NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Amyotte*, 2018 NSCA 98

Date: 20181214
Docket: CAC 471763
Registry: Halifax

Between:

Matthew Chad Amyotte

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Elizabeth Van den Eynden
Appeal Heard:	June 14, 2018, in Halifax, Nova Scotia
Subject:	Reasonable and probable grounds; refusal of demand; leave
Summary:	A provincial court judge convicted Mr. Amyotte of refusal/failure to provide a breath sample (s.254 (5) of the *Criminal Code*). He unsuccessfully appealed his conviction to the Summary Conviction Appeal Court (SCAC). He appeals to this Court under s. 839(1) of the *Code*. Leave is required and only on a question of law.
Issues:	Did the SCAC judge err in law in finding: (1) the police officer had reasonable and probable grounds to arrest and make a breath demand; (2) Mr. Amyotte unequivocally refused to provide a breath sample; and, (3) a new s. 10(b) *Charter* argument could not be raised on appeal?
Result:	Leave denied. The grounds of appeal have little to no merit. The appeal does not raise issues that extend beyond it or affect the administration of justice. This case involves well-established principles with no apparent legal error in their application to the circumstances of this case.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 12 pages.

NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Amyotte*, 2018 NSCA 98

Date: 20181214
Docket: CAC 471763
Registry: Halifax

Between:

Matthew Chad Amyotte

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Fichaud, Bryson and Van den Eynden JJ.A.
Appeal Heard:	June 14, 2018, in Halifax, Nova Scotia
Held:	Leave to appeal denied, per reasons for judgment of Van den Eynden, J.A.; Fichaud and Bryson, JJ.A. concurring
Counsel:	Nicholaus S. Fitch, for the appellant Kenneth W.F. Fiske, Q.C., for the respondent

Reasons for judgment:

Overview

[1] A provincial court judge convicted Mr. Amyotte of refusal/failure to provide a breath sample (s.254 (5) of the *Criminal Code*). He unsuccessfully appealed his conviction to the Summary Conviction Appeal Court (SCAC). He appeals to this Court under s. 839(1) of the *Code*. Leave is required. If granted, our jurisdiction is restricted to questions of law.

[2] Mr. Amyotte contends, as he did in both courts below, that the police officer did not make a proper demand for his breath sample, nor was his refusal unequivocal. Although no *Charter* breaches were advanced at trial, Mr. Amyotte asked the SCAC to entertain an argument that his s. 10(b) *Charter* rights were breached. The SCAC judge declined. Mr. Amyotte says this too was an error.

[3] I would decline to grant leave. My reasons follow.

Background

[4] The appellant, Matthew Chad Amyotte, was charged that he did, on or about November 29, 2015 at or near Dartmouth, Nova Scotia:

> Have the care or control of a motor vehicle while his ability to operate a motor vehicle was impaired by alcohol or drug, contrary to Section 253(l)(a) of the Criminal Code;
>
> AND FURTHER that he at the same time and place aforesaid, did unlawfully and without reasonable excuse, fail or refuse to comply with a demand made to him by a Peace Officer to provide samples of his breath suitable to enable an analysis to be made in order to determine the concentration, if any, of alcohol in his blood, contrary to Section 254(5) of the Criminal Code.

[5] The appellant pleaded not guilty to both counts. The matter was heard in the Provincial Court on October 25, 2016 before the Honourable Judge Flora I. Buchan.

[6] The Crown called two witnesses, Sergeant Joel Leger, a member of the A. Murray MacKay Bridge Patrol, and Constable Kristen Bradley of the Halifax Regional Police. The appellant did not testify. Sergeant Leger testified that on

November 29th, he was on bridge patrol duty and attended to a disabled vehicle on the bridge. The vehicle had a flat tire. The appellant was standing beside the vehicle. Sergeant Leger called a tow truck.

[7] While waiting for the tow truck, Sergeant Leger observed Mr. Amyotte stumble and stagger and he smelled alcohol on Mr. Amyotte's breath. Sergeant Leger called for Halifax Regional Police to attend the scene. Constable Bradley arrived approximately forty-five minutes later.

[8] Constable Bradley arrested Mr. Amyotte for having care and control of a motor vehicle while intoxicated. The Constable read him his *Charter* rights and cautioned him. Constable Bradley then read a demand for a breath sample to Mr. Amyotte. He responded, "No, prove it." He was charged with refusal as noted above.

[9] The appellant was taken to the Halifax police station where he spoke with duty counsel. He was not asked to provide a breath sample and he did not volunteer to do so.

[10] There was no evidence respecting Mr. Amyotte actually operating the motor vehicle and no clear evidence that he occupied the driver's seat. In both courts below, Mr. Amyotte tried to advance these details, as well as the timing of certain events, to prop up his argument that the breath demand was invalid and the police officer's belief that he had committed an offence under s. 253 within the preceding three hours was not objectively reasonable.

[11] The trial judge rejected these arguments and the SCAC judge found no fault with her doing so. The evidence and the treatment of same is best understood by reference to the decisions below. Later, I will set out the relevant excerpts.

[12] After concluding the evidence portion of the trial, the parties opted to provide written submissions to the trial judge. In its written submissions, the Crown acknowledged there was uncertainty, based on the evidence, about whether Mr. Amyotte was seen in the driver's seat of the motor vehicle. Accordingly, the Crown did not rely upon the presumption of care or control set out in s. 258(1)(a) of the *Code* and thus, the court had to assess whether "care or control" has been established in compliance with the "realistic risk of danger" analysis as set out in *R. v. Boudreault*, 2012 SCC 56. This involves a consideration of whether the vehicle was operable. In this case, there was no evidence that Mr. Amyotte made any attempt to put the vehicle in motion given the flat tire, plus he was awaiting a

tow truck. Considering this, the Crown conceded that the trial judge could find there was a reasonable doubt about whether there was a realistic risk of danger.

[13] In her decision rendered January 9, 2017, Judge Buchan acquitted Mr. Amyotte on the s. 253(1)(a) charge (care or control) and entered a conviction in relation to the s. 254(5) charge (refusal). She imposed a $1,000 fine plus a $300 VFS and a one-year driving prohibition.

[14] Mr. Amyotte appealed from this conviction, alleging Judge Buchan erred by finding Constable Bradley had reasonable and probable grounds to make a breath demand and that there was an unequivocal refusal.

[15] SCAC judge Justice Ann E. Smith heard the appeal on August 23, 2017. She invited follow up submissions respecting Mr. Amyotte's s. 10(b) *Charter* rights. These were received in October. In her decision (2017 NSSC 278) released November 22, 2017, Justice Smith dismissed the appeal from conviction. Mr. Amyotte then filed a Notice of Application for Leave to Appeal and Notice of Appeal to this Court.

Issues

[16] Mr. Amyotte's appeal raises the following grounds:

1. Did the SCAC judge err in law in finding the police officer had reasonable and probable grounds to arrest and make a breath demand?
2. Did the SCAC judge err in law in finding that Mr. Amyotte unequivocally refused to provide a breath sample?
3. Did the SCAC judge err in law in finding that Mr. Amyotte could not raise a s. 10(b) *Charter* argument during his appeal?

Should leave to appeal be granted?

[17] As noted, before we can entertain this appeal, we must be persuaded that leave ought to be granted and the ground(s) must involve a question of law alone (see s. 839(1) *Code*).

[18] In his written submissions to this Court, Mr. Amyotte neglected to address the essential issue of whether leave should be granted. In oral submissions, counsel for Mr. Amyotte made brief submissions on why leave should be granted. The submissions were more in the nature of conclusionary statements that the leave

threshold has been met rather than an explanation of how and why that might be the case.

[19] This is not a *de novo* appeal from the decision of the trial judge. Our focus must be on the alleged errors of the SCAC judge, specifically, whether the SCAC judge erred in the statement or application of the legal principles governing its review. In *R. v. Pottie*, 2013 NSCA 68, Justice Farrar explained why leave is not generously granted. He said:

> [20] The rationale for selectively granting leave to appeal in order to limit access to provincial appellate courts is understandable. When a summary conviction matter is granted a second appeal to a provincial appellate court, it becomes the third court involved in the proceedings. If leave to the provincial appellate courts is not granted selectively, summary matters would essentially have more appeal rights than some of the most serious criminal cases at the Supreme Court of Canada. (citations omitted.)

[20] In *Pottie*, Justice Farrar summarized the legal principles that guide provincial appellate courts when deciding whether leave to appeal from a SCAC decision should be granted (see para. 21 and authorities cited therein). And in *R. v. McIntosh*, 2018 NSCA 39, this Court said:

> [9] Leave to appeal from the SCAC will be granted where the questions of law raised transcend the borders of the specific case and are significant to the general administration of justice or where a "clear" error is apparent, especially if the convictions are serious and the appellant faces a significant deprivation of liberty (see R. v. R.R., 2008 ONCA 497; R. v. MacNeil, 2009 NSCA 46; R. v. Pottie, 2013 NSCA 68).
>
> [10] An appeal involving well-settled areas of the law will not usually raise issues that have significance to the administration of justice beyond a particular case (R. v. Zaky, 2010 ABCA 95 at para.10).

[21] The respondent Crown made extensive submissions, both written and oral, in support of its position that leave should be denied. In summary, the Crown asserts that although this appeal may be important to the appellant, it does not raise issues that extend beyond this case or affect the administration of justice. Rather, this case involves well-established principles applicable to the singular circumstances of this case. Further, the appellant does not face a significant deprivation of liberty if this Court refuses to grant leave. Because of his conviction, Mr. Amyotte was ordered to pay the minimum fine and received the minimum

one-year driving prohibition. The Crown says these sanctions do not constitute a significant deprivation of liberty.

[22] In short, the Crown argues the decision of the SCAC judge does not reveal any obvious error and Mr. Amyotte is just asking this Court to undertake the exact same analysis the SCAC judge undertook, and come to a different conclusion.

[23] It is helpful to now review some excerpts from the decision of the SCAC judge.

[24] Respecting his first complaint that the police officer lacked the reasonable and probable grounds to arrest and make a breath demand, the appellant concedes the officer had the subjective belief that he was the driver but argues it was objectively unreasonable to believe this and that an offence had occurred in the previous three hours. The SCAC judge disposed of Mr. Amyotte's complaint this way:

> [13] A review of the Trial Judge's decision shows that she gave ample consideration as to whether Constable Bradley possessed the requisite reasonable and probable grounds to make the breath demand to the Appellant.
>
> [14] At pp. 10-12 of her decision, Judge Buchan states:
>
> > First of all I'm a – I am satisfied that Constable Brady (sic) had reasonable grounds in the whole of the circumstances to believe that an offence had been committed within the preceding three hours. The Defendant submits that there is no evidence as to when the car in question stopped on the bridge due to a flat tire other than when Sergeant Leger was notified by his superior that the car had stopped on the bridge at 3:50 a.m.
> >
> > Sergeant Leger immediately went to investigate arriving within moments at the stopped car. He testified that he was on patrol duty of the bridge on the night in question and that he would make several patrols across the bridge over the course of a shift. It only makes common sense that Mr. Amyotte's car suffered the flat tire very close to the time that Sergeant Leger arrived at the scene.
> >
> > The flat tire car occurred on one of two toll bridges spanning the Halifax Harbour. Traffic was very light. Sergeant Leger's testimony was that he made several patrols over the bridge on the night in question but that it was his Chief who directed him to Mr. Amyotte's car which Sergeant Leger had obviously not seen during some of his patrols up to that point.
> >
> > No pedestrians are permitted on this bridge therefore I could easily infer from these facts that a stalled or disabled vehicle on this particular bridge would very quickly come to the attention of Bridge Patrol. It makes no

> common sense whatsoever that Mr. Amyotte could have been on the bridge unnoticed with a flat tire for anything more than a few minutes before Sergeant Leger approached. Even going so far as considering that he – if he may have been there for an hour stranded on the bridge which is under regular patrol I am satisfied beyond a reasonable doubt that the breath demand was made within the three-hour requirement.
>
> While the Crown does not have to prove beyond a reasonable doubt that the Defendant was in fact in care of control of the vehicle and charged with refusal, based on the information that Constable Bradley had received from Sergeant Leger and his own observations including the fact that Mr. Amyotte had requested a tow truck for the very vehicle in question, his belief that Mr. Amyotte had care of control of the motor vehicle having consumed alcohol was both objectively and subjectively reasonable.

[15] In my view, the Trial Judge appropriately concluded that not only did the demanding officer hold a subjective belief as to the requisite factual elements, that the belief was objectively reasonable on the evidence before him.

[25] As to Mr. Amyotte's assertion that his refusal was equivocal, the SCAC judge concluded:

> [31] I am satisfied that Judge Buchan made no error of law when she determined on the evidence before her that the Crown proved that the officer made a lawful demand for breath samples. The learned Trial Judge made no legal error in finding that Mr. Amyotte refused to comply with a valid demand.

[26] Prior to reaching this conclusion, the SCAC judge reviewed these arguments and further reasons of the trial judge:

> [17] The Crown says that Mr. Amyotte's responses to Constable Bradley constituted an unequivocal and intentional refusal to provide breath samples.
>
> [18] The Crown refers to *R. v. McKeen*, 2001 NSCA 14 and *R. v. Komenda*, 2012 BCSC 536 as standing for the proposition that a refusal is complete once the accused unequivocally refuses, even if he later offers to provide a breath sample.
>
> [19] The Appellant in this case did not offer to provide a breath sample after talking with counsel, and was not asked to do so. The Appellant says that the refusal was not complete in those circumstances.
>
> [20] In her decision, the learned Trial Judge addressed the Appellant's argument that a refusal followed afterwards by a request to provide a sample does not ground liability pursuant to s. 254(5) of the *Criminal Code*.
>
> Judge Buchan referred to *R. v. Brown* as follows at p. 132 of her decision:

> In support of this submission the Defence provided the Court with a copy of an unreported decision of Judge Lenehan at his court *R. v. Martin Brown*.
>
> In that case the Court found that an – than an accused should not be asked about legal obligation until such as they have exercised their right to counsel. In that case the Defendant testified and the Court considered that testimony as follows, and I quote,
>
> > I do have some concern with regard to the refusal but after speaking with duty counsel Mr. Bright (sic) might have – Mr. Brown, I beg your pardon, might have been thinking that he was going to be asked 'are you going to be taking the test' and that what was on his mind when he said 'yes' as opposed to 'are you still refusing' so I have some concerns about whether or not Mr. Brown intended to refuse the breathalyzer demand.

[21] Judge Buchan distinguished the facts before her, stating as follows starting at p. 14 of her decision:

> Here the Court has no testimony from the Defendant about whether or not he clearly understood the demand, what his intention was with respect to the demand, nor if he requested an opportunity to blow after speaking to counsel.
>
> Constable Bradley did not testify that this was the case. He did provide Mr. Amyotte with more than one opportunity to provide a breath sample confirmed that him – hit –with him that he was still refusing but did not ask him again after Mr. Marriot (sic) – Amyotte had spoken with counsel.
>
> I do not find any circumstances that this equates to the offence not having – not having been completed.
>
> The – the demand made by Constable Bradley was unequivocal. There could not have been doubt left in the mind of Mr. Amyotte that he – that he must respond affirmatively to that demand or he will be charged with a failure or refusal of that demand.
>
> Making the demand on arrest complies with the requirements of the Code and also informs the accused of his or her jeopardy where they are asked whether they –before they're asked whether they wish to speak to counsel.
>
> I accept the unrefuted testimony of Constable Bradley that Mr. Amyotte understood the demand and that Mr. Amyotte [..] refusal was unequivocal on more than one occasion. Once he exercises right to counsel there is no evidence before the Court that he requested another opportunity to blow. His refusal was clearly

> intentional and without lawful excuse for the whole of the evidence.
>
> Section 254 in any event does not require – 254(3) in any event does not require multiple demands while there may be circumstances of which it would be prudent for a police officer to make a further demand following an accused exercising his or her right to counsel. This is not one of them therefore, on the whole of the evidence, the Crown has proven all the elements of the offence as noted on – as – as with respect to Count 2 of the Information and as a result I would find you, sir, guilty.
>
> Constable Bradley's testimony is that he gave Mr. Amyotte the breath demand reading from the card in his notebook at 4:37 a.m. followed by the provision of *Charter* rights including right to counsel.
>
> Mr. Amyotte wanted to exercise his right however he told Constable Bradley to prove it in response to the demand and engaged in conversation with Constable Bradley about why he – why the officer would not make a demand for his blood instead. **The officer told him that he was fully capable of providing the breath sample and told him to stop talking until he had talked to his lawyer and asked him three more times to provide a breath sample to which Mr. Amyotte responded on each occasion, "Prove it."** [my emphasis]

[27] It is the bolded statement above that lead the SCAC judge to write counsel and invite submissions respecting s. 10(b) of the *Charter*. This takes us to Mr. Amyotte's third complaint respecting the SCAC judge's refusal to entertain a new issue on appeal. In her letter to counsel she said:

> …I refer to the decision of the Honourable Judge Buchan…in particular to her statement:
>
> > The officer told him that he was fully capable of providing the breath sample and told him to stop talking until he had talked to his lawyer and asked him three more times to provide a breath sample to which Mr. Amyotte responded on each occasion, "prove it."
>
> I would like to receive written submissions as to whether you say that Mr. Amyotte's section 10(b) *Charter* rights were violated when Constable Bradley asked him for a breath sample on at least three occasions after he indicated he wished to speak to a lawyer. It would be helpful to the Court to receive your submissions as to whether *R v Bagherli*, 2014 MBCA 105, decision [sic] of the Court of Appeal, is relevant. …

After receiving submissions, the SCAC judge disposed of the matter as follows:

> [27] As noted above, on the evidence before the Court of Appeal in *Bagherli*, the Court found that Mr. Bagherli's s. 10(b) *Charter* rights had been violated when he was asked, "Will you provide samples of your breath?" after he had requested to speak with counsel.
>
> [28] I invited further submissions from counsel following the hearing of this appeal on whether there was a s. 10(b) *Charter* issue at play and as to whether the *Bagherli* decision was relevant. I received submissions from both Crown and Defence counsel.
>
> [29] I am satisfied that since Mr. Amyotte, who was represented by counsel at trial and on appeal, declined to raise the issue of a s. 10(b) *Charter* violation at trial or on appeal, I should not on my own raise a new issue on appeal. Further, I agree with Crown counsel that the evidentiary record before this Court is insufficient for this Court to consider whether a breach of *Charter* rights occurred. There is no evidence which establishes specifically when Cst. Bradley asked Mr. Amyotte to provide a sample, nor is there evidence of the precise language used by the officer in making those queries. Judge Buchan refers to him being asked three more times, but it is unclear precisely when.
>
> [30] In any event, I am convinced that I should not raise a *Charter* issue at this juncture.

[28] In his submissions to this Court, Mr. Amyotte described his argument on s. 10(b) as follows: "My main disagreement with the lower court's (SCAC) decision was the finding that the evidentiary record was incomplete for the Court to consider the *Charter* issue."

Leave request denied

[29] I would decline to grant leave. With respect, the grounds of appeal have little to no apparent merit. I agree with the Crown's submission that this case does not raise issues that extend beyond it or affect the administration of justice, rather it involves the application of well-established principles. The appellant does not face a significant deprivation of liberty if we refuse to grant leave. I agree with the Crown's position that Mr. Amyotte is essentially asking this Court to repeat the same analysis the SCAC judge undertook but arrive at a more favourable conclusion—that is not our role.

[30] The SCAC judge was clearly aware of her powers and responsibilities under s. 686(1) of the *Code*. She cited and applied the correct standard of review. She specifically referred to these principles before conducting her analysis (see paras. 8 to 10 of Justice Smith's decision.)

[31] Respecting the first issue (*Did the SCAC judge err in law in finding the police officer had reasonable and probable grounds to arrest and make a breath demand?*) the appellant has not identified any legal error committed by the SCAC judge in her statement of the principles governing her review or the application of those principles to the circumstances of this case. The SCAC judge reviewed the relevant provisions of the *Code* and governing authorities, reviewed the evidence and carefully considered the trial judge's reasons for finding the police officer's belief that Mr. Amyotte had care or control of the motor vehicle after having consumed alcohol was both subjectively and objectively reasonable. Further, after reviewing the complete record, it seems evident that these findings of the trial judge are supported by the record.

[32] Similarly, Mr. Amyotte has failed to identify nor do I see, any apparent error of law arising from the SCAC judge's conclusion that the trial judge did not err by holding, on the evidence before her, that the officer made a lawful demand for breath samples and Mr. Amyotte refused to comply with a valid demand. As stated by this Court in *R. v. Hadley*, [1989] N.S.J. No. 312, the finding whether words and conduct amount to a refusal to comply with a demand is one of fact. Courts have more recently treated appeals from "failure or refusal" cases the same (see for example *R. v. Peck* [1994] N.S.J. No. 39, 128 N.S.R. (2d) 206 (NSCA), para 14; *R v. Griffin* 1987 2 M.V.R. 309, para 17-19; *R. v. Weinkauf* 2007 SKQB 371 paras 6-8; *R. v. Desharnais* 1998 ABCA 167, para 12; *R v. White* 2005 NSCA 32, para 16.) Furthermore, Mr. Amyotte's case is not like *R. v. Cunningham* [1989 ABCA 163] where the refusal and a subsequent offer of a breath sample were both part of a single transaction.

[33] Turning to the third and final complaint, being the refusal of the SCAC judge to entertain a new *Charter* issue on appeal, similarly, no error is apparent. The appellant devoted only a few brief paragraphs in his written submissions in support of this contention of reviewable error. And with respect, oral submissions were equally brief, and, not persuasive.

[34] Apart from declaring a disagreement with the SCAC judge's determination that the evidentiary record is incomplete, the appellant again fails to point to any legal error of the SCAC judge in her statement and application of the principles that govern raising a *Charter* issue for the first time on appeal.

[35] In *R. v. Hobbs*, 2010 NSCA 53, this Court addressed the issue of raising *Charter* arguments for the first time. In *Hobbs*, Justice Saunders wrote:

> [55] There is a general prohibition against considering issues on appeal which were not raised at trial. To do so is fundamentally inconsistent with an appellate court's function. **R. v. Brown**, [1993] 2 S.C.R. 918; **R. v. Rollocks** (1994), 91 C.C.C. (3d) 193 (Ont. C.A.).
>
> [56] Our leave is required before an entirely new issue can be raised on appeal when it was not raised at trial. Whether to grant leave is a matter within our discretion. The exercise of that discretion will be guided by balancing the interests of justice as they affect the parties to the litigation. **R. v. Vidulich**, [1989] B.C.J. No. 1124 (Q.L.)(C.A.).
>
> [57] A high threshold is demanded before permitting argument on an issue that was not raised at trial. It is only in "exceptional circumstances" that an appellate court will grant leave to do so. **R. v. Ullrich** (1991), 69 C.C.C. (3d) 473 (B.C.C.A.). Mr. Hobbs' appeal is hardly an exceptional case. It is not one, for example, where an obvious injustice has arisen.
>
> [58] The test is particularly high where an appellant seeks to raise a **Charter** issue for the first time on appeal. **Charter** issues are too important to be dealt with in a factual void. **R. v. Shunamon** (1990), 99 N.S.R. (2d) 275 (C.A.) and **MacKay v. Manitoba**, [1989] 2 S.C.R. 357.

[36] Mr. Amyotte was represented by counsel at trial and on appeal to the SCAC. He did not raise the s. 10(b) issue at trial nor at his appeal. The SCAC judge turned her mind to the issue, invited submissions and then concluded, properly in my view, that she would not entertain any argument. She explained her concerns with the record and found it to be insufficient. Her concerns and determination of insufficiency seem well-founded.

Conclusion

[37] I would decline to grant leave. As a result, there is no need to further address the merits of this appeal.

Van den Eynden, J.A.

Concurred in:

Bryson, J.A.
Fichaud, J.A.