Her Majesty the Queen v. Bush
[Indexed as: R. v. Bush]

101 O.R. (3d) 641
2010 ONCA 554

Court of Appeal for Ontario,
Blair and LaForme JJ.A., Durno J. (ad hoc)
August 17, 2010

Charter of Rights and Freedoms -- Counsel -- Accused selecting name off list of lawyers taking calls at all hours but when officer unable to reach counsel telling arresting officer not to leave message -- Accused giving police name of lawyer he knew and speaking to that lawyer twice before providing breath sample -- Accused not expressing dissatisfaction with that advice or desire to speak to first lawyer -- Trial judge finding that accused's rights under s. 10(b) of *Charter* were not infringed -- Summary conviction appeal judge allowing accused's appeal from impaired driving conviction on other ground and not dealing with s. 10(b) issue -- Court of Appeal allowing Crown's appeal on other issue and restoring conviction -- Accused not unfairly deprived of appellate review of trial judge's dismissal of s. 10(b) application -- Argument that first lawyer was accused's only true counsel of choice having no reasonable prospect of establishing s. 10(b) violation or of leading or exclusion of evidence of impairment -- *Canadian Charter of Rights and Freedoms*, s. 10(b).

Charter of Rights and Freedoms -- Search or seizure -- Onus -- Trial judge stating correctly at outset of *Charter* ruling that onus was on Crown to establish that arresting officer had reasonable and probable grounds for breathalyzer demand but misstating burden near end of ruling -- Review of reasons as whole establishing that trial judge applied correct test.

Criminal law -- Breathalyzers -- Reasonable and probable grounds -- Police officer receiving report from dispatch that citizen had observed erratic driving and believed that driver was intoxicated -- Officer arriving at scene to find that accused's vehicle had crashed into parked truck -- Officer noting odour of alcohol on accused's breath, red and glassy eyes, accused seeming dazed and unsteady -- Officer almost immediately making breathalyzer demand and arresting accused for impaired driving without questioning him about his drinking -- Officer having reasonable and probable grounds for breathalyzer demand -- Assessment of whether officer objectively had reasonable and probable grounds not involving ticking off scorecard of usual indicia of impairment -- Although officer should consider possibility of other explanations for indicia of impairment need not exclude them from consideration -- Officer not required to perform approved screening device test before making breathalyzer dem and nor required to question accused for minimum period of time before concluding had reasonable and probable grounds for breathalyzer demand -- Officer entitled to rely on hearsay in determining whether reasonable and probable grounds existed.

The accused was charged with impaired driving and driving over 80. The arresting officer received a report from dispatch that a civilian witness had observed erratic driving and believed that the driver was intoxicated. Before the officer arrived, the accused's vehicle crashed into a parked truck. The officer detected a smell of alcohol on the accused's breath and noted that his eyes were red and glassy, he

seemed dazed and was unsteady on his feet. Within about a minute of arriving at the scene, and without questioning the accused about his drinking, the officer arrested him for impaired driving and made a breathalyzer demand. At the police station, the accused selected a lawyer from a list of lawyers who were prepared to accept after hours calls, but told the arresting officer not to leave a message when they received no answer. He gave the officer the name of a lawyer whom he knew and spoke to that lawyer twice before providing a breath sample. He did not say that he was dissatisfied with the second lawyer's advice, nor did he ask to call the first lawyer again. The trial judge found that the arresting officer had reasonable and probable grounds to arrest the accused and make the breathalyzer demand. She found that the accused's right to counsel under s. 10(b) of the *Canadian Charter of Rights and Freedoms* was not infringed. The accused was convicted on both counts, and the driving over 80 count was conditionally stayed. The summary conviction appeal judge allowed the accused's appeal without addressing the accused's s. 10(b) ground. The Crown appealed.

Held, the appeal should be allowed.

The trial judge did not err in finding that the officer had reasonable and probable grounds to make the breathalyzer demand. The totality of the circumstances must be examined in determining whether reasonable and probable grounds exist. There is no mathematical formula, with a certain number of indicia of impairment being required. An officer is not required to ignore apparent indicia of impairment because there may be an alternative cause for the observations (such as having been in the car accident), only to consider the possibility of other inferences when making the assessment based on the totality of the circumstances. There is no minimum time period or mandatory questioning that must occur before the officer can objectively have reasonable and probable grounds nor is the officer required to perform an approved screening device test before making a breathalyzer demand. In determining whether reasonable and probable grounds exist, the officer is entitled to rely on hearsay, such as the information from the civilian who observed the accused's erratic driving before the accident.

At the outset of her ruling on reasonable and probable grounds, the trial judge correctly stated that because the breath samples were obtained as a result of a warrantless search, the onus was on the Crown to establish that the officer had reasonable and probable grounds to make the breathalyzer demand. At the end of that section of her ruling, she stated that the accused had not met the onus of establishing the breach of s. 8 of the *Charter* on a balance of probabilities. However, when the ruling was read as a whole, it was apparent that the trial judge did not reverse the onus of proof.

Restoring the impaired driving conviction did not unfairly deprive the accused of appellate review of the trial judge's dismissal of his s. 10(b) *Charter* application. The argument that the first lawyer was his only true counsel of choice had no reasonable prospect of establishing a breach or excluding any evidence.

APPEAL by the Crown from the decision of the summary conviction appeal court by McWilliams J. dated May 20, 2008 allowing the accused's appeal from the conviction entered by Nicholas J., [2006] O.J. No. 852, 2006 ONCJ 53.

Cases referred to *R. v. Uppal*, [1995] O.J. No. 5124, 1995 CarswellOnt 4566 (Prov. Ct.), not folld

H. (F.) v. MacDougall, [2008] 3 S.C.R. 41, [2008] S.C.J. No. 54, 2008 SCC 53, 61 C.R. (6th) 1, 61 C.P.C. (6th) 1, 297 D.L.R. (4th) 193, 83 B.C.L.R. (4th) 1, [2008] 11 W.W.R. 414, 260 B.C.A.C. 74, EYB 2008-148155, J.E. 2008-1864, 60 C.C.L.T. (3d) 1, 380 N.R. 82, 169 A.C.W.S. (3d) 346, EYB 2008-148155, apld

Other cases referred to *R. v. Berlinski*, 2001 CanLII 24171 (ON CA), [2001] O.J. No. 377, 9 M.V.R. (4th) 67, 48 W.C.B. (2d) 506 (C.A.); *R. v. Bernshaw*, 1995 CanLII 150 (SCC), [1995] 1 S.C.R. 254, [1994] S.C.J. No. 87, 176 N.R. 81, [1995] 3 W.W.R. 457, J.E. 95-256, 53 B.C.A.C. 1, 95 C.C.C. (3d) 193, 35 C.R. (4th) 201, 26 C.R.R. (2d) 132, 8 M.V.R. (3d) 75; *R. v. Burns*, 1994 CanLII 127 (SCC), [1994] 1 S.C.R. 656, [1994] S.C.J. No. 30, 165 N.R. 374, J.E. 94-647, 42 B.C.A.C. 161, 89 C.C.C. (3d) 193, 29 C.R. (4th) 113, 23 W.C.B. (2d) 211, EYB 1994-67081; *R. v. Censoni*, [2001] O.J. No. 5189, [2001] O.T.C. 948, 22 M.V.R. (4th) 178, 52 W.C.B. (2d) 179 (S.C.J.); *R. v. Costello*, [2002] O.J. No. 93, 22 M.V.R. (4th) 165, 52 W.C.B. (2d) 265 (C.A.), revg [2001] O.J. No. 2109, 50 W.C.B. (2d) 151 (S.C.J.); *R. v. Davis-Harriot*, [2010] O.J. No. 848, 2010 ONCA 161, 74 C.R. (6th) 316; *R. v. Debot*, 1989 CanLII 13 (SCC), [1989] 2 S.C.R. 1140, [1989] S.C.J. No. 118, 102 N.R. 161, J.E. 90-12, 37 O.A.C. 1, 52 C.C.C. (3d) 193, 73 C.R. (3d) 129, 45 C.R.R. 49, 8 W.C.B. (2d) 803; *R. v. Deighan*, [1999] O.J. No. 2413, 45 M.V.R. (3d) 90 (C.A.); *R. v. Duris*, [2009] O.J. No. 4403, 2009 ONCA 740; *R. v. Elvikis*, [1997] O.J. No. 234, 31 O.T.C. 161, 25 M.V.R. (3d) 256, 33 W.C.B. (2d) 336 (Gen. Div.); *R. v. Golub* (1997), 1997 CanLII 6316 (ON CA), 34 O.R. (3d) 743, [1997] O.J. No. 3097, 102 O.A.C. 176, 117 C.C.C. (3d) 193, 9 C.R. (5th) 98, 45 C.R.R. (2d) 254, 35 W.C.B. (2d) 277 (C.A.); *R. v. Haas* (2005), 2005 CanLII 26440 (ON CA), 76 O.R. (3d) 737, [2005] O.J. No. 3160, 201 O.A.C. 52, 200 C.C.C. (3d) 81, 138 C.R.R. (2d) 29, 20 M.V.R. (5th) 32, 66 W.C.B. (2d) 306 (C.A.) [Leave to appeal to S.C.C. refused [2005] S.C.C.A. No. 423]; *R. v. Jacques*, 1996 CanLII 174 (SCC), [1996] 3 S.C.R. 312, [1996] S.C.J. No. 88, 139 D.L.R. (4th) 223, 202 N.R. 49, J.E. 96-1946, 110 C.C.C. (3d) 1, 1 C.R. (5th) 229, 24 M.V.R. (3d) 1, 180 N.B.R. (2d) 161, 65 A.C.W.S. (3d) 775, 32 W.C.B. (2d) 86; *R. v. Lewis* (1998), 1998 CanLII 7116 (ON CA), 38 O.R. (3d) 540, [1998] O.J. No. 376, 107 O.A.C. 46, 122 C.C.C. (3d) 481, 13 C.R. (5th) 34, 50 C.R.R. (2d) 358, 37 W @@.C.B. (2d) 269 (C.A.); *R. v. McClelland*, 1995 ABCA 199 (CanLII), [1995] A.J. No. 539, 29 Alta. L.R. (3d) 351, 165 A.R. 332, 98 C.C.C. (3d) 509, 12 M.V.R. (3d) 288, 27 W.C.B. (2d) 280 (C.A.); *R. v. Moreno-Baches*, [2007] O.J. No. 1314, 2007 ONCA 258, 43 M.V.R. (5th) 106, 73 W.C.B. (2d) 236; *R. v. Musurichan*, 1990 ABCA 170 (CanLII), [1990] A.J. No. 418, 107 A.R. 102, 56 C.C.C. (3d) 570, 10 W.C.B. (2d) 45 (C.A.); *R. v. Oliveira*, [2009] O.J. No. 1002, 2009 ONCA 219, 247 O.A.C. 156, 243 C.C.C. (3d) 217; *R. v. Perka*, 1984 CanLII 23 (SCC), [1984] 2 S.C.R. 232, [1984] S.C.J. No. 40, 13 D.L.R. (4th) 1, 55 N.R. 1, [1984] 6 W.W.R. 289, J.E. 84-1013, 28 B.C.L.R. (2d) 205, 14 C.C.C. (3d) 385, 42 C.R. (3d) 113, 13 W.C.B. 33; *R. v. R. (R.)* (2008), 90 O.R. (3d) 641, [2008] O.J. No. 2468, 2008 ONCA 497, 238 O.A.C. 242, 59 C.R. (6th) 258, 234 C.C.C. (3d) 463, 78 W.C.B. (2d) 606; *R. v. Rhyason*, [2007] 3 S.C.R. 108, [2007] S.C.J. No. 39, 2007 SCC 39, 281 D.L.R. (4th) 577, 365 N.R. 200, [2007] 9 W.W.R. 581, J.E. 2007-1504, 78 Alta . L.R. (4th) 1, 412 A.R. 282, 221 C.C.C. (3d) 1, 48 C.R. (6th) 74, 49 M.V.R. (5th) 1, 74 W.C.B. (2d) 83; *R. v. Shepherd*, [2009] 2 S.C.R. 527, [2009] S.C.J. No. 35, 2009 SCC 35, 309 D.L.R. (4th) 139, [2009] 8 W.W.R. 193, 245 C.C.C. (3d) 137, EYB 2009-161619, J.E. 2009-1373, 66 C.R. (6th) 149, 81 M.V.R. (5th) 111, 331 Sask. R. 306, 391 N.R. 132; *R. v. Smith* (1996), 1996 CanLII 1074 (ON CA), 28 O.R. (3d) 75, [1996] O.J. No. 372, 88 O.A.C. 374, 105 C.C.C. (3d) 58, 46 C.R. (4th) 229, 34 C.R.R. (2d) 314, 19 M.V.R. (3d) 262, 30 W.C.B. (2d) 37 (C.A.); *R. v. Squires* (2002), 2002 CanLII 44982 (ON CA), 59 O.R. (3d) 765, [2002] O.J. No. 2314, 159 O.A.C. 249, 166 C.C.C. (3d) 65, 7 C.R. (6th) 277, 24 M.V.R. (4th) 172 (C.A.); *R. v. Stellato* (1994), 1994 CanLII 94 (SCC), 18 O.R. (3d) 800, [1994] 2 S.C.R. 478, [1994] S.C.J. No. 51, 168 N.R. 190, 72 O.A.C. 140, 90 C.C.C. (3d) 160, 31 C.R. (4th) 60, 3 M.V.R. (3d) 1, affg (1993), 1993 CanLII 3375 (ON CA), 12 O.R. (3d) 90, [1993] O.J. No. 18, 61 O.A.C. 217, 78 C.C.C. (3d) 380, 18 C.R. (4th) 127, 43 M.V.R. (2d) 120, 18 W.C.B. (2d) 320 (C.A.); *R. v. Storrey*, 1990 CanLII 125 (SCC), [1990] 1 S.C.R. 241, [1990] S.C.J. No. 12, 105 N.R. 81, J.E. 90-372, 37 O.A.C. 161, 53 C.C.C. (3d) 316, 75 C.R. (3d) 1, 47 C.R.R. 210, 9 W.C.B. (2d) 570; *R. v. Wang*, [2010] O.J. No. 2490, 2010 ONCA 435, 95 M.V.R. (5th) 80, 256 C.C.C. (3d) 225

Statutes referred to *Canadian Charter of Rights and Freedoms*, ss. 8, 9, 10(b), *Criminal Code*, R.S.C. 1985, c. C-46, ss. 254(2), (3), 686(1)(b) (iii), 839 [as am.]

Rules and regulations referred to Criminal Appeal Rules, SI/93-169, rule 18(3)

Christopher Webb, for appellant.

David Paciocco, for respondent.

The judgment of the court was delivered by

[1] DURNO J. (ad hoc): -- A citizen called Ottawa Police reporting that the vehicle in front of him was being driven erratically, as though the driver were intoxicated. The citizen remained on the phone with police as the arresting officer was dispatched to the area. Before the officer arrived, the vehicle driven by the respondent collided with the rear end of a truck parked at the side of the road. Within roughly a minute of arriving at the scene, and without asking the respondent if he had been drinking or how the accident happened, the officer arrested the respondent for impaired operation. At the station, the respondent provided breath samples that analyzed over the legal limit.

[2] In pre-trial applications, the respondent unsuccessfully argued the arresting officer lacked reasonable and probable grounds to make an Intoxilyzer demand and arrest him and that his right to consult with counsel of choice was breached. After a trial, the respondent was found guilty of impaired driving and "over 80" with the "over 80" count conditionally stayed. He received a $700 fine and 12-month driving prohibition.

[3] On his summary conviction appeal ("SCA"), the respondent argued the trial judge erred in reversing the onus on the s. 8 *Canadian Charter of Rights and Freedoms* application in finding the officer had objective reasonable and probable grounds to make the breath demand and in failing to "adequately articulate" her reasons for concluding there was no breach of s. 10(b), as well as that the finding was unreasonable.

[4] The summary conviction appeal judge allowed the appeal and ordered a new trial, finding the trial judge reversed the onus and that he was not satisfied the trial judge assessed the totality of the surrounding circumstances in determining if the officer had reasonable and probable grounds.

[5] The Crown seeks leave to appeal, and if leave is granted, appeals against the SCA judgment seeking to have the conviction restored.

[6] For the following reasons, I would grant leave to appeal, allow the appeal and restore the conviction.

The Facts

[7] Shortly after midnight on April 17, 2004, the respondent was driving his Nissan Murano on Colonel By Drive. Before turning onto Bank St., a taxi that was behind him flashed its high-beam lights about six times. Vincent Paolucci, who was driving behind the taxi, saw the respondent swerve towards the curb. Twenty feet further up the road, the respondent bounced off the curb. After another 20 feet, the respondent drove up onto the curb, missing a light post by about one and one-half feet. Paolucci called 911 reporting his location, that he was following a silver Nissan that was bouncing off the curb and that

he believed the driver to be impaired. He remained on the phone with the dispatcher, following the Nissan until it struck the rear end of a four-by-four GMC truck parked at the roadside. His numerous attempts to get the respondent's attention by flashing his lights had no effect.

[8] Constable Lucas was dispatched to intercept the Nissan. While he did not hear what Mr. Paolucci told the operator, the dispatcher told him a civilian reported erratic driving and believed the driver was intoxicated. In his 18 years as a police officer, Constable Lucas found that type of information reliable. Before he was able to intercept Mr. Bush, the respondent collided with a truck parked against the right curb in a well-lit residential area. The collision's force propelled the truck across other lanes of traffic and into a light pole, snapping off its rear axle.

[9] At the accident scene, Constable Lucas saw the extensively damaged truck and the respondent's vehicle with extensive front-end damage. He spoke very briefly with Mr. Paolucci, who confirmed he made the call to police and identified the respondent as the Nissan's driver.

[10] The officer "bee-lined" it to the respondent, who was standing beside the Nissan and asked if he was okay. The respondent had a dazed look on his face and said he was. The officer noted an odour of alcohol on his breath, red and glassy eyes, and that he was weaving back and forth while standing. Within "a minute give or take" of his arrival, Constable Lucas arrested the respondent for impaired driving and made an Intoxilyzer demand as a result of his observations of the respondent, the information he received from the dispatcher and the accident itself. As regards the accident, the roads were clear and dry and the speed limit was 40 km/h. Earlier that shift, the officer had seen the GMC truck parked fully to the right side of the road and observed the distance the truck was moved by the impact. When making his observations of the respondent, the officer took into consideration that he had been in an accident in which his air bags deployed. Constable Lucas still believed the respondent's ability to operate a motor vehicle was impaired by alcohol.

[11] The officer acknowledged that on the basis of what the dispatcher told him, he had no grounds upon which he could believe the respondent's ability to drive was impaired by the consumption of alcohol and that he had never asked the respondent if he had been drinking or how the accident occurred. He agreed that it is not unusual for the powder from airbags to get into the eyes and cause redness and watery eyes. After he had been arrested, the respondent told the paramedics that he did not know whether he was injured.

The *Charter* Ruling

[12] The respondent argued the arresting officer objectively lacked reasonable and probable grounds to arrest and make a breath demand. He also argued that his rights to counsel were violated when he selected a lawyer from a list of counsel who were prepared to accept "off hour" calls and no message was left when the counsel could not be reached. The respondent then provided police with the name of a lawyer and on two occasions spoke to that counsel. On the s. 10(b) application, the alleged breach was that the lawyer selected from the list was his counsel of choice and the officer failed to facilitate contact with that particular counsel.

[13] At the outset of the *Charter* ruling, the trial judge correctly noted the Crown had the burden of proving that reasonable grounds existed for the breath sample demand, relying on *R. v. Haas* (2005), 2005 CanLII 26440 (ON CA), 76 O.R. (3d) 737, [2005] O.J. No. 3160 (C.A.), leave to appeal refused [2005]

S.C.C.A. No. 423. She identified the issue on the reasonable and probable grounds argument as follows [at para. 12]:

> In this case, defence counsel conceded, during his extensive cross-examination, that Lucas subjectively had reasonable and probable grounds for arrest. The issue to be determined at present is whether those grounds are justifiable from an objective point of view as per our Supreme Court of Canada in *Storrey v. The Queen*(1990), 1990 CanLII 125 (SCC), 53 C.C.C. (3d) 316. This is particularly so as this is an arrest without a warrant. *Storrey* makes plain that an officer is not obliged to establish a prima face case for conviction before making the arrest. An arrest which is lawful does not become unlawful simply because the officer intends to continue the investigation post arrest. *Storrey* also addresses the context of drinking and driving investigations and the need to strike a balance between our rights as citizens to liberty and the need to protect society and its citizens from the menace of impaired drivers.

[14] The trial judge found the arresting officer was entitled to rely on the civilian's opinion regarding the driver's intoxication. She further found that an officer receiving that type of information was not required to obtain confirmatory evidence before acting on it, citing *R. v. Golub* (1997), 1997 CanLII 6316 (ON CA), 34 O.R. (3d) 743, [1997] O.J. No. 3097 (C.A.). Mr. Paolucci was similarly situated to the civilian whose information was relied upon by the officer in *Golub*; having observed the erratic driving, called police and followed the car.

[15] The trial judge found that she had to look at the grounds collectively and not individually. In assessing whether reasonable and probable grounds existed, she found that the absence of some of the usual indicia of impairment did not detract from the probative value of those observed. While defence counsel had focused on the observations that were not made and non-alcohol related explanations for those that were, the trial judge concluded it was "not an exercise in building blocks where the incriminatory grounds lose value in the face of the absence of certain other usual grounds". An explanation for one indicator of impairment, such as red and glassy eyes, did not render the officer's observations unreliable. Finally, the trial judge found it was not necessary for the officer to have administered an approved screening device ["ASD"] before arresting the respondent.

[16] On the issue of reasonable and probable grounds, the trial judge concluded [at para. 23]:

> The accused has the burden of proving, on a balance of probabilities that his rights were violated. He has failed to do so and the motion is denied.

[17] The trial judge found no s. 10(b) *Charter* breach. The respondent selected the first lawyer from a list of names of counsel who were prepared to receive after-hours calls. There was no answer at that lawyer's number. The trial judge found the respondent told the officer not to leave a message and concluded that when the respondent gave the officer the name of a lawyer he knew and had used, that it was reasonable for Constable Lucas to be satisfied that the second lawyer was, as of then, his counsel of choice. The officers facilitated contact with the lawyer on two occasions before the first breath sample was taken. The respondent never expressed any dissatisfaction with the second lawyer's advice nor any desire to speak to the first lawyer after he began consulting the second. In these circumstances, the weight of evidence pointed to the second lawyer as the respondent's lawyer of choice.

[18] In convicting the respondent, the trial judgment's first paragraph contains the following comment:

In separate reasons issued on February 7, 2005 this Court reviewed in detail the evidence of the arresting officer, presented by the Crown, and ruled that [the] defence had not proven the alleged *Charter* violations on the required balance of probabilities.

The SCA Judgment

[19] The summary conviction appeal court quoted from the trial judgment's reference to *Storrey*, noting it was an aggravated assault case, not a case of impaired driving and that the trial judge used virtually identical language to that in *R. v. Censoni*, [2001] O.J. No. 5189, [2001] O.T.C. 948 (S.C.J.). The SCA judge accepted the respondent's argument that *Censoni* inappropriately created a lower standard of reasonable and probable grounds to be applied in drinking and driving cases. The summary conviction appeal judge concluded, "[c]onsequently, there is no express reduction in the standards required for a lawful arrest as set out in *Storrey* to meet the highway carnage referred to in newspaper editorials across the country with respect to drinking and driving."

[20] The justice on appeal continued:

> The trial judge referred to this phenomenon in these words:
>
> "Every year, drunk driving leaves a terrible trail of death, injury and destruction." [See Note 1 below] But notwithstanding such judicial concerns Sopinka, J. noted in *Bernshaw* (1994), 1995 CanLII 150 (SCC), 95 C.C.C. (3d) 193 (S.C.C.) that "the requirement of 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*. Section 8 requires that reasonable and probable grounds exist in fact and not that their presence can be deemed to exist notwithstanding the evidence." It seems to me that the trial judge may have overlooked this caveat set out [by] Sopinka, J. in *Bernshaw*, *supra*.

[21] The justice on appeal noted the arrest was made within a minute of Constable Lucas arriving at the accident and without him making further inquiries of either Mr. Bush or Mr. Paolucci. The respondent was standing around and it appeared he would have been there as long as the officer wanted to investigate. The appeal judge continued: "[i]t may be that the officer thought that alcoholic breath plus an accident equals impaired by alcohol". He found the accident "muddied the waters", as Ratushny J. held in *R. v. Uppal*, [1995] O.J. No. 5124, 1995 CarswellOnt 4566 (Prov. Ct.), a case the justice on appeal found was factually similar to the matter before him.

[22] The justice on appeal also found that the trial judge reversed the burden of proof, constituting reversible error as it was "not possible to understand [the trial judge's] analysis of the evidence if the persuasive onus was erroneously placed on the accused to justify the reasonableness of the search". The justice on appeal appeared troubled by "numerous references" in the reasons to the respondent's failure to testify which may also have resulted from the onus she erroneously placed on the respondent.

[23] The appeal judge concluded:

> I cannot be satisfied that the trial result would have been the same had the onus been placed properly on the Crown. On the basis that the only satisfactory remedy for a bad trial is a new trial which I so order, I do not consider it necessary to deal with the grounds of appeal argued

> under s. 10(b) and I make no determination on that issue since those grounds will probably be argued at the new trial.
>
> Counsel for the Crown argued that the trial judge's misplaced onus produced no reversible error, but I reject that notion because I have come to different conclusions based on how the trial judge marshaled the evidence. I am not satisfied that she assessed the totality of the surrounding circumstances. In the circumstances there will be an order for a new trial before a different judge of the Ontario Court at Ottawa.

The Leave Application

[24] In *R. v. R. (R.)* (2008), 2008 ONCA 497 (CanLII), 90 O.R. (3d) 641, [2008] O.J. No. 2468 (C.A.), Doherty J.A. summarized the test to be applied on leave applications pursuant to s. 839 of the *Criminal Code*, R.S.C. 1985, c. C-46. While there is no single litmus test, the key variables are the significance of the legal issues raised to the general administration of criminal justice and the merits of the proposed grounds of appeal. If the grounds have significance to the administration of justice beyond the particular case, leave may be granted where the grounds are arguable, even if they are not particularly strong. Where the merits appear very strong, leave may be granted even if the issues have no general importance. This is particularly so where the convictions are serious and the accused faces significant deprivation of his liberty.

[25] The Crown submits the appeal judge erroneously endorsed an approach to reasonable and probable grounds that excludes from consideration any indicia of impairment which could be attributed to another cause and requires officers to conduct interviews before determining if reasonable and probable grounds exist. The Crown submits the appeal judge erred by applying *Uppal*, a case that was wrongly decided, and asks this court to express its disapproval.

[26] The Crown also contends the trial judge's misstatement regarding the onus has to be viewed in the context of the entire judgment, including that she expressed the onus correctly at the outset of her reasons. Finally, the Crown submits the appeal judge erroneously quashed the conviction in a case where the Crown's evidence was very strong.

[27] The respondent submits the reasonable and probable grounds issue is entirely fact-driven and includes no unsettled question of law. As regards the onus, there is no dispute between the parties regarding the applicable law. The only issue is whether in this case the trial judge reversed the burden. Mr. Paciocco also submits that if this court allows the appeal and restores the conviction, the respondent will be deprived of his right to have an appellate ruling on the s. 10(b) issue because the justice on summary conviction appeal did not address that issue.

[28] Finally, and forcefully, the respondent argues that leave should be refused because of the delay in the Crown perfecting the appeal. Written reasons on the summary conviction appeal were released on May 20, 2008. This appeal was argued on March 17, 2010, 21 months later. The Crown's Notice of Application for Leave to Appeal and Notice of Appeal was filed on June 8, 2008. The last transcript for the appeal was available on July 8, 2009. In those circumstances, the appellant had until October 8, 2009 to perfect the appeal: Criminal Appeal Rules, SI/93-169, rule 18(3).

[29] By Notice of Application dated November 20, 2009, the respondent applied to have the appeal dismissed for delay. In support of the application, the respondent filed an affidavit stating that he "lived

under a constant fear and a cloud of suspicion" since the date the application for leave was filed. He had been fearful that "at any moment he could lose his license". The intervening period had been an immensely stressful time in his professional and personal life.

[30] The Crown's appeal book and factum were filed on November 24, 2009. On November 27, 2009, the return date for the application, Sharpe J.A. held that the motion was moot because the appeal had been perfected. However, Sharpe J.A. also held that the respondent could argue that leave should not be granted because of the delay before the panel hearing the appeal.

[31] I am persuaded that leave to appeal should be granted notwithstanding the inordinate delay in perfecting the appeal. Drinking and driving offences have the highest trial rate of any offences in the Ontario Court of Justice. The reasonable and probable grounds to make breath demands and arrests are frequently contested in those trials, especially where alternative, non-alcohol-related explanations emerge for the observed "usual" indicia of impairment. Along with the absence of some of the "usual" indicia of impairment, the nature of the required pre-arrest investigation and the relevance of an accident are frequently litigated.

[32] I agree that the summary conviction appeal judge implicitly endorses an approach that excludes from consideration some "explained" observed indicia of impairment in determining if reasonable and probable grounds existed, requires investigating officers to conduct interviews in assessing their reasonable and probable grounds, and finds that an accident and alcoholic breath cannot provide reasonable and probable grounds. Those findings conflict with binding and persuasive authorities to the contrary. In fairness to the SCA judge, not all of the authorities that were relied upon on this appeal were brought to his attention. I am persuaded that the issues relating to reasonable and probable grounds have significance to the administration of justice beyond the facts of this case.

[33] In addition, I would grant leave to appeal on the issue of whether the trial judge reversed the burden of proof because the summary conviction appeal judge did not address the trial judge's correct statement of the law at the outset of the reasons or whether when reading the reasons as a whole it was clear the trial judge reversed the onus. While the legal issues are not in dispute, the failure to refer to the correct statement of the onus and consider the issue in the context of the entire reasons merits review.

[34] In determining that I would grant leave, I have considered the inordinate delay in perfecting the appeal and the respondent's unchallenged affidavit regarding the effects of the delay. This issue has been addressed in previous judgments with clear warnings that significant delays will not be tolerated: see *R. v. Moreno-Baches*, [2007] O.J. No. 1314, 2007 ONCA 258; *R. v. Oliveira*, [2009] O.J. No. 1002, 2009 ONCA 219; and *R. v. Davis-Harriot*, [2010] O.J. No. 848, 2010 ONCA 161. Delays such as the one in this case, or longer, tell against arguments that the issue is of importance to the general administration of criminal law. However, delay is but one factor to be considered. I have also considered that there were 21 months between the conviction date and the date on which the respondent's SCA was heard.

Reasonable and Probable Grounds in Drinking and Driving Cases

[35] The appeal judge found the trial judge erroneously proceeded on the basis that there was a reduced standard for reasonable and probable grounds in drinking and driving cases. He also implied the trial judge determined the requisite standard was met notwithstanding the evidence.

Analysis

[36] Drinking and driving prosecutions involve a continuum of findings, beginning with a reasonable suspicion the driver has alcohol in his or her body, the standard for an approved screening device (roadside) demand pursuant to s. 254(2) of the *Criminal Code*. At the other end of the continuum, is the standard for conviction, proof beyond a reasonable doubt that the operator's ability to operate a motor vehicle was impaired by the consumption of alcohol or that the driver's blood alcohol concentration was over the legal limit.

[37] Between suspicion and proof beyond a reasonable doubt lies reasonable and probable grounds. Section 254(3) of the *Criminal Code* authorizes peace officers to demand Intoxilyzer breath samples provided the officer "has reasonable grounds to believe that a person is committing or at any time within the preceding three hours has committed" the offence of impaired operation or driving 'over 80'" (emphasis added). Reasonable and probable grounds do not amount to proof beyond a reasonable doubt or to a prima face case: see *Censoni*, at para. 31; and *R. v. Shepherd*, [2009] 2 S.C.R. 527, [2009] S.C.J. No. 35, 2009 SCC 35, at para. 23.

[38] Reasonable and probable grounds have both a subjective and an objective component. The subjective component requires the officer to have an honest belief the suspect committed the offence: *R. v. Bernshaw*, 1995 CanLII 150 (SCC), [1995] 1 S.C.R. 254, [1994] S.C.J. No. 87, at para. 51. The officer's belief must be supported by objective facts: *R. v. Berlinski*, 2001 CanLII 24171 (ON CA), [2001] O.J. No. 377, 9 M.V.R. (4th) 67 (C.A.), at para. 3. The objective component is satisfied when a reasonable person placed in the position of the officer would be able to conclude that there were indeed reasonable and probable grounds for the arrest: *R. v. Storrey*, 1990 CanLII 125 (SCC), [1990] 1 S.C.R. 241, [1990] S.C.J. No. 12, at p. 250 S.C.R.

[39] While the SCA judge correctly noted that *Storrey* involved the validity of the arrest for aggravated assault, not impaired driving, I am not persuaded the trial judge inappropriately applied a reduced standard below reasonable and probable grounds. In *Censoni*, Hill J. wrote, at para. 42:

> In *Storrey v. The Queen*, supra at 323, Cory J. articulated the overarching context of drinking/driving investigations -- the need for reasonable balance between the individual's rights to liberty and the need for society to be protected from the menace of impaired drivers. Every year, drunk driving leaves a terrible trail of death, injury, and destruction: *The Queen v. Bernshaw*, *supra* at 204; *Regina v. Saunders* (1988), 1988 CanLII 197 (ON CA), 41 C.C.C. (3d) 532 (Ont. C.A.) at 537, 539, 541 per Cory J.A. (as he then was). (Emphasis added)

[40] In *Storrey*, Cory J. addressed the importance of the requirement that officers have reasonable grounds as follows, at pp. 249-50 S.C.R.:

> The importance of this requirement to citizens of a democracy is self-evident. Yet society also needs protection from crime. This need requires that there be a reasonable balance achieved between the individual's right to liberty and the need for society to be protected from crime.

[41] In order to address the problems of drinking and driving, Parliament enacted a two-stage scheme for testing for driver impairment, the first involving roadside breath tests and the second, what has become the Intoxilyzer tests.

[42] What the trial judgment and *Censoni* appropriately examine is the context in which the officer's reasonable and probable grounds obligations operate. Neither advocated a standard of less than reasonable and probable grounds. Both examined reasonable and probable grounds in the context of a roadside investigation, an approach that is consistent with judgments of the Supreme Court of Canada and this court. Even under the *Charter*, reasonable and probable grounds can mean different things in different contexts: see *R. v. Jacques*, 1996 CanLII 174 (SCC), [1996] 3 S.C.R. 312, [1996] S.C.J. No. 88, at para. 20; *Bernshaw*, per L'Heureux-Dubé J., at para. 97; *Censoni*, at para. 38.

[43] In *Golub*, Doherty J.A. held that it did not follow that information that would not meet the reasonableness standard on an application for a search warrant would also fail to meet that standard in the context of an arrest, beginning, at para. 18 [to para. 19]:

> Both a justice and an arresting officer must assess the reasonableness of the information available to them before acting. It does not follow, however, that information which would not meet the reasonableness standard on an application for a search warrant will also fail to meet that standard in the context of an arrest. In determining whether the reasonableness standard is met, the nature of the power exercised and the context within which it is exercised must be considered. The dynamics at play in an arrest situation are very different than those which operate on an application for a search warrant. Often, the officer's decision to arrest must be made quickly in volatile and rapidly changing situations. Judicial reflection is not a luxury the officer can afford. The officer must make his or her decision based on available information which is often less than exact or complete. The law does not expect the same kind of inquiry of a police officer deciding whether to make an arrest that it demands of a justice faced with an application for a search warrant.
>
> The justice asked to issue a search warrant based on information provided by a police source is in a very different position than the police officer who is face to face with the complainant. The justice asked to issue a search warrant based on information provided by a police source cannot assess the reliability of that secondhand information without additional information from the officer pertaining to the reliability of the officer's source. The police officer faced with a complaint from a witness to events has information from a firsthand source and can question that source, if necessary. To the extent that the position of the justice and the arresting officer can be compared at all, the officer acting on a complaint from a witness to the relevant events is in a similar situation to a justice who acts on firsthand information provided by the police officer.

[44] Doherty J.A. continues in Golub, at para. 21:

> In deciding whether reasonable grounds exist, the officer must conduct the inquiry which the circumstances reasonably permit. The officer must take into account all information available to him and is entitled to disregard only information which he has good reason to believe is unreliable: *R. v. Storrey*, *supra*, at pp. 423-24; *Chartier v. The Attorney General of Quebec* (1979), 1979 CanLII 17 (SCC), 48 C.C.C. (2d) 34 at 56 (S.C.C.); *R. v. Hall* (1995), 1995 CanLII 647 (ON CA), 39 C.R. (4th) 66 at 73-75 (Ont. C.A.); *R. v. Proulx* (1993), 1993 CanLII 3677 (QC CA), 81 C.C.C. (3d) 48 at 51 (Que. C.A.).

[45] On a subsequent occasion, Doherty J.A. found police in a drinking and driving investigation were involved in making quick but informed decisions whether there were reasonable and probable grounds: see *R. v. Smith* (1996), 1996 CanLII 1074 (ON CA), 28 O.R. (3d) 75, [1996] O.J. No. 372 (C.A.).

[46] In the context of a breath demand, the reasonable and probable grounds standard is not an onerous test: see *R. v. Wang*, [2010] O.J. No. 2490, 2010 ONCA 435, at para. 17. It must not be inflated to the context of testing trial evidence. Neither must it be so diluted as to threaten individual freedom: *Censoni*, at para. 43.

[47] There is no necessity that the defendant be in a state of extreme intoxication before the officer has reasonable and probable grounds to arrest: *R. v. Deighan*, [1999] O.J. No. 2413, 45 M.V.R. (3d) 90 (C.A.), at para. 1. Impairment may be established where the prosecution proves any degree of impairment from slight to great: *R. v. Stellato* (1993), 1993 CanLII 3375 (ON CA), 12 O.R. (3d) 90, [1993] O.J. No. 18 (C.A.), affd (1994), 1994 CanLII 94 (SCC), 18 O.R. (3d) 800, [1994] 2 S.C.R. 478, [1994] S.C.J. No. 51. Slight impairment to drive relates to a reduced ability in some measure to perform a complex motor function, whether impacting on perception or field of vision, reaction or response time, judgment and regard for the rules of the road: *Censoni*, at para. 47.

[48] The test is whether, objectively, there were reasonable and probable grounds to believe the suspect's ability to drive was even slightly impaired by the consumption of alcohol: see *R. v. Stellato*, *supra*; *Moreno-Baches and Wang*, at para. 17. Where appellate courts are called upon to review the trial judge's conclusions as to whether the officer objectively had reasonable and probable grounds, the appellate court must show deference to the trial judge's findings of fact although the trial judge's ruling is a question of law reviewable on the standard of correctness: *Wang*, at para. 18.

[49] Having reviewed the reasons for judgment, I am persuaded the appeal judge erred in concluding the trial judge applied a lower standard of proof. The trial judge appropriately took into consideration the context in which the demand was made.

<u>The Relevance of the Accident and the Factors to be Examined in Assessing Whether Reasonable and Probable Grounds Existed</u>

[50] The appeal judge implied the trial judge found objective reasonable and probable grounds existed notwithstanding the evidence. He was not satisfied the trial judge considered all the circumstances in determining whether the requisite standard existed and implicitly found the trial judge took into consideration indicia of impairment that should have been ignored because there could be other explanations. He found the investigating officer might have believed that an accident plus alcoholic breath equalled impaired by alcohol and that the accident had muddied the waters.

[51] In concluding the accident muddied the waters, the appeal judge relied on *R. v. Uppal*, *supra*, where the accused was acquitted in what the SCA judge found were similar circumstances to this case. In *Uppal*, the defendant was involved in a serious motor vehicle accident in which he hit his head on the windshield. The trial judge found the driver's incoherent and dazed state, unsteadiness and apparent unawareness that there had been an accident were very possibly attributable to the effects of the accident. She found the indicia that were independent of the effects of the accident were the strong odour of alcohol, the hearsay information from dispatch that there was a possible impaired driver involved and the fact an accident had occurred. In these circumstances, the only factors the officer could

rely upon were those unrelated to the accident. Her Honour concluded [at para. 6], "Because of the accident, the visible and extensive damage to the vehicle, some apparent head injury to the accused and an obvious dazed state, the other indicia should not have been relied upon."

[52] The trial judge in Uppal concluded that the officer honestly believed all the indicia pointed to impairment. While that could have been, in the circumstances, they also could be solely attributable to the accident. Without the indicia that could have been related to the accident, the officer's belief was not reasonable and the arrest was not justifiable. What was left, a smell of alcohol, a hearsay report of a suspicion of impaired driving and an accident did not amount to reasonable and probable grounds to believe the defendant was impaired, even to the slightest degree. The trial judge concluded the fact of the accident had muddied the waters.

[53] Based in part on Uppal, on his SCA the respondent argued that the only evidence upon which reasonable and probable grounds could be determined was the odour of alcohol on the respondent's breath and the fact an accident occurred because the other indicia of impairment were capable of being explained by the accident. The remaining indicia could not amount to objective reasonable and probable grounds.

Analysis

[54] Whether reasonable and probable grounds exist is a fact- based exercise dependent upon all the circumstances of the case. The totality of the circumstances must be considered: see *Shepherd*, at para. 21; *R. v. Rhyason*, [2007] 3 S.C.R. 108, [2007] S.C.J. No. 39, 2007 SCC 39; *R. v. Elvikis*, [1997] O.J. No. 234, 31 O.T.C. 161 (Gen. Div.), at para. 26; *Censoni*, at para. 47. That an accident occurred, including the circumstances under which it occurred and the possible effects of it, must be taken into account by the officer along with the other evidence in determining whether there are reasonable and probable grounds to arrest for impaired driving. Consumption plus an unexplained accident may generate reasonable and probable grounds although that may not always be the case: *Rhyason*, *supra*, at para. 19.

[55] In assessing whether reasonable and probable grounds existed, trial judges are often improperly asked to engage in a dissection of the officer's grounds looking at each in isolation, opinions that were developed at the scene "without the luxury of judicial reflection": *Censoni*, at para. 43; also *Jacques*, at para. 23. However, it is neither necessary nor desirable to conduct an impaired driving trial as a threshold exercise in determining whether the officer's belief was reasonable: *R. v. McClelland*, 1995 ABCA 199 (CanLII), [1995] A.J. No. 539, 165 A.R. 332 (C.A.).

[56] An assessment of whether the officer objectively had reasonable and probable grounds does not involve the equivalent of an impaired driver scorecard with the list of all the usual indicia of impairment and counsel noting which ones are present and which are absent as the essential test. There is no mathematical formula with a certain number of indicia being required before reasonable and probable grounds objectively existed: *Censoni*, at para. 46. The absence of some indicia that are often found in impaired drivers does not necessarily undermine a finding of reasonable and probable grounds based on the observed indicia and available information: *R. v. Costello*, [2002] O.J. No. 93, 22 M.V.R. (4th) 165 (C.A.), at para. 2; *Wang*, at para. 21.

[57] Consideration of the totality of the circumstances includes the existence of an accident. However, that the accident could have caused some of the indicia relied upon when they could also have been caused by the consumption of alcohol does not mean the officer has to totally eliminate those indicia from consideration: *R. v. Duris*, [2009] O.J. No. 4403, 2009 ONCA 740, at para. 2. They have to be considered along with all the other indicia in light of the fact there may be another explanation. To the extent that Uppal determines otherwise, with respect, it was wrongly decided.

[58] Here the investigating officer testified that he took into consideration that the respondent had been in an accident. In assessing whether reasonable and probable grounds objectively existed, the trial judge appropriately considered that there had been an accident. However, that there might be another explanation for some of the factors the officer properly took into account in forming his opinion of impairment to drive did not eliminate the indicia or render them unreliable. I am persuaded that the appeal judge erred in finding the trial judge had permitted the accident to muddy the waters and failed to assess all the surrounding circumstances.

The Requisite Investigation and the Use of Hearsay Evidence

[59] The respondent argued that the arrest within a minute or less of the officer's arrival amounted to a "rush to justice", and that more investigation was required before making the arrest, including making a roadside breath demand, asking the respondent if he had been drinking and asking the respondent and other witnesses at the scene how the accident happened.

Analysis

[60] There is no minimum time period nor mandatory questioning that must occur before an officer can objectively have reasonable and probable grounds. There is no requirement that a roadside sample be taken. The ASD provides evidence of the blood alcohol concentration in the suspect's blood, not evidence of impairment. The trial judge correctly found that if the officer subjectively and objectively had reasonable and probable grounds that withstand judicial scrutiny, the failure to invoke the roadside screening provisions was irrelevant. If the officer's belief failed to meet the requisite standard, there was a s. 8 *Charter* violation.

[61] A trained police officer is entitled to draw inferences and make deductions drawing on experience. Here, the investigating officer had 18 years' experience. The trial judge was entitled to take into consideration that experience and training in assessing whether he objectively had reasonable and probable grounds: *Censoni*, at paras. 36 and 37. In addition, in determining whether reasonable and probable grounds exist, the officer is entitled to rely on hearsay: *R. v. Debot*, 1989 CanLII 13 (SCC), [1989] 2 S.C.R. 1140, [1989] S.C.J. No. 118, at pp. 1167 S.C.R. and 1168 S.C.R., *Costello; R. v. Lewis* (1998), 1998 CanLII 7116 (ON CA), 38 O.R. (3d) 540, [1998] O.J. No. 376 (C.A.), at paras. 15 and 16; *Censoni*, at para. 57.

[62] In *Costello*, a case not provided to the summary conviction appeal judge, Rosenberg J.A. provided an informative analysis of reasonable and probable grounds. Police were dispatched to a coffee shop on Highway 401 regarding an "intoxicated male". When the officer arrived, three civilians told him "he is on the off ramp exit in the Green Thunderbird". The officer did not stop for further information but proceeded to the ramp and stopped the Thunderbird. The driver got out of the vehicle without difficulty and approached the officer who noted an immediate odour of alcohol from the driver; his eyes were

bloodshot and he swayed from side to side. The officer arrested the driver for impaired operation. Notwithstanding that the driver did not exhibit many of the usual indicia of impairment, the trial judge found the officer had reasonable and probable grounds to arrest the driver and make a breath demand.

[63] On his summary conviction appeal (reported at [2001] O.J. No. 2109, 50 W.C.B. (2d) 151 (S.C.J.)), the court found that objectively the officer lacked reasonable and probable grounds to arrest because some of the "normal" indicia of impairment were absent and the officer had not personally interviewed the witnesses who had called police to report an "intoxicated male", thereby precluding the officer or the judge from evaluating the reasonableness or accuracy of the observation.

[64] In restoring the conviction at the Court of Appeal, Rosenberg J.A. held that the absence of some indicators that are commonly found in an impaired driver did not undermine the finding of reasonable grounds based on the tip from the civilian, as confirmed by the officer's own observations that the respondent was swaying, had an odour of alcohol and had bloodshot eyes.

[65] In *Rhyason*, where the accused struck and killed a pedestrian at a crosswalk, the arresting officer did not ask the accused how the accident occurred or if he had been drinking. After being at the scene for a few minutes, he arrested Rhyason, who had admitted he was the driver who struck the pedestrian. Rhyason was crying and had bloodshot eyes, blinked slowly, was shaking and had a moderate odour of alcohol on his breath: see, also, *R. v. Squires* (2002), 2002 CanLII 44982 (ON CA), 59 O.R. (3d) 765, [2002] O.J. No. 2314 (C.A.).

[66] In making his or her determination, the officer is not required to accept every explanation or statement provided by the suspect: *Shepherd*, at para. 23. That the officer turned out to be under a misapprehension is not determinative: *Censoni*, at para. 35. The important fact is not whether the officer's belief was accurate. It is whether it was reasonable at the time of the arrest. That the conclusion was drawn from hearsay, incomplete sources or contained assumptions will not result in its rejection based on facts that emerge later. What must be assessed are the facts as understood by the peace officer when the belief was formed: *R. v. Musurichan*, 1990 ABCA 170 (CanLII), [1990] A.J. No. 418, 107 A.R. 102 (C.A.).

[67] An officer is required to assess the situation and competently conduct the investigation he or she feels appropriate to determine if reasonable and probable grounds exist. In some cases, that might include interviewing witnesses and/or the suspect if necessary: *Golub*, at para. 19. In others, the officer's observations and information known at the time may readily establish the requisite grounds.

[68] Here, the officer could have asked the respondent if he had consumed alcohol. What weight the officer attached to the answer would have been for the officer to determine. If he said he had one beer or nothing to drink, the officer was not required to accept what he was told and terminate the investigation.

[69] The officer could have asked the respondent how the accident occurred. However, if he provided an explanation unrelated to intoxication, the officer was not required to accept the explanation and eliminate the accident from consideration. At trial, the respondent admitted that he hit the curb because he was making cellphone calls and looking up numbers as he drove. His cellphone records confirmed he made six calls to his girlfriend which were continually disconnecting within five minutes of

the accident. Continuing to make telephone calls while driving into curbs could also be seen as a sign of impairment: see *Shepherd*, at para. 23.

[70] The issue is not whether the officer could have conducted a more thorough investigation. The issue is whether, when the officer made the breath demand, he subjectively and objectively had reasonable and probable grounds to do so. That the belief was formed in less than one minute is not determinative. That an opinion of impairment of the ability to operate a motor vehicle can be made in under a minute is neither surprising nor unusual.

[71] Here, the officer could rely on the report of erratic driving that appeared to be consistent with the driver being intoxicated, that the driver had struck a truck the officer knew was parked at the extreme side of the road with ample space for cars to pass, propelling the truck to the other side of the road, that the respondent had the odour of alcohol on his breath, bloodshot eyes and was swaying. Finally, when the officer asked the respondent if he was okay, he said that he was.

[72] On this record, the trial judge considered the appropriate factors and correctly concluded the officer objectively had reasonable and probable grounds. There was ample evidence to support that conclusion.

The Reversal of the Burden of Proof

[73] At the outset of the written *Charter* ruling, the trial judge correctly noted that because the breath samples were obtained as a result of a warrantless search, the onus was on the Crown to establish Constable Lucas had reasonable and probable grounds to make the demand referring to *Haas*, *supra*. At the end of the "reasonable and probable grounds" section of the ruling, however, the trial judge concluded that the respondent had not met the onus of establishing the breach on a balance of probabilities. Without reference to the initial correct statement regarding the onus, the summary conviction appeal judge found the trial judge committed reversible error by reversing the onus. He found it was not possible to understand the trial judge's analysis of the evidence if the persuasive burden was erroneously placed on the respondent to justify the reasonableness of the search.

[74] On the summary conviction appeal, the Crown, not Mr. Webb, argued that the reasons had to be read as a whole to determine if the onus was reversed although he agreed that at one point the trial judge "oversimplifies the onus" and may very well have misstated it. In this court, the Crown submits for the first time that the trial judge was referring to the s. 9 [*Charter*] application when she referred to the onus being on the respondent. On that application, the onus was properly on the respondent.

[75] In addition to the last two sentences of the reasonable and probable grounds analysis, the respondent relies on three instances in the reasonable and probable grounds reasons when the trial judge noted the respondent did not testify on the *Charter* application in support of his argument that the onus was reversed.

[76] Finally, the respondent relies upon the trial judge's reference at the outset of the trial judgment that the respondent had failed to meet the onus on all *Charter* applications.

Analysis

[77] A trial judge's failure to apply the correct burden of proof is an error of law. In determining whether the trial judge erred, the reasons must be read as a whole and not held to an abstract standard of

perfection. Misstatements do not necessarily undermine the reasons, requiring appellate intervention: *Rhyason*, *supra*, at para. 10. In *Rhyason*, the trial judge said the officer required only evidence of consumption, not impairment, before making an Intoxilyzer demand. The majority held that when the reasons were read as a whole, that was not the test the trial judge applied.

[78] In *H. (F.) v. MacDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, [2008] S.C.J. No. 54, the Supreme Court provided guidelines for examining allegations the trial judge applied an incorrect standard of proof. Where the judge does not express an opinion on the onus, it will be presumed that the correct standard was applied because trial judges are presumed to know the law with which they routinely work: *R. v. Burns*, 1994 CanLII 127 (SCC), [1994] 1 S.C.R. 656, [1994] S.C.J. No. 30, at p. 664 S.C.R. Where the judge states the onus correctly, it will be presumed it was correctly applied in the absence of a clear indication to the contrary. Finally, where the trial judge expressly states the incorrect onus, it will be presumed that it was applied in that manner: *H. (F.)*, at para. 54. Here, where conflicting onuses were stated, it is necessary to examine the balance of the reasons to determine if the onus was correctly applied.

[79] First, I am not persuaded that the trial judge was referring to s. 8 in the opening paragraph and s. 9 in the last two sentences of the reasons. The trial judge made no reference to s. 8 or s. 9 of the *Charter* in the reasons. In the reasonable and probable grounds segment, she used "demand" and "arrest" interchangeably. In *Shepherd*, released after the summary conviction appeal in this case, the Supreme Court, in examining reasonable and probable grounds in a drinking and driving case involving an accident, noted that none of the three courts below had examined the issue in reference to s. 9, concluding, at para. 14, "based on the facts of this case, nothing would be added by an analysis under s. 9". The same comments apply here. It is difficult to see why the trial judge would refer to the s. 9 application for the first time in the concluding sentences of her analysis. Examining the attempt to draw a distinction between the different *Charter* applications does not assist in determining whether the trial judge applied the correct onus.

[80] I am also not persuaded the trial judge's references to the respondent not testifying assists in determining if the onus was reversed. The first reference was in the same paragraph in which the onus was correctly stated and immediately following a reference to the respondent's s. 10(b) *Charter* application upon which he had the onus. The second reference correctly noted there was no evidence the officer made an angry comment to the respondent because the officer denied it in cross-examination and the respondent did not testify. The final reference was in relation to the respondent's physical condition after the accident, an area the respondent relied upon as evidence of an "innocent" explanation for the observed indicia of impairment. The trial judge fairly noted the respondent gave no evidence about his physical symptoms on the *voir dire*. Finally, all three references occur in the portion of the reasons where the evidence is being reviewed and not in the analysis.

[81] Of greater importance are the trial judge's four references in four paragraphs in the course of the s. 10(b) analysis to his failure to testify on the application -- an application upon which he had the onus. In those same paragraphs, the trial judge found that it bore repeating that the burden was on the respondent. When contrasted with the absence of references to the respondent not testifying in the reasonable and probable grounds analysis, these aspects of the reasons support an inference the correct onus was applied. I would also note that trial counsel saw fit to file 53 cases on reasonable and probable grounds and 59 on the right to counsel. The trial judge reserved judgment and reviewed all the cases. It

is reasonable to conclude that the trial judge had the correct onus repeatedly reinforced when reading those cases.

[82] Reviewing the reasons and eliminating the conflicting onus references, there is no indication that the wrong onus was applied. At one point, the trial judge emphasized that it was a warrantless search albeit without reference to its impact on the onus. Her Honour in examining and rejecting the defence submissions provides valid reasons why there was no rush to judgment, that an ASD breath sample was not required, and why the absence of some of the usual indicia of impairment and "innocent" explanations for some that were observed did not result in a breach of s. 8 of the *Charter*. The trial judge states several non-onus related principles correctly, finds the facts were similar to *Squires* and that Mr. Paolucci was similarly situated to the civilian in *Golub*. *Squires* and *Golub* were both cases involving warrantless searches with the onus on the Crown.

[83] Eliminating the conflicting onus references, two aspects of the rulings are problematic. First, at the outset of the trial judgment, six months after the *Charter* ruling, the trial judge noted that in previous reasons she had "ruled that [the] defence had not proven the alleged *Charter* violations on the required balance of probabilities" (emphasis added). The reference to multiple violations reflected the blended nature of the *voir dire*. While the respondent bore the onus on the s. 10(b) application, the Crown bore the onus on the s. 8 application because it was a warrantless search. Second, it cannot be suggested that the *Charter* ruling references were slips of the tongue because both were written reasons.

[84] In the end, however, having reviewed the reasons as a whole and applying *H. (F.)*, I am satisfied the trial judge applied the correct test, notwithstanding her contradictory bookend remarks at the beginning and end of her analysis. The trial judge stated the correct onus at the outset with a reference to binding authority and misstated it six pages later. The onus on a warrantless search is a law with which trial judges routinely work. I am persuaded the erroneous two lines are more a reflection of being drafted and edited without the required diligence and not a reflection of the onus that was applied.

[85] Even if the trial judge applied the wrong onus, however, it would have made no difference. She considered the appropriate factors in arriving at her decision on reasonable and probable grounds, and arrived at the correct decision because, applying the earlier analysis, the Crown had established the officer objectively had reasonable and probable grounds. The result would inevitably have been the same: s. 686(1)(b)(iii).

The Right to Counsel Issue

[86] The respondent's argument that if the conviction were restored, he would be deprived of appellate review of the trial judge's dismissal of his s. 10(b) *Charter* application because the summary conviction appeal judge did not deal with the issue, can be dealt with briefly, having reviewed the complete transcript of the respondent's argument on the issue on the summary conviction appeal. Counsel argued the trial judge failed to "adequately articulate" her reasons for dismissing the s. 10(b) *Charter* application and sought to challenge the trial judge's "incorrect" findings of fact that "misapprehended and failed to consider some of the essential evidence", arguing Constable Lucas' evidence on the issue was neither credible nor reliable. It was "quite Darwinian" as it evolved over the course of the dates upon which he testified as new information was brought to his attention.

[87] First, the respondent was entitled to raise any additional issues not referred to by the Crown in opposing the appeal: *R. v. Perka*, 1984 CanLII 23 (SCC), [1984] 2 S.C.R. 232, [1984] S.C.J. No. 40. The respondent did not raise the s. 10(b) ruling as an additional issue

[88] Second, the alleged s. 10(b) breach occurred at the station after the respondent's arrest and would not have resulted in the exclusion of the pre-breach evidence, the evidence upon which he was convicted of impaired operation.

[89] Third, the trial judge made findings of fact that were available on the evidence and provided adequate reasons in support of her factual conclusions. While the officer had few notes on the right to counsel issue, she found that his credibility was not undermined. Her Honour reviewed the issues raised by counsel during his vigorous cross-examination of the officer. That the respondent disagrees with those findings or indeed that another judge might have reached a different conclusion is not the test on appeal. Provided the findings are reasonable, as here, the appellate court is not entitled to re-try the case and substitute its view of the evidence.

[90] Based on the trial judge's factual findings, the respondent selected a name off a list, the call was made without success and he did not ask that a message be left. He then provided the officer with the name of a lawyer of his own independent selection whose name was not on the "after hours" list, the officer located the number in the phone book and the respondent spoke to that lawyer twice before providing breath samples. The trial judge's key factual finding was that it could not be said the first lawyer remained his counsel of choice once he provided the name of a lawyer with whom he had previous dealings in the absence of any evidence by the respondent. There could be no challenge to the informational or implementational component of the rights to counsel in regards to the counsel whose name he provided.

[91] There was no evidence the respondent had any connection with the first lawyer, nor any evidence the advice he received from the counsel he next turned to for assistance was in any way defective. In these circumstances, the argument that the first lawyer was his only true counsel of choice had no reasonable prospect of successfully establishing a breach or excluding any evidence. Even if there was no call made to the first lawyer as the respondent contended on the SCA based on the first lawyer's phone records and the cross-examination, in spite of the officer's notation "01:04 selects Bloom - 2666554 no answer" and his investigative action report notation, "Bush did not want to leave a message", the argument that the first lawyer was his only true counsel of choice had no reasonable prospect of successfully establishing a breach or excluding any evidence.

[92] In these circumstances, there is no unfairness to the respondent.

Conclusion

[93] For the foregoing reasons, I would grant leave to appeal, allow the appeal and restore the conviction and sentence.

Appeal allowed.

Notes

Note 1: This quote was inaccurately attributed to the trial judge. The comment appears in *Bernshaw*, at para. 16.