SUPREME COURT OF YUKON

Citation: *R v McGuire*, 2021 YKSC 45

Date: 20210903
S.C. No. 20-AP001
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

AND

JOHN HAROLD MCGUIRE

RESPONDENT

Before Chief Justice S.M. Duncan

Counsel for the appellant — Leo Lane

Counsel for the respondent — Gregory Johannson

REASONS FOR DECISION

Introduction

[1] The respondent, John Harold McGuire, was stopped for driving his semi-truck and transport trailer erratically on the Alaska Highway. The police officer observed signs of drinking and conducted a roadside breath test. After several insufficient attempts to provide a sample into an approved screening device ("ASD"), the respondent provided a sample that was analyzed as a "fail". He was arrested and taken to the police detachment where he provided breath samples showing his blood alcohol level was over the legal limit.

[2] At the respondent's trial for driving with a blood alcohol level in excess of the legal limit, the arresting officer showed a lack of awareness about the status messages and sounds from the ASD during the insufficient attempts by the respondent to provide a sample. The officer had no notes about the operation of the ASD.

[3] After arresting the respondent, the officer read him his right to counsel, and he said he wished to speak to a lawyer. Then, in response to a comment made by the respondent, the officer asked him whether he had anything to drink while he was in Teslin.

[4] The respondent applied to exclude the breath samples obtained from him and any statements he made from admission at trial under s. 24(2) of the *Canadian Charter of Rights and Freedoms*, *Constitution Act, 1982* (the "*Charter*"), on the basis that his rights under ss. 8, 9, and 10(b) of the *Charter* were breached.

[5] The trial judge granted the application and excluded the evidence of breath samples on the basis that the officer did not have objectively reasonable grounds to believe the ASD was in good working order, thereby violating the respondent's ss. 8 and 9 *Charter* rights. The trial judge also found the police officer's question about the respondent's alcohol consumption before he had an opportunity to speak with counsel violated his s. 10(b) *Charter* right.

[6] For the following reasons, the Crown's appeal is allowed, the acquittal is reversed and the matter is remitted to trial under s. 834(1)(a) of the *Criminal Code*, R.S.C., 1985, c. C-46 ("the *Code*").

***Voir dire* evidence**

[7] The arresting officer, Constable Candice MacEachen, had been employed as a General Duty officer by the RCMP for approximately five years as of October 6, 2017, the day in question. She had been involved in approximately two dozen impaired driving investigations and had been trained in the use and administration of the Alco-Sensor FST, the ASD used in this case. In addition, she is trained as a breath technician.

[8] Between 7:00 and 8:00 p.m. on October 6, 2017, Constable MacEachen received reports about a Kenworth semi-truck pulling a white trailer on the Alaska Highway between Teslin and Whitehorse passing a vehicle across a double solid line and driving erratically. The truck was also reported to have stopped in the middle of a lane, with the driver stumbling on the side of the road and relieving himself.

[9] While driving south towards the location of the reports of the truck, Constable MacEachen spotted a truck matching the description provided to her. She turned around and followed it, activating her emergency lights and siren. The truck did not stop. Its speed was fluctuating between approximately 60 and 80 kilometres per hour. It was crossing the centre line and jerky on corners. Constable MacEachen radioed another officer to let him know that the vehicle was not stopping. She activated her air horn and tried to move into the other lane so the driver could see her in his mirrors. Eventually after being followed by Constable MacEachen for approximately five kilometres, the driver pulled the vehicle over and stopped.

[10] Constable MacEachen approached the driver's side of the truck. She stood on the side step of the truck at the driver's side window level approximately one to two feet away from the driver. While speaking with him, she noted he had glossy eyes, slurred

speech and an odour of liquor on his breath. Based on these observations as well as the driving complaints she had received and the driving she observed, she read him the demand to provide a breath sample into an ASD.

[11] The ASD process took just over three minutes. Three breath samples provided by the respondent were insufficient to provide a reading. The fourth one registered a "fail", signifying to Constable MacEachen that he was impaired because he had a blood alcohol concentration of over 80 milligrams in 100 millilitres of blood.

[12] On the basis of all of her observations and the ASD "fail" reading, Constable MacEachen arrested the respondent for impaired driving and read him the demand to provide breath samples into an approved instrument, located at the police detachment. She also read him his *Charter* right to counsel and he replied that he did want to speak with a lawyer.

[13] Before leaving for the detachment, the following exchange occurred between the respondent and Constable MacEachen:

> JM: Don't you guys got like, breaks or something, like?
> CM: What's that?
> JM: Some kind of a…give a guy a chance, a little bit? I just stopped in Teslin. I'm sorry!
> CM: Did you have something to drink in Teslin?
> JM: Well obviously. But not much!

[14] At the police station, the respondent spoke with a lawyer. He then provided two breath samples into the Intox EC/IR II (the approved instrument) which showed he had 130 milligrams of alcohol in 100 millilitres of blood, exceeding the legal limit of 80 milligrams in 100 millilitres of blood.

[15] Constable MacEachen testified she had taken a course in the use of this ASD approximately one or two years before October 2017. That was the last time she read the ASD manual.

[16] She testified she believed the ASD was operating correctly and it was functioning on October 6, 2017. She based her belief on the check performed at the beginning of her shift to ensure the calibration expiry date was not reached, as well as on her provision of a breath sample into the device which registered zero with a green light, showing it was functioning properly.

[17] Constable MacEachen knew that if the ASD was not properly calibrated it would lock the user out. This was confirmed by Constable Louis Allain, who testified at trial as a trained calibrator of the ASD, and who said an ASD operator could not override a lockout. He confirmed that the calibration was done every 28 days.

[18] Constable MacEachen testified if the ASD is operated outside of a temperature range of minus 12 degrees Celsius and plus 55 degrees Celsius, it will display “too cold” or “too hot” and then shut off. Constable Allain confirmed this. Constable MacEachen could not recall the temperature of the ASD in this case.

[19] Constable MacEachen testified that she did not write down the serial number of the ASD in this case although she said it was her usual practice to do so.

[20] Constable MacEachen was asked to explain the significance of certain beeps emitted by the ASD before and during the insufficient sample attempts. She said that when the ASD is ready, it will beep but she could not recall the tone. She said double beeping signified the ASD had not received a proper sample. When asked about the two beeps and then a double beeping heard before the first blow, Constable

MacEachen said she could not, off the top of her head, know exactly what each beep meant. She said she would read the words displayed on the ASD but she did not recall what they were and did not write it down. Constable MacEachen was asked what was displayed on the machine after there was a continuous beeping heard after the first insufficient sample. She said it displayed a code for an insufficient sample but she did not recall the specific code. She confirmed that she did not write down any of the specific codes displayed on the ASD after each insufficient breath attempt of the respondent and she could not recall which of the four codes appeared on the ASD display.

[21] Constable MacEachen was asked about the meaning of the beep sound after the respondent's second insufficient attempt to blow. She said it meant there was an insufficient sample again, but could not remember the code that was displayed on the ASD at that time.

[22] Constable MacEachen confirmed she changed the mouthpiece after the second insufficient attempt.

[23] Constable MacEachen confirmed there was a third insufficient attempt.

[24] On the fourth attempt, Constable MacEachen received the "fail" reading. On the basis of this, and the other observations she made, she arrested the respondent.

[25] Constable Allain confirmed that the ASD produces certain sounds. He did not testify further about what those sounds are or their significance for the operation of the ASD. Constable Allain also testified that the ASD displays one of four error messages where breath flow is insufficient. In any of those cases, no reading of blood alcohol level is provided for that sample.

[26] Constable Allain testified that after three insufficient sample attempts, the ASD turns itself off. The device does not lock the user out. The device must be started up again in order to take another breath sample.

[27] Constable MacEachen was not asked whether the ASD did turn itself off after the respondent's third insufficient attempt to blow, or whether she had to turn it on again.

Ruling of Trial Judge

[28] The trial judge held that Constable MacEachen's reliance on the ASD "fail" result to arrest the respondent for an impaired driving offence was not objectively reasonable. His reasons were that Constable MacEachen's "ignorance of the fundamental operational aspects of the ASD, i.e. the displays generated, the temperature of the ASD, and the beeping sounds emitted" did not support her acceptance of the results at face value, "in a somewhat wilfully blind manner". In the trial judge's opinion, "[t]here is an obligation on a police officer to have this fundamental knowledge and to monitor the operation of the ASD accordingly when seeking to obtain a breath sample from a detainee" (para. 108). He elaborated on this point at para. 113, stating that "it is incumbent on a police officer operating an ASD to have an understanding as to what the displays mean and what the beeping sounds mean. This is important information as to the proper operation of the ASD." The trial judge also stated that care needs to be taken in recording this relevant information in notes or the equivalent. He concluded on this point that there were "things that occurred" in this case, which should have alerted Constable MacEachen to the possibility that the ASD was not functioning properly (para. 119). The absence of a contemporaneous record or clear recollection of what occurred left the trial judge with a serious concern about the objective reasonability of

her reliance on the ASD. As a result, the "fail" result could not be relied on by Constable MacEachen as a ground for arresting the respondent.

[29] The trial judge further found that without the ASD "fail" result, there was insufficient evidence of other factors indicating impairment to provide reasonable grounds to believe the respondent had committed an impaired driving offence. The trial judge did not provide an analysis except to say that at most the other factors gave rise to a reasonable suspicion. The trial judge had provided the analysis of reasonable suspicion earlier in his decision when he determined that Constable MacEachen had sufficient suspicion to request a breath demand. He did not elaborate on the reasons why the factors did not rise from reasonable suspicion to reasonable and probable grounds.

[30] The trial judge concluded that the respondent's arrest, detention and provision of breath samples were in breach of his ss. 8 (right to be secure against unnecessary search and seizure), and 9 (right not to be arbitrarily detained) *Charter* rights.

[31] The trial judge also found that the respondent's s. 10(b) *Charter* right to retain and instruct counsel without delay and to be informed of that right was breached by Constable MacEachen asking whether he had anything to drink in Teslin. The trial judge called this "a significant error in judgment" (para. 131).

[32] The trial judge then applied the test in *R v Grant*, 2009 SCC 32 ("*Grant"*) and excluded the breath test results from the evidence under s. 24(2) of the *Charter*. He focussed particularly on the need to maintain public confidence in the administration of justice. He said this was negatively affected "when police officers fail to take such steps as they should reasonably be expected to in the circumstances, when subjecting

individuals to the powers of the state by interfering with their liberty interests when detaining and arresting them" (para. 175). The trial judge remarked that "public confidence in the justice system at the policing stage relies on a police officer's understanding in exercising their powers in compliance with the law, in particular, when the law has been well settled" (para. 177).

Grounds of Appeal

[33] The Crown appeals on two grounds: first, the trial judge erred in law in finding the police officer lacked reasonable grounds to arrest the respondent and issue a breath demand under s. 254(3) of the *Code*; and second, the trial judge erred in law by excluding the breath samples from evidence under s. 24(2) of the *Charter*.

[34] The first ground has two parts: the first error alleged is that the police officer did have objectively reasonable grounds to rely on the ASD. The second part in the alternative is that the officer did have reasonable and probable grounds to arrest the respondent for an impaired driving offence without the ASD reading.

Positions of the Parties

The appellant

[35] The appellant's first argument on objective reasonability relies in part on the principle stated in *R v Bernshaw*, [1995] 1 SCR 254. The ASD is presumed to be reliable and accurate unless there is credible evidence to the contrary. This principle has been adopted in a number of other decisions, where courts have held that there is a heavy onus on the defence to establish a high degree of unreliability of the ASD on the specific facts of the case. Other cases have held that the Crown is not required to prove

that the ASD was working properly (*R v Topaltsis* (2006), 34 MVR (5th) 27 (ONCA); *R v Steeves*, 2011 ABQB 661 ("*Steeves*"); *R v Beharriell*, 2014 ONSC 1100 ("*Beharriell*")).

[36] The Crown argues the trial judge focussed improperly on the police officer's inability to recall and failure to note why the first three samples were insufficient. This was not a legitimate reason to find her reliance on the device objectively unreasonable. These samples did not form part of Constable MacEachen's grounds for arrest; it was the "fail" result. The defence did not call evidence to contradict her testimony that in her opinion the ASD was working properly. There was no evidence that the unexplained beeps or the insufficient display messages that were not noted or recalled were fundamental or important information as concluded by the trial judge. There was no evidence that these factors were indications of the malfunction of the ASD. The trial judge's approach resulted in a reverse onus, requiring the Crown to prove through the officer that the ASD was in working order.

[37] The second argument on the first ground of appeal is the trial judge erred in his finding that without the ASD result the officer had no reasonable ground for arrest on an impaired driving charge. The Crown reviewed the reported erratic driving and reported driver behaviour of parking in the middle of the highway lane and stumbling while relieving himself, the officer's own observations of his erratic driving, including his failure to stop the truck while being followed by the officer for approximately five kilometres with lights, siren and air horn, and the officer's observations upon speaking to him of odour of alcohol on his breath, glossy eyes and slurred speech, and argues that these factors satisfy the objective basis for impairment by alcohol.

[38] The second ground of appeal raised by the Crown is the error by the trial judge in the s. 24(2) exclusion of evidence by applying the *Grant* test. The s. 10(b) breach was inconsequential as it had no effect on the investigation or the respondent's jeopardy. The question was not intended to elicit evidence and it did not reveal any new information.

[39] The Crown noted the trial judge further erred (at para. 165) by applying the *Grant* analysis to the impaired driving charge. That offence was not before the court and had no bearing on the importance of the breath results to the prosecution.

[40] The Crown argues that the s. 24(2) errors justify intervention and reassessment of the *Grant* factors. There was no egregious state conduct and breath tests are a minimally intrusive procedure. The administration of justice would be brought into disrepute by excluding the reliable breath testing evidence on the facts of this case.

The respondent

[41] The respondent characterizes the central issue in this appeal as whether there was credible evidence that the ASD used by Constable MacEachen was functioning improperly. The respondent says in this case the test of credible evidence of possible ASD malfunction was satisfied by the various unexplained beeping sounds, and the inability of the officer to explain them. The respondent notes there was virtually no evidence provided about the functioning of the ASD at the time it was administered. The fact that the police officer was the holder of the information distinguishes this case from the mouth alcohol cases relied on by the appellant. There is unfairness to the Crown's position that the objective reasonability test has been met without the provision of any explanation that is within their knowledge and control about the concerns raised by the

respondent. The respondent says the trial judge was correct to find Constable MacEachen's reliance on the ASD accuracy objectively unreasonable.

[42] In response to the argument that reasonable and probable grounds to suspect impairment existed without the ASD "fail" result, the respondent says the trial judge correctly noted (at para. 122) that Constable MacEachen gave no evidence that she had reasonable grounds to believe the respondent had committed an impaired driving offence before she received the ASD "fail" result. The respondent argues it would be an error to impute a belief of reasonable grounds retroactively without evidence on the record. Further, the factors noted by the Crown do not amount to reasonable grounds (*R v McClelland*, 1995 ABCA 199).

[43] Finally, the s. 24(2) exclusion determination of the trial judge should be accorded considerable deference, especially since the trial judge is closer to knowing and understanding police practices. The s. 10(b) breach was serious – the question was not conversational but instead it related directly to the investigation. The absence of new information was irrelevant.

Standard of Review

[44] There are two applicable standards of review. The first ground of appeal requires a review of the trial judge's finding of whether the officer had reasonable and probable grounds to arrest the respondent and issue a breath demand. The finding of facts by the trial judge is entitled to deference. But the question in this case is whether the facts as found by the trial judge amount at law to objectively reasonable and probable grounds. This is a question of law. The finding that the officer did not have an objectively reasonable basis to rely on the ASD is subject to review on the correctness standard.

Similarly, whether or not the police officer had reasonable and probable grounds to arrest and issue a breath demand without the ASD is reviewable on a standard of correctness (*R v Shepherd*, 2009 SCC 35 at para. 20; *Housen v Nikolaisen*, 2002 SCC 33 at para 8).

[45] The trial judge's order to exclude evidence under s. 24(2) of the *Charter* is entitled to considerable deference (*R v Côté*, 2011 SCC 46 at para. 44).

Onus

[46] The taking of breath samples is a warrantless search and seizure. The onus is on the Crown to establish the seizure was reasonable on a balance of probabilities (*R v Collins*, [1987] 1 SCR 265 at para. 22). A police officer may make a breath sample demand if they have reasonable grounds to believe that a person is committing or has committed at any time within the preceding three hours the offence of impaired operation or driving, having consumed excess alcohol (s. 254(3)). The officer must subjectively have an honest belief based on reasonable and probable grounds. That belief must also be objectively reasonable on the basis of information known to the police officer at the time of the demand (*R v Bernshaw*, [1995] 1 SCR 254 ("*Bernshaw*")).

Analysis

Did the trial judge err in finding police officer's belief in ASD proper function was not objectively reasonable?

Purpose of ASD and principles arising from ASD use

[47] An ASD is a tool approved by Parliament to screen drivers quickly at the first stage of investigating whether they are possibly impaired. As explained by the Supreme Court of Canada in *Bernshaw* at paras. 21 and 23, the tested drivers will either be those

with alcohol in their systems, and those without alcohol or a low level. Police officers can confirm or reject promptly their suspicion that a driver is impaired due to alcohol consumption. The test is to be administered quickly and the expectation is that the person will be detained for a brief period.

> … Parliament has recognized the need to balance the competing concerns of accuracy and convenience to the general motoring public. … A driver who fails an [ASD] test is not subject to criminal liability but may be required to take the more accurate breathalyzer test provided for in s. 254(3) of the *Criminal Code*.

[48] The court in *Beharriell* set out the following principles emerging from the cases where a police officer relies on an ASD to confirm or reject their suspicion about a driver's impairment by excess alcohol and the driver claims infringement of their s. 8 rights at para. 56:

> i) the determination is made on a case-specific basis;
>
> ii) breath samples taken pursuant to an *Intoxliyzer* demand, involve a warrantless search and the onus is on the Crown to establish, on a balance of probabilities, that the search was reasonable;
>
> iii) police officers may, but are not required to, rely on 'fail' readings obtained on an ASD as the basis or one of the bases upon which they conclude they have reasonable and probable grounds to make an *Intoxilyer* breath demand;
>
> iv) **police officers using an ASD are entitled to rely on its accuracy unless there is credible evidence to the contrary**;
>
> v) **in doing so, the officer must have a reasonable belief the ASD was calibrated properly and in working order before relying on the 'fail' reading as a component of their reasonable and probable grounds to make an *Intoxilyzer* demand**;

> vi) a relevant consideration is whether the record discloses that because of his or her training the officer knows that in the circumstances in which the ASD is being used the results will be unreliable;
>
> vii) whether an officer had that reasonable belief can be established by direct or circumstantial evidence;
>
> viii) **there is no requirement that the Crown prove** the instrument's calibration or **that the ASD was working properly**; and
>
> ix) **there is a heavy onus on the accused to establish a high degree of unreliability in the specific facts of the case. That evidence may arise in the Crown's case or through defence expert evidence.** [emphasis added]

[49] The Court in *Beharriell* went on to say at para. 57:

> … The test is not whether another judge would have reached the same conclusion or whether this Court would have found the criteria met. Rather, it is whether there was evidence upon which the trial judge could reasonably reach the conclusions he did.

No credible evidence

[50] There was some discussion in oral submissions at the hearing of this appeal about whether the trial judge accepted that Constable MacEachen subjectively believed that the ASD was in good working order. Although he did not explicitly state this in his decision, the trial judge implicitly accepted her subjective belief. The issue he addressed in his decision was the objective reasonability of that belief.

[51] The trial judge erred in finding that the unexplained irregular beeping before and during the insufficient attempts, the absence of evidence of whether the machine shut off and was turned back on again after the third insufficient attempt, and the lack of any

notes or recall of the officer about the displays or temperature on the machine, amounted to credible evidence that the ASD was not working properly.

[52] There was no evidence provided by either the Crown or defence to show that the beeps indicated a malfunction. No one asked Constable MacEachen about her training on the meaning of the sounds emitted by the ASD. Constable Allain, called by the Crown to testify about the calibration of the ASD, was not asked specifically about the significance of the beeps made by the ASD; only whether the ASD makes sounds, which he said it did. There was no further elaboration. The defence did not introduce any evidence that the beeps heard on the audio-recording played at trial showed evidence of ASD malfunction.

[53] Although Constable MacEachen could not recall the displays before the respondent's first attempt to blow or after each of the three insufficient attempts at trial and had neglected to write notes, she testified that she looked at the displays after each breath attempt. Her failure to recall or note them is not the same as credible evidence that the ASD was not working properly. There was no evidence that the read-outs on the display were connected to the proper workings of the ASD. In other words, the unavailability of information on the reasons why the first three breath samples were insufficient was not credible evidence that the ASD was not working.

[54] The same conclusion applies to the failure of Constable MacEachen to testify about the specific temperature of the ASD. Both she and Constable Allain testified that if it were too cold or too hot it would show this on the display and shut off. There is no evidence that this occurred here.

[55] Constable MacEachen was not asked whether the ASD shut off after the third insufficient attempt and/or whether she had to turn it on again. The trial judge referred to this process as common knowledge about the ASD operation. Although he acknowledged that Constable MacEachen was not asked directly about what occurred here, it appeared to influence his conclusion that there was no objective reasonableness about the ASD's reliability. Once again, however, the deficiency of evidence on this point did not contribute to credible evidence of the ASD's poor working order.

[56] Constable MacEachen did not rely on any of the three insufficient breath attempts to confirm or reject her suspicion of impairment. She relied on the final blow, the fourth breath sample, which registered a "fail." There was no evidence that this sample was compromised either through irregular beeping or any other unusual aspects.

[57] There was evidence that the ASD was calibrated and working at the start of Constable MacEachen's shift. She testified that she checked the calibration expiry date and it was within the proper timeframe. She tested the ASD by blowing a breath sample herself and all was in order, demonstrated by the green light. Constable Allain confirmed that if the ASD had not been calibrated properly, it would have locked the user out. There is no evidence that this occurred.

[58] The respondent argues that while this is some evidence of the ASD's good working order at the start of the shift, there is no evidence of its good working order at the time it was being used to test the respondent. The trial judge observed that the absence of this kind of evidence made it impossible for him to assess whether there

was an objectively reasonable basis to rely on the "fail" reading of the ASD. However, with respect, this requirement for evidence from the police officer is misplaced. The Crown is not required to prove that the ASD is in good working order; its reliability is presumed in the absence of credible evidence to the contrary. It is the lack of credible evidence to the contrary in this case that makes the trial judge's approach incorrect.

High degree of unreliability required

[59] This conclusion is borne out by the case law. In addition to the general principles set out in *Beharriell*, the following cases are helpful.

[60] In *Bernshaw*, a case dealing with the effect of mouth alcohol on the test results, the Supreme Court of Canada wrote at para. 59:

> If the scientific evidence establishes a high degree of unreliability with respect to the screening device when certain conditions prevail, and if a police officer knows, for example based on his or her training, that the resultant screening device will provide inaccurate results where a suspect has consumed alcohol within the 15 minutes prior to administering the test, how can the police officer testify that he or she had an honest belief of impairment, absent other indicia? …

[61] Here, there is no scientific evidence of a high degree of unreliability of the ASD as a result of irregular beeping before and during some of the insufficient attempts of the respondent to blow. Without that scientific evidence of a high degree of unreliability, there is no basis to question the objective reasonableness of the officer's reliance on the "fail" result. Notes or an explanation from the officer is not a requirement for the purpose of establishing reliability, where there is no credible evidence of unreliability.

Crown not required to prove ASD in working order in absence of credible evidence

[62] Decisions after *Bernshaw* have confirmed that the Crown is not required to prove the ASD is in good working order, in the absence of credible evidence of its unreliability.

[63] For example, in *Steeves*, the officer provided no evidence about the proper working order of the ASD, but there was no credible evidence led about any problem with the functioning of the ASD. Any suggestion of unreliability of the test was speculation. The court in *Steeves* noted that the principles in *Bernshaw* apply not only to the presence of mouth alcohol, but also to other factors that may affect the reliability of the test, including whether the device is functioning properly. In other words, a mere possibility that a test may be inaccurate does not invalidate an officer's reliance on the test. The officer can rely on the accuracy of an ASD in the absence of evidence to the contrary. The Crown is not required to prove anything further with respect to the accuracy or reliability of the ASD in this circumstance.

[64] This finding in *Steeves*, following the Supreme Court of Canada in *Bernshaw*, addresses the respondent's argument that the mouth alcohol cases are distinguishable because they relate to a factor that is not within the control of the officer. I adopt the finding of the court in *Steeves* (and *Bernshaw*) that the principles in *Bernshaw* apply to other factors that may affect the reliability of the test, including whether the device is functioning properly. Just because the information about the ASD reliability may or ought to be within the knowledge of the police officer, does not mean that the onus is reversed and the Crown is required to prove its functioning. Credible evidence to the contrary is still required, regardless of the origin of the factor suggesting unreliability.

Type of evidence required from Crown and from defence

[65] In *Beharriell*, similar to the case at bar, the issue was whether the absence of certain evidence on which a court could determine reliance on the "fail" result was objectively reasonable. There was no evidence that the officer turned his mind to testing the ASD, when it was last calibrated, what steps he took to determine it was working properly, or even whether he believed it to be working properly. The summary conviction appeal judge, while noting that the evidence was slim, concluded it was not unreasonable for the trial judge to draw the inference that the officer reasonably believed the "fail" was reliable and obtained from a properly working ASD. That evidence was the officer's training on the ASD, his explanation of its workings to the driver, and his limited experience with its use. Further, there was no evidence to the contrary about the accuracy of the ASD result.

[66] In the case at bar, the officer provided more evidence about the working order of the ASD (calibration at the outset of the shift, successful self-test, training and experience) than did either of the officers in *Steeves* and *Beharriell*. A factor distinguishing this case from *Steeves* and *Beharriell* was that here, in the trial judge's view, there was some evidence of the questionable working order of the ASD. In other words the issue of its reliability was "on the table" (*Beharriell* at para. 51) as a result of evidence led on cross examination of the irregular beeping and the inability of the officer to explain or recall the display codes and temperature after the insufficient attempts. However, the legal question is still whether that evidence was sufficiently credible to warrant a disbelief in the objective reasonability of the "fail" result.

[67] More is needed from the respondent to meet the heavy burden to establish a high degree of unreliability on the specific facts of the case. For example, in *R v Johnston*, 2007 ONCJ 45 ("*Johnston*"), the court found the arresting officer lacked reasonable and probable grounds to make a breath demand or arrest the accused. There was no evidence about the ASD's calibration. The officer testified he did not check the calibration sticker. He had received instructions only for one morning about its use, including the need to calibrate every two weeks. Significantly, the accused called an expert at trial who testified about the workings of the ASD and the requirement to calibrate at least every two weeks. The issue of the ASD calibration was "on the table." The court noted in these circumstances, the Crown had to prove on a balance of probabilities the reasonableness of the reliability, but the accused bore a heavy onus to prove a high degree of unreliability. At para. 44, the court held that:

> … It would, in my view, tend to diminish respect for Charter values were evidence excluded as a result of an officer's inadvertence or honest mistake about calibration **in the absence of specific proof of the instrument's unreliability.** [emphasis added]

[68] It is the specific proof of the ASD's unreliability that is missing in this case. There is no indication that the "fail" result was compromised by the beeping or the inability of the officer to explain it fully or recall the display codes before and during some of the insufficient attempts. It is not enough for the accused to raise a question about the possibility of the ASD being unreliable; the burden is greater than this. In this case, the trial judge was left to speculate about the significance of the beeping sounds, or the displays generated, or the temperature of the ASD because there was no evidence that

linked those factors to improper working. At para. 114, he said:

> A perfectly functioning tire on a vehicle may in an instant stop functioning even though it was working fine at the start of a drive. Who is to say whether the same may be true of an ASD. If Cst. MacEachen had been able to testify as to the various displays and beeping sounds and the operating temperature of the ASD, particularly in consideration of the three failed attempts in order to give meaning to them, perhaps her ability to rely on the results would have been enhanced.

[69] In *Steeves*, as noted above, the court held that mere speculation did not invalidate an officer's honest and reasonable belief in the reliability of the screening tool (para. 31).

[70] Here, the inability of the trial judge to conclude there was a high degree of unreliability but at best to note that it was possible that a well-functioning ASD at the outset might stop functioning at some point, does not meet the required legal standard.

Expectation on police officers of knowledge of ASD operation

[71] The trial judge's reliance on Constable MacEachen's lack of awareness or knowledge about the beeping, displays, temperature of the ASD to support his conclusion on objective reasonability is not supported by the case law. The level of expectation on the police officer with respect to knowledge that may affect the working of the ASD was explored in *R v Notaro*, 2018 ONCA 449 ("*Notaro*"). The officer failed to consider the presence of mouth alcohol before administering the ASD, even though she knew residual mouth alcohol can last up to 15 minutes after drinking and can create inaccurate ASD results. She had been told by the driver that he had just left a bar and had drunk alcohol while he was there. She agreed it would have been prudent to ask him when his last drink was, but it did not cross her mind to do so. In spite of the

officer's admitted oversight, especially in light of her knowledge and training, the court held she had objectively reasonable grounds to rely on the "fail" result. "[T]he outcome of the objective test does not turn on whether the officer considered the presence of residual mouth alcohol. It turns on the information the officer knew at the time of the evidential breath demand or arrest" (*Notaro* at para. 40). The objective reasonableness "can be undermined, on a case by case basis, by credible evidence known to an arresting officer that the suspect had residual mouth alcohol at the time of testing" (*Notaro* at para. 42). In *Notaro*, the knowledge of the officer at the time, which did not include knowledge about mouth alcohol that she admitted she should have asked about given her training, did not meet the test of credible evidence.

[72] It was accepted generally and known by the officer in *Notaro* that the presence of mouth alcohol affects the accuracy of the test. However, the court found there was no duty on the officer to ask the suspect about it, even with that knowledge.

[73] In the case at bar, there is no scientific evidence that the beeping created an inaccuracy in the fail result. An inability of the officer to explain it in the face of a "fail" result is not sufficiently credible evidence, even if she ought to have been able to do so, to undermine the objective reasonableness of her belief in the ASD's reliability.

[74] Another example of the courts' expectations about an arresting officer's knowledge of the ASD is found in *R v Jennings*, 2018 ONCA 260 ("*Jennings*"), also referenced by the trial judge. There, the Court of Appeal overturned the decision of the trial judge that the officer's belief that the ASD was functioning properly was not reasonable because he failed to follow three steps in the police policy manual. Those three steps were: 1) performing a self-test of the ASD at the beginning of his shift; 2)

recording the particulars of the ASD calibration check in his notebook; and 3) performing a second self-test after the respondent provided his breath sample. The Court of Appeal wrote at para. 17:

> Failure to follow policy or practice manual directions does not automatically render reliance on test results unreasonable. What matters is whether the officer had a reasonable belief that the device was calibrated properly and in good working order, and whether the test was properly administered: *Bernshaw*, at paras. 59-60; *R v Topaltsis* (2006), 34 M.V.R. (5th) 27 (Ont. C.A.) at paras. 7,9. A failure to follow a practice manual direction can serve as *some* evidence undermining the reasonableness of an officer's belief. … Not all practice manual directions will bear equally, or perhaps at all, on the reasonableness of an officer's belief that the ASD is properly functioning. It is necessary to take the further step and determine how or whether each of the specific failures identified undermine the reasonableness of the officer's belief that the ASD was functioning properly. (emphasis in original)

[75] The Court of Appeal in analysing each of policy manual steps missed by the officer said the following about the failure to record the calibration particulars at para. 19:

> … The constable testified that he did check these at the time of the stop, but that he did not record the details in his notebook as required. Again, recording calibration results is an administrative matter. There may be good reason for it, presumably of an evidentiary nature, but a failure to record does not automatically negate a constable's testimony that he performed the necessary checks.

[76] The officer also testified that he knew that the ASD would not operate if not properly calibrated. The Court of Appeal held "[p]recisely how or when he learned this is not important" (para. 20).

[77] In the case at bar, the failure to record the displays or temperature cannot negate the officer's testimony that the ASD was in good working order. Constable MacEachen testified that she looked at the displays at each stage of the ASD process.

Conclusion on objective reasonability argument

[78] To conclude on the first argument of the first ground of appeal, there was in this case insufficient credible evidence of the unreliability of the ASD for the trial judge to find an absence of objective reasonableness of the officer's belief that it was in good working order. As a result there were no *Charter* breaches under ss. 8 or 9.

[79] Having reached this legal conclusion, I appreciate the trial judge's comments at para. 113 of his decision that a police officer operating an ASD should have an understanding of its sounds and displays and should take care to record the relevant information during the administration of a test either by writing notes or on the audio recording itself. These measures are part of responsible policing, and when implemented properly, contribute to public confidence in the administration of justice.

Were there reasonable and probable grounds to arrest without the ASD?

[80] Having found that the ASD "fail" result should not be excluded because there was no *Charter* breach, it is unnecessary to consider the trial judge's conclusion that absent the ASD, there were no reasonable and probable grounds to arrest for the disposition of this appeal.

Exclusion of breath samples under s. 24(2) from ss. 8 and 9 Charter breaches

[81] It is also not necessary given my finding on the ASD to rule on the exclusion of that evidence under s. 24(2) based on the ss. 8 and 9 *Charter* breaches.

Section 10(b) Charter breach and exclusion of breath samples under s. 24(2)

[82] Constable MacEachen's question to the respondent about whether he had anything to drink in Teslin after he told her he had stopped there, was a breach of his right to counsel. The officer asked the question after he indicated he wanted to speak with a lawyer but before he had an opportunity to do so. The trial judge referred to the statement of the law at para. 26 of *R v Taylor*, 2014 SCC 50 at para. 130 of his decision:

> Until the requested access to counsel is provided, it is uncontroversial that there is an obligation on the police to refrain from taking further investigative steps to elicit evidence (citations omitted).

[83] Similarly, the Supreme Court of Canada in *R v Willier*, 2010 SCC 37, said at para. 33:

> Detainees who choose to exercise their s. 10(b) right by contacting a lawyer trigger the implementational duties of the police. These duties require the police to facilitate a reasonable opportunity for the detainee to contact counsel, and to refrain from questioning the detainee until that reasonable opportunity is provided. ...

[84] The trial judge found that the police officer's question was inadvertent and "not intended to cause [the respondent] to provide self-incriminating evidence in an inquisitorial way" (para. 131). The Crown did not seek admission of the evidence of what he said in response to Constable MacEachen's question. However, the fact that the question was asked at that time, after he said he wanted to speak with a lawyer, was enough to satisfy the test for a breach of s. 10(b).

[85] The evidence to be excluded as a result of this breach is the breath samples, even though they did not result from this *Charter* breach. The trial judge held that this

breach is part of the entirety of events to be considered under s. 24(2). He relied on *R v Thompson*, 2020 ONCA 264 at para 79:

> … A temporal connection between the breach of a *Charter* right and the discovery of evidence is enough to engage s. 24(2). …

[86] The trial judge's s. 24(2) analysis was done on the cumulative effect of the ss. 8, 9 and 10(b) breaches.

[87] For the purpose of this appeal, given my finding there were no ss. 8 or 9 *Charter* breaches, I will only consider the decision of the trial judge on the s. 24(2) exclusion as a result of the s. 10(b) breach. It is unclear if only a s. 10(b) breach had been found by the trial judge whether he would have come to the same conclusion on exclusion of evidence as he did after considering the cumulative effect of the three breaches.

[88] I am mindful of the considerable discretion afforded to the trial judge in deciding whether to exclude breath demand results under s. 24(2) as a result of a *Charter* breach. However, the s. 10(b) breach does not justify an exclusion of the breath samples.

[89] As set out in *R v Pye*, 2017 YKTC 57 at para. 26, the Supreme Court of Canada in *R v Grant*, 2009 SCC 32 at para. 71 identified the following three factors to be considered for the exclusion of evidence:

> … (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all

> the circumstances, admission of the evidence would bring the administration of justice into disrepute. …

Seriousness of the breach

[90] The trial judge held that Constable MacEachen's question to the respondent was "a violation of a fundamentally important *Charter* right to counsel that has been the law for decades. A higher standard is expected and is required, therefore, this breach is very serious" (para. 154).

[91] The respondent initiated the conversation by asking whether he could get a break and volunteering that he only stopped in Teslin and the officer's question whether he had anything to drink in Teslin elicited the reply "[w]ell, obviously. But not much!". I agree the officer's question was inadvertent. It did not elicit new information for the officer, given the ASD "fail" result and her other observations. However, given how clear the law is on this point, even if the effects were inconsequential, I agree with the trial judge that the seriousness of this breach does favour exclusion.

Impact on the respondent

[92] The second factor is the impact of the *Charter* violations on the respondent. There are two lines of authority in the context of the taking of breath samples. One line limits this factor to a consideration of the intrusiveness of the breath sample itself, which is accepted as a minimally intrusive procedure. The other line requires the judge to consider not only the impact of the administration of the breath sample procedures, but the whole procedure faced by the accused after arrest – for example, the initial detention, transportation in a police cruiser to the detachment, detention at the police station. In *Jennings*, the Court of Appeal for Ontario ruled that the first line of authority was appropriate. To find otherwise would be to automatically favour the exclusion of

evidence under this factor, since in these cases, drivers are usually arrested and taken to the police station. The trial judge in this case did not necessarily accept this view, and said in any event, the cumulative effect of the three breaches on the respondent favoured the exclusion of the breath sample evidence.

[93] Accepting the Court of Appeal statement of the law in *Jennings*, and given my finding that there was only one *Charter* breach and not three, I conclude that the impact on the respondent of the breath samples is minimally intrusive and militates in favour of admitting the evidence.

Societal interest in an adjudication on the merits

[94] Finally, in the third branch of the *Grant* inquiry, the societal interest in an adjudication on the merits, the Court must consider whether the truth-seeking function would be better served by admission or exclusion of the evidence; whether the evidence is reliable; what is the importance of the evidence to the prosecution's case; and the seriousness of the offence. Here, as the trial judge found, the evidence is reliable, necessary for the Crown to prove its case, and although the offence is serious, this was not a case where death or bodily harm resulted. I agree with the trial judge that this third factor militates in favour of admission of the evidence.

Administration of justice into disrepute

[95] In the final balancing analysis of whether exclusion or admission of the breath sample evidence would bring the administration of justice into disrepute, the trial judge concluded that public confidence in the administration of justice is negatively affected when police officers fail to take reasonably expected steps while detaining and arresting individuals. The importance of ensuring police understand and operate within the legal

parameters of their powers outweighed the societal concerns arising from an inability of the Crown to prosecute an impaired driving case. The long-term effect on the public confidence in the administration of justice required the exclusion of the breath sample evidence in the trial judge's view.

[96] In my analysis above, I concluded only the first factor favours exclusion of the breath sample evidence because of an inadvertent and inconsequential albeit serious breach of s. 10(b). The tragic effects of impaired driving and the consequent imperative to hold impaired drivers to account must be considered in assessing whether or not to exclude or admit evidence. On balance, exclusion of this highly reliable breath testing evidence that would prevent the Crown from prosecuting its case of a blood alcohol driving offence against the operator of a professional transport truck driving long highway distances would bring the administration of justice into disrepute.

Remedy

[97] For all of the above reasons, the acquittal is reversed, and the matter is remitted for trial under s. 834(1)(a) of the *Code*.

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DUNCAN C.J.