C A N A D A
PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX

C.H. 38503

I N T H E C O U N T Y C O U R T
OF DISTRICT NUMBER ONE

BETWEEN:

HER MAJESTY THE QUEEN, by
her Attorney General for
Nova Scotia,

Respondent

- and -

DELEON TIMOTHY MURPHY,

Appellant

The defendant, appellant in person.
Adrian Reid, Esq., for the respondent.

1983, January 17, O Hearn, J.C.C.:- The defendant appeals a conviction for refusal to submit to a Breathalyzer test. Several grounds were argued, including a constitutional objection to the Breathalyzer which I rejected in the course of the argument. One ground remained at the end of the discussion and it involved a perusal of the transcript, to determine what evidence was actually put forward and what use the late Chief Judge Green made of it.

The argument, in effect, is that the trial judge based his conviction upon evidence of impairment by intoxication after the initial demand to take the Breathalyzer test was made, and that the evidence concerning what the police officer making the demand observed before doing so was insufficient to provide reasonable and probable grounds for making the demand.

There was some brief discussion on the point during the trial, because the defendant was represented by counsel at the trial and counsel objected to evidence of intoxicated behaviour after the demand was made. In fact, the defendant at first agreed to take the test and then when brought to the testing van refused, and the demand was repeated. The evidence objected to was of another officer who did not come into contact with the defendant

until that point, and prosecuting counsel, in supporting the admissibility of the evidence argued, urged '...when the defence is challenging the propriety of the reasonable and probable grounds of the demanding officer, subsequent observations by an independent witness, while they're not relevant in terms of what the demanding officer thought would tend somewhat to support the demanding officer in terms of the existence of objective criteria or objective grounds which found a breathalyzer demand.' To this the judge respondent, 'I think you're right...the evidence will be admitted.'

The argument is that such evidence does not prove the grounds but is consistent with their existence and to that extent supports their existence. It is a distinction that has to be kept very clearly in mind, because if such evidence were the only evidence of impairment by the consumption of alcohol or a drug, it could not justify a peace officer making a demand.

In his summing up, the trial judge said there was ample evidence for the officer to make the initial demand and I agree. Unfortunately, the summing up, in commenting on the individual items of evidence composing the grounds, treated each such item as of little or no weight and easily explicable, in the circumstances in an innocent way. Even so, it was possible for him to rely upon the total picture as supplying definitive grounds, as long as the total picture was focused on the events and conditions that Corporal Woolridge testified he perceived before making the demand. This, however, is not clear from the trial judge's summing up, and it gives an impression that he was relying, to some extent at least, upon what happened after the demand, including the second demand, to provide the reasonable and probable grounds.

While it is possible and even probable that this is not a true reading of the summing up, especially in view of the remarks of counsel to justify the evidence that was objected to, nevertheless, the doubt about what actually happened is sufficiently

substantial to require a new trial. The appeal will be allowed and a new trial ordered. The defendant prosecuted his own appeal so that the only costs he can recover are his disbursements.

P.J. Thomas

A Judge of the County Court
of District Number One