SUPREME COURT OF YUKON

Citation: *R v Kroeker,* 2015 YKSC 2

Date: 20150119
S.C. No. 14-AP007
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Appellant/
Respondent

And

DAVID KROEKER

Respondent/
Cross-Appellant

Before: Mr. Justice L.F. Gower

Appearances:

David A. McWhinnie — Counsel for the Appellant/Respondent
Shawn Beaver — Counsel for the Respondent/ Cross-Appellant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an appeal by the Crown and a cross-appeal by Mr. Kroeker. The Crown appeals from a finding of the trial judge that Mr. Kroeker was not guilty of an offence of driving over .08, contrary to s. 253(1)(b) of the *Criminal Code*, RSC 1985, c C-46 (the "*Code*"), following a ruling that the Certificate of a Qualified Technician tendered in relation to that charge was not admissible. Mr. Kroeker has cross-appealed from the finding that he was guilty of impaired driving, contrary to s. 253(1)(a) of the *Code*.

[2] The trial was held in Dawson City on October 8 and 9, 2013, and was continued in Whitehorse on November 12, 2013. It was agreed that the Crown's evidence would be called in a *voir dire* and applied to the trial, if determined to be admissible. The Crown's evidence included: testimony from Cst. Bundt, the investigating officer, and Cpl. Morin, the qualified technician who took the breath samples from Mr. Kroeker; a DVD of the Video In Car System ("VICS") video taken by Cst. Bundt during the investigation, as well as a DVD of a video recording of Mr. Kroeker taken at the RCMP detachment in Dawson City while the breath tests were being administered; and a Designation of Qualified Technician pursuant to s. 254 of the *Code*, dated January 13, 2012.

[3] The trial judge determined that the Crown had not proven beyond a reasonable doubt that Cpl. Morin was a "qualified technician" able to operate an approved instrument for the purposes of taking breath samples, under s. 254(1)(a) of the *Code*. Accordingly, he ruled that the Certificate of a Qualified Technician containing the results of those samples was not admissible, and acquitted Mr. Kroeker of the offence of driving over .08.

[4] On the other hand, the trial judge found that Cst. Bundt had reasonable grounds to make a breath sample demand and that the Crown had proven that Mr. Kroeker was impaired while driving.

ISSUES

[5] There are four issues on this appeal. Specifically, did the trial judge err in concluding:

1) That Cpl. Morin was not a properly designated "qualified technician"?
2) That Cst. Bundt had reasonable grounds to make a breath sample demand?

3) In the alternative, if Cst. Bundt did not have reasonable grounds, that the results of breath samples would not have been excluded? and
4) That Mr. Kroeker's ability to drive a motor vehicle was impaired by alcohol consumption?

ANALYSIS

1. Was Cpl. Morin a properly designated "qualified technician?

[6] It is agreed that the standard of review on this question of law is correctness.

[7] Crown counsel appropriately submitted here that the essential question is whether the language in s. 3 of the *Director of Public Prosecutions Act*, SC 2006, c. 9, s. 121 ("*DPPA*") referring to the conduct of prosecutions should be construed broadly or narrowly. The Crown says that the definition of "prosecution" is defined in the *DPPA* as "a proceeding respecting any offence" and that this is broad enough to include the designation of a qualified technician under s. 254(1) of the *Code.* Defence counsel says that under this subsection a qualified technician must be designated by the Attorney General, or the Attorney General's lawful deputy, which in this case was not done.

[8] There is a presumption of regularity in s. 258(1)(f.1) and(g) of the *Code*, meaning that a document printed by an approved instrument and a certificate of a qualified technician are each evidence of the facts alleged in these respective documents without proof of the "signature" or the "official character" of the person signing the document. However, this presumption is premised on the operation of the instrument by a "qualified technician", which fact must therefore be proved by the Crown beyond a reasonable doubt. "Qualified technician" is defined in s. 254(1) as follows:

> "qualified technician" means,

> (a) in respect of breath samples, a person designated by the Attorney General as being qualified to operate an approved instrument…

"Attorney General" is defined in s. 2(b) of the *Code* as:

> (b) with respect to the Yukon Territory, the Northwest Territories and Nunavut… means the Attorney General of Canada and includes his or her lawful deputy.

[9] At the trial, the Crown tendered a certificate purporting to confirm the designation of Cpl. Morin as a qualified technician. It was dated January 13, 2012 and was signed by George Dolhai, Acting Deputy Director of Public Prosecutions. Mr. Dolhai is presently Deputy Director of Public Prosecutions, and nothing turns on the fact that he was the "Acting" Deputy at the time. Rather, the issue is whether the Director of Public Prosecutions ("DPP") or his or her lawful Deputy have been properly delegated the authority to designate qualified technicians under s. 254(1) of the *Code*.

[10] In 2006, the authority of the Attorney General of Canada to prosecute offences under the *Code* and other federal statutes was devolved to the Director of Public Prosecutions under the *DPPA.* Prior to that, the Minister of Justice, acting as both the Attorney General and the Minister, essentially wore two hats. As Attorney General, he or she was the chief law officer of Canada and was responsible for all criminal and quasi-criminal prosecutions within their jurisdiction. As Minister of Justice, the same person was head of the government's legal department, with responsibility for legislation, policy and litigation involving the Government of Canada as a party. I gather this was perceived to create an appearance of conflict from time to time, and that this was the purpose behind the enactment of the *DPPA*. The creation of the office of the Director of Public Prosecutions with responsibility for the initiation and conduct of prosecutions, and any

related communications or advisory functions, was intended to remove, for the most part, the prosecutorial function ordinarily exercised by the Attorney General. This change left the Attorney General/Minister of Justice with greater freedom to continue to exercise policy and legislative authority within the political domain.

[11] The specific duties and functions delegated by the Attorney General to the DPP are set out in s. 3(3) of the *DPPA*, as follows:

> (3)The Director, under and on behalf of the Attorney General,
>
> (a) initiates and conducts prosecutions on behalf of the Crown, except where the Attorney General has assumed conduct of a prosecution under section 15;
>
> (b) intervenes in any matter that raises a question of public interest that may affect the conduct of prosecutions or related investigations, except in proceedings in which the Attorney General has decided to intervene under section 14;
>
> (c) issues guidelines to persons acting as federal prosecutors respecting the conduct of prosecutions generally;
>
> (d) advises law enforcement agencies or investigative bodies in respect of prosecutions generally or in respect of a particular investigation that may lead to a prosecution;
>
> (e) communicates with the media and the public on all matters respecting the initiation and conduct of prosecutions;
>
> (f) exercises the authority of the Attorney General respecting private prosecutions, including to intervene and assume the conduct of - or direct the stay of - such prosecutions; and
>
> (g) exercises any other power or carries out any other duty or function assigned to the Director by the Attorney General that is compatible with the office of Director.

[12] Section 3(4) of the *DPPA* confirms that the DPP is the lawful deputy of the Attorney General when exercising the powers and duties in subsection (3):

> (4) For the purpose of exercising the powers and performing the duties and functions referred to in subsection (3), the Director is the Deputy Attorney General of Canada.

[13] The "catch-all" provision in s. 3(3)(g) respecting other powers and duties which may be exercised by the DPP is subject to the condition precedent under s. 3(6) that any such assignment of authority by the Attorney General must be in writing and published in the *Canada Gazette*:

> (6) Any assignment under paragraph (3)(g) must be in writing and be published by the Attorney General in the Canada Gazette.

[14] Under s. 10 of the *DPPA*, the Attorney General may also issue directives to the DPP, providing he or she has consulted with the DPP in advance, and that any such directives are in writing and published in the *Canada Gazette*:

> 10. (1) Any directive that the Attorney General issues to the Director with respect to the initiation or conduct of any specific prosecution must be in writing and be published in the Canada Gazette.
>
> (2) The Attorney General may, after consulting the Director, issue directives respecting the initiation or conduct of prosecutions generally. Any such directives must be in writing and be published in the Canada Gazette.

[15] In the case at bar, counsel are agreed that there have been only three assignments (March 10 and September 29, 2007) and one directive (March 10, 2007) made by the Attorney General pursuant to the *DPPA*. However, none of these delegates the authority of the Attorney General to designate qualified technicians under s. 254(1) of the *Code* to the DPP.

[16] The directive published in the *Canada Gazette* on March 10, 2007 (issued February 21, 2007) provides as follows:

> I hereby direct that the Office of the Director of Public Prosecutions, including all federal prosecutors and persons acting as federal prosecutors, shall continue to be guided by the policies and guidelines for the exercise of prosecutorial authority set out in the *Federal Prosecution Service Deskbook* [the "*Deskbook*"], with any modifications that the circumstances may require, subject to any guidelines issued by the Director under paragraph 3(3)(c) of the *Director of Public Prosecutions Act*.

[17] The *Deskbook* itself has not been published in the *Canada Gazette*. I am informed by counsel that the version of the *Deskbook* in existence at the at the relevant time predated the *DPPA* and contained the following statements in c. 16.3:

> The purpose of this policy is to assist in identifying who should be the effective decision-maker for the various statutory provisions requiring a decision to be made by the Attorney General.
>
> …
>
> While the Attorney General and the Deputy Attorney General retain the power to personally make any decision required to be made in their names, some of those decisions will be made by officials such as the Assistant Deputy Attorney General (Criminal Law), who has been given functional responsibility over the manner in which the prosecution function is carried out on behalf of the Attorney General. The appendices to this policy set out a scheme in which particular types of decisions are delegated to officials whom experience has shown are the appropriate decision-maker [as written].

Appendix "B" to the *Deskbook* sets out the decisions to be made by the Assistant Deputy Attorney General (Criminal Law), and refers to s. 254(1) of the *Code*, with the following notation:

> [D]esignation of blood analysts, qualified breathalyzer technicians and qualified blood technicians

[18] The Crown relies on the *Carltona* doctrine arising from the case of the same name: *Carltona Ltd v Commissioners of Works*, [1943] 2 All ER 560 (CA). That doctrine generally provides that, where the exercise of a discretionary power is entrusted to a minister of the Crown, it may be presumed that such powers will not be exercised by the minister personally, but rather by responsible officials in the minister's department. This doctrine has effectively been codified in s. 24(2) of the *Interpretation Act,* RSC 1985, c. I-21, (the "*Act*") which provides:

> 24.(2) Words directly or empowering a minister of the Crown to do an act or thing, regardless of whether the act or thing is administrative, legislative or judicial, or otherwise applying to that minister as the holder of the office, include
>
> …
>
> (c) his or their deputy; and
>
> (d) notwithstanding paragraph (c), a person appointed to serve, in the department or ministry of state over which the minister presides, in a capacity appropriate to the doing of the act or thing, or to the words so applying.

[19] Thus, the Crown argues that when the then Acting Deputy Director of Public Prosecutions, George Dolhai, designated Cpl. Morin as a qualified technician on January 13, 2012, Mr. Dolhai was either acting as the lawful deputy of the Attorney General under s. 3(4) of the *DPPA*, in the process of carrying out a prosecutorial function, or was otherwise acting as a person within the Attorney General's department in an appropriate capacity to designate qualified technicians under s. 254 of the *Code*. Indeed, the trial judge appeared to agree with the latter proposition. However, he disagreed with the former. At para. 51 of his reasons (cited at 2014 YKTC 31), he stated:

> [51] I think that it is likely that the Director is in an appropriate capacity to designate qualified technicians under s. 254 of the *Code*, however the *DPP Act* could also be viewed as expressing a contrary intention to that implied delegation. The scheme of the *DPP Act* is such that only certain powers and duties were specifically devolved. There is nothing explicit about making designations, either under s. 254 or any other section. I do not find that such a function is readily viewed as implicit. The delegated functions and authority set out in ss. 3(a) through 3(f) seem to relate solely to the conduct of prosecutions and communicating or advising about prosecutions. The only reference to a role with law enforcement or investigations is with respect to advising entities on a specific prosecution or prosecutions generally. There is no suggestion that the Director is empowered to make designations about investigative roles or functions. Furthermore, the language of the basket clause in s. 3(3)(g) seems to reflect the language of s. 24(2) of the *Interpretation Act*, i.e. the Director can exercise other duties or functions 'compatible' with the office, however, any such assignment must be Gazetted and placed on the public record.

[20] I agree with this reasoning. In my view, the creation of a prosecutorial shortcut through the presumption of regularity in s. 258 of the *Code* where documents have been generated by a qualified technician is a matter of legislative policy which should properly be dealt with by the Attorney General, acting as Minister of Justice, unless that authority is expressly delegated to the DPP or his or her lawful deputy. In the case at bar, this has not been done.

[21] The trial judge also noted that in order for s. 24(2) of the *Act* to apply, the court must further be satisfied that no “contrary intention” appears, pursuant to s. 3(1) of that *Act*, which provides:

> 3. (1) Every provision of this Act applies, unless a contrary intention appears, to every enactment, whether enacted before or after the commencement of this Act.

[22] In this regard, the trial judge found that the scheme of the DPPA reveals a contrary intention, by limiting the express delegation of authority to the DPP to matters relating solely to the conduct of prosecutions or communications or advice about such prosecutions (para. 51). At para. 54, he concluded:

> [54] The *Act* is clear in its transfer of certain discrete duties and functions to the Director. To the extent that the *Act* contemplates additional assignments under s. 3(3)(g), it requires that they be explicit and public. Both of these requirements to me seem contrary to the very permissive implied delegation clause in s. 24(2)(d) of the *Interpretation Act*. The *DPP Act* reveals a contrary intention, as envisioned by s. 3(1) of the *Interpretation Act*, to the implied delegation of power to designate qualified technicians.

Once again, I agree with this reasoning.

[23] Accordingly, I conclude that the trial judge did not err in ruling that the certificate designating Cpl. Morin as a qualified technician was not admissible.

2. Did Cst. Bundt have reasonable grounds to make a breath sample demand?

[24] It is common ground that the issue of whether the Cst. had reasonable grounds is a question of law and that the standard of review is one of correctness.

[25] It is also non-contentious that the Crown must establish that Cst. Bundt had both a subjective and objective basis for his reasonable grounds to demand that Mr. Kroeker provide breath samples: *R v Shepherd,* 2009 SCC 35, at para. 17. There is no issue that the Constable had an honest subjective belief that Mr. Kroeker's ability to operate a motor vehicle was impaired by alcohol. The real issue is whether the grounds for the belief were objectively reasonable.

[26] The test for objective reasonableness is not an overly onerous one: *R v Wang,* 2010 ONCA 435, at para. 17. When impaired driving is an issue, what is required is that

the facts found by the trial judge be sufficiently objective to support the police officer's subjective belief that the motorist was driving while his ability to do so was impaired by alcohol, even to a slight degree: *Wang,* para.17.

[27] Mr. Kroeker's counsel has submitted that, while the indicia observed by a police officer are to be considered in their totality and not in a piecemeal fashion, "it is necessary to first examine them individually, to determine the significance of each when assessing the evidence as a whole." Counsel cites as authority for this proposition *R v Baltzer*, 2011 ABQB 84, at para. 5. With respect, I do not find that this passage from *Baltzer* provides the asserted support. Rather, the case authorities suggest that it is an error in law to test individual pieces of evidence in isolation (*R v Todd*, 2007 BCCA 176, at para.14; and *R v Bush*, 2010 ONCA 554, at para. 55) or to weigh them separately and conclude that the totality of the evidence does not overcome the equivocal nature of the parts (*Todd*, at para. 13). Rather, the indicia and the circumstances must be evaluated in their totality: *Todd*, at para. 13; *R v Usher*, 2011 BCCA 271, at para. 38; and *Bush*, at paras. 54 and 55. Finally, even though there might be an alternative explanation for some of the indicia observed by the police officer in forming his or her opinion of impairment that does not eliminate the indicia or render them unreliable: *Bush*, at para. 58.

[28] In summary, the totality of the circumstances and the indicia of impairment observed by Cst. Bundt were as follows:

1) erratic driving;
2) Mr. Kroeker was the sole occupant of the vehicle stopped by Cst. Bundt;
3) there was an odour of alcohol inside Mr. Kroeker's vehicle, which the Constable believed to be coming from Mr. Kroeker;

4) Mr. Kroeker's speech was mumbly, slurred and difficult to understand;

5) Mr. Kroeker's motor skills were slow and he dropped a card when attempting to produce his driver's license, registration and insurance; and

6) Mr. Kroeker's eyes were red, heavy and droopy and he had the appearance of being sleepy.

[29] With respect to the driving pattern, defence counsel submitted that the trial judge misapprehended the evidentiary record and that Mr. Kroeker's driving pattern could not "be characterized as "erratic" by any stretch of the imagination." I disagree.

[30] First of all, Cst. Bundt initially observed Mr. Kroeker making a wide right-hand turn from a side street onto Fifth Avenue. While the trial judge did not accept the Constable's estimate that approximately 1/3 of Mr. Kroeker's vehicle crossed over the center line, he did agree that "it was clearly a wide turn and over the middle of the street." I have observed all the video evidence tendered at trial and I have no difficulty agreeing with the trial judge's assessment in that regard. Further, almost immediately after the wide right-hand turn, Cst. Bundt observed the vehicle drift over to the right of Fifth Avenue, where it traveled for several seconds in the parking lane of the Avenue. Then, once on the highway leading out of Dawson City southbound, Mr. Kroeker's vehicle crossed over the center line again. By my reckoning, about 1/3 to 1/2 of his vehicle was traveling in the oncoming lane for approximately 10 to 11 seconds. Finally, even though Mr. Kroeker passed from a 40 km/h speed zone to a 70 km/h speed zone, he failed to increase his speed beyond 40 km/h for a further period of about 25 to 28 seconds, until he was eventually stopped by the Constable. In my view, the totality of these observations

objectively supports the reasonableness of Cst. Bundt’s opinion that Mr. Kroeker's driving was erratic.

[31] With respect to the odour of alcohol inside Mr. Kroeker's vehicle, defence counsel properly submits that the Constable did not ask Mr. Kroeker if he had been drinking and did not ask him to step out of the vehicle to try and isolate the odour of alcohol. The implicit argument here is that there could have been an alternative explanation for the odour of alcohol other than it coming exclusively from Mr. Kroeker's breath. While that is correct as far as it goes, once again, the fact that there might be an alternative explanation does not render the observation unreliable. Further, it must be remembered that Mr. Kroeker was the sole occupant of the vehicle and that Cst. Bundt’s interaction with him at the roadside lasted for approximately 71 seconds.

[32] As for Mr. Kroeker's red, droopy and sleepy eyes, defence counsel submits that, “without more, this observation is of little value” and that Mr. Kroeker “had just worked an 18 hour shift.” This last submission is factually incorrect. As I interpret what Mr. Kroeker told Cst. Bundt at the RCMP detachment, he claimed to have woken up at about 7 AM and worked a shift of 10 to 12 hours. After that, it appears that Mr. Kroeker had some supper and then went to the bar. In any event, it is also relevant that the traffic stop took place at about 2:22 AM, which was just after the time the bars closed. Again, the fact that there might be an alternative explanation for the observation of Mr. Kroeker’s eyes does not render it unreliable.

[33] The same can be said for the submissions of defence counsel regarding Mr. Kroeker's presentation of his wallet to Cst. Bundt and his delay in producing his driver’s license. Defence counsel submits that when Cst. Bundt asked Mr. Kroeker for his license,

registration and insurance, Mr. Kroeker immediately produced his wallet stating “it's all there”. While the Constable acknowledged that the wallet may have been open to Mr. Kroeker's driver’s license, it is nevertheless objectively significant that it took Mr. Kroeker an additional 60 seconds or more to actually retrieve the driver’s license from the wallet and hand it to the officer. It was during this interaction that the Constable described Mr. Kroeker's motor skills as slow. It appears from the video that Mr. Kroeker showed the officer a bankcard, rather than the requested documentation, during this time. He also appears to have dropped his social insurance card as he emerged from his vehicle. I disagree with the suggestion by defence counsel that there is no “evidentiary value whatsoever” to these observations.

[34] Finally, defence counsel is critical of Cst. Bundt’s description of Mr. Kroeker's speech as slurred, mumbly and difficult to understand. The main reason for this criticism seems to be that the Constable also testified that Mr. Kroeker’s speech pattern did not change significantly from what he observed at the roadside to what he observed later at the RCMP detachment during their two -15 minute conversations while waiting for the breath samples to be taken. Defence counsel characterized Mr. Kroeker in police custody as someone who was “articulate and coherent enough to carry on an intellectually stimulating conversation.” Once again, I disagree. Having listened closely to all of the video evidence, I conclude that Mr. Kroeker appeared to be slurring even when handing his wallet to the Constable and stating “it's all there”. Further, I disagree that Mr. Kroeker was articulate and coherent at the RCMP detachment. Rather, I would characterize his speech pattern as slurred throughout that time. While he was admittedly able to carry on

a conversation with the Constable, Mr. Kroeker was nevertheless slurring his words. In short, Mr. Kroeker looked and sounded like someone under the influence of alcohol.

[35] The trial judge concluded that, on the totality of the evidence, Cst. Bundt had met the objective test of reasonable grounds (para. 27). I agree with the correctness of that conclusion.

3) In the alternative, if Cst. Bundt did not have reasonable grounds, should the results of the breath samples have been excluded?

[36] The three-part test for determining whether evidence should be excluded pursuant to s. 24(2) of the *Charter* in *R v Grant*, 2009 SCC 32, was set out by the trial judge at para. 30 of his reasons. The considerations are:

1) the seriousness of the *Charter*-infringing conduct;
2) the impact on the *Charter*-protected interests of the accused; and
3) Society's interest in the adjudication of the case on its merits.

[37] A helpful summary of the considerations in *Grant* is set out in *R v Harrison*, 2014 ONCJ 5, at para. 33:

> 33 In *R. v. Beattie*, Duncan J. summarized in point form what he considered to be the important points set out by the Supreme Court of Canada as follows:
>
> * The new approach is more flexible than the *Collins/Stillman* approach. There are no presumptions of admission or exclusion.
>
> * The purpose is to maintain the good repute of the administration of justice by both maintaining the rule of law and upholding *Charter* rights.
>
> * The focus is both long term and prospective, not on the immediate reaction to admission or exclusion in a particular case.

> * The focus is also societal and systemic. It is not to punish the police or compensate the accused in any particular case but to further the long term interests of society and the justice system.
>
> * The court must consider all of the circumstances which involves an assessment and balancing of 1) the seriousness of the *Charter*-infringing state conduct, 2) the impact of the breach on the *Charter*-protected interests of the accused, and 3) the societal interest in adjudication on the merits.
>
> * The seriousness of *Charter*-infringing conduct can be graded on a spectrum from trivial to blatant and flagrant.
>
> * The impact of the police conduct on the appellant's *Charter*-protected interests is examined from the perspective of the accused. The degree of intrusiveness of the unconstitutional action of government agents ranges from impact which might be described as fleeting, transient or technical to profoundly intrusive.
>
> * Society's interest in adjudication on the merits will almost always favour admission of the evidence. However the gravity of the charge should not be permitted to overwhelm the other factors.

[38] *Grant* also states that considerable deference should be accorded to the weighing process and the balancing of these concerns by the trial judge: para. 127. In addition, in cases involving breath sample evidence, whose method of collection is relatively non-intrusive, reliable evidence obtained from the accused's body may be admitted: para. 111.

[39] The short but specific reasons of the trial judge on this point were set out at paras. 31 to 34:

> [31] It is true that the arrest led to the detention of Mr. Kroeker for several hours. However, even if the officer in this case did not have objectively reasonable grounds for the arrest before the accused exited his truck, sufficient grounds were apparent shortly thereafter based on additional indicia

> of impairment, as depicted in the video entered by the Crown. Accordingly, any breach was short-lived. It is my view that, overall, the officer was acting in good faith.
>
> [32] The impact of the *Charter*-protected privacy interest is less serious in this case than in other types of searches (e.g. a search of one's home). Aside from the period of detention, any other *Charter* breach was minimally serious. There was no impact on Mr. Kroeker's dignity, any impact on his privacy was not at the high end of the spectrum, and the impact on his bodily integrity was very low.
>
> [33] The offences for which Mr. Kroeker is charged are serious. There is a strong public interest in the detection of individuals whose ability to drive is impaired. As well, the breath samples constitute reliable evidence.
>
> [34] On balance, the analysis in this case favours inclusion of the evidence.

[40] Defence counsel has failed to persuade me that the trial judge committed any error of law in these reasons.

4) Was Mr. Kroeker's ability to drive a motor vehicle impaired by alcohol consumption?

[41] At para. 57 of his reasons, and quoting from the Yukon Court of Appeal's decision in *R v Schmidt*, 2012 YKCA 12, the trial judge correctly summarized the state of the law on the proof of impaired driving. In short, the Crown must prove that the consumption of alcohol by an accused has impaired that person's ability to operate a motor vehicle "to any degree ranging from slight to great."

[42] Further, as noted in *Bush*, cited above, at para. 47, a slight impairment to drive relates to a reduced ability in some measure to perform a complex motor function impacting on response time, judgment and regard for the rules of the road.

[43] Here, the trial judge focussed on Mr. Kroeker's confusion regarding his right to counsel and later at the RCMP detachment (paras. 59 and 60). He then concludes at para. 61:

> [61] In my view, these exchanges demonstrate that Mr. Kroeker is having a difficult time processing what is occurring. Although it may be expected that an individual, especially one who has never been previously arrested, would become nervous and uncertain in this type of situation, Mr. Kroeker's demeanour is beyond this state, and is consistent with someone who is impaired.

I agree with this assessment and would add that this is also a good description of how Mr. Kroeker appeared during his lengthy conversations with Cst. Bundt at the detachment while waiting to provide the breath samples.

[44] In addition, it is reasonable to presume that the trial judge also had in mind here what he observed earlier about Mr. Kroeker immediately after getting out of his vehicle at the roadside:

> …As the saying goes, a picture is worth a thousand words. My observations are of an individual who, seconds after his arrest, has a confused and awkward demeanour. For example, after exiting his truck and being asked to accompany the officer to the police vehicle, Mr. Kroeker complies and starts walking beside the officer. He then, unexpectedly, stops, turns toward and stares at the officer, before saying 'sure', after which he continues moving towards the vehicle with the officer. He walks in a slow and deliberate fashion… (para. 28)

[45] Is also important to remember, although not specifically mentioned by the trial judge, that Cst. Bundt testified that, upon putting Mr. Kroeker in the rear seat of the police vehicle, the odour of alcohol was noticeably stronger and had not been present in the police vehicle previously.

[46] The trial judge further relied upon Cst. Bundt's evidence that when he saw Mr. Kroeker three days later at the detachment, he was speaking more clearly, had more fluid movement and had no odour of alcohol on his breath. In the result, the trial judge concluded at paras. 62 and 63:

> [62] Cst. Bundt also had an opportunity to interact with Mr. Kroeker three days later at the police detachment. He describes Mr. Kroeker as having clearer speech, more fluid movement and an absence of the odour of alcohol on his breath. Despite some issues pointed out by the defence (i.e. Cst. Bundt's lack of detailed notes of this encounter, some unclearness as to the length of the encounter), in my view this evidence is still of value in assessing Mr. Kroeker's ability to drive a motor vehicle on October 20th.
>
> [63] Considering all of the evidence, I find beyond a reasonable doubt that his ability to operate a motor vehicle was impaired by alcohol.

[47] As I understood his argument, the main point raised by defence counsel here is that the trial judge failed to consider the video evidence showing Mr. Kroeker's lengthy interaction with Cst. Bundt during the two observation periods preceding the taking of the breath samples. Again, counsel characterized this evidence as a "significant" demonstration of Mr. Kroeker's "coherence… physical abilities and mental awareness at a time proximate to the offence." I indicated earlier that I disagree with this assessment. For my reasons at para. 34 above, I agree with the trial judge that how Mr. Kroeker looked and sounded at the detachment, rather than constituting evidence capable of raising a reasonable doubt as to his impairment, is consistent with someone who was impaired.

[48] In any event, as I noted in *R v Winfield*, 2008 YKSC 69, at paras. 7 and 8, in the absence of an error of law, the test to be applied by a summary conviction appeal judge

is whether the evidence at trial is reasonably capable of supporting the trial judge's conclusions. If it is, the appeal court is not entitled to substitute its view of the evidence for that of the trial judge. Further, a misapprehension of the evidence does not necessarily render a verdict unreasonable. Rather, a high standard of deference is due to the trial judge's reasons, unless there has been a palpable and overriding error affecting his or her assessment of the facts.

CONCLUSION

[49] The Crown's appeal on the issue of the designation of Cpl. Morin as a qualified technician is dismissed.

[50] Mr. Kroeker's cross-appeal on the issues of reasonable grounds, exclusion of the breath sample results and proof of impairment by alcohol is similarly dismissed.

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GOWER J.