

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v.* [REDACTED]
2016 BCSC 1336

Date: 20160719
Docket: 39158
Registry: Campbell River

Between:

Regina

Respondent

And

[REDACTED] [REDACTED]

Appellant

Before: The Honourable Mr. Justice Thompson

On appeal from: An order of the Provincial Court of British Columbia,
dated June 24, 2015 (*R. v.* [REDACTED] Campbell River Docket No. 39158-1)

Reasons for Judgment

Counsel for the Appellant: R. Neary

Counsel for the Respondent: T. Morgan

Place and Dates of Hearing: Nanaimo, B.C.
February 18, 2016
June 10, 2016

Place and Date of Judgment: Campbell River, B.C.
July 19, 2016

SUMMARY: Appeal by [REDACTED] from his conviction for having care or control of a motor vehicle with a blood alcohol level exceeding .08. [REDACTED] was sentenced to 30 days' imprisonment and a two-year driving prohibition. He took the position that the trial judge failed to take account of relevant evidence in reaching the conclusion that the ASD fail provided reasonable grounds for the breathalyzer demand. He submitted that he made statements both before and after the ASD fail that reasonably ought to have caused the police officer to question the reliability of the ASD fail.

HELD: Appeal allowed.

The trial judge misdirected herself to ignore relevant evidence that arose between the ASD test and the breathalyzer demand. The trial judge's reasons, read as a whole, did not properly respond to the critical question of whether it was objectively reasonable for the officer to rely on the ASD fail. The error was not minor, harmless, or trivial. A new trial was necessary.

[1] Mr. [REDACTED] was tried on a two-count information. He was convicted of having care or control of a motor vehicle having consumed alcohol in such quantity that the concentration thereof in his blood exceeded 80 mg of alcohol in 100 ml of blood, and sentenced to 30 days' imprisonment and a two year driving prohibition. He was acquitted on the impaired driving count. Mr. [REDACTED] brings a summary conviction appeal.

[2] At approximately 8 p.m. on 13 December 2013, Cst. Dormuth pulled over a pickup truck. Mr. [REDACTED] was driving. He was the truck's sole occupant. Shortly thereafter, the police officer made a demand for and administered a test at roadside using an approved screening device (the "ASD"). The test resulted in a "fail" indication. This was followed by a demand that Mr. [REDACTED] accompany the police officer for the purpose of providing further breath samples (the "breathalyzer demand"). Mr. [REDACTED] provided two breath samples at the RCMP detachment, and the Certificate of a Qualified Technician indicates results of 200 mg and 190 mg of alcohol in 100 ml of blood.

[3] Mr. [REDACTED] advances one ground of appeal, and his argument is summarized at the outset of his statement of argument:

It is submitted that the Trial Judge erred when, in considering an application to exclude breathalyzer results on the basis that the seizure was made without [reasonable and probable grounds], and therefore violated s. 8 of the Charter, she concluded that statements from the accused suggesting the possible presence of mouth alcohol, made prior to the issuance of the breathalyzer demand, were irrelevant because the accused had already taken and failed an ASD test . . .

In other words, the Trial Judge held that it did not matter that the investigating officer had information that cast doubt on the reliability of the ASD fail because that information only emerged after the fail result was obtained, notwithstanding that at the time the officer received the information he had yet to make the breathalyzer demand. The accused says this was a significant error because it was clear from the investigating officer's evidence that the ASD fail was crucial to his making the breathalyzer demand, and had the Trial Judge not erred as described it is impossible to say how she would have ruled on the accused's application to exclude the breathalyzer results.

[Emphasis in original]

I

[4] The right to appeal in a summary conviction case is governed by Part XXVII of the *Criminal Code*, R.S.C. 1985, c. C-46. Section 822(1) provides that in a summary conviction appeal pursuant to s. 813, certain sections in Part XXI apply, including s. 686:

686(1) On the hearing of an appeal against conviction ... the court of appeal

(a) may allow the appeal where it is of the opinion that

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or,

(iii) on any ground there was a miscarriage of justice;

(b) may dismiss the appeal where

...

(ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (a), [or,]

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred ...

(2) Where a court of appeal allows an appeal under paragraph (1)(a), it shall quash the conviction and

(a) direct a judgment or verdict of acquittal to be entered; or

(b) order a new trial.

[5] The appellant submits that by removing from consideration what occurred after the ASD fail and before the breathalyzer demand, the trial judge failed to take account of relevant evidence in reaching the conclusion that the ASD fail provided reasonable grounds for the breathalyzer demand. In *Harper v. The Queen*, [1982] 1 S.C.R. 2 at 14, the Supreme Court of Canada affirmed the principle that while an appellate court is not to reassess evidence at trial, the record may be examined to determine if the trial court has properly directed itself to all of the evidence bearing on the relevant issues:

An appellate tribunal has neither the duty nor the right to reassess evidence at trial for the purpose of determining guilt or innocence. The duty of the

appellate tribunal does, however, include a review of the record below in order to determine whether the trial court has properly directed itself to all the evidence bearing on the relevant issues. Where the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence, then it falls upon the reviewing tribunal to intercede.

II

[6] Argument before the trial judge and on appeal focused on the roadside conversation between Cst. Dormuth and Mr. [REDACTED]. The roadside events were captured by a video from a dashboard-camera and audio produced by a microphone worn by Cst. Dormuth. (The video and audio was played at trial, but the transcript of the proceedings at trial simply notes that fact and does not contain a verbatim account of the conversation between Cst. Dormuth and Mr. [REDACTED]. At the outset of the appeal, counsel played the video and audio. I have transcribed the following account of the relevant parts of their conversation.)

[7] The relevant part of the conversation began shortly after Mr. [REDACTED] truck was pulled over, and when Cst. Dormuth was at the driver's side window:

Cst. Dormuth:	Okay, how much have you had to drink tonight?
Mr. [REDACTED]	Nothing --
Cst. Dormuth:	When was the last time --
Mr. [REDACTED]	-- absolutely nothing.
Cst. Dormuth:	When was the last time you had anything to drink?
Mr. [REDACTED]	Uh ... probably three days ago.
Cst. Dormuth:	Really?
Mr. [REDACTED]	I don't drink so --
Cst. Dormuth:	Why?
Mr. [REDACTED]	I already had an impaired charge. I don't do it.
Cst. Dormuth:	Okay, well you talk -- showing some signs that would make me have -- kind of wonder here.
Mr. [REDACTED]	Nope.
Cst. Dormuth:	So if you provided a sample on the roadside screening device it'll be all zeroes?
Mr. [REDACTED]	I would think so.

[8] Cst. Dormuth had detected a smell of alcohol and wanted to discern if it was coming from the vehicle or from Mr. [REDACTED]. He asked Mr. [REDACTED] to get out of his vehicle and Mr. [REDACTED] did so. A few moments later, Cst. Dormuth made the ASD demand. Their conversation continued:

Cst. Dormuth:	Okay, anything in your mouth right now?
Mr. [REDACTED]	No.
Cst. Dormuth:	Okay, lift your tongue up, okay, perfect, thank you.
Mr. [REDACTED]	I've had a couple beer, but -- I might -- I might fail on the roadside, but --
Cst. Dormuth:	So now you've had a couple of beer?
Mr. [REDACTED]	Well, I was at my brother's, so --
Cst. Dormuth:	Okay, so first you tell me you haven't drank for three days. Now it's a couple beer.
Mr. [REDACTED]	Well, earlier --
Cst. Dormuth:	See how things change?
Mr. [REDACTED]	Yeah, I understand what you're saying.
Cst. Dormuth:	And I'm also getting an odour, quite an odour of liquor now from your breath as we're standing close together like this, okay. So, when was your last drink? If it's been within the last 15 minutes it's going to give me a false reading and I don't want that. I want a true reading on the roadside screening device.
Mr. [REDACTED]	Uh...I'm going to say 20 minutes ago, maybe. I had two beer --
Cst. Dormuth:	Okay.
Mr. [REDACTED]	-- at my brother's. But, normally -- no. Everybody lies.
Cst. Dormuth:	Alright -- I don't really make a habit of that.
Mr. [REDACTED]	Well they do -- but they do. I know you -- they lie --
Cst. Dormuth:	Okay.
Mr. [REDACTED]	-- I'm being honest.

[9] The ASD test was administered and Cst. Dormuth told Mr. [REDACTED] of the ASD fail. He told Mr. [REDACTED] that the ASD was designed so as to not give a "fail" reading until 100 mg percent. The conversation continued:

Cst. Dormuth:	So right now --
Mr. [REDACTED]	That's a --

Cst. Dormuth: -- you've got -- you've got a 100 milli -- millilitres -- milligrams of alcohol in a 100 millilitres of --

Mr. [REDACTED] But I only had two beer in the last --

Cst. Dormuth: Well --

Mr. [REDACTED] -- few minutes so --

Cst. Dormuth: In the last few minutes?

Mr. [REDACTED] Yeah.

Cst. Dormuth: Okay --

Mr. [REDACTED] Well --

Cst. Dormuth: -- now it's changing.

Mr. [REDACTED] In the last 20 -- 20 minutes probably, or 20 --

Cst. Dormuth: Uhm, hmm.

Mr. [REDACTED] -- yeah, not very long. Anyway -- so -- so, is -- uh --

Cst. Dormuth: Just one second.

Mr. [REDACTED] I'm just trying to understand it.

Cst. Dormuth: That means you've got over the legal limit in your body. Your ability to operate a motor vehicle is impaired.

[10] Cst. Dormuth proceeded to make the breathalyzer demand. Section 254(3) provides that in order to make a breathalyzer demand, a peace officer must believe on reasonable grounds that a person is committing, or at any time within the preceding three hours has committed, an offence under s. 253 [impaired driving or over .08] as a result of the consumption of alcohol. Cst. Dormuth testified that the ASD fail was his reason for making the breathalyzer demand. Cst. Dormuth gave evidence during cross-examination about his belief that the ASD result was reliable:

Q. ...You understood, before requesting Mr. [REDACTED] to blow into the ASD, and that if he'd had a drink in the last 20 minutes, one form of contamination, you needed to ensure that an adequate waiting period occurred before he blew into the instrument to produce as accurate a sample as could be?

A. If he had a drink within the 15 minutes we would wait.

Q. Okay. And I'm going to -- I already asked you this, but I'll take you back. When -- use the expression coughed up and said -- and acknowledged to you that he'd had a couple of drinks before he blew into the instrument, and he said "in the last few minutes", and he said "20 minutes", and he said "not very long", you couldn't be sure, at that point, whether he'd had a drink in the preceding 20 minutes?

- A. He told me "20 minutes" and that's what I believed.
- Q. You already acknowledged to me, Constable, that what he said was -- and we can play the tape back -- I think --
- A. Mm-hmm.
- Q. -- it was at around 20:05, "in the last few minutes"; then he said "20 minutes" and then he said "not very long", and it was -- it was pretty rapid --
- A. Right.
- Q. -- that he said that? And at that time you had no way of determining whether there was any other form of contamination, such as burping, belching, I think you call it a wet burp?
- A. Correct.
- Q. Call it a wet burp. In the preceding 20 minutes?
- A. Not within the preceding 20, but you know --
- Q. Or even in the preceding 15 minutes?
- A. Not preceding 15, no, 'cause I wasn't with him with -- for the preceding 15.
- Q. And because of that you weren't in a position where you could insure a proper result from the ASD?
- A. It was my understanding that he hadn't had anything to drink for the 20 minutes and that's what I went by.
- Q. "In the last few minutes"?
- A. Mm-hmm.
- Q. "Twenty minutes -- not very long"?
- A. Correct.

[11] The evidence that is critical to this appeal can be summarized as follows:

1. Before the ASD demand, Cst. Dormuth was told by Mr. [REDACTED] that his last drink was probably three days before.
2. After the ASD demand but before the ASD test, Mr. [REDACTED] told Cst. Dormuth that he had drank a couple of beer. Cst. Dormuth explained that he needed to know whether the last drink was within the past 15 minutes because he wanted to avoid getting a false ASD reading. Mr. [REDACTED] replied, "I'm going to say 20 minutes ago, maybe."

3. The ASD test was conducted. After the ASD fail, Mr. [REDACTED] said, "But I only had two beer in the last few minutes." When Cst. Dormuth suggested that Mr. [REDACTED] story seemed to be changing, Mr. [REDACTED] said: "In the last 20 -- 20 minutes probably, or 20 -- yeah, not very long."
4. Cst. Dormuth testified that he was told by Mr. [REDACTED] that he had not had a drink for 20 minutes, and that he believed this to be true. Cst. Dormuth proceeded to make a s. 254(3) breathalyzer demand.

III

[12] Where evidence is obtained by a warrantless search or seizure, the onus is on the Crown to show, on a balance of probabilities, that the search or seizure was reasonable. To be reasonable, a search must be authorized by law, the authorizing law must be reasonable, and the search must be carried out in a reasonable manner: *R. v. Collins*, [1987] 1 S.C.R. 265 at 278; *R. v. Shepherd*, 2009 SCC 35 at para. 15. The Crown's onus in this case was to show on a balance of probabilities that the search was carried out in a reasonable manner, *i.e.*, that Cst. Dormuth had the "reasonable grounds to believe" necessary to make a s. 254(3) breath demand. Evidence must always be "clear, convincing and cogent...to satisfy the balance of probabilities test": *F.H. v. McDougall*, 2008 SCC 53 at para. 46.

[13] The "reasonable grounds to believe" requirement has a subjective and an objective component. The subjective part is satisfied if the peace officer has an honest belief that the individual has driven while impaired or "over .08" within the preceding three hours: *R. v. Bernshaw*, [1995] 1 S.C.R. 254 at para. 48; *R. v. Shepherd*, at para. 17. On appeal, Cst. Dormuth's honest belief is conceded by Mr. [REDACTED]

[14] The objective component requires proof by the Crown of reasonable grounds for Cst. Dormuth's belief. The question for a trial judge was distilled in *R. v. Gunn*, 2012 SKCA 80 at para. 8:

Where an individual challenges the validity of a breath-demand on the basis that the police officer's belief was not reasonable, the question for the trial judge is whether, on the whole of the evidence adduced, a reasonable person standing in the shoes of the officer would have believed the individual's ability to operate a motor vehicle was impaired ... This is a question of law and a trial judge's answer to it is measured on appeal against the yardstick of correctness (see *R. v. Shepherd*).

[Emphasis added]

[15] The correct moment for assessing the reasonableness of the peace officer's grounds for belief is the time that the s. 254(3) demand is made. The trial judge must consider the totality of the evidence up until the time of the demand. See *R. v. Slippery*, 2014 SKCA 23 at paras. 21-22; *R. v. Musurichan*, 1990 ABCA 170 at para. 10; *R. v. Gavin*, [1993] P.E.I.J. No. 136 at para. 7.

IV

[16] Mr. [REDACTED] argument is that he made statements both before and after the ASD fail that reasonably ought to have caused Cst. Dormuth to question the reliability of the ASD fail. In particular, Mr. [REDACTED] relies on the fact that when he said "I'm going to say 20 minutes ago, maybe" before the ASD test, this should reasonably have been received by Cst. Dormuth as a clear signal that 20 minutes was only an estimate. And, when Mr. [REDACTED] said, after the ASD fail, "But I only had two beer in the last few minutes" and, "In the last 20 -- 20 minutes probably, or 20 -- yeah, not very long," Mr. [REDACTED] submits that this should have added to the concern that his most recent drink may have occurred within 15 minutes and caused an unreliable ASD fail. Mr. [REDACTED] argues that since the only reason put forward by Cst. Dormuth for making the breathalyzer demand was the ASD fail, if the ASD fail cannot be shown to be reliable then the s. 254(3) requirement of belief on reasonable and probable grounds cannot be made out and a s. 8 *Charter* breach is thereby established.

[17] The question is whether a reasonable person in the shoes of this experienced police officer, at the time the breathalyzer demand was made, would have believed Mr. [REDACTED] ability to operate a motor vehicle was impaired. In this case, because the demand was made solely on the ground of the ASD fail, this reduces to the question of whether it was objectively reasonable for Cst. Dormuth to rely on the ASD fail. The argument is that it was not objectively reasonable because of uncertainty over whether Mr. [REDACTED] had his last drink inside or outside the 15 minute holding period.

[18] The trial judge's written reasons are not indexed or reported so I will quote relevant extracts in their entirety. She summarized her understanding of the accused's argument:

[6] Mr. [REDACTED] argues that the ASD test results should not be admitted as evidence in circumstances in which Cst. Dormuth knew or ought to have known that the test results would be unreliable. Mr. [REDACTED] asserts that consumption of alcohol in the 15 to 20 minutes before the ASD test is given can produce a false "Fail". Cst. Dormuth, he says, could have waited for a period of 20 minutes before giving the test to exclude contamination by residual "mouth alcohol".

[7] Flowing from that, Mr. [REDACTED] submits that without the results of the ASD test to rely on, Cst. Dormuth lacked the requisite reasonable grounds to believe an offence under s. 253 of the *Criminal Code* had been committed and therefore, Cst. Dormuth was not authorized by law to make the demand that Mr. [REDACTED] submit breath samples for Breathalyzer testing.

[8] Mr. [REDACTED] applies pursuant to Sections 7, 8, 9 and Sections 24(1) and 24(2) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), to exclude the ASD test results and the Certificate of a Qualified Technician and also [seeks] a judicial stay of proceedings resulting from the breach of the aforementioned Charter rights.

[19] After reading these three paragraphs, I reviewed the transcript of the arguments made to the trial judge. With respect, the submission made by defence counsel at trial (who is not counsel appearing on the appeal) in relation to the alleged *Charter* breaches was not a model of clarity. On the hearing of the appeal, I queried whether the foundation of Mr. [REDACTED] argument on appeal — *i.e.*, that he made statements both before and after the ASD test that ought reasonably to have caused Cst. Dormuth to doubt the reliability of the ASD fail — is an argument that was advanced at trial. However, Mr. Morgan for the Crown, in his usual fair manner,

conceded that this point was made in the course of the submissions on behalf of the appellant at trial.

[20] Returning to the trial judge's reasons, after reviewing the facts and noting the requirement for "reasonable grounds to believe" in order to make a lawful s. 254(3) demand for breath samples, the trial judge undertook an analysis under the heading, "Did Cst. Dormuth administer the ASD properly?" The trial judge's analysis of this question she posed to herself dealt squarely with one of the arguments advanced at trial: the contention that Cst. Dormuth ought to have delayed the ASD test when he was told by the appellant that he had a "couple of beer...20 minutes ago, maybe":

[44] ... A great deal of argument centered around whether or not Cst. Dormuth knew or ought to have known that the ASD results would not have been proper or accurate after Mr. [REDACTED] finally admitted that he had consumed "two beer" twenty minutes before. It is suggested that Cst. Dormuth could simply have delayed the administration of the ASD test.

[45] A number of impaired and "over 08" cases were before the Ontario Superior Court of Justice in a case indexed as *R. v. Mastromartino*, [2004] O.J. No. 1435, 80 O.R. (3d) 540. Justice Durno provided a very helpful analysis of the law regarding the administration of ASD tests which has been followed [by] the courts in BC. I take the following relevant principles from that case:

A police officer is not required to wait before administering the ASD test even where the driver may have been in a bar shortly before being stopped;

The mere possibility that a driver has consumed alcohol within 15 minutes before taking the test does not preclude an officer from relying on the accuracy of the ASD;

Whether an officer is required to wait is to be determined on a case by case basis but [the] officer must, at a minimum, consider whether or not they could obtain a reliable result without a delay.

[46] The evidence before me is that Cst. Dormuth's RCMP training provides that there must be a minimum 15 minute delay between the time a driver has consumed alcohol and provides a breath sample for the ASD. This is to eliminate the possibility of a false "Fail" result from residual alcohol left in the mouth.

[47] Cst. Dormuth was alive to that issue and specifically questioned Mr. [REDACTED] and, indeed, advised him why it was important that he know if any alcohol had been consumed within the past 15 minutes. Initially, Mr. [REDACTED] had denied having any alcohol for 3 days but after Cst. Dormuth told him about the importance of this factor, Mr. [REDACTED] reluctantly in my view, said; "I am going to say 20 minutes ago. I had two beer." "I am being honest."

[48] Whether or not there should be a delay before administering the ASD depends upon all the circumstances — whether the driver is observed leaving a bar; the strength of the smell of alcohol on the breath of the individual; the presence of alcohol in the vehicle and within reach of the accused; what the accused says about recent consumption and whether or not this is believed by the officer: *R. v. Shepherd*, 2009 SCC 35, cited in *R. v. Seivewright*, 2010 BCSC 163.

[49] Mr. [REDACTED] was not seen leaving a bar and there was no alcohol seen in the vehicle until after the ASD was given and Cst. Dormuth went to the vehicle to retrieve Mr. [REDACTED] wallet when he found alcohol in the back of the extended cab. Mr. [REDACTED] initially said he consumed no alcohol and Cst. Dormuth didn't believe him. But when Mr. [REDACTED] finally and reluctantly admitted he had two beer about 20 minutes prior and told Cst. Dormuth that he was being honest, Cst. Dormuth was, in my view, entitled to accept that he would be able to obtain an accurate result.

[50] I find that even if Cst. Dormuth disbelieved Mr. [REDACTED] there is no evidence that was available to Cst. Dormuth that Mr. [REDACTED] had consumed alcohol within the 15 [minute] time period prior to the demand and the ASD test. A mere possibility that Mr. [REDACTED] had consumed alcohol within 15 minutes of the ASD sample does not require an officer to delay an ASD test.

[51] I was referred to the decision of Mr. Justice Metzger in *Seivewright* in which the ASD results were inadmissible due to failure of the officer to delay the test in the face of recent consumption of alcohol. That case is distinguishable in that Mr. Seivewright was seen by the officer leaving a bar and he was pulled over shortly thereafter, and although he initially denied alcohol consumption, he eventually acknowledged having consumed alcohol within the previous twenty minutes. Furthermore, the officer acknowledged that the consumption of alcohol could have been as recent as a few minutes prior to the ASD demand.

[52] Mr. [REDACTED] argues that Cst. Dormuth should have waited a longer period of time especially due to the fact that Mr. [REDACTED] also told Cst. Dormuth he had the two beer “in the last few minutes”. Mr. [REDACTED] statement “in the last few minutes” was after Cst. Dormuth had already administered the ASD test and is of no assistance to Mr. [REDACTED]. Mr. [REDACTED] also followed that statement by saying “in the past 20 minutes.” The assessment of Cst. Dormuth’s actions must be based on the evidence he had in the time leading up to the ASD demand and test.

[53] I also considered Cst. Dormuth’s evidence that RCMP training is that a 15 minute delay is required between a subject’s last alcoholic drink and the ASD test. It was suggested on cross examination that the manufacturer’s recommendation is to wait 20 minutes. Cst. Dormuth’s evidence is that the 20 minute wait is recommended for the Intoxilyzer breath samples

[54] I have reviewed all the case law that was provided to me by counsel and I note that reference is frequently made to both a 15 minute and 20 minute recommended wait [time]. In *Bernshaw*, Mr. Justice Sopinka discussed the two different waiting periods but ultimately stated that whether it is 15 or 20 minutes, “the basic concern is the same.” In order to ensure that the results of the test are not falsely elevated, one must wait an adequate

period of time so that any mouth alcohol present has had an opportunity to dissipate.”

[55] On the facts of this case, Cst. Dormuth was not obliged to delay the ASD test.

[56] The results of the ASD test...are admissible and Cst. Dormuth was entitled to rely on that result in forming reasonable grounds to believe that an offence had been committed under s. 253 and the subsequent demand for breath samples pursuant to s. 254(3) was lawful. The Certificate of a Qualified Technician is also admissible in evidence and I accept those findings as fact.

[Emphasis added]

[21] The question posed by the trial judge — “Did Cst. Dormuth administer the ASD properly?” — is, however, only part of the equation. The appellant submits and I agree that even if the ASD was “administered properly” in the sense that at the time Cst. Dormuth administered the ASD he had no reason to doubt the reliability of the result, the proper and ultimate question in this case is whether it was objectively reasonable, at the time he made the breathalyzer demand, for Cst. Dormuth to rely on the ASD fail. I think the reasoning error at para. 52 of her reasons for judgment is the result of the trial judge posing the question in the way she did. In other words, the trial judge understood from the submissions made to her that the question to be answered was the one she posed. Having answered the question in the affirmative — *i.e.*, that the ASD test was administered properly — it was logical to conclude as she did that anything that occurred after administration of the ASD test would not be relevant to the inquiry. However, there were further utterances by the accused after the ASD test. Mr. [REDACTED] argued that his utterances both before and after the ASD test ought to have caused the police officer to doubt the reliability of the ASD result. The judge was bound to weigh all of the circumstances prior to the breathalyzer demand in deciding whether the objective component of the test was satisfied. By asking herself the question she did, I conclude that the trial judge removed from consideration, when making the necessary objective inquiry, the evidence between the times of the ASD fail and the making of the breathalyzer demand.

[22] The trial judge’s findings in para. 56 that “Cst. Dormuth was entitled to rely on [the ASD] result in forming reasonable grounds to believe that an offence had been

committed under s. 253 and the subsequent demand for breath samples pursuant to s. 254(3) was lawful” must be read in the context of the preceding paragraphs, all of which addressed the issue of whether Cst. Dormuth ought to have delayed the ASD test. While the issue of whether the ASD test should have been delayed was a live issue at trial, I conclude that if the trial judge conducted the objective inquiry called for by the Supreme Court of Canada in *Bernshaw* and *Shepherd*, it was after misdirecting herself to ignore relevant evidence that arose between the ASD test and the breathalyzer demand. The circumstances of this case required the trial judge to weigh all of the evidence up until the time of the s. 254(3) demand, and in particular the conversation between Cst. Dormuth and Mr. [REDACTED] both before and after the ASD test, to determine the question of whether it was objectively reasonable for Cst. Dormuth to rely on the ASD fail. Not to have done so was a “wrong decision on a question of law” within the meaning of s. 686(1)(a)(ii).

[23] It follows that I am not persuaded by the Crown’s submission that Mr. [REDACTED] is re-litigating an issue that was dealt with at length of the trial judge, or that the focus on the error in para. 52 of her reasons for judgment is “cherry-picking” one paragraph without conducting a proper contextual analysis of the reasons in their entirety. I accept Mr. [REDACTED] argument that the trial judge’s detailed reasons, read as whole, do not properly respond to the critical question of whether it was objectively reasonable for Cst. Dormuth to rely on the ASD fail. It was not possible to tackle this question properly by excluding from consideration what occurred after the ASD test and before the breathalyzer demand.

V

[24] The Crown submits that if the trial judge is held to have committed an error, the appeal ought to be dismissed in any event because “no substantial wrong or miscarriage of justice has occurred,” citing the judgment of Watt J.A. in *R. v. Moo*, 2009 ONCA 645 at para. 66:

An informed assessment of the effect of any legal error on the verdict rendered also cannot take leave of the evidence adduced at trial. Context is critical. What may be fatal in one case may pale to little significance in

another. After all, there is an essential step between legal error and appellate reversal — was there a substantial wrong or miscarriage of justice caused by *this* error, on *this* evidence, in *this* trial?

[Emphasis in original]

[25] The curative proviso in s. 686(1)(b)(iii) is only to be invoked where the respondent shows that there is no “reasonable possibility that the verdict would have been different had the error...not been made”: *R. v. Khan*, 2001 SCC 86 at para. 28. There are only two situations where the use of s. 686(1)(b)(iii) is called for: (1) where the error is harmless or trivial; or (2) where the evidence is so overwhelming that, notwithstanding that the error is not minor, the trier of fact would inevitably convict (paras. 29-31). See also *R. v. Sekhon*, 2014 SCC 15 at para. 53.

[26] The first branch of the test cannot apply because the error in this case is not minor or harmless or trivial. On the second branch of the test, as Justice Deschamps explained in *R. v. Trochym*, 2007 SCC 6 at para. 82, the standard is substantially higher than the requirement that the Crown prove its case beyond a reasonable doubt:

This standard should not be equated with the ordinary standard in a criminal trial of proof beyond a reasonable doubt. The application of the proviso to serious errors reflects a higher standard appropriate to appellate review. The standard applied by an appellate court, namely that the evidence against an accused is so overwhelming that conviction is inevitable or would invariably result, is a substantially higher one than the requirement that the Crown prove its case “beyond a reasonable doubt” at trial.

[27] I would frame the curative proviso issues on this the appeal as follows: (1) has it been shown that on a new trial, after considering the entirety of the evidence up until the breathalyzer demand, a judge would inevitably reject Mr. [REDACTED] argument and conclude that the objective component of the reasonable grounds requirement was satisfied? (2) If not, and a *Charter* infringement were established, has it been shown that a judge would inevitably reject an application under s. 24(2) to exclude the Certificate of a Qualified Technician?

[28] I am not persuaded that the circumstances in this case meet the very demanding test for the application of the curative proviso. Because I have concluded

that a new trial is necessary, I will not comment on the strength of Mr. [REDACTED] argument other than to say that in my opinion a conviction is not inevitable. A trial judge considering the entirety of the conversation between Cst. Dormuth and Mr. [REDACTED] up to the time of the breathalyzer demand could find the evidence not sufficiently clear, convincing and cogent to allow the Crown to meet its onus of establishing on the balance of probabilities that it was objectively reasonable for the police officer to rely on the ASD fail.

[29] In reaching this conclusion, I am mindful of the Crown's submission, based on the language of Justice Sopinka in *Bernshaw* at para. 80, that a police officer is entitled to rely on an ASD's accuracy unless there is credible evidence to the contrary, and I am cognizant of the various authorities cited by the Crown that support the proposition that a mere possibility that a driver may have consumed alcohol within 15 minutes of taking an ASD test does not preclude the officer from relying on the accuracy of the screening device. Bearing in mind that the honesty of Cst. Dormuth's belief is not in issue in this case, as well as the observation of Rosenberg J.A. in *R. v. Gundy*, 2008 ONCA 284 at para. 42, that Sopinka J.'s reasons in *Bernshaw* focus almost entirely on the subjective component, I think the question of whether all of the evidence available up until the time of the demand provides the basis for a finding that the Crown has established that it was objectively reasonable for Cst. Dormuth to rely on the ASD fail is an issue that ought to be resolved at a new trial. The point advanced by Mr. [REDACTED] at trial was an arguable one and it deserved consideration. It was not addressed by the trial judge or if it was, it was addressed without considering all of the relevant evidence.

[30] The Crown submits that in the event a *Charter* infringement were to be established, it is beyond question that the accused would not be able to get over the s. 24(2) hurdle. Having regard to the s. 24(2) considerations articulated by the Supreme Court of Canada in *R. v. Grant*, 2009 SCC 32 at paras. 68-71, I am unable to agree with this submission.

[31] On the other side, Mr. [REDACTED] submits that the record is sufficient for me to direct an acquittal. He submits that I can find a clear *Charter* infringement and find that the accused has established that the administration of justice would be brought into disrepute by the admission of the Certificate of a Qualified Technician. I do not agree. I think that it would be open to a trial judge considering all of the evidence up to the time of the breathalyzer demand to find that it was objectively reasonable for Cst. Dormuth to rely on the ASD fail, or for a trial judge to not accede to a s. 24(2) submission.

[32] I allow the appeal, quash the conviction, and order a new trial.

“Thompson J.”