Written Decision: June 24, 2010

Counsel: Stanley W. MacDonald, Q.C., for the appellant
Christopher Harmes, for the respondent

Erratum:

[57] The quote from the trial judge at para. 18 reads in part:

> [17] I am satisfied, that although the grounds for the demand were articulated poorly by Constable Bruce, I am satisfied that he did in fact have a subjective belief when one factors is that he had to have the "Fail" result from the SL2 in his mind. It is my belief that he simply, for whatever reason, forgot to articulate that in giving his answers to Mr. Harmes. Justice Robertson - you had this portion underlined - do you still want it underlined ?

It should read:

> [17] I am satisfied, that although the grounds for the demand were articulated poorly by Constable Bruce, I am satisfied that he did in fact have a subjective belief when one factors is that he had to have the "Fail" result from the SL2 in his mind. It is my belief that he simply, for whatever reason, forgot to articulate that in giving his answers to Mr. Harmes.

Justice M. Heather Robertson