SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Tobin, 2011 NSSC 31

Date: 20110128
Docket: Syd. No. 333146
Registry: Sydney

Between:

James Eugene Tobin

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Cindy A. Bourgeois
Heard:	January 24, 2011, in Sydney, Nova Scotia
Counsel:	Darlene MacRury, for the Appellant Gerald B. MacDonald, for the Respondent

By the Court:

INTRODUCTION AND BACKGROUND

[1] The Appellant, James Eugene Tobin, was charged that he did, on or about April 15, 2009, at or near Glace Bay, Nova Scotia:

> while his ability to have care and control of a vehicle was impaired by alcohol did have care and control of a motor vehicle contrary to s. 253(1)(a) of the *Criminal Code of Canada;*
>
> And further:
>
> that he did without reasonable excuse fail to comply with a demand made to him by Constable Sonya Dicks, a peace officer, to provide then or as soon as possible or practicable samples of his breath as in the opinion of a qualified technician were necessary to enable a proper analysis to be made in order to determine the concentration if any of alcohol in his blood and to accompany the said peace officer for the purpose of enabling such sample to be taken, contrary to s. 254(5) of the *Criminal Code of Canada*.

[2] The matter came for hearing in the Provincial Court on July 5, 2010, and after hearing evidence presented by both the Crown and the Accused, the Honourable Judge Brian Williston entered a stay in relation to the charge under s. 253(1)(a) of the *Criminal Code*. A conviction was entered in relation to the second count under s. 254(5), which is the subject of the present appeal before the Court.

In relation to this offence, the Appellant was sentenced on the same day to a fine of $1000.00 plus costs, and a one year driving prohibition.

[3] By way of brief contextual background, on April 5, 2009, the Appellant was sitting in the driver's seat of his vehicle, while parked in the parking lot of a local pool hall. At approximately 1 a.m. police officers attended at the scene in response to a call complaining of a male making threats and potentially possessing a firearm at the same location.

[4] Upon arriving, the Appellant was noted to be sitting in the driver's seat, with another passenger in the front. The vehicle was not running. The Appellant was asked to vacate the vehicle, which he did. Keys to the vehicle were found in his pocket. Based upon noting signs she viewed as indicative of impairment, a breath demand was made to the Appellant by Cst Dicks. He was transported to the Grand Lake detachment for the purpose of administering the test. The Appellant declined to take the test, and was charged at noted above.

ISSUES ON APPEAL

[5] In his Notice of Summary Conviction Appeal, the Appellant puts forward three grounds of appeal as follows:

> 1. The judge erred in law in finding that the appellant "did without reasonable excuse fail to comply with a demand made to him by Cst. Sonya Dicks to provided samples of his breath";
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> 2. The judge erred in law and fact in finding that Cst. Sonya Dicks had "reasonable grounds" to request the appellant provide a sample of his breath.
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> 3. The judge erred in law and in fact in failing to make a finding that the appellant had "care and control" of a motor vehicle pursuant to section 254(5) of the *Criminal Code of Canada*.

[6] In the brief filed with the Court, the Appellant identifies there as being one issue before the Court for determination, namely:

> Whether the Learned Trial Judge erred in law in finding Constable Sonya Dicks had "reasonable and probable grounds" to demand Mr. Tobin provide a sample of his breath in accordance with Section 254 of the *Criminal Code of Canada*.

[7] In oral submissions Appellant's counsel re-iterated the two prongs to her argument on appeal, asserting that the learned trial judge erred by not considering whether the peace officer issuing the demand had "reasonable and probable grounds" to believe that the Appellant had "care and control" of a motor vehicle, as

defined in the *Criminal Code*, and secondly, asserting that Cst. Dicks lacked the requisite "reasonable and probable grounds" based upon the evidence before the Court.

POWERS OF A SUMMARY CONVICTION APPEAL COURT

[8] The appeal before the Court has been brought under section 813(a)(i) of the *Criminal Code*. The powers of a summary conviction appeal court are outlined in section 686(1) of the *Criminal Code*, which reads:

> 686(1) Powers
>
> 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
>
> (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
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> (iii) on any ground there was a miscarriage of justice;
>
> (b) may dismiss the appeal where
>
> (i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the

> indictment, was properly convicted on another count or part of the indictment,
>
> (ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (a),
>
> (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion the no substantial wrong or miscarriage of justice has occurred; or
>
> (iv) notwithstanding any procedural irregularity at trial, the trial court had a jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;

STANDARD OF REVIEW

[9] As a preliminary matter, it is helpful for the Court to turn its mind to the appropriate standard of review to be applied in the present matter. The Court is mindful that the Appellant has raised not only errors of law, but fact, as noted above. The appropriate standard or review was succinctly set out by the Court of Appeal in ***R. v. Nickerson***, [1999] N.S.J. 210 as follows:

> 6. The scope of review of the trial court's findings of fact by the Summary 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.C.A.) 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. B. (R.H.)*, [1994] 1 S.C.R. 656 (S.C.C.) 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.

[10] This Court has also found helpful the direction of Cromwell J.A. (as he then was) regarding the scope of appellate review of evidence relied upon in support of a verdict at trial. In ***R. v. Barrett***, 2004 NSCA 38, his Lordship writes:

> [14] This Court may allow an appeal in indictable offences like these if of the opinion that "... the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence.": s. 686(1)(a)(i). In applying this section, the Court is to answer the question of whether the verdict is one that a properly instructed jury (or trial judge), acting judicially, could reasonably have rendered: *Corbett v. The Queen*, [1975] 2 S.C.R. 275 at 282; *R. v. Yebes*, [1987] 2 S.C.R. 168 at 185; *R. v. Biniaris*, [2000] 1 S.C.R. 381 at para. 36.
>
> [15] The appellate court must recognize and give effect to the advantages which the trier of fact has in assessing and weighing the evidence at trial. Recognizing this appellate disadvantage, the reviewing court must not act as if it were the "thirteenth juror" or give effect to its own feelings of unease about the

> conviction absent an articulable basis for a finding of unreasonableness. The question is not what the Court of Appeal would have done had it been the trial court, but what a jury or judge, properly directed and acting judicially, could reasonably do: *Biniaris* at paras. 38 - 40.
>
> [16] However, the reviewing Court must go beyond merely satisfying itself that there is at least some evidence in the record, however scant, to support a conviction. While not substituting its opinion for that of the trial court, the court of appeal must "... re-examine and to some extent reweigh and consider the effect of the evidence.": *Yebes* at 186. As Arbour, J. put it in *Biniaris* at para. 36, this requires the appellate court "... to review, analyse and, within the limits of appellate disadvantage, weigh the evidence..." so as to examine the weight which the evidence could reasonably bear.

EVIDENCE AT TRIAL

[11] The Court has carefully reviewed the trial transcript in its entirety, as well as considered the particular passages referred to it by Counsel. It is not the intention of the Court to review the evidence in detail, however, given the arguments posed by both parties, it is prudent to note several aspects of the testimony.

[12] Cst. Sonya Dicks testified on behalf of the Crown. On the evening of April 4 and morning of April 5, 2009, she was on duty in her capacity as a Constable

with the Cape Breton Regional Police Services. At shortly after 1 a.m. on April 5th, a call was received requesting police to attend at Dooley's in Glace Bay, Nova Scotia, due to a complaint of an individual allegedly making threats and claiming to have a gun. Cst. Dicks testified that given her patrol car was located very close to Dooley's, she arrived on scene very shortly after the call.

[13] Upon arrival, Cst. Dicks testified that there were two males sitting in a truck, being the only truck in the parking lot fitting the description provided in the initial call to attend. She noted a male in the driver's seat, and a male in the passenger seat of the vehicle. She initially went to speak to the passenger, while fellow officers spoke to the driver. After placing the passenger in the rear of a police car, she proceeded to return to the vehicle to provide assistance dealing with the occupant of the driver's seat. Cst. Dicks identified that person as being the Appellant.

[14] Cst. Dicks testified that she was present when fellow officers were questioning the Appellant, including directing him not to place his hands in his pockets. The witness testified the Appellant continued to put his hands in his

pockets contrary to the instructions provided to him by fellow officers. He was handcuffed and placed in the rear of a police vehicle.

[15] As for her observations regarding the Appellant's behaviour, Cst. Dicks testified at page 5 of the transcript as follows:

> Yes I noted that his eyes were bloodshot, his speech was slurred, there was a strong smell of liquor on his breath, he had trouble following direction, simple directs, and in my opinion he appeared to be intoxicated.

[16] Cst. Dicks testified that the Appellant also responded to her in a verbally aggressive manner, and physically kicked at her while in the process of reading the breath demand to him.

[17] As for the belief held by Cst. Dicks based upon her observations, she testified at page 7 of the trial transcript:

> At that point I believe that his ability to operate a motor vehicle had been impaired by alcohol and I believe that he was in care and control of the vehicle so I placed him under arrest for care and control of the vehicle, of the motor vehicle.

[18] Later at page 14 of the transcript, Cst. Dicks testifies as to a conversation with the Appellant relating to the concept of "care and control". Lines 7 through 15 of the transcript are as follows:

> A. At one point he said to me that I couldn't arrest him for impaired driving because I didn't actually get him driving. I explained to him that with care and control we don't need to get him driving, that he simply needs to be impaired and to have the ability to put the vehicle in motion, which he did, he had the keys and he was sitting in the driver's seat.
>
> Q. And so you explained that to him?
>
> A. I did explain that to him.
>
> Q. And did you explain this to him while you were on route to Sydney?
>
> A. Yes that's correct.

[19] Cst. Richard Spencer also provided evidence on behalf of the Crown. He testified he was also on duty on the evening in question and attended to the Appellant Tobin upon arriving on scene. He was located in the passenger seat of the vehicle. Upon exiting the vehicle, keys, which were subsequently determined to start the vehicle, were located in the Appellant's jacket pocket.

[20] The defence called the Appellant's son, James Michael Tobin, to testify. Mr. Tobin testified that around 9 p.m. on the evening of April 4, 2009, he had met

his father in Glace Bay. During the course of their conversation, Mr. Tobin became aware his father intended to go to Dooley's that evening. The Appellant made arrangements with Mr. Tobin to meet him later at that establishment.

[21] Mr. Tobin further testified that he received a telephone call from his father around midnight to 12:30 a.m. requesting he attend Dooley's. His father was seeking a drive home. Mr. Tobin testified that he was somewhat delayed in arriving at Dooley's as he showered and went to pick up a friend to drive his father's vehicle back home. Although not certain of his exact time of arrival at Dooley's, he testified it was between 1 a.m. and 2 a.m. "Maybe around one thirty, somewhere around there". His father had been removed by police by the time he arrived.

[22] The Appellant testified at trial. He confirmed he had been at Dooley's on the evening of April 4, 2009, as he enjoys playing on the video poker machines. At midnight, the machines shut down, and the Appellant testified he called his son around that time, as he anticipated he would be arriving to drive him home. While waiting for his son to arrive, the Appellant testified he went outside with another

patron for a cigarette. As it was cold, the Appellant testified he and the other individual decided to sit in his truck while smoking.

[23] The Appellant testified that while in the vehicle, the key was never placed in the ignition at any time, nor did he have any intention of starting the vehicle. It was while smoking and sitting in the vehicle that the police arrived. The Appellant testified he explained to the officers he was waiting for his son to arrive to drive him home.

[24] On cross-examination, the Appellant acknowledged that he was "a bit upset" that his son had not arrived earlier at Dooley's. He further acknowledged that he was asked to take "the test" and that he declined.

ANALYSIS

Position of the Appellant

[25] The Appellant has submitted that there are several *Criminal Code* sections which are relevant to the issues before the Court. Given the charge upon which he was convicted, sections 254(3) and (5) are obviously relevant. They read:

> (3) If a peace officer has reasonable grounds to believe that a person is committing, or at any time within the preceding three hours has committed, an offence under section 253 as a result of the consumption of alcohol, the peace officer may, by demand made as soon as practicable, require the person
>
> (a) to provide, as soon as practicable,
>
> > (i) samples of breath that, in a qualified technician's opinion, will enable a proper analysis to be made to determine the concentration, if any, of alcohol in the person's blood, or
> >
> > (ii) if the peace officer has reasonable grounds to believe that, because of their physical condition, the person may be incapable of providing a sample of breath or it would be impracticable to obtain a sample of breath, samples of blood that, in the opinion of the qualified medical practitioner or qualified technician taking the samples, will enable a proper analysis to be made to determine the concentrations, if any, of alcohol in the person's blood; and
>
> (b) if necessary, to accompany the peace officer for that purpose.
>
> (5) Everyone commits an offence who, without reasonable excuse, fails or refuses to comply with a demand made under this section.

[26] The Appellant also submits that this Court should consider the provisions contained in section 258(1)(a) of the *Criminal Code*, which states:

> (a) where it is proved that the accused occupied the seat or position ordinarily occupied by a person who operates a motor vehicle, vessel or aircraft or any railway equipment or who assists in the operation of an aircraft or of railway equipment, the accused shall be deemed to have had the care or control of the vehicle, vessel, aircraft or railway equipment, as the case may be, unless the accused establishes that the accused did not occupy that seat or position for the purpose of setting the vehicle, vessel, aircraft or railway equipment in motion or assisting in the operation of the aircraft or railway equipment, as the case may be.

[27] The Appellant argues that the trial judge erred in not making a determination whether he had actual care and control of the vehicle, including a consideration of the rebuttable presumption contained in section 258(1)(a). It is submitted that as such, the Court failed to assess a necessary element of the offence for which he was convicted. The Appellant cited a number of case authorities, notably ***R. v. Thynne*** 2008 NSSC 153 and ***R. v. Ellis*** 2008 NSSC 178, in support of how a trial judge should properly determine whether an accused is in "care and control" of a motor vehicle.

[28] As noted above, the Appellant raises as a secondary issue namely, that Cst. Dicks did not have "reasonable grounds" to make a demand upon him, given the

nature of the evidence presented at trial. Relying on ***R. v. Ryan*** 2002 NSCA 153, it is submitted that the Learned trial judge erred in determining that Cst. Dicks observed adequate indicia of impairment to justify the demand. The Appellant submits that the trial evidence was lacking, and further "at no time did the Learned Trial Judge review the indicia to establish its sufficiency with respect to proving Mr. Tobin was ‘impaired' as opposed to ‘being under the influence of alcohol'". As such, given that proper grounds did not exist for the making of the demand, the Appellant was justified in not complying.

Position of the Respondent

[29] The Crown asserts that in all regards, the appeal should fail. In oral submissions, the Respondent asserted that the "care and control" cases relied upon by the Appellant, have no applicability to the charge upon which he was convicted, a failure to provide a breath sample as demanded. It was asserted that to accept the Appellant's position on appeal, would be tantamount to requiring a peace officer to establish the necessary elements of an offence beyond a reasonable doubt, prior to making a demand. The Crown submits Cst. Dicks possessed the necessary grounds in the present instance.

[30] The Court intends to address first, the third ground of appeal as stated in the Notice of Summary Conviction Appeal as follows:

> 3. The judge erred in law and in fact in failing to make a finding that the appellant had "care and control" of a motor vehicle pursuant to section 254(5) of the *Criminal Code of Canada*.

[31] The thrust of the Appellant's argument in this regard appears to be that a determination that an accused is not in "care and control" of a vehicle, can give rise to "a reasonable excuse" as contemplated by Section 254(5). Because the trial judge did not make such a determination, the Appellant was prevented from successfully establishing that he had a reasonable excuse for his failure to abide by the demand.

[32] I have carefully reviewed the content of the trial judge's decision, and I agree with the Appellant that a determination whether he was actually in "care or control" of the vehicle was not made. The trial judge entered a stay in relation to the charge under Section 253(1), a decision which is not being challenged by either party. However, the question this Court must now address is whether, in

adjudicating upon the Section 254 charge, the trial judge erred in not making such a determination.

[33] The trial judge did not err in my view. This Court was provided with no authority which establishes that a trial judge must determine the actual question of "care and control" when faced with a demand charge under Section 254. In my view, the trial judge is only required to turn his or her mind to whether the peace officer possessed reasonable and probable grounds to believe the accused was in "care and control" of the vehicle. With respect to the Appellant, whether an accused is, or will be found to be in "care and control" is irrelevant to the requisite determinations required under Section 254. Simply put, whether an accused is or is not in actual "care and control" of a vehicle, does not relate to the existence of a "reasonable excuse" under Section 254(5).

[34] The authorities provided by the Appellant in support of this argument, although certainly thorough, are applicable in my view, to charges under Section 253(1), and are not supportive of the argument advanced before the Court. In my view, the proper interrelationship between the two sections, and in particular the

requirement of a finding of actual “care and control” has been determined by the Supreme Court of Canada.

[35] In ***R. v. Taraschuk*** [1977] 1 S.C.R. 385, an accused was given a breathalyser demand by a peace officer who had reasonable and probable grounds to believe the accused had care or control of a motor vehicle. He refused. He was charged both for failure to comply in relation to the demand, as well as having care and control of a vehicle while impaired. At trial, the accused was convicted of the failure to give a sample of breath, but acquitted on the second charge.

[36] The issue before the Court was best articulated within the stated case of the trial judge as follows:

> Did I err in law in holding that having found as a fact that the appellant was not in the care or control of a motor vehicle at the time and place alleged, that this was not a reasonable excuse to fail or refuse to comply with the demand made by a Police Officer under Section 235 of the *Criminal Code* to provide a sample of breath suitable to enable analysis to be made in order to determine the proportion, if any, of alcohol in his blood, and to accompany a Peace Officer for the purpose of enabling such a sample to be taken.

[37] The Court determined that the trial judge did not err and commented with respect to the interplay of the two sections. At page 389 of the decision, Chief Justice Laskin states as follows:

> The contention of the appellant is that a reasonable excuse, ex post facto so to speak, arises on a charge under s. 235(2) if the accused did not in fact have care or control or was not impaired. This contention invites a self-defeating construction of s. 235 and would wipe out the difference, clearly made in ss. 234 and 235, between culpability under the one and under the other. Counsel would have it that a person who cannot be found guilty under s. 234 becomes immune to guilt under s. 235(2), although the requirements for a proper demand for a breath sample have been met. **Reasonable excuse, under s. 235(2), refers, in my view, to matters which stand outside of the requirements which must be met (i.e. those under s. 235(1)) before a charge can be supported under s. 235(2)**. See, for example, *Brownridge v. The Queen* [[1972] S.C.R. 926.]. (Emphasis added)

[38] The same issue has been subsequently addressed by the Nova Scotia Court of Appeal in ***R. v. Neville*** (1983), 64 N.S.R. (2d) 178. There, the Crown appealed the acquittal of an accused on a charge of refusing a breathalyser demand, and in particular the trial judge's reasoning relating to the required proof of whether an accused had "care and control" of his vehicle in order to support a refusal conviction. As outlined in paragraph 4 of the decision, the trial judge framed the issue under appeal as follows: "Did I err in law in holding that the Crown was

required to prove that the respondent had actual care and control of the motor vehicle in addition to establishing the peace officer's belief on reasonable and probable grounds that the respondent had committed an offence under s. 234 or s. 236 of the *Criminal Code*?"

[39] The Court of Appeal, following ***Taraschuk, supra***, readily answered the above question in the affirmative. Chief Justice MacKeigan states at paragraph 6 as follows:

> We assume from the wording of the stated question the trial judge found that the constable when he gave the breathalyser demand had reasonable and probable grounds to make the demand, viz., those prescribed by s. 235(1) –belief that the accused "is committing, or at any time within the preceding two hours has committed, an offence under s. 234 or 236" – including belief that he is or has been in care or control of a motor vehicle or has been driving so as to fall in the compass of s. 234 or s. 236. **That being so, the fact that the accused in the judge's view was not "in actual care or control" is, I respectfully believe, irrelevant to the s. 235(2) charge.** (Emphasis added)

[40] Clearly, based upon the above, even if the trial judge had determined that the Appellant was not, given the circumstances, in care and control of a vehicle, such could not be considered as determinative of the s. 254 charge and further, such a determination **would not** provide him with a reasonable excuse for the purpose of the charge thereunder. As such, this ground of appeal is without merit.

[41] The Appellant's remaining arguments focus upon whether the police officer held the necessary "reasonable and probable grounds" to make the demand, and whether the trial judge properly considered same.

[42] The Supreme Court of Canada has recently addressed in ***R. v. Shepherd,*** 2009 SCC 35 how a Court is to determine whether the requisite "reasonable and probable grounds" exist to support a valid breath demand. There, the Crown appealed an accused's acquittal of driving while impaired, the trial judge having excluding the results of a breathalyser, as it was found that the police officer was lacking in grounds to make the request. The appeal was successful before the Saskatchewan Court of Appeal, with a new trial being ordered. The accused appealed to the Supreme Court, which was dismissed.

[43] Writing for the Court, Chief Justice McLachlin and Justice Charron, state as follows:

> 20. While there can be no doubt that the existence of reasonable and probable grounds is grounded in the factual findings of the trial judge, the issue of whether the facts as found by the trial judge amount *at law* to reasonable and probable grounds is a question of law. As with any issue on appeal that requires the court to review the underlying factual foundation of a case, it may understandably seem at first blush as though the issue of

reasonable and probable grounds is a question of fact. However, this Court has repeatedly affirmed that the application of a legal standard to the facts of the case is a question of law: see *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 18; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 23. In our view, the summary conviction appeal judge erred in failing to distinguish between the trial judge's findings of fact and his ultimate ruling that those facts were insufficient, *at law*, to constitute reasonable and probable grounds. Although the trial judge's factual findings are entitled to deference, the trial judge's ultimate ruling is subject to review for correctness.

21. In his ruling, the trial judge rightly stated that the totality of the circumstances should be considered in determining whether the officer had reasonable and probable grounds to make the breath demand. The trial judge thus reviewed the evidence before him, including evidence of Mr. Shepherd's driving, appearance, and conduct, as well as Sgt. Seller's testimony that he believed that Mr. Shepherd's ability to operate a motor vehicle was impaired by alcohol. The trial judge noted that the indicia of impairment identified by Sgt. Sellers were "substantially corroborated" by the evidence of Cst. Horsley, the other officer who appeared on the scene shortly after Mr. Shepherd's arrest.

22. Turning to Mr. Shepherd's explanation that he was driving erratically because he thought the police car was an ambulance, the trial judge noted that this was "just as valid an explanation" for Mr. Shepherd's manner of driving as the suggestion that he was impaired by alcohol. The trial judge went on to conclude that, on the totality of the circumstances, the officer's subjective belief that Mr. Shepherd's ability to operate a motor vehicle was impaired by alcohol was not objectively reasonable.

23. With respect, it is our view that the trial judge erred in finding that the officer's subjective belief of impairment was not objectively supported on the facts. The officer's belief was based not only on the accused's erratic driving pattern but also on the various indicia of impairment which he observed after he arrested Mr. Shepherd. The trial judge placed substantial weight on Mr. Shepherd's explanation that he thought the police vehicle was an ambulance. Leaving aside the fact that this confusion itself can be a sign

> of impairment, it is important to note that the officer need not have anything more than reasonable and probable grounds to believe that the driver committed the offence of impairing driving or driving “over 80" before making the demand. He need not demonstrate *a prima facie* case for conviction before pursuing his investigation. In our view, there was ample evidence to support the officer’s subjective belief that Mr. Shepherd had committed an offence under s. 253 of the *Criminal Code*. We therefore conclude that the officer had reasonable and probable grounds to make the breath demand, and that Mr. Shepherd’s *Charter* claim must fail.

[44] A review of the trial judge’s decision in this instance shows that he did give ample consideration to whether Cst. Dicks possessed the requisite reasonable and probable grounds to make the breath demand to the Appellant. At page 75 and later at page 82 of the transcript, the trial judge reviews carefully Cst Dicks’ evidence supporting not only her belief of impairment, but that the Appellant had care and control of the vehicle. He concludes, based on the evidence before him, that a lawful demand was made.

[45] Upon reviewing the authorities provided by both Counsel, and those referenced by the Court, as well as reviewing the entire trial transcript, there is in my view, no merit to any of the grounds of appeal put forward by the Appellant. In my view, the trial judge appropriately concluded that not only did the

demanding officer hold a subjective belief as to the requisite factual elements, that the belief was objectively reasonable on the evidence before him.

[46] In conclusion, for the reasons stated above, the appeal is dismissed.

J.