

**SUPREME COURT OF NOVA SCOTIA**  
**Citation:** R. v. Al-Mansoob, 2013 NSSC 79

**Date:** 20130206  
**Docket:** Hfx No. 374560A  
**Registry:** Halifax

**Between:**

Her Majesty the Queen

Appellant

v.

Abdullah Al-Mansoob

Respondent

**Judge:** The Honourable Justice Michael J. Wood

**Heard:** February 6, 2013, in Halifax, Nova Scotia

**Written Decision:** March 6, 2013

**Counsel:** Ronald Lacey, for the Appellant  
J. Gordon Allen, for the Respondent

**By the Court:**

[1] On August 5, 2010 at 4:30 a.m., the motor vehicle being driven by Abdullah Al-Mansoob was pulled over by Constable David Harding of the Halifax Regional Police Service. The stop took place on Spring Garden Road, near the intersection with Grafton Street. As a result of his interaction with Mr. Al-Mansoob, Constable Harding requested that he provide a breath sample for analysis using a roadside screening device.

[2] Despite repeated attempts, Mr. Al-Mansoob did not provide a suitable breath sample. He was subsequently charged with refusal to provide a breath sample contrary to s. 254(5) of the *Criminal Code*, as well as impaired driving contrary to s. 253(1)(a) of the *Criminal Code*.

[3] Mr. Al-Mansoob's trial was held on November 29, 2011. At the conclusion of the evidence, the trial judge found Mr. Al-Mansoob not guilty of the impaired driving charge and reserved decision on the refusal charge.

[4] On December 20, 2011, the trial judge gave an oral decision and found Mr. Al-Mansoob not guilty of the charge under s. 254(5) of the *Criminal Code*. His reasoning was that Constable Harding was acting under the provisions of the *Motor Vehicle Act* and not the *Criminal Code* when the demand was made for a breath sample, and so Mr. Al-Mansoob had been charged with the wrong offence. The Crown has appealed that decision.

**STANDARD OF REVIEW**

[5] The Crown's appeal from the Summary Conviction Court is pursuant to s. 813(b)(i) of the *Criminal Code*, which states as follows:

**813.** Except where otherwise provided by law,

....

(b) the informant, the Attorney General or his agent in proceedings under this Part may appeal to the appeal court

- (i) from an order that stays proceedings on an information or dismisses an information,

[6] The scope of such an appeal was outlined by the Nova Scotia Court of Appeal in *R. v. Hewlin*, [1999] N.S.J. 70 at paras. 14-15:

14 The appellant submits that the Summary Conviction Appeal Court judge erred in law by substituting his determination of the facts for that of the trial judge, rather than determining whether or not the decision of the trial judge was unreasonable and not supported by the evidence, and that the Summary Conviction Appeal Court judge erred in law by applying erroneous principles or tests.

15 The appeal from the Provincial Court to Justice Haliburton was pursuant to s. 813(b) of the *Criminal Code*. It is well settled that the Crown is entitled to appeal an acquittal of a summary conviction matter on a question of fact. See *R. v. Crocker* (1986), 73 N.S.R. (2d) 151 (N.S. C.A.) and *R. v. Gillis* (1981), 45 N.S.R. (2d) 137 (N.S. C.A.). As noted in both of those cases, the Summary Conviction Appeal Court may only set aside an acquittal, on a question of fact, where it can be said that the verdict was unreasonable or cannot be supported by the evidence. See also the more recent statement to the same effect by the Manitoba Court of Appeal in *R. v. Multitech Warehouse (Manitoba) Direct Inc.* (1995), 100 C.C.C. (3d) 153 (Man. C.A.) at p. 164:

...In my opinion, it can safely be said that on a Crown appeal from an acquittal in a summary conviction matter, the appeal court has the jurisdiction to reverse a finding of fact. But in doing so, it must pay heed to the indisputable advantage given to the trial judge who saw and heard the witnesses, and the attendant “elbow room” that follows from this principle. Once this is understood, it seems to me to follow that on a Crown summary conviction appeal the appeal court must be free to reverse an acquittal on findings of fact when examination of all of the evidence discloses that the verdict is unreasonable. To hold otherwise would emasculate the undoubted authority that the appeal court judge has, within the guidelines just referred to, to reverse findings of facts.

[7] Similarly, the Ontario Court of Appeal in *R. v. Labadie*, 2011 ONCA 227 said at para. 51:

51 No controversy exists about the right of the Attorney General to appeal under s. 813(b)(i) on grounds that involve a question of law alone, or on grounds that involve questions of mixed law and fact. No closed list exists of what

constitutes a question of law alone, but it is reasonable to conclude that questions of law alone take in, but are not confined to, issues involving the admissibility of evidence.

[8] It is obvious from these authorities that the scope of a Crown appeal from acquittal is not limited to questions of law and includes issues of fact, and of mixed fact and law. For questions of law, the standard is correctness. Where the appeal challenges a finding of fact, it can only succeed where the verdict was unreasonable or could not be supported by the evidence. An appeal on an question of mixed fact and law should also be reviewed on a standard of reasonableness. There is obviously a higher degree of deference that should be given to the trial court when the appeal challenges factual findings.

## **TRIAL DECISION**

[9] On December 20, 2011, the trial judge gave his oral decision. He started by reviewing the evidence and witness testimony. He stated that he believed the police officers who testified and concluded that they gave credible evidence. He said that he did not believe the testimony of Mr. Al-Mansoob and said that he was not truthful when he denied having consumed alcohol that day. The trial judge's oral decision then proceeded as follows, commencing at p. 142 of the transcript:

**THE COURT:** I'm also satisfied that, on the testimony of the police officers, that your conduct amounted to a refusal or a failure to comply with the demand that was made on you. However, I will ask counsel to comment on the following observation. Constable Harding, in cross-examination, made the following comment. He said that he made the demand on Mr. Al-Mansoob, not because he thought that he would be over the legal limit, but because Mr. Al-Mansoob, as a new driver, was not supposed to have any alcohol in his system.

The question I have, I'll ask the Crown to comment on this, that would seem to me that Constable Harding was getting his authority to demand Mr. Al-Mansoob under section 100A of the *Motor Vehicle Act* and not under the *Criminal Code*.

**THE COURT:** Ms. MacKay, you're in a bit of a disadvantage because you're not the Crown who conducted the trial, but in cross-examination, Constable Harding, in response to questioning from defence counsel, said that very thing, that it wasn't because he thought Mr. Al-Mansoob would be over the

legal limit, but as a new driver he wasn't supposed to have any alcohol in his system.

**MS. MACKAY:** And, Your Honour, perhaps I might just have a moment to refer to the sections of the *Criminal Code*. I've heard what you had to say. As Your Honour has mentioned, I wasn't expecting. . .

**THE COURT:** Yes.

**MS. MACKAY:** . . . because this was for a decision hearing, to be asked to make further submissions.

**THE COURT:** The. . .

**MS. MACKAY:** So I will, just if I could, just take a moment.

**THE COURT:** What I can tell you is that the wording under the *Motor Vehicle Act* is very similar, if not almost word for word, the same as under the *Criminal Code*. My question is, if the police officer was seeking his authority to make the demand under the *Motor Vehicle Act*, it is appropriate that Mr. Al-Mansoob is charged under the *Criminal Code* with the failure to comply? I'm satisfied on the testimony of Constable Harding that he got his authority to demand Mr. Al-Mansoob under the *Motor Vehicle Act*.

[10] After raising the issue of the potential demand under the *Motor Vehicle Act*, the trial judge invited submissions from counsel on that point. Following the submissions, the oral decision continued as follows, commencing at p. 153 of the transcript:

The circumstances that Constable Harding faced was his attention was brought to the vehicle being operated by Mr. Al-Mansoob because it sounded like the engine was revving. It sounded to Constable Harding as if the operator of the vehicle was having a difficult time getting it into gear, and then when the constable observed the vehicle with the wiper blades up on the windshield, he decided this vehicle at 4:30 in the morning coming from the area of Pizza Corner, decided to pull the vehicle over and have a chat with the operator, Mr. Al-Mansoob.

When he approached the vehicle and made the demand for particulars, he detected an odour of liquor coming from the vehicle, which was as a result, I'm satisfied, of the passenger who was in the vehicle, but when Mr. Al-Mansoob was

asked to exit the vehicle, and following the police officer also observing an open bottle of liquor in the vehicle, that he had a conversation with Mr. Al-Mansoob and he detected the odour of liquor on his breath.

So he would have had the grounds to make a demand under the *Criminal Code*. However, the constable says that's not why he demanded Mr. Al-Mansoob. He says that he demanded Mr. Al-Mansoob because, as a new driver, he wasn't supposed to have any alcohol in his system. Therefore, my finding is that the police officer obtained, in his view and in the court's view, obtained his authority to make a demand on Mr. Al-Mansoob under section 100A of the *Motor Vehicle Act*. That was his authority to make the demand.

At that time he was not functioning under the *Criminal Code*, not within his own mind. Constable Harding was functioning under the *Motor Vehicle Act*. That was his authority. When Mr. Al-Mansoob failed to comply with that demand, it was not open for the police officer at that time to choose then to go under the *Criminal Code*. If you take your authority under one statute, and the person does not comply under that statute, then I'm satisfied that the proper procedure, the one that can be condoned by the courts, is to continue with the procedure under that statute. And in this case, where the demand was made pursuant to section 100A, where the demand was made under that section of the *Motor Vehicle Act*, it was not made under section 254 of the *Criminal Code*, but it was made pursuant to section 100A of the *Motor Vehicle Act*. Any failure to comply must, therefore, be charged under section 100A(4) of the *Motor Vehicle Act*.

I do not agree that the police can simply choose to ignore what their underlying authority was and then proceed to charge under the most serious statute. That is not what our justice system is based on. You cannot demand a new driver to give a sample of breath because they are a new driver and there's some alcohol in their system, and then charge every new driver who fails or refuses to comply with that demand under the *Motor Vehicle Act* with breaching a *Criminal Code* section. It is not proper.

Constable Harding gave very straightforward truthful testimony, and had he not made that comment in his cross-examination, had he not indicated where he had got his authority, then his court would have assumed that he had been functioning under the *Criminal Code*. But Constable Harding was very honest and truthful, an extremely credible witness in giving that testimony, that he made the demand because Mr. Al-Mansoob was a new driver. That's why he made the demand. It was under the *Motor Vehicle Act*. So the failure to comply should have been charged under the *Motor Vehicle Act*.

And as I've said before, had the police officer been functioning under the *Criminal Code* with Mr. Al-Mansoob's actions, I would have convicted him under the *Criminal Code*, but the police officer obtained his authority and was proceeding pursuant to the *Motor Vehicle Act* and this charge should have been pursuant to the *Motor Vehicle Act*, the penalty would have been much less than what is before the court. Mr. Al-Mansoob's liberty, security of the person is much greater by proceeding under the *Criminal Code* than it would be under the *Motor Vehicle Act*, the infringement of it, and, therefore, it is not justified that, where the police were proceeding under the *Motor Vehicle Act*, for them to subsequently decide to go under the *Criminal Code*.

Honestly, I'm not sure that anybody might have really given any real thought to one or the other. It may be that the persons who laid the information and swore the information didn't even consider the *Motor Vehicle Act* or didn't even consider what the authority was to make the demand, but it's clear on the testimony that it wasn't because there was any suspicion Mr. Al-Mansoob would be impaired. The testimony was that the demand was made because he was a new driver. That's under the *Motor Vehicle Act*.

So the charge for failure to comply should have been under the *Motor Vehicle Act*. So I'm finding him not guilty under the *Criminal Code* because it's not the offence that should have been charged.

## THE TRIAL EVIDENCE

[11] The notice of appeal sets out five grounds of appeal. The grounds essentially amount to a single issue, and that is whether the trial judge erred in concluding that there was no demand made for a breath sample from Mr. Al-Mansoob pursuant to s. 254(2) of the *Criminal Code*. In my view, this is an issue of mixed fact and law, which requires some consideration of the evidence presented at trial and, in particular, the testimony of Constable Harding.

[12] After indicating that he detected a faint odour of alcohol from Mr. Al-Mansoob, Constable Harding went on to describe his interaction with Mr. Al-Mansoob as follows, commencing at p. 13 of the transcript:

Q. And where you found it located in the vehicle. Thank you. Okay. So, sorry, you pick up the story where you were telling us about what you -- what you were doing there.

A. Sure. So while I was obtaining the documents from the driver, I'm speaking with him, I asked if he had anything to drink tonight, to which he advised he had not. He'd just attended the downtown area to pick up a friend, who he advised was seated in the passenger seat.

Q. Yes.

A. From there I -- sorry, so, yeah, so he said he came downtown to pick up his friend, again, who was seated in the passenger seat. At that time I requested that the driver provide a sample of his breath on an approved screening device, which he advised he understood. I read the approved screening device demand verbatim from my police notebook.

Q. All right. And do you have your police notebook with you now, sir?

A. I do, yes.

Q. Can you get it out? Can you read the demand that you read to Mr. Al-Mansoob on the date in question here, 5th of August, 2010?

A. Yes. So this is the approved screen device demand:

"I demand that you forthwith provide me with a sample of your breath suitable for analysis by an approved screen device and to accompany me to . . ."

Which would have been next to my police wagon:

". . .for the purpose of obtaining a sample of your breath. Should you refuse the demand, you'll be charged with the offence of refusal. Do you understand?"

Q. And did Mr. Al-Mansoob reply to that demand?

A. He did. he advised that he understood.

Q. Okay. And when was that demand read, please?

A. The demand was read at 4:38 a.m.



Q. Okay. Now, what led you to read that demand to Mr. Al-Mansoob?

A. Well, the course of events leading up to the -- to the traffic stop. Upon speaking with Mr. Mansoob (*sic*), like I said, a faint odour of alcohol on his breath, glossy eyes and the fact that there was a Cheers bracelet on his left-hand wrist after indicating that he had just come downtown to pick up a friend.

Q. Okay. And as a result of making those observations, what belief did you form, if any?

A. After making this. . .

Q. With respect to Mr. Al-Mansoob.

A. Yeah. That he had consumed alcohol on the night in question. I did suspect that he had -- that he had been drinking, to what extent at that time was unknown.

[13] Constable Harding also provided evidence with respect to discussions he had with Mr. Al-Mansoob as he attempted to provide a breath sample. His testimony on this issue was as follows at p. 19 of the transcript:

Q. Okay. Can you describe Mr. Al-Mansoob, his demeanour and what he was doing during the time of the -- the instructions were being read and then subsequently while the test was being administered.

A. Yes. While the instructions were being read, he was being cooperative, listening to what he was being told, advising that he understood the instructions. From my involvement standing by, like I said, watching him administer the test, it appeared to me that he wasn't providing a suitable sample, was avoiding to provide a suitable sample into the -- into the device. During his attempts, I advised him that failing to provide a suitable sample would be the same charge as an impaired driving charge. Advising him that it would be in his best interest too to provide a sample at that time. And, again, he was cooperative during that portion of the event.

and at p. 22 of the transcript:

Q. Okay. Okay. Now, what was -- in terms of your dealings with Mr. Al-Mansoob, you said you were -- you mentioned an arrest time of 4:46. What -- what prompted that?

A. So after the approved screen device was read and attempted to be administered on the side of the road, as I said, I explained to him that failing to provide a suitable sample would be the same charge as impairment. Again he was explained how to provide a sample, but, in my opinion, failed to provide a suitable sample. So after numerous attempts I advised him that he was going to be charged for failing to provide a sample, for refusal, as well as impaired operation of a motor vehicle. He was arrested for both and read *Charter* and caution at 4:46 a.m.

[14] In his cross-examination, Constable Harding testified that his dealings with Mr. Al-Mansoob were influenced by his status as a newly licensed driver. It was this evidence that led the trial judge to his conclusion that he was charged with the wrong offence. The cross-examination evidence was as follows, commencing at p. 40:

Q. Okay. Now, it was a little unclear from your direct evidence the number of attempts. Initially you gave evidence of one attempt, and you suggested he was blowing but didn't have a good seal with his mouth around the mouthpiece?

A. Um-hmm.

Q. And then you mentioned other attempts. Wasn't there two or three attempts? Isn't that correct?

A. From my recollection there was -- I believe it was four attempts of trying to provide a sample. I advised him at that time that failing to provide a sample. . .

Q. Yes.

A. . . same charge as impaired driving.

Q. Yes.

A. Again, he was given the opportunity to provide a sample, I believe, twice more, at which time he was arrested. . .

Q. Right.

A. . . .for failing to provide a sample.

Q. Now, didn't the last attempt, didn't Constable Lennon remove the device from his mouth mid attempt?

A. Again, I can't speak to what Constable Lennon did for that.

Q. Okay. All right. Now, after -- after this arrest and just before that, didn't Mr. Al-Mansoob state, you know, "I'll take the test," or request to do it again? Request to be given other attempts?

A. No. I gave the option at booking of whether or not he'd like to provide another sample, which. . .

Q. You did?

A. I did.

Q. At booking?

A. Yes.

Q. Okay. And who was present when you did that?

A. There would have been booking officers, other officers inside the booking area.

Q. Okay. All right. Now, why did you call for the roadside screening device? Why didn't you just take him down and get him to blow the breathalyser?

A. The faint odour of alcohol -- like I said, he was speaking fine with me.

Q. Yeah.

A. He was being clear.

Q. There was no clear evidence that he was impaired, wouldn't you agree?

A. I didn't believe him to be over the legal limit to drive.

Q. Yes.

A. I did believe that he -- he had been consuming alcohol that night.

Q. Yes.

A. And being, as I said, he was a new driver, not to have any alcohol in his system. . .

Q. Yeah.

A. . . .were all flags for me.

## LEGISLATION

[15] In light of the trial judge's reliance on the provisions of both the *Criminal Code* and *Motor Vehicle Act*, I will set these out. Both statutes contain the authority for a peace officer to issue a demand to a driver to provide a breath sample for roadside screening. Under the *Criminal Code*, this is found in s. 254(2), which provides:

**254. (2)** If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a motor vehicle or vessel, operated or assisted in the operation of an aircraft or railway equipment or had the care or control of a motor vehicle, a vessel, an aircraft or railway equipment, whether it was in motion or not, the peace officer may, by demand, require the person to comply with paragraph (a), in the case of a drug, or with either or both of paragraphs (a) and (b), in the case of alcohol:

(a) to perform forthwith physical coordination tests prescribed by regulation to enable for the peace officer to determine whether a demand may be made under subsection (3) or (3.1) and, if necessary, to accompany the peace officer for that purpose; and

(b) to provide forthwith a sample of breath that, in the peace officer's opinion, will enable a proper analysis to be made by means of an approved screening device and, if necessary, to accompany the peace officer for that purpose.

[16] Under the *Motor Vehicle Act*, it is s.s. 100(A)(1) and (2) which state:

100A (1) Any person who

1. (a) is a licensed learner;

(b) is a newly licensed driver; or

(c) has been issued a driver's license prior to the coming into force of this Section but has less than two years of experience as the holder of a class 1, 2, 3, 4, 5 or 6 driver's license as set out in regulations made pursuant to Section 66,

operating or having care and control of a motor vehicle, whether it is in motion or not, having consumed alcohol in such a quantity that the concentration in the person's blood exceeds zero milligrams of alcohol in one hundred millilitres of blood is guilty of an offence.

2. Where a peace officer believes on reasonable and probable grounds that a person is committing, or at any time within the preceding two hours has committed, as a result of the consumption of alcohol, an offence under subsection (1), the peace officer may, by demand made to that person forthwith or as soon as practicable, require that person to provide then or as soon thereafter as is practicable

(a) such samples of the person's breath as in the opinion of a qualified technician; or

(b) where the peace officer has reasonable and probable grounds to believe that, by reason of any physical condition of the person,

(i) the person may be incapable of providing a sample of his breath, or

(ii) it would be impracticable to obtain a sample of the person's breath,

such samples of the person's blood, under the conditions referred to in subsection (3), as in the opinion of the qualified medical practitioner or qualified technician taking the samples,

are necessary to enable proper analysis to be made in order to determine the concentration, if any, of alcohol in the person's blood, and to accompany the peace officer for the purpose of enabling such samples to be taken.

[17] In light of the trial judge's apparent conclusion that a demand for a breath sample must be made under either the *Motor Vehicle Act* or the *Criminal Code*, and that a single demand could not trigger consequences under both statutes, the following provisions of the *Motor Vehicle Act* are also relevant:

100B (1) In this Section,

(a) "provincially approved screening device" means a device prescribed by regulation;

(b) "qualified technician" means a qualified technician as defined in subsection 254(1) of the *Criminal Code*.

(2) Subsection (3) applies and subsection (4) does not apply if a peace officer making a demand of a licensed learner or a newly licensed driver uses one screening device for the purpose of Section 279C and another screening device for the purpose of this Section, and subsection (4) applies and subsection (3) does not apply if the peace officer uses one screening device for the purpose of both Section 279C and this Section.

(3) A peace officer may request a licensed learner or a newly licensed driver to surrender the person's license if, upon demand of the officer made pursuant to Section 100A, the licensed learner or a newly licensed driver fails or refuses to provide a sample of breath or provides a sample of breath that, on analysis by a provincially approved screening device, produces a result indicating, in the manner prescribed by regulation, the presence of alcohol.

(4) A peace officer may request a licensed learner or a newly licensed driver to surrender the person's license if, upon demand made by the peace officer under subsection 254(2) of the *Criminal Code*, the driver

- (a) fails or refuses to provide a sample of breath; or
- (b) provides a sample of breath that, on analysis, produces a result indicating, in the manner prescribed by regulation, the presence of alcohol.

....

279C (1) Where, upon demand of a peace officer made pursuant to subsection 254(2) of the Criminal Code, a person provides a sample of the person's breath which, on analysis by an approved screening device as defined in section 254 of the Criminal code, registers "Warn", the peace officer shall request the person to surrender the person's license.

(2) Where, upon demand of a peace officer made under subsection 254(3) of the Criminal Code, a person provides a sample of the person's breath which, on analysis by an approved instrument as defined in section 254 of the Criminal Code, indicates that the concentration of alcohol in the person's blood is fifty milligrams or more and not exceeding eight milligrams of alcohol in one hundred millilitres of blood, a peace officer shall request the person to surrender the person's license.

(3) repealed 2009, c. 21, s. 2.

(4) Upon a request being made pursuant to subsection (1) or (2), the person to whom the request is made shall forthwith surrender the person's license to the peace officer and, whether or not the person is unable or fails to surrender the person's license to the peace officer, the person's license is suspended and the person's driving privilege is suspended for a period of

- (a) seven days in the case of a first suspension within the last ten years;
- (b) fifteen days in the case of a second suspension within the last ten years; or
- (c) thirty days in the case of a third or subsequent suspension within the last ten years,

from the time the request is made.

- (5) The suspension of a license or the suspension of a driving privilege pursuant to this Section is in addition to and not in substitution for any proceeding or penalty arising from the same circumstances.

## ANALYSIS

[18] It is clear from the trial judge's reasons that he was satisfied Constable Harding had "reasonable grounds to suspect" that Mr. Al-Mansoob had alcohol in his body, which would justify making a demand for a breath sample pursuant to s. 254(2) of the *Criminal Code*. He also concluded that Mr. Al-Mansoob failed or refused to comply with the demand without reasonable excuse. He specifically says that he would have entered a conviction had Constable Harding been acting under the authority of the *Criminal Code*.

[19] The reason given by the trial judge for his conclusion that the police officer was acting under the authority of the *Motor Vehicle Act* was the reference, in cross-examination, to Mr. Al-Mansoob's status as a newly licensed driver who was therefore prohibited from having any alcohol in his body. This conclusion is based upon the underlying assumption that a demand for a breath sample must be made either under the *Criminal Code* or *Motor Vehicle Act*. The logical extension of that position is that a single demand could not result in sanctions under both statutes; however, that is not borne out by the legislation itself.

[20] Section 279C(1) indicates that a demand for a breath sample pursuant to s. 254(2) of the *Criminal Code* can result in the requirement to surrender a driver's license if the approved screening device registers "warn". Subsection (4) permits the peace officer to suspend the driver's license. Subsection (5) states that such a suspension is in addition to "any proceeding or penalty arising from the same circumstances". It is obvious from this that a request for a breath sample can trigger consequences under the *Criminal Code* as well as the *Motor Vehicle Act*.

[21] Section 100B(2) states that s-s. (4) of that section applies where the peace officer uses a single screening device for the purposes of both s. 279C and s. 100B. Subsection (4) permits a peace officer to request surrender of the person's driving license upon failure or refusal to provide a breath sample in response to a demand pursuant to s. 254(2) of the *Criminal Code*.



[22] I believe it was an error on the part of the trial judge to conclude that Mr. Al-Mansoob's status as a newly licensed driver was only relevant to a demand made under the *Motor Vehicle Act*. It is clear from the provisions of that legislation that a demand under the *Criminal Code* can lead to license suspension under the *Motor Vehicle Act* for a newly licensed driver.

[23] To the extent that the trial judge's conclusion that the demand was made under the authority of the *Motor Vehicle Act* could be considered a finding of fact or mixed fact and law, I believe that it is unreasonable and unsupported by the evidence. I have reached this conclusion based upon the language of the demand made by Constable Harding, as well as his explanation of the consequences of a refusal.

[24] The text of the demand read to Mr. Al-Mansoob tracks fairly closely the language of s. 254(2)(b) of the *Criminal Code*. In particular, it required Mr. Al-Mansoob to "forthwith provide me with a sample of your breath suitable for analysis by an approved screening device". The demand described in s. 100A(2) of the *Motor Vehicle Act* permits a peace officer to "forthwith or as soon as practicable, require that person to provide then or as soon thereafter as is practicable" provide a breath sample for analysis. There is no reference to an approved screening device in that section.

[25] In comparing the demand given to Mr. Al-Mansoob with the two pieces of legislation, it seems clear that Constable Harding is using the language of the *Criminal Code* and not the *Motor Vehicle Act*. In addition, Constable Harding described how he explained the consequences of failure to provide a sample to Mr. Al-Mansoob on three different occasions in his testimony. In each case, he said that he advised Mr. Al-Mansoob that the penalty for refusal was the same as for impaired driving. That is obviously a reference to s. 255 of the *Criminal Code*, which sets out the same punishment for offences under s.s. 253 or 254. Refusal under the *Motor Vehicle Act* does not carry the same sanctions.

[26] In his decision, the trial judge did not explain the inconsistency between Constable Harding's testimony about his interaction with Mr. Al-Mansoob and a demand made under the *Motor Vehicle Act*. The obvious, and only, inference to be drawn from Constable Harding's evidence was that he was demanding a sample of Mr. Al-Mansoob's breath under the authority granted by the *Criminal Code*.

The trial judge's conclusion to the contrary is unreasonable and not supported by the evidence.

[27] As a final matter, I would note that Mr. Al-Mansoob should have been under no misapprehension about the consequences of his failure to provide a proper breath sample. He was specifically told that the sanction would be the same as impaired driving. There was never a suggestion that it might trigger lesser penalties under the provincial legislation.

[28] When police officers encounter drivers in circumstances where they reasonably suspect they may have alcohol in their body, they are entitled to request that the driver provide a breath sample for analysis by a roadside screening device. Depending upon the outcome of that test, they will determine how to proceed. If it registers a warning, they may choose to implement the authority found in the *Motor Vehicle Act* to suspend the person's license. Without anticipating the results of this test, it was unreasonable to expect the peace officer to make a decision whether this will be a *Motor Vehicle Act* or *Criminal Code* matter. Even with a newly licensed driver, the officer should not be expected to predetermine which legislative scheme might be applicable. The trial judge's decision places a burden on the police officer which was unreasonable in the circumstances of this case.

## **DISPOSITION**

[29] For the reasons outlined above, I will allow the appeal and set aside the trial judge's acquittal of the charge under s. 254(5) of the *Criminal Code*. In light of the trial judge's findings that there were proper grounds for Constable Harding to make a demand under s. 254(2) and conduct on the part of Mr. Al-Mansoob which amounted to an unreasonable refusal, I will enter a conviction under s. 254(5). The authority to enter a verdict of guilty on a summary conviction appeal was acknowledged by the Ontario Court of Appeal in *R. v. Labadie, supra*.

[30] I will remit the matter to the trial judge for a sentencing hearing.