Regina v. Milne *

[Indexed as: R. v. Milne]

28 O.R. (3d) 577
[1996] O.J. No. 1728
No. C21474

**Court of Appeal for Ontario,
Houlden, Abella and Moldaver JJ.A.**

May 16, 1996

* Application for leave to appeal to the Supreme Court of Canada dismissed with costs December 12, 1996 (La Forest, Cory and Major JJ.). S.C.C. File No. 25436. S.C.C. Bulletin, 1996, p. 2157.

Charter of Rights and Freedoms — Right to counsel — Detention — Sobriety tests — Police officer detaining motorist under s. 48(1) of Highway Traffic Act and requiring him to perform physical coordination tests without informing him of right to counsel — Accused charged with impaired driving — Admission of evidence resulting from physical coordination tests to prove impairment rendering trial unfair — Denial of detained motorist's right to counsel justifiable under s. 1 of Charter only where use of results of roadside sobriety tests restricted to determining whether or not there is evidence to justify making breathalyzer demand — Canadian Charter of Rights and Freedoms, ss. 1, 10(b) — Highway Traffic Act, R.S.O. 1990, c. H.8, s. 48(1).

Charter of Rights and Freedoms — Exclusion of evidence — Trial judge having discretion to exclude evidence if its admission would render trial unfair — Exclusion not depending on s. 24(1) or (2) of Charter but grounded in trial judge's general Charter duty to exercise his or her discretion to exclude evidence that would result in unfair trial — Admission of evidence resulting from physical coordination tests to prove impairment rendering trial unfair — Canadian Charter of Rights and Freedoms, s. 24(1), (2) — Highway Traffic Act, R.S.O. 1990, c. H.8, s. 48(1).

The accused was detained by a police officer who had received information that the driver of a vehicle the description of which matched that of the accused was possibly impaired. The police officer detected a strong odour of alcohol on the accused's breath and noticed that his eyes were glassy. The police officer asked the accused to perform physical co-ordination tests. He did not inform the accused of his right to counsel. When the accused failed those tests, the police officer arrested him and made a breathalyzer demand.

The accused was charged with impaired driving and care or control "over 80". At trial, the Crown conceded that the breathalyzer technician had not complied with s. 258(1)(c)(ii) of the Criminal Code. The care or control "over 80" charge was accordingly dismissed.

Defence counsel applied to exclude the evidence of the physical coordination tests on the ground, inter alia, that the accused's right to counsel under s. 10(b) of the Canadian Charter of Rights and Freedoms and his right against self-incrimination under s. 7 of the Charter were violated when the accused was required to undertake the tests. The trial judge concluded that the decision of the Ontario Court of Appeal in R. v. Saunders was binding authority for the principle that the violation of the accused's s. 7 and s. 10(b) rights was saved under s. 1 of the Charter. In Saunders, the accused was charged with driving "over 80". The Court of Appeal held that the limitation on the motorist's right to counsel arose by necessary implication from s. 48(1) of the Highway Traffic Act (which provides that a police officer may require the driver of a motor vehicle to stop for the purpose of determining whether or not there is evidence to justify making a demand under s. 254 of the Code), and that it was a reasonable limit which could be demonstrably justified in a free and democratic society. The trial judge

refused to exclude the evidence of the sobriety tests. The accused was convicted, and the conviction was affirmed on his summary conviction appeal. The accused appealed.

Held, the appeal should be allowed.

It is apparent from Saunders that roadside coordination tests were meant to be an investigative tool to allow police to remove impaired drivers from the highway immediately. Their use was to be limited to enabling the police officer to make a breathalyzer demand if the results of the tests provided the reasonable and probable grounds necessary to justify a demand. In asking the accused to undergo the coordination tests, the police officer's purpose fell within the ambit of s. 48(1) of the Highway Traffic Act. Accordingly, it could not be said that the evidence resulting from those tests was obtained unfairly or in a manner which violated the accused's right to counsel. However, admission of the test results at trial to incriminate the accused on a charge of impaired driving, a purpose altogether different from the one contemplated by s. 48(1), would render the trial unfair. If, having regard to the circumstances under which evidence was obtained, it could be said that the admission of that evidence would lead to an unfair trial, the evidence should be excluded under the Charter. Exclusion in such circumstances would not depend on s. 24(1) or (2) of the Charter, but instead on the trial judge's duty, constitutionalized by the enshrinement of a right to a fair trial in the Charter, to exercise his or her discretion to exclude evidence that would result in an unfair trial.

If sobriety tests were meant to provide the police with a means of gathering evidence that could later be used to incriminate and convict a motorist of impaired driving, s. 48(1) would not pass scrutiny under s. 1 of the Charter. Driving "over 80" cases which have upheld sobriety tests or ALERT tests as reasonable limits under s. 1 of the Charter have emphasized that the motorist's submission to either kind of test does not, of itself, render the motorist liable to criminal charges. The limited purpose and use of such tests has figured prominently in the jurisprudence that has justified the tests under s. 1. The fact that the evidence provided by the ALERT test cannot be introduced against the motorist is a critical factor in the s. 1 analysis. But for this limitation, it is doubtful that roadside testing would have passed any of the three branches of the proportionality test. The right to counsel, as it relates to the self-incrimination component, could not be said to have been impaired as little as possible if the compelled and self-created incriminatory evidence gathered at the roadside could be used for trial purposes to convict a motorist.

R. v. Harrer, [1995] 3 S.C.R. 562, 32 C.R.R. (2d) 273, 101 C.C.C. (3d) 193, 42 C.R. (4th) 269, 128 D.L.R. (4th) 98, 186 N.R. 329; R. v. Oakes (1986), 19 C.R.R. 308, [1986] 1 S.C.R. 103, 53 O.R. (2d) 719n, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, *apld*

R. v. Saunders (1988), 36 C.R.R. 175, 27 O.A.C. 184, 41 C.C.C. (3d) 532, 63 C.R. (3d) 37, 4 M.V.R. (2d) 199 (C.A.), *distd*

R. v. Colarusso (1994), 19 C.R.R. (2d) 193, [1994] 1 S.C.R. 20, 87 C.C.C. (3d) 193, 26 C.R. (4th) 289, 110 D.L.R. (4th) 297, 49 M.V.R. (2d) 161, 162 N.R. 321; R. v. Ross, [1989] 1 S.C.R. 3, 46 C.C.C. (3d) 129, 67 C.R. (3d) 209, 91 N.R. 81, 31 O.A.C. 321, 37 C.R.R. 369, *consd*

Other cases referred to

R. v. Bartle, [1994] 3 S.C.R. 173, 92 C.C.C. (3d) 289, 33 C.R. (4th) 1, 23 C.R.R. (2d) 193, 118 D.L.R. (4th) 83, 6 M.V.R. (3d) 1; R. v. S. (R.J.), [1995] 1 S.C.R. 451, 26 C.R.R. (2d) 1, 96 C.C.C. (3d) 1, 36 C.R. (4th) 1, 121 D.L.R. (4th) 589, 177 N.R. 81, 21 O.R. (3d) 797n; R. v. Seo (1986), 54 O.R. (2d) 293, 20 C.R.R. 241, 25 C.C.C. (3d) 385, 51 C.R. (3d) 1, 27 D.L.R. (4th) 496, 38 M.V.R. 161, 13 O.A.C. 359 (C.A.);

R. v. Smith (1996), 28 O.R. (3d) 75, 34 C.R.R. (2d) 314, 105 C.C.C. (3d) 58 (C.A.); R. v. Talbourdet (1984), 8 C.R.R. 82, 32 Sask. R. 5, 12 C.C.C. (3d) 173, 39 C.R. (3d) 210, 9 D.L.R. (4th) 406, 27 M.V.R. 46, [1984] 3 W.W.R. 525 (Sask. C.A.); R. v. Therens, [1985] 1 S.C.R. 613, 13 C.R.R. 193, 18 C.C.C. (3d) 481, 45 C.R. (3d) 97, 18 D.L.R. (4th) 655, 32 M.V.R. 153, 59 N.R. 122, 40 Sask. R. 122, [1985] 4 W.W.R. 286, 38 Alta. L.R. (2d) 99n; R. v. Thomsen, [1988] 1 S.C.R. 640, 32 C.R.R. 257, 40 C.C.C. (3d) 411, 63 C.R. (3d) 1, 4 M.V.R. (2d) 185, 84 N.R. 347, 27 O.A.C. 85

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 1, 7, 8, 10(b), 24(2)
Criminal Code, R.S.C. 1985, c. C-46, ss. 254 [am. R.S.C. 1985, c. 27 (1st Supp.), s. 36; R.S.C. 1985, c. 1 (4th Supp.), s. 14; R.S.C. 1985, c. 32 (4th Supp.), s. 60], 258 (1)(c) [am. R.S.C. 1985, c. 27 (1st Supp.) s. 36]
Highway Traffic Act, R.S.O. 1990, c. H.8, s. 48(1)

APPEAL from a judgment affirming a conviction on a charge of impaired driving.

Paul Burstein, for appellant.
Rick Libman, for the Crown, respondent.

The judgment of the court was delivered by

MOLDAVER J.A.: — Section 48(1) of the Highway Traffic Act, R.S.O. 1990, c. H.8 ("HTA"), provides:

> 48(1) A police officer, readily identifiable as such, may require the driver of a motor vehicle to stop for the purpose of determining whether or not there is evidence to justify making a demand under s. 254 of the Criminal Code (Canada).

In R. v. Saunders (1988), 41 C.C.C. (3d) 532, 36 C.R.R. 175 (Ont. C.A.), this court considered s. 48(1) (at the time of Saunders, s. 48(1) of the HTA was numbered 30a(1); for convenience, I propose to use the present number throughout) and concluded:

- that it authorized a police officer to require a detained motorist, suspected of impaired driving, to submit to roadside physical co-ordination tests for the purpose of determining whether there is evidence which would justify an A.L.E.R.T. or breathalyzer demand;

- that it was unnecessary for the officer to advise the motorist of his or her s. 10(b) Charter right to counsel before requiring the motorist to submit to these co-ordination tests; and

- that the limitation on the motorist's right to counsel arose by necessary implication from s. 48(1) and that it was a reasonable limit which could be demonstrably justified in a free and democratic society pursuant to s. 1 of the Canadian Charter of Rights and Freedoms.

These principles were recently affirmed by this court in R. v. Smith, a judgment of the Ontario Court of Appeal, released February 5, 1996 [now reported 28 O.R. (3d) 75, 34 C.R.R. (2d) 314].

In this appeal we are asked to decide whether the state can use evidence created as a result of the motorist's required participation in physical roadside co-ordination tests to prove impairment at trial on a charge of impaired driving.

BACKGROUND FACTS

The appellant was charged in a single information with the offences of driving while his ability to operate a motor vehicle was impaired by alcohol, and having the care or control of a motor vehicle with a blood alcohol level that exceeded 80 mg of alcohol in 100 ml of blood ("over 80"). The pertinent facts were read into the record at trial by way of agreed statement of fact.

After receiving information that the driver of a green Pinto parked by "Beozek's" electrical shop was possibly impaired, Ontario Provincial Police Constable Roth attended at the scene and observed the tail lights of the Pinto come on as the vehicle was reversing out of its parking spot. Constable Roth blocked the path of the vehicle and approached the driver (the appellant). The constable detected a strong odour of alcohol on the appellant's breath and noticed that his eyes were "very glassy". When asked for his driver's licence, the appellant was "very slow" in producing it. The appellant identified himself and admitted to having consumed two glasses of wine.

Constable Roth asked the appellant to exit his vehicle. Due to the icy conditions in the parking lot, Constable Roth asked Mr. Beozek, the proprietor of the electrical shop, for permission to use the basement of his shop to conduct physical co-ordination tests. Once in the basement, Constable Roth asked the appellant to perform various co-ordination and sobriety tests. After Constable Roth explained and demonstrated the finger-to-nose test, the appellant made two unsuccessful attempts at performing this test. The officer then asked the appellant to look straight ahead and walk heel to toe. The appellant kept his hands at his side and took about eight to ten steps forward. During this walking test, the appellant's feet were not steady and he swayed towards the right. Following the failed tests, Constable Roth arrested the appellant, cautioned him, and made a formal demand for samples of his breath. The appellant complied and was taken to the White River Police Detachment where he provided two samples of his breath. The readings were respectively 160 mg and 153 mg of alcohol per 100 ml of blood.

At trial, Crown counsel conceded that the breathalyzer technician had not complied with s. 258(1)(c)(ii) of the Criminal Code, R.S.C. 1985, c. C-46, because there had not been an interval of at least 15 minutes between the times when the samples were taken. The over 80 charge was accordingly dismissed. The impaired driving charge, as noted, proceeded by way of agreed statement of fact.

Defence counsel submitted that the appellant's rights under ss. 7, 8 and 10(b) of the Charter were violated when the appellant was required to undertake the co-ordination tests and, consequently, the resulting evidence should be excluded. The learned trial judge ruled that s. 8 of the Charter had no application to the circumstances of the case. He then proceeded to consider the issue of whether or not the appellant's participation in the sobriety tests violated his s. 10(b) Charter right to counsel and his s. 7 Charter right against self-incrimination. The trial judge concluded that these issues had been canvassed and decided in R. v. Saunders, supra, and that he was bound by that decision. Accordingly, he concluded that, even though the appellant's ss. 7 and 10(b) Charter rights had been violated, the violation was saved under s. 1 of the Charter. He therefore dismissed the appellant's application to have the sobriety test evidence excluded under s. 24(2) of the Charter.

The trial judge then reviewed the facts and found that the evidence led to no other conclusion but that the appellant's ability to operate a motor vehicle was impaired by alcohol. In coming to this conclusion, he relied in part on the appellant's poor performance on the sobriety tests. Accordingly, he convicted the appellant of impaired driving.

The appellant proceeded by way of summary conviction appeal. The appeal was dismissed. In disposing of the grounds of appeal under ss. 7 and 10(b) of the Charter, the learned summary conviction appeal court judge held that Saunders, supra, was determinative and that he too was bound by the decision. The appellant now applies to this court for leave to appeal on a question of law alone and, if leave is granted, he appeals against his conviction on the charge of impaired driving.

THE SAUNDERS DECISION

The courts below were of the view that Saunders, supra, was determinative of the issue at hand. That remains to be seen.

In Saunders, the accused was tried on an over 80 charge. The facts giving rise to the offence can be briefly stated.

On the day in question, a police officer took note of the Saunders vehicle because it was travelling at a high rate of speed and moving from side to side within its lane. After stopping the vehicle and making certain observations, the officer suspected that Saunders' ability to operate a motor vehicle might be impaired by alcohol. He then asked Saunders to perform various physical co-ordination tests at the roadside, as a result of which he formed the opinion that Saunders was impaired.

Saunders was placed under arrest for impaired driving and advised of his right to counsel. The officer then asked Saunders to accompany him to the police station to provide samples of his breath suitable for analysis. Saunders complied and two breath tests were administered, each revealing a blood alcohol level of 140 mg.

Saunders was found guilty at trial and his summary conviction appeal was dismissed. A subsequent appeal to this court raised two issues:

-- Was Saunders detained when he was asked to perform the physical co-ordination tests at the roadside; and

-- If so, should he have been advised of his right to counsel before being asked to undergo the co-ordination tests?

Before proceeding further, it is important to understand the significance of these two issues. In order to justify the breathalyzer demand, the officer needed to have reasonable and probable grounds to believe that Saunders was committing, or had within the preceding two hours committed, the offence of impaired driving or over 80. On the facts, it is apparent that the officer relied on reasonable and probable grounds of impairment to make the breathalyzer demand, arising from Saunders' failure to adequately perform the physical co-ordination tests. It therefore became necessary to consider whether or not the officer could use those test results to form his opinion of impairment. This in turn necessitated Charter scrutiny to determine whether Saunders was detained when he was asked to perform the co-ordination tests and, if so, whether he should have been advised of his right to counsel before being required to perform the tests. Affirmative answers to both of these questions would have raised a further issue, namely, whether the evidence resulting from the tests had been obtained in a manner that infringed Saunders' right to counsel, thereby potentially warranting its exclusion.

Writing for the court, Cory J.A. (as he then was) determined that Saunders was detained when he was pulled over and required to undergo the co-ordination tests. He succinctly explained at p. 536 C.C.C.:

> Even without a suggestion of the application of physical restraint, a person in the appellant's position would believe that he was detained when he was pulled over and would understand that he had no alternative but to comply with the officer's request to perform the co-ordination tests.

(Emphasis added)

I take this to mean that, even if Saunders was not legally required to submit to the co-ordination tests (as would seem to be the case), it could properly be inferred that he felt compelled to comply with them, absent evidence to the contrary. In other words, he believed that he had no choice. That being so, Cory J.A. recognized that, in the ordinary course of events, Saunders ought to have been advised of his right to counsel.

Cory J.A. noted the importance of the right to counsel and, in particular, the fact that self-incriminating evidence obtained following a breach of that right will generally lead to exclusion. He continued at p. 537 C.C.C.:

> However, if the stopping of the appellant and the requirement that he perform the tests constitute a reasonable limit on the right to retain and instruct counsel without delay which is prescribed by law and which can be demonstrably justified, then the exclusionary provisions of s. 1 of the Charter may be applicable.

Cory J.A. then commenced his s. 1 analysis. After pointing out the societal risks and grave consequences associated with impaired driving, he concluded that s. 48(1) was enacted to provide a means whereby impaired drivers could be removed from the highway immediately. From this, he reasoned that s. 48(1) implicitly and necessarily empowered a police officer to require a driver, suspected of being impaired, to undergo co-ordination tests at the roadside. As he observed, absent such authority, a police officer who was not equipped with an A.L.E.R.T. device would have no choice but to allow the suspect impaired motorist to drive off, regardless of the likelihood of imminent harm to the public.

This concern also governed Cory J.A.'s consideration of the right to counsel issue. In this regard, if the officer were required to advise the motorist of his or her s. 10(b) Charter right, drivers who chose to exercise the right would undoubtedly be told that they need not comply with the request to perform co-ordination tests. This would

leave the officer with no choice but to allow the motorist to proceed despite the potential for imminent harm. Such an approach would undermine the legitimate purpose of s. 48(1): namely, removing impaired drivers from the highway immediately. Balanced against this, Cory J.A. noted that co-ordination tests were nothing more than an investigative tool. The tests do not cause any real inconvenience to the motorist nor do they expose the motorist to a criminal charge in and of themselves. Accordingly, Cory J.A. resolved that s. 48(1), by necessary implication, imposed a limitation upon the motorist's s. 10(b) right to counsel.

Cory J.A. went on to determine whether or not s. 48(1) complied with the tests laid down in R. v. Oakes, [1986] 1 S.C.R. 103, 24 C.C.C. (3d) 321. His reasons for concluding that it did are found in the following passage, at pp. 542-43 C.C.C.:

> There can be no doubt that the objective of the legislation which is to reduce the ever-increasing number of fatalities and serious injuries occurring on the highways is of sufficient importance to warrant overriding the constitutionally protected right to be promptly informed upon detention of the right to retain counsel. The means chosen to protect the public are neither arbitrary nor unfair, nor are they based on irrational considerations. Certainly they impair "as little as possible" the right or freedom in question. The co-ordination test takes but little time, causes very slight inconvenience to the driver and does not of itself make the driver liable to criminal charges. Further, there is a clear proportionality between the effects of the measure and the object of the legislation.

(Emphasis added)

In arriving at this conclusion, Cory J.A. drew heavily on the ready-made analogy arising from the roadside A.L.E.R.T. jurisprudence. He observed that both R. v. Seo (1986), 54 O.R. (2d) 293, 25 C.C.C. (3d) 385 (C.A.), and R. v. Talbourdet (1984), 12 C.C.C. (3d) 173, 8 C.R.R. 82 (Sask. C.A.), had determined that the use of the roadside A.L.E.R.T. screening device constituted a reasonable and justifiable limit on a motorist's right to be advised upon detention of his or her right to counsel. At pp. 543-44 C.C.C., Cory J.A. quoted extensively from Cameron J.A.'s reasons in Talbourdet, supra, at pp. 180-82 C.C.C. A portion of those reasons warrant repetition since, in my view, they are apposite to the issue in this appeal:

> "For perfectly obvious reasons it is a crime in Canada and elsewhere to drive a motor vehicle while one's ability to do so is impaired by alcohol. And everyone whose blood-alcohol level exceeds 80 mg of alcohol in 100 ml of blood is now reasonably regarded by the criminal law of Canada to be thus impaired. To provide for the effective enforcement of this law, Parliament has justifiably empowered Canada's peace officers, wherever they have 'reasonable and probable grounds' to believe that a person is breaking the law, to demand of that person that he or she submit to a breathalyzer test. But often a person's blood-alcohol level will exceed the legal limit without that fact being obvious. A peace officer may well suspect a person of committing an offence -- there may be a distinct odour of alcohol -- but, having regard for the fact that ours is a free society, the law requires that there be more than mere 'suspicion' before a police officer can require a person to submit to a breathalyzer test; he has to have 'reasonable and probable grounds' to do so.
>
> And this, of course, is where the roadside screening device comes into the picture. It is an investigative tool. Its purpose is to resolve the doubt, which will often exist between 'suspicion' on the one hand and 'reasonable and probable ground' on the other. When a policeman finds himself in that grey area between suspecting that an offence of this kind is being committed, and having reasonable and probable grounds for believing it is being committed, he may, providing there is good reason for his suspicion, ask the driver to clarify the position by submitting to a preliminary test conducted by means of a roadside screening device. This is a minor inconvenience and the person upon whom such a demand for clarification has been made runs no risk of being found guilty of any offence by submitting to the test. If he passes the test he is free to go on his way; if he fails it then, of course, there are reasonable and probable grounds to believe that he may be guilty of an offence, and, in that event, a peace officer may make a further demand of him,

> namely, that he submit to a more definitive test by means of a breathalyzer machine. And at that stage he has a right to consult a lawyer: R. v. Therens.
> In my opinion, this is a perfectly defensible scheme of law, and law enforcement, which strikes a sensitive balance between the freedom of the individual on one hand and the legitimate concerns of the collective on the other. Provided a person has a right to counsel following a breathalyzer demand -- when a number of complex legal issues arise in relation to which the average person may need legal advice -- what legitimate purpose would be served by insisting that there also be a right to counsel at the earlier, screening stage? The worst that can befall a person who fails a roadside test is that he will then be required to submit to a more refined test."

(Emphasis added)

ANALYSIS

It is apparent from Saunders, supra, that roadside co-ordination tests were meant to be an investigative tool to allow police to remove impaired drivers from the highway immediately. Their use was to be limited to that of enabling the officer to make a demand under s. 254 of the Criminal Code if the results of the tests provided the reasonable and probable grounds necessary to justify a demand.

On the facts of this case, I am prepared to accept that, in asking the appellant to undergo the co-ordination tests, Constable Roth's purpose fell within the ambit of s. 48(1) of the HTA. Accordingly, in view of Saunders, supra, it cannot be said that the evidence resulting from these tests was obtained unfairly or in a manner which violated the appellant's s. 10(b) Charter rights. That, however, is not determinative of the issue raised in this appeal, namely, whether the state should be permitted to use the test results at trial to incriminate the motorist on a charge of impaired driving -- a purpose altogether different from the one contemplated by s. 48(1) of the HTA. In my opinion the answer to this issue depends on whether admission of the evidence at trial for that purpose would lead to an unfair trial, an approach sanctioned by the Supreme Court of Canada in R. v. Harrer, [1995] 3 S.C.R. 562, 101 C.C.C. (3d) 193.

In Harrer, La Forest J., writing for the majority at p. 567 S.C.R., p. 197 C.C.C., spelled out the specific issue facing the Supreme Court of Canada:

> [I]s an inculpatory statement, made without the benefit of counsel by a Canadian citizen to American peace officers, concerning her participation in a criminal offence in Canada, admissible in evidence by the Crown when the statement, though made in accordance with United States law, would if taken in Canada by Canadian police in similar circumstances violate the accused's right to counsel under s. 10(b) of the Charter?

To resolve this issue, the court found it necessary to consider the application of ss. 7, 11(d), 24, 32 and 10(b) of the Charter.

Initially, La Forest J. concluded that the Charter had no direct application to the U.S. interrogations because the U.S. authorities had questioned Ms. Harrer on their own behalf and not on behalf of any of the governments in Canada. He found, however, that, irrespective of any direct application of the Charter, trials conducted in Canada must be guided by Canadian law in accordance with the fundamental principles of justice enshrined in our legal system. In his words at pp. 574-75 S.C.R., p. 203 C.C.C.: "We must, in determining whether evidence should be admitted into evidence, be guided by our sense of fairness as informed by the underlying principles of our own legal system as it applies to the specific context of the case." According to La Forest J., if, having regard to the particular circumstances under which the evidence was obtained, it could be said that the admission of such evidence would lead to an unfair trial, that evidence should be excluded under the Charter. Exclusion in these situations, he continued at p. 578 S.C.R., p. 205 C.C.C., would not depend on s. 24(1) or (2) of the Charter but, instead, "on the basis of the trial judge's duty, now constitutionalized by the enshrinement of a fair trial in the Charter, to exercise properly his or her judicial discretion to exclude evidence that would result in an unfair trial" (emphasis added).

Applying the "fair trial" principle to this case, I am satisfied that the evidence resulting from the co-ordination tests was not obtained unfairly or unconstitutionally. However, its admission to prove impairment at the appellant's trial would, in my opinion, render the trial unfair. This conclusion hinges to a large extent on the limited purpose of s. 48(1) of the HTA.

According to Cory J.A. in Saunders, supra, s. 48(1) was enacted to provide police officers with the tools needed to effect the immediate removal of impaired drivers from the highway. To that end, he determined that it was constitutionally permissible for a police officer to require a detained motorist to participate in roadside co-ordination tests before advising the motorist of his or her s. 10(b) Charter rights. The results of these tests were to be used solely as a means of confirming or rejecting the officer's suspicion that the detained motorist might be impaired. Assuming that the tests confirmed the suspicion, the officer would then have the grounds needed to justify a demand under s. 254 of the Criminal Code.

These tests were not meant to provide the police with a means of gathering evidence that could later be used to incriminate and convict the motorist of impaired driving at trial. Indeed, in my view, had that been their purpose, s. 48(1) would not pass s. 1 Charter scrutiny. This distinction requires elaboration, since it plays an important role in my conclusion that admission of the test results at trial to incriminate the motorist would render the trial unfair.

In the context of their s. 1 analyses in Saunders, supra, and Talbourdet, supra, Cory and Cameron JJ.A. emphasized that the motorist's submission to either the A.L.E.R.T. or the physical co-ordination tests did not, of itself, render the motorist liable to criminal charges. In coming to this conclusion, I do not take either to have meant that Parliament had simply not criminalized the failure to pass the A.L.E.R.T. test or roadside co-ordination tests. Rather, in my opinion, each was recognizing the limited purpose of these tests and the limited use which could be made of them. I am satisfied that this limited purpose and use played an important role in their decisions to uphold as constitutional the procedures authorized by then s. 234.1(1) of the Criminal Code and s. 48(1) of the HTA.

Having regard to the limited purpose and use of the investigative techniques authorized by s. 48(1) of the HTA, I have no difficulty accepting that the provision constitutes a reasonable limit on the right to counsel which can be justified in a free and democratic society. On the other hand, I am not prepared to accept that s. 48(1) would survive s. 1 Charter scrutiny if it were found to be a device by which the police could gather evidence for the purpose of incriminating a motorist at his or her impaired driving trial. In my view, such a scheme would impermissibly broaden the scope and purpose of the testing procedures contemplated by s. 48(1). It would also render it constitutionally permissible for the police, acting on mere suspicion, to compel a detained motorist to participate directly in the creation of self-incriminating evidence that could later be used to convict the motorist at trial, absent any requirement that the motorist be advised of his or her s. 10(b) Charter rights. To my mind, such a scheme would not pass s. 1 Charter scrutiny.

In the realm of roadside A.L.E.R.T. testing, which I take to be the federal legislation equivalent to s. 48(1) of the HTA, I am satisfied that the limited purpose and use of such testing has figured prominently in the jurisprudence that has justified this procedure under s. 1 of the Charter. This is evident from the emphasized passages in Talbourdet, supra, and is equally apparent in the following excerpt from Seo, supra, at pp. 316-17 O.R., p. 408 C.C.C.:

> Accepting that all eight of the members of the Supreme Court of Canada who participated in the Therens judgment were satisfied that advising the detained person of his s. 10(b) rights and assisting in the implementation of those rights was mandatory before he blows into a breathalyzer, it does not follow that the same legal conclusion applies to the A.L.E.R.T. device. Only the refusal to comply with the demand attracts criminal consequences. A negative reading does not have the same consequences as a similar reading on a Borkenstein breathalyzer device. There is no statutory provision to make the readings admissible and, as described in the material submitted and as reflected in submissions by Crown counsel, it is not intended that the results shown on the A.L.E.R.T. device be tendered in evidence.

(Emphasis added)

Further support for this conclusion comes from the case of R. v. Thomsen, [1988] 1 S.C.R. 640, 40 C.C.C. (3d) 411, where the Supreme Court of Canada applied s. 1 in upholding roadside screening devices. At p. 649 S.C.R., p. 418 C.C.C., albeit in the context of determining whether a roadside A.L.E.R.T. demand constituted detention of the motorist, Le Dain J., speaking for a unanimous court, said:

> In my opinion, the s. 234.1(1) demand by the police officer to the appellant to accompany him to his car and to provide a sample of breath into a roadside screening device fell within the above criteria. The demand by which the officer assumed control over the movement of the appellant was one which might have significant legal consequence because, although the evidence provided by the roadside screening device could not be introduced against the appellant, it might provide the basis for a s. 235(1) breathalyzer demand.

(Emphasis added)

The fact that the evidence provided by the roadside A.L.E.R.T. device cannot be introduced against the motorist is, in my opinion, a critical factor in the s. 1 analysis. But for this limitation, I doubt that roadside A.L.E.R.T. testing would have passed any of the three branches of the proportionality test provided by Oakes, supra. Given that we are here concerned with the duty imposed on state authorities to inform a detained person of his or her right to retain and instruct counsel without delay, the following excerpt from R. v. Bartle, [1994] 3 S.C.R. 173, 92 C.C.C. (3d) 289, is instructive. At p. 191 S.C.R., pp. 300-01 C.C.C., Lamer C.J.C. explains the purpose of this right:

> The purpose of the right to counsel guaranteed by s. 10(b) of the Charter is to provide detainees with an opportunity to be informed of their rights and obligations under the law and, most importantly, to obtain advice on how to exercise those rights and fulfil those obligations: R. v. Manninen (1987), 38 C.R.R. 37 at pp. 41-45, [1987] 1 S.C.R. 1233 at pp. 1242-43, 61 O.R. (2d) 736 (digest). This opportunity is made available because, when an individual is detained by state authorities, he or she is put in a position of disadvantage relative to the state. Not only has this person suffered a deprivation of liberty, but also this person may be at risk of incriminating him- or herself. Accordingly, a person who is "detained" within the meaning of s. 10 of the Charter is in immediate need of legal advice in order to protect his or her right against self-incrimination and to assist him or her in regaining his or her liberty: Brydges, at pp. 249-50 C.R.R., p. 206 S.C.R.; R. v. Hebert (1990), 49 C.R.R. 114 at pp. 134-35, [1990] 2 S.C.R. 151 at pp. 176-77, 47 B.C.L.R. (2d) 1, and Prosper, supra. Under s. 10(b), a detainee is entitled as of right to seek such legal advice "without delay" and upon request. As this court suggested in R. v. Clarkson (1986), 19 C.R.R. 209 at p. 217, [1986] 1 S.C.R. 383 at p. 394, 69 N.B.R. (2d) 40, the right to counsel protected by s. 10(b) is designed to ensure that persons who are arrested or detained are treated fairly in the criminal process.

(Emphasis added)

Certainly insofar as the liberty interest of the detainee is concerned, it cannot be doubted that roadside A.L.E.R.T. and physical co-ordination tests take but a little time and cause only minor inconvenience to the motorist. Accordingly, I have no trouble finding proportionality insofar as the liberty interest component of s. 10(b) is concerned. However, the same cannot be said about the "risk of incrimination" component if, in fact, the motorist can be compelled to create self-incriminating evidence that can later be used at trial. If roadside test results could be used in this manner, this would overshoot their limited objective. That objective, it will be recalled, is to provide the police with the tools needed to remove impaired drivers from the highway immediately and thereby avoid the calamitous results likely to occur if they are allowed to proceed. The objective is not to convict impaired drivers at any cost. If it were, there would be no reason for insisting that the motorist be given his or her Charter rights when the investigation moves to the arrest stage for impaired driving or to a request for a breathalyzer demand pursuant to s. 254 of the Criminal Code. And yet, the law is clear that, at this juncture, the motorist is entitled to full protection of the rights accorded by the Charter: R. v. Therens, [1985] 1 S.C.R. 613, 18

C.C.C. (3d) 481. That protection, I suggest, would be hollow indeed if the state could simply turn around and use the results of the roadside A.L.E.R.T. test to convict the motorist of over 80, or, as in this case, use the inability of the appellant to adequately perform the physical co-ordination tests to convict the appellant of impaired driving.

Similar reasoning can be applied to the second and third branches of the Oakes proportionality test. I find it difficult to comprehend how the right to counsel, as it relates to the self-incrimination component, could be said to have been impaired as little as possible if the compelled and self-created incriminatory evidence gathered at the roadside could be used for trial purposes to convict a motorist. The same holds true for the severity of the deleterious effects of these measures on the particular motorist when compared with the purpose they are intended to serve.

For these reasons, I have concluded that the provisions allowing for a breach of the motorist's s. 10(b) rights at the roadside would not be saved under s. 1 if the evidence resulting from compelled participation in the tests -- designed to firm up mere suspicion of impairment or a blood-alcohol level exceeding 80 mg -- could be used for trial purposes to incriminate and convict a motorist of either offence.

I wish to make it clear that this conclusion applies only to evidence obtained from compelled direct participation by the motorist in roadside tests authorized by s. 48(1) of the HTA, specifically designed to determine impairment or a blood-alcohol level exceeding 80 mg. I am not referring to observations the officer might make of the driver while carrying out other authorized duties. Thus, by way of example, an officer may observe signs of impairment in a driver, such as a strong odour of alcohol, blood-shot and glassy eyes, dilated pupils, slurred speech, unsteadiness of gait upon the driver exiting the vehicle, or other similar signs. These observations would be admissible at trial to prove impairment. Counsel for the appellant took no issue with this differentiation. Indeed, he conceded in argument that such evidence, obtained indirectly through observation, would be admissible at trial.

This distinction accords with the principles outlined by Lamer J. (as he then was) in R. v. Ross, [1989] 1 S.C.R. 3 at p. 17, 46 C.C.C. (3d) 129 at p. 140. In a case turning on identification, Lamer J. drew a distinction between physical evidence resulting from mere observation, and physical evidence "that could not have been obtained but for the participation of the accused in the construction of the evidence for the purposes of the trial", such as the line-up evidence in question: see also R. v. S. (R.J.), [1995] 1 S.C.R. 451 at pp. 555 and 560, 96 C.C.C. (3d) 1 at pp. 76-77 and 80, per Iacobucci J.

I have to this point taken a contextual approach to the Charter issues under consideration. This has led me to conclude that the denial of a detained motorist's right to counsel, arising by necessary implication in s. 48(1) of the HTA, is not justifiable under s. 1 of the Charter unless the evidence resulting from the roadside co-ordination tests is restricted to the particular use prescribed by that provision, namely, "for the purpose of determining whether or not there is evidence to justify making a demand under s. 254 of the Criminal Code (Canada)". If the state were permitted to use the results of those tests at trial to incriminate the motorist on a charge of impaired driving, I am satisfied that s. 48(1) would not withstand scrutiny under s. 1 of the Charter.

While not entirely analogous, I derive some support for this approach from R. v. Colarusso, [1994] 1 S.C.R. 20, 87 C.C.C. (3d) 193. In that case, the Supreme Court of Canada drew a distinction, albeit in the context of s. 8 of the Charter, between blood samples seized by the state in the person of the coroner for the limited purpose and use prescribed by the Coroner's Act, R.S.O. 1980, c. 93, as amended, and the subsequent seizure of these samples by the police for use in a criminal prosecution. At pp. 55-56 S.C.R., pp. 216-17 C.C.C., of that decision, La Forest J. observed:

> As discussed in Dyment, the actions of the doctor are relevant and important. Though he or she may have obtained the sample under lawful circumstances, the limited purpose for which it was obtained cannot be ignored. Equally, the lawful possession of the sample by another cannot be allowed to detract from the review of the police actions which must remain a primary focus for the court. The same is true in the present case. The police cannot rely on the actions of the coroner to shift the court's focus away from their actions. The fact that the sample in this case may have

> initially been properly seized by the coroner is relevant, but this does not necessarily preclude a finding that the police may also have seized the sample or that the subsequent appropriation of the evidence for use in a criminal prosecution may make the seizure unreasonable.
>
> Consequently, in dealing with a situation in which a bodily sample is seized by a party other than the police, but ultimately winds up being used against the individual by the criminal law enforcement arm of the state, it is essential that the court go beyond the initial non-police seizure and determine whether the actions of the police (or other agent of the criminal law enforcement arm of the state) constitute a seizure by the state in and of themselves or make the initially valid seizure by the coroner unreasonable. That being so, the actions of the agents of the criminal law enforcement arm of the state will be subject to scrutiny under s. 8 of the Charter even if, absent the intervention of the police, the initial non-police seizure would not run afoul of the Charter.

(Emphasis added)

Clearly, the analogy is not exact. In the case at hand, it is the police who obtained the evidence of impairment from the roadside co-ordination tests and, again, it is the police who sought to use this evidence to incriminate the appellant at his impaired driving trial. Nonetheless, in my opinion, the major premise of Colarusso, supra, remains intact, namely, that state action that is constitutionally permissible for one particular use or purpose is not necessarily constitutionally permissible for any and all purposes and uses.

In view of my conclusion that the tests authorized by s. 48(1) of the HTA were not meant to provide the police with a means of gathering self-incriminatory evidence to be used against the motorist at trial, and my further view that s. 48(1) would not survive s. 1 Charter scrutiny if that were its purpose, I am satisfied that the admission at trial of the co-ordination test results to prove impairment on a charge of impaired driving would render the trial unfair.

The unfairness arises in part from the fact that the motorist has been conscripted against himself or herself when, at the behest of the police, he or she is required to undertake co-ordination tests designed to establish or disprove impairment. The use of that evidence, which could not have been obtained but for the participation of the motorist in its construction, would tend to render the trial process unfair. Moreover, the use of the test results to prove impairment at trial constitutes an impermissible broadening of the scope and purpose of the testing procedures contemplated by s. 48(1) of the HTA. Since the tests were not meant to provide the police with a means of gathering evidence to incriminate the motorist at trial, surely it would render the trial unfair if the state could use them for that purpose.

The test results should not be admitted to prove impairment. Instead, their use should be limited to the purpose set out in s. 48(1) of the HTA: to justify the officer in making a demand under s. 254 of the Criminal Code.

This does not mean that the state can never introduce the results obtained from physical co-ordination tests to prove impairment at trial. To the contrary, nothing prevents the police from requesting that the tests be repeated after the driver has been advised of the s. 10(b) right to counsel with a reasonable opportunity to exercise the right if requested. Indeed I understand that breathalyzer technicians regularly engage in this practice during the 15-minute interval between the first and second breath tests. Once the driver exercises or waives the right to counsel, it can safely be concluded that the detained driver has freely and voluntarily chosen to repeat the tests.

This court has consistently expressed concerns about the urgent need to control drinking and driving. Insofar as drinking and driving is concerned, as a general rule, when balancing the interests of the individual and those of the state in providing a fair and workable system of justice, the courts have opted for public safety and afforded the police wide powers in their efforts to detect and apprehend impaired drivers. This case in no way resiles from that approach. The results of roadside sobriety tests will continue to be available to police in deciding whether to administer breathalyzer tests; however, like the results of breathalyzer tests, the results of sobriety tests should not be available unless the driver has been advised of the right to counsel.

CONCLUSION

The trial judge should not have considered the evidence resulting from the co-ordination tests when deciding whether or not the Crown had proved the charge of impaired driving beyond a reasonable doubt. Accepting as I do that Constable Roth's purpose in requesting these tests pursuant to s. 48(1) of the HTA was legitimate, this could only mean that, prior to making the request, the constable merely suspected that the appellant might be impaired by alcohol. Accordingly, the evidence giving rise to that suspicion -- which was the only evidence of impairment apart from the results of the sobriety tests -- could not possibly satisfy the burden of proof necessary to justify a conviction. It follows, therefore, that the appellant should have been acquitted of the impaired driving charge at trial.

In the result, I would grant leave to appeal and allow the appeal, quash the conviction and enter a verdict of acquittal.

Appeal allowed.