ONTARIO COURT OF JUSTICE

CITATION:

DATE: December 21, 2018

COURT FILE No.: Central East Region

BETWEEN: HER MAJESTY THE QUEEN

— AND —

M. C.

Before Justice F. Javed Heard on November 15, 16, 2018

Reasons for Judgment released on December 21, 2018

G. Handy - counsel for the Crown

D. Genis - counsel for Ms. M. C.

F. JAVED J.:

A. Introduction

[1] On July 25, 2017, Ms. M. C., was roused by the police knocking on her door. She opened the door in sleepwear and was investigated for a drinking and driving offence. She was arrested on her property for the offences of impaired care or control and failing to comply with a breath demand contrary to s.253(1)(a) and s.254(5) respectively, of the Criminal Code.

[2] The circumstances of the allegations arose after a civilian called 911 and reported that she was involved in a minor motor vehicle collision and the driver left the scene. The 911 caller suspected the driver was under the influence and followed her to her residence. Police Constable Nicholas D'Andrea ("PC D'Andrea'") of the Durham Regional Police Service responded to the 911 call and investigated Ms. Mulunda- Chizelu at her residence. He arrested her for impaired care or control after six failed attempts to provide a sample of her breath into an approved screening device (ASD). A demand was made for her to provide her samples into an approved instrument which she refused. She was charged accordingly. [3] Ms. M. C. alleges that PC D'Andrea violated her rights under the Charter of Rights and Freedoms ("Charter"). Specifically, she says PC D'Andrea had no grounds to arrest her in violation of s.8 and illegally searched her residence, also in violation of s.8.

Consequently, she was arbitrarily detained contrary to s.9. As a remedy for these alleged violations, she seeks to exclude the evidence of her refusal under s24(2). Moreover, she says she was not impaired by not alcohol at the time of driving.

[4] The Crown called the investigating officer, PC D'Andrea, a Qualified Breath Technician, PC Justin Azzano of the DRPS and some civilian witnesses to explain the circumstances of the collision as well as the arrest.

[5] Ms. M. C. testified on the Charter issues. The parties agreed to blend the evidence.

[6] Mr. Genis reasonably submits that there's no issue that Ms. M. C. intentionally refused the breath demand. The disputed issue is whether the demand was lawful and Charter compliant, which would mean that Ms. M. C. did not have to comply with the demand. Alternatively, the proven Charter violations should lead to the evidence of the refusal being excluded under s.24(2).

[7] The issues for the court to be considered are as follows:

i. Was there a s.8 violation on the basis that PC D'Andrea lacked reasonable and probable grounds for a breath demand under $.254(3)(a)?

ii. As a subset of the above issue, is there evidence that Ms. Mulunda Chizelu was operating a motor vehicle in the preceding three hours and committed a s.253 offence?;

iii. Was there a second s.8 violation on the basis that the police investigated and arrested Ms. M. C. inside her home?

iv. Was there a third s.8 violation on the basis that the police unlawfully entered Ms. M. C.'s home after her arrest to retrieve her personal effects?

V. Was there a s.9 violation on the basis that Ms. M. C. was arbitrarily detained? Vi. If there were any Charter violations, should the evidence of the refusal be excluded under s.24(2) of the Charter? Vii. On the basis of the admissible evidence, has the Crown proven the

offences beyond a reasonable doubt?

B. Summary of Legal Conclusions

[8] After a careful review of the evidence, including a consideration of the respective onus on each legal issue, | have arrived at the following conclusions: i. I'm satisfied there is evidence establishing that Ms. M. C. was driving a motor vehicle in the preceding three hours and was involved in a minor motor vehicle collision;

ii. PC D'Andrea made a lawful roadside demand which did not result in a breach of s.8;

iii, | However, PC D'Andrea did not have reasonable and probable grounds to make a breath demand into an approved instrument, pursuant to s.254(3) and therefore the arrest for the

offence of impaired care or control resulted in as.8 violation and an unlawful arrést under s.495;

iv. PC D'Andrea did not arrest Ms. M. C. inside her home and had lawful authority to detain her on her porch, thus there was no separate violation of s.8;

v. However, after the arrest, the police entered Ms. M. C.'s home without lawful authority to search for and seize her personal effects and the Crown has not proven that the search/seizure was reasonably conducted incident to her arrest, resulting in a separate s.8 violation;

vi. In light of my conclusion that the arrest was unlawful, she was arbitrarily detained under s.9 resulting in a further Charter breach;

vii. | Since the breath demand was unlawful, there was no obligation to comply with the demand, thus the refusal was not an offence;

viii. | Alternatively, given the seriousness of the Charter violations, the evidence of

the refusal was obtained in a manner that violated her s.8 and s.9 Charter rights and on balance, the refusal should be excluded; and

ix. | The Crown has not proven impairment of the ability to drive beyond a reasonable doubt.

[9] The following are my reasons supporting the above conclusions.

The Background Facts

[10] | will start with some background facts then move to the contested areas. | am mindful that | can accept some all or none of the evidence presented. In resolving credibility disputes, | am guided by the doctrine in D.W. v. the Queen (1991) 63 C.C.C. (3d) 397 (SCC).

[11] In the context of a Charter application, it's important to keep in mind that the Crown bears the onus of proving on a balance of probabilities that the warrantless search was lawful. Ms. M. C. carries the burden on the s.9 issue as well as excluding the evidence under s.24(2). Given the Charter application, it should be clear as well that the Crown bears the onus of proving a lawful breath demand.

The Motor Vehicle Collision

[12] Tammy McFarland testified she went to Pickering Beach with her family members, Paul and Sherry McFarland. She was traveling on Kingston Rd, when a white Hyundai Santa Fe SUV entered the left turning lane. In doing so, the passenger side mirror made contact with her driver's side mirror resulting in it being shattered.

[13] Ms. McFarland said she honked her horn hoping the Santa Fe would stop but it didn't. She decided to follow the vehicle. She pulled next to the Santa Fe and approached the driver's side window, which was rolled down and said "excuse me, you hit my vehicle. [I] was honking the horn". The driver responded "well people honk all the time"

[14] Ms. McFarland described the driver as female, black, with dark short hair, wearing a dress that had a blue and black pattern. Curiously, she said the driver wasn't wearing any undergarments. The driver made limited eye contact and had "glossy, glazed eyes".

[15] The driver did not remain to exchange documents and drove off. Ms. McFarland called 911 and told the dispatch she believed the driver "was under the influence of something". She did not say she smelled alcohol or thought it was alcohol. She said the Santa Fe slowly reversed and in doing so, mounted the curb. She made a u-turn and began to travel in the opposite direction on Kingston Rd.

[16] She began to follow the Santa Fe, all the while speaking to the 911 operator. She stated that the Santa Fe ran a stop sign and entered a private driveway at 16 Dennis Dr. in Ajax. She saw the woman enter her residence.

[17] Ms. M. C. admitted operating the Santa Fe but denied she knew there was an accident. She is employed as a nurse and testified she worked a long shift and was tired. Her son asked her for a ride to his workplace, McDonald's and she agreed. She got dressed and drove him to work. Moreover, she was wearing undergarments. She said her side mirror may have "flipped" but she didn't Know how and didn't think it was caused by a collision. She was in her vehicle listening to music when confronted by Ms. McFarland. She was accused of causing a collision and checked her mirror, which had turned inwards but didn't appear to be damaged. As a result, she decided to drive home. She admitted making a u-turn but denied any poor driving. She denied drinking alcohol before driving the vehicle. She maintained she was tired and wanted to go home and sleep.

[18] In cross-examination, it was suggested to Ms. M. C. that she drove off because she was impaired and didn't want the police called. She disagreed, stating she had no idea there was an accident. It is hard to imagine how one could miss making contact with another vehicle. That said, it is not uncommon for a side mirror to turn inwards. | accept she was fatigued and wasn't paying attention.

The Police Dispatch

[19] At 2:18 pm, PC D'Andrea was dispatched to the 911 call and ultimately followed Ms. McFarland's directions to 16 Dennis Dr., which is Ms. M. C.'s residence. PC D'Andrea has been a qualified breath technician since 2009 and has investigated drinking and driving offences.

[20] At 2:22 pm, he learned that the driver had parked on a driveway at 16 Dennis Dr. and entered the residence. The description was updated as "black female, early 30's, - small build, 5''2, short dark hair, wearing a black t-shirt with a dark blue print pattern".

[21] At 2:23 pm, PC D'Andrea arrived at 16 Dennis Dr. and had a quick conversation with Ms. MCFarland who was present with her two passengers. | will review their evidence below on the issue of whether the police entered her home. PC D'Andrea proceeded to the front door and knocked on the door.

[22] The issue of whether PC D'Andrea had authority to investigate Ms. Mulunda- Chizelu for a criminal offence on private property when he didn't see her driving on a highway as defined in the Highway Traffic Act was not argued before me. This matters because the evidence is unclear that the police had a lawful basis to do a sobriety check on private property. Arguably, this was not a "hot pursuit" or even a "fresh pursuit" case because the 911 call was for the H7A offence of fail to remain. If PC D'Andrea did not have lawful authority, arguably there would be a further s.8 and s.9 issue. For my purposes, | will assume, without deciding, that PC D'Andrea had lawful authority to investigate her for an HTA offence on her private property, which organically turned into a criminal investigation. If so, PC .D'Andrea was within his rights to knock on her door as the police are given an implied license to pass over private property leading up to the point of access or entry: R. v. Tricker (1995), 96 C.C.C. (3d) 198 (Ont. C.A.), leave to appeal to S.C.C. refused, 103 C.C.C. (3d) vi, [1995] S.C.C.A. No. 87.

[23] PC D'Andrea testified that within one minute, he saw a black female walking

down the staircase through the glass window. He was satisfied she matched the description of the possible impaired driver as she was female black, small build, wearing a blue/black patterned short dress. She also had an orange scarf loosely sitting on her head, which was not included in the initial information. He said she appeared to be older than "early 30's". Ms. M. C. opened the door.

[24] The evidence diverges from here. There is a dispute about what happened at the residence and the circumstances leading to the arrest of Ms. M. C. including whether the Crown has proven identity.

C. Analysis

(i) Has the Crown proven that Ms. M. C. was identified as the operator of the white Hyundai Santa Fe?

[25] Mr. Genis argues that the identification evidence is weak as the police did little to confirm if Ms. M. C. was the driver of the Santa Fe, which would be a requirement to form a belief that she was committing an offence under s.253.

[26] | disagree. [27] It is trite that identification evidence can be dubious. Honest witnesses sometimes make unreliable identifications. Courts are instructed to proceed with care. However, |'m satisfied the Crown has proven that Ms. M. C. was operating the Santa Fe for the following reasons.

[28] First, while Ms. McFarland didn't know Ms. M. C., she maintained continuous observations of her driving the vehicle up to the point of entering her residence. It was not a fleeting glance but rather a meaningful interaction where she was able to make note of specific details. These details were corroborated by PC D'Andrea.

[29] Second, while there was a discrepancy in the age of the driver and the addition of the towel, which was not part of the initial description, | do not find this materially detracted

from the identification. Only 5 minutes or so had passed before the interaction at the door, which was sufficient time to put on a towel on her head.

[30] Third, there's no evidence that anybody other than Ms. M. C. had access to the white Hyundai Santa Fe parked on the driveway. In other words, the vehicle was correctly identified by the license plate. Moreover, the collision as explained by Ms. McFarland was also corroborated by PC Knowler who examined both vehicles. In my view, the inference that Ms. M. C. was the same person described in the 911 call is the only rational and reasonable inference.

(ii) Were Ms. M. C.'s rights under s.8 violated?

[31] Mr. Genis advanced three separate violations of Ms. M. C.'s right to be free from an unreasonable search and seizure under s.8. First, he argued the police didn't have reasonable grounds to arrest her for a s.253 offence. Second, the police arrested her inside her home without any authority and third, the police had no lawful basis to re-enter her home after the arrest to retrieve her personal effects.

[32] Mr. Hendry responds that PC D'Andrea had sufficient grounds for an arrest, the arrest took place on the porch, not inside her home and while the police did re-enter her home, it was after a lawful arrest and only to retrieve her personal effects which he says was reasonable. There were no s.8 violations.

[33] | agree with Mr. Genis that the police violated Ms. M. C.'s s.8 rights. In my view, there were two separate but related s.8 violations as the police did not have reasonable and probable grounds for an arrest. Ms. M. C. was unlawfully arrested and the problem was compounded when the police entered her home to retrieve personal effects without lawful authority. | do not find that Ms. M. C. was arrested inside her home. The resolution of the s.8 issues very much turns ona credibility dispute in the conflicting accounts.

The Evidence of Ms. M. C. [34] Ms. M. C. testified she was tired after dropping off her son at work. She said she was wearing underwear when she drove which is contradicted by Ms. McFarland. | suspect Ms. M. C. wasn't being forthcoming about the - underwear issue because Ms. McFarland had no reason to invent this detail, which of course is embarrassing. | suspect Ms. M. C. didn't expect to take her son to work but did and in the haste of the moment, left without underwear, expecting to return home right away as it was not a long commute. In any event, she said after dropping him off, she quickly finished a glass of wine to help her sleep and went to bed. She was sleeping upstairs and heard a loud bang on the door. In cross-examination she clarified she was laying down and not fully asleep. While there is a discrepancy, | don't make much of this as Ms. M. C. was not a sophisticated witness and the issue is one of semantics. | accept she was in bed as evidenced by her clothing. She quickly put on some sleepwear and put an orange towel on her hair. She opened the door and was surprised to see PC D'Andrea. She was standing in the door frame while he was on the porch.

[35] She stated PC D'Andrea introduced himself and asked if she was involved ina motor vehicle collision. She responded she did nothing wrong and just dropped off her son at McDonald's. The parties were standing about 3 feet apart. PC D'Andrea said he detected a

slight odour of alcohol emanating from her breath as she spoke. He asked if she had anything to drink. Ms. M. C. said she “had a glass of wine earlier’. PC D’Andrea did not ask when she consumed the wine, which would have been prudent considering she was at home and not operating a motor vehicle. | have no basis to reject her evidence about alcoho! consumption and in my view, makes sense, given that the smell became more pronounced later.

[36] Atthis point, PC D’Andrea stepped into the home and read her an ASD demand. She was confused as she didn’t think she did anything wrong and asked for her husband. She agreed to take the test.

[37] PC D’Andrea said he remained on the porch and asked Ms. M. C. to step on the porch where he made the ASD demand. After complying, she told him she

was inappropriately dressed and wanted to get changed. He said no. She asked to call her husband. He said she couldn’t as she was being investigated for a criminal offence.

[38] | accept the evidence of PC D’Andrea that he didn’t step into the residence to conduct the ASD test. | arrive at this conclusion for the following reasons:

[39] First, the investigation took place in the summer, when it was warm. There was no weather related reason to enter the home, which might have been more reasonable if it was very cold or there was poor weather. It was a warm sunny day and there was a covered porch. Itis sensible he remained on the porch.

[40] Second, there was no reason known to PC D’Andrea in advance to enter the home as he was not in “hot pursuit” of a person and had no grounds to make an arrest without any investigation. | accept he was investigating a drinking and driving offence and developed grounds to suspect a criminal offence organically.

[41] Third, | believe PC D’Andrea when he said he didn’t enter the home because he had to retrieve the ASD before he could administer a breath test. This suggests walking off the property and returning. It would be illogical for any officer to step inside a residence without a search warrant or consent. While he didn’t testify he secured

~ consent, it makes more sense that the testing occurred on the porch and out of the view of the McFarland’s, who were some distance away. .

[42] | Fourth, | find Ms. M. C.’s evidence was unreliable on this point because it was never clarified with her what she meant by the “whole interaction” taking place inside the home. For example, it’s unclear if she took the interaction on the porch to mean inside her home. There is no controversy that the police did enter her home after she was arrested but the timing of the entry is legally nuanced. With respect, Ms. M. C. was not a sophisticated witness and may have been confused on this point. It does not mean | found her to be dishonest, but simply mistaken.

[43] Fifth, I’m comforted in my conclusion because both Paul and Sherry McFarland testified they saw the police exit the home with Ms. M. C., which | find was after the arrest.

Given their position on the street, | find they simply assumed the police entered inside the home right away. They were not able to see the whole interaction.

[44] In conclusion, PC D'Andrea did not arrest Ms. M. C. inside her home, thus there was no s.8 violation on this basis. That said, there were two other Charter breaches. | will start with the grounds for arrest.

(iii) Did PC D'Andrea have grounds for a roadside demand?

[45] Mr. Genis submits that PC D'Andrea had enough grounds to form reasonable suspicion for an ASD demand pursuant to s.254(2)(b) of the Criminal Code. | think this is a reasonable concession. However, he goes on to say that PC D'Andrea did not have reasonable grounds to arrest her and make a breath demand pursuant to s.254(3) of the Criminal Code, largely on the basis of confirming there was minor collision. He says this was insufficient to make a breath demand.

[46] Mr. Hendry disagrees submitting that PC D'Andrea had enough grounds for an arrest and breath demand from the outset and was simply being conservative in demanding an ASD sample. There was no s.8 violation.

[47] With respect, | disagree with the Crown's position.

[48] In order to evaluate this submission, | will pause to consider the two standards for a roadside demand and a breath demand into an approved instrument. This will inform the consideration of whether PC D'Andrea fell into error after deciding to abort the roadside demand and move to an arrest. Grounds for the ASD Demand

[49] Section 254(2)(b) of the Criminal Code permits police officers to make a roadside demand of a person if they have reasonable grounds to suspect that a person has alcohol in their body and has operated a motor vehicle in the preceding three hours.

[50] Reasonable suspicion means something more than a mere suspicion and something less than a belief based upon reasonable and probable grounds. The legal standard of reasonable suspicion involves a credibly based possibility not probability. It is not necessary that the person show signs of impairment or that the officer believe that the person is committing a crime. The Court of Appeal has held that the odour of alcohol on a driver's breath, standing alone, is sufficient to give rise to a reasonable suspicion that a driver has alcohol in his body: R. v. Schouten 2016 ONCA 872 at paras. 26-27. See also R. v. Bush, 2010 ONCA 554 at para. 38.

Grounds for the Arrest °

[51] In contrast, the legal standard for a breath demand into an approved instrument under s.254(3) of the Criminal Code is different and higher than reasonable suspicion. Fundamentally, care must be taken not to conflate the two standards because an officer who has sufficient reasonable grounds would have crossed the rubicon of reasonable suspicion but the opposite is not necessarily true. In other words, an officer who has reasonable suspicion, may not also have reasonable grounds because the standard is

higher. Each case must be evaluated on its own to consider the totality of the circumstances.

[52] Grounds to arrest must be subjectively held by the officer and this belief must be objectively justified: R. v. Canary, 2018 ONCA 304; R. v. Saciragic, 2017 ONCA 91 at para. 16; R. v. Shepherd, [2009] S.C.J. No. 35; R. v. Bernshaw (1995), 95 C.C.C. (3d) 193 (S.C.C.) at p. 216; R. v. Storrey, [1990] 1 S.C.R. 241; R. v. Bush, [2010] O.J. No. 3453 (C.A.).

[53] In R. v. Notaro 2018 ONCA 449 (CA) at para. 37, Justice Paciocco reminded that the inquiry into subjective grounds deals with the honesty of the arresting officer's belief (emphasis added).

[54] The objective inquiry asks whether a reasonable person, standing in the shoes of the police officer, would have believed that reasonable grounds existed to make the arrest: Storrey, at pp. 250-51.

[55] When considering whether an officer's subjective belief is objectively reasonable, the court must look at the objectively discernible facts through the eyes of a reasonable person with the same knowledge, training and experience as the officer: R. v. Chehil, 2013 SCC 49, [2013] 3 S.C.R. 220, at paras. 45-47. The proper question to ask in this case is whether PC D'Andrea acted on reasonable grounds known to him: Notaro,

supra at para. 40. This inquiry considers the reasonableness of his actions at the time of the arrest, not later on. Aborted ASD Test

[56] PC D'Andrea testified he commenced the ASD test at 2:28 pm. Ms. Mulunda- Chizelu was unsuccessful in providing a sample as she kept fumbling the mouthpiece. After five unsuccessful attempts, he said the smell of alcohol on her breath became stronger. However, it is noteworthy that PC D'Andrea was initially confronted with an answer to his question about consumption that "had a glass of wine earlier'. There's no evidence that PC D'Andrea took. any steps to find out the time of her last alcoholic drink. This does not necessarily engage the issue of residual mouth alcohol or whether he should have waited 15 minutes but as | will explain below, may impact the reasonableness of his belief.

[57] PC D'Andrea said during the testing, Ms. M. C. displayed glassy eyes and was beginning to use the brick pillar on the porch to support herself. There's no evidence she had slurred speech or any issues with her dexterity until after her 6" breath attempt. | do not view this as symptomatic of impairment because she was barefoot, in sleepwear and trying to provide a breath sample and clearly not succeeding — a logical reason to be out of breath.

[58] Ms. M. C. was increasingly confused and asked again to speak to her husband. He repeated she couldn't call her husband as he was trying to get a suitable sample. It's unclear if her husband was home or not. It was not suggested to her in cross-examination that she was deliberately feigning the attempts in an effort to obfuscate the breath testing. | accept she was trying to provide a sample and for whatever reason, couldn't. After the 6" failed attempt, another female officer who was present, (PC Knowler) approached PC D'Andrea and told him that she had had spoken with Ms. McFarland and observed the side

mirror of the parked vehicle on the driveway and determined there likely was a minor collision.

[59] At 2:35 pm, some seven minutes later, PC D'Andrea decided to abort the ASD testing and said he had enough grounds to arrest Ms. M. C. for impaired care or control. Again, the stated grounds included (i) the odour of alcohol on her breath which was getting stronger, (ii) glassy eyes, (iii) Slouching during the interaction, (iv) the driving evidence from the 911 caller and (v) confirmation of an accident.

[60] Mr. Hendry says this was enough to meet the legal standard. While in some cases, this kind of evidence may be enough to surmount the legal hurdle, the difficulty with the Crown's submission is that in this case, it wasn't, largely because of PC D'Andrea's evidence. In my view, PC D'Andrea's reasonable suspicion had not crossed the rubicon to reasonable grounds.

[61] In Notaro at para.35, Justice Paciocco reviewed the issue of reasonable and probable grounds and stated "the nature and quality of the investigation will affect the information that the officer has, and can therefore indirectly influence the sufficiency of the officer's grounds". The case at bar illustrates this point. The effect of the ASD demand means that PC D'Andrea didn't subjectively believe he had enough grounds for an arrest, but rather only had subjective grounds for a roadside demand. If he had the former, arguably he would have moved to an arrest right away as he has a legal obligation to do so forthwith. The ASD test is meant as an investigative tool, thus a person of his experience and background could not have reasonably been over- cautious in his approach. He was not a new officer and this wasn't his first drinking and driving investigation.

[62] _PC D'Andrea was never asked why and how his subjective belief changed almost 7 minutes later. Even | were to assume that he honestly believed he had developed grounds for an arrest, | do not accept that it was reasonable for him to form this subjective belief at the time he did. There was nothing that occurred that would be sufficient to recalibrate the honesty of his subjective belief. Put differently, the only additional facts before the aborted ASD test were a stronger smell of alcohol on her breath, alleged slouching and confirmation of a collision. According to him, she developed problems with her dexterity after trying — for the sixth time — to provide a sample of her breath. A reasonable person would think she was out of breath and tired, coupled with a reasonable inference that she was just roused out of bed.

[63] In Notaro, Justice Paciocco reminded that the objective inquiry does the bulk of the work in the reasonable and probable grounds calculus. The proper question to consider is whether PC D'Andrea acted on reasonable grounds (at para. 40). When | consider the totality of the circumstances, | find that he did not act on reasonable grounds. Objectively, the only new information he acquired was confirmation of an accident but there were no material changes in her perceived impairment. Accidents can happen for a variety of reasons and there's nothing to suggest he doubted the veracity of the 911 dispatch in which Ms. McFarland said there was an accident and she failed to remain on scene. Ms. M. C. had already admitted to him that she was driving her son to work, thus proof of driving was inconsequential. He never testified that he felt Ms. M. C. was feigning the ASD breath testing

or lying to him about alcohol consumption. Moreover, it seems to me that if the smell of alcohol was becoming more pronounced, this might have been another reason to ask her when she last consumed her alcoholic drink, which he did not do. The smell of alcohol on a driver's breath is potentially ambiguous or even misleading, but cannot standing alone give any information about the effects of alcohol on one's ability to drive. See for example, R. v. Tavone, [2007] O.J. No. 3073 (Ont. Sup. Ct.) at para. 11 per Justice Hill. The smell of alcohol is even more important in a case like this where a person is not investigated driving a motor vehicle and is in their home, where they would be within their right to consume alcohol.

[64] | agree with Mr. Genis that PC D'Andrea simply became frustrated that Ms. M. C. was incapable of providing a breath sample into the ASD and simply decided he was going to arrest her. According to his evidence, he did not have reasonable grounds to begin with, thus the Crown's submission that he did, with respect, rings hollow. Nor did he testify he had reasonable grounds and simply proceeded cautiously. What remains unclear from the record is why he simply didn't choose to arrest her for failing to comply with a roadside demand, which might have been more reasonable. Even on a liberal application of the Notaro standard, no reasonable person standing in his shoes would believe that he had grounds to arrest Ms. M. C. for impaired care of control. In R. v. Rehill 2015 ONSC 6025 Justice Campbell considered a case in which the trial judge found a s.8 breach based on an aborted ASD test. While the case was decided on s.24(2) issues, Campbell J. noted it was arguable whether there was a s.8 breach because the police officer who made the ASD demand was inexperienced but acted reasonably in continuing to develop grounds before he aborted the ASD test and moved to an arrest. It was also reasonable that he sought advice from a senior officer before the aborted test. In that case, Campbell J. held there was no constitutional shortcut. This case is different. PC D'Andrea aborted the test due to frustration. A person with his experience ought to have known he didn't have grounds for an arrest. Presumably if he had grounds for an arrest right from the outset, he could have applied for a search warrant once he knew she was inside her home. That wasn't done either.

[65] In my view, the arrest was not premised on reasonable and probable grounds and therefore was unlawful. It resulted in a s.8 breach.

(iv) Was Ms. M. C. arbitrarily detained under s.9?

[66] | am proceeding on the basis that Ms. M. C. was lawfully detained during the initial investigation as PC D'Andrea was conducting a drinking and driving investigation and had grounds for a roadside demand. However, when he changed his mind and decided to arrest her for a s.253 offence, the detention became arbitrary. As | held above, PC D'Andrea lacked the necessary reasonable and probable grounds to arrest Ms. Mulunda-Chizeulu without a warrant in accordance with the statutory requirements under s.495 of the Criminal Code.

[67] This resulted in an arbitrary detention from the moment of the arrest at approximately 2:35 pm to the time of her release at 4:51 pm. This was a period of approximately 2 hours and 16 minutes. During this time, Ms. M. C. was handcuffed,

removed from her residence while barefoot and inappropriately dressed, without any undergarments.

[68] This was a violation of s.9.

(v) | Did the police have the power to search Ms. M. C.'s residence incident to her arrest and seize personal effects?

[69] | find there was a separate s.8 violation when the police entered her residence to retrieve her personal effects after the arrest. [70] | wholly accept the evidence of Ms. M. C. on this issue. She testified after PC D'Andrea arrested her, (which | have concluded was on the porch, not. inside her home) she remained barefoot and inappropriately dressed. She asked to change and PC D'Andrea said no. The police entered her home to retrieve some shoes. There's no evidence that the police sought her consent or she gave it before this happened. PC D'Andrea said after arresting her, he tasked PC Knowler to "grab some shoes" that he saw in the foyer. PC Knowler picked up some shoes but they belonged to her daughter so she dropped them. PC D'Andrea added he recalled trying to determine what shoes belonged to Ms. M. C. but she was so angry that he gave up and left while she was still barefoot and inappropriately dressed. The parade video shows Ms. M. C. barefoot throughout the station. While this paints an unfortunate scene, the Crown did not call PC Knowler so I'm left with the evidence of PC D'Andrea and Ms. M. C..

[71] Mr. Hendry says it would have been unreasonable for the police to simply transport Ms. M. C. without any shoes, thus the entry into the foyer was reasonable. He says the police were simply trying to be helpful.

[72] _ While | agree it would have been unreasonable to simply leave without any shoes, | am not satisfied that the police conduct was reasonable in this case. There's simply no evidence that the police even attempted to secure consent before entry. There's also no evidence that the police allowed Ms. M. C. the option of getting dressed or even grabbing a jacket to cover herself before she was removed from her home in handcuffs. In contrast, there is evidence the police went beyond the foyer and into a bedroom on the second floor and there's also evidence the police remained in the residence for more than just a brief period of time.

[73] The law recognizes that the purpose of s.8 is to protect individuals from unjustified state intrusion on their privacy interests: Hunter v. Southam Inc. [1984] 2 S.C.R. 145 at p.160. This is not a new legal principle. In R. v. Reeves [2018] SCJ No. 56, the Supreme Court of Canada reviewed the principles animating search and seizure and observed that if s.8 is engaged, the court must determine whether the search and seizure was reasonable. A warrantless search or seizure is presumptively unreasonable and the Crown bears the burden of rebutting this presumption. A search or seizure is reasonable "if it is authorized by law, the law itself is reasonable and if the manner in which the search or seizure was carried out is reasonable (at para. 14).

[74]. In this case, the police searched Ms. M. C.'s home for her personal effects and seized her personal effects from her purse, which was in her bedroom. The issue in this case

therefore turns on whether the Crown has rebutted the presumption on a balance of probabilities that the warrantless search and seizure was unreasonable.

[75] In Reeves, the Supreme Court considered the issue of police entry into a shared home. In doing so, the Supreme Court reminded that the law has long recognized the prime importance of privacy within our homes (at para. 24). | did not have to hear evidence from Ms. M. C. that she had a reasonable expectation of privacy in her own home. She clearly does. Moreover, unlike the case of a shared home, a personal home carries with it a higher degree of privacy. The higher the expectation of privacy, the greater the claim to constitutional shelter: R. v. Tessling, 2004 SCC 67 at paras. 19-21. Here, the police entered not only the foyer but also a bedroom, which arguably is not a common area visible to someone who might stand at the threshold of a

doorway.

[76] | find as a fact that PC Knowler entered Ms. M. C.'s foyer and bedroom to retrieve her personal effects — after she had been arrested. There is no evidence that Ms. M. C. gave either police officer consent to enter her home even for this limited purpose: R. v. Wills (1992), 7 O.R. (3d) 337 (C.A.). Nor is there evidence that there was implied consent. Moreover, the police did not have prior judicial authorization through a search warrant: R. v. Feeney [1997] 2 S.C.R. 13. Accordingly, there was no legal basis to enter Ms. M. C.'s home except perhaps convenience, which of course, is not a lawful basis.

[77] Mr. Hendry says the police were trying to be helpful, thus they're conduct was reasonable. Unfortunately, the evidence does not support this submission.

[78] First, there's no evidence that any officer even attempted to procure consent from Ms. M. C. prior to entering her home. A simple request would have been easy. That wasn't done.

[79] Second, there's no evidence that any officer gave Ms. M. C. the option of getting dressed and retrieving her own shoes, before they entered her home. It would have been easy to advise her that she was going to be arrested and transported to a police station and she had the choice of getting dressed if she wanted to. If she turned it down, that would be different. That choice wasn't given. Moreover, there's nothing to suggest the investigation was urgent or there were exigent circumstances or even officer safety issues. PC Knowler, a female officer, was present and could have escorted her to her bedroom to get changed while at the same time making sure she didn't consume alcohol, which might jeopardize the police investigation. That also didn't happen.

[80] Third, | simply don't know why PC Knowler saw fit to enter her bedroom. PC D'Andrea confirmed he tasked her with obtaining shoes in the foyer and could not say she didn't enter the bedroom. Ms. M. C. said she did. | believe her. She said prior to leaving the house, she "saw a lady go upstairs" which | conclude was PC Knowler — as she was the only female officer on scene. PC D'Andrea clarified that he thought PC Knowler retrieved her driver's license when she went inside to obtain her shoes. | find that the driver's license was in her bedroom, not in the foyer. Unfortunately, PC Knowler didn't testify on this issue where the Crown bore the onus of proving a reasonable search. [81] Fourth, there is evidence that well after Ms. M. C.'s arrest, the police either re-attended at the residence or

remained in the residence. The record is unclear _ on this issue. PC Azzano testified that while he was trying to perform the breath tests at the station, Ms. M. C. kept asking to speak with her husband. He discovered that the police were inside her home, ostensibly, with her husband, although that too is unclear. The Crown did not call Ms. M. C.'s husband on this issue thus | don't know if he gave permission to enter of if the police remained in the home on their own accord. It's significant that this phone call was at least 45 minutes after her arrest.

[82] Fifth, and perhaps most ironically, even after spending some time in the foyer to find some shoes, the police ultimately left without any shoes. PC D'Andrea said Ms. M. C. was angry so he left. It would have been easy to let her find her own shoes but that wasn't done either.

[83] In fairness to PC Knowler, | will decline to make any adverse findings against her on this issue but suffice to say, it would be a serious problem if she remained inside the house after the arrest, when there was no reason to do so. With respect, the problem of retrieving the driver's license was largely created by PC D'Andrea who took no initial steps to confirm Ms. M. C.'s identity. When he knocked on her front door, he never asked her for documentation which he likely would have if she was stopped at the roadside. There's a reason why the law has developed in a way to circumscribe arrests within a home.

[84] In the end, the s.8 violation has not been rebutted by the Crown. Even if stepping into the foyer was reasonable, the search in her bedroom was not.

[85] | now turn to the circumstances of the refusal.

[86] Given my conclusion of the unlawful arrest, Ms. M. C. was not obligated to provide a sample of her breath so any refusal is inconsequential. It would also mean that the Crown would not meet the high burden of proving impairment of the ability to drive. This would end the prosecution. However, in the even the arrest was lawful, | will go to consider the circumstances of the refusal and whether it ought to be excluded under s.24(2).

(vi) Has the Crown proven the refusal beyond a reasonable doubt?

[87] At 2:47 pm, Ms. M. C. arrived at the police station and was paraded. The parties tendered the parade video. Ms. M. C. was visibly upset, alleging she was arrested because she was black. Mr. Genis did not allege a s.9 violation on this basis, nor does the evidence establish one.

[88] Ms. M. C. testified she was upset and argumentative not because she was impaired but due her perceived poor treatment. She was confused about being arrested in her home and was inappropriately dressed, without any undergarments or shoes. Given her culture and background, she felt uncomfortable around men, let alone police officers. She felt as if she was treated poorly by PC D'Andrea. [89] At 3:02 pm, PC D'Andrea provided his grounds for arrest to the QBT, PC Azzano.

[90] Section 254(5) criminalizes the conduct of anyone who without reasonable excuse "fails or refuses" to comply with a lawful breath demand made under s.254(3) of the

Criminal Code. The Crown must prove a proper (and lawful) demand, made forthwith or as soon as practicable, where the officer believed on reasonable grounds that the accused had committed an offence under s.253 due to the consumption of alcohol within the preceding three hours, a failure to comply with the demand and proof that the failure was wilful (the mens rea).

[91] There is no issue with the mens rea of the offence. Mr. Genis admits the refusal was unequivocal. | agree.

[92] The issue in this case turns on proof of the actus reus, namely, whether the demand was premised on reasonable grounds that Ms. M. C. committed a s.253 offence.

[93] As | explained above, PC D'Andrea did not have reasonable grounds to arrest Ms. M. C. for impaired care or control, thus the Crown hasn't proven there was a valid demand. There was no obligation to comply. See for example R. v. Cote [1992] O.J. No. 7 (C.A.) where Arbour J.A. (as she then was) explained (at para. 7) that if a demand does not comport with the strict requirements of the section, it is not valid and there is no obligation to comply. Here, the demand was not valid so Ms. Mulunda- Chizelu did not have to comply. | will now consider if she was obligated to comply with PC Azzano's demand as well.

[94] There were two breath demands in this case. The first one was by PC D'Andrea after the arrest and the second demand was by PC Azzano prior to the refusal. The law is clear that as long as there is evidence of a valid demand, that's all the Crown has to prove. The demand from the arresting officer can be a continuing demand or a second demand can be made by the QBT if the first demand is deficient: R. v. Townsend, [2007] OJ No. 1686 (CA).

[95] This is not a case where a deficient demand by the arresting officer was cured by the QBT and thus for Charter purposes amounted to a "fresh start".

[96] The evidence establishes that PC D'Andrea provided his grounds for arrest to PC Azzano who had difficulty persuading Ms. M. C. to enter the breath room as she was upset at PC D'Andrea. He spent a lot of time trying to explain to her that despite any perceived angst towards his colleague(s), his job was to perform breath tests. Ms. M. C. eventually agreed and entered the breath room. However, she immediately refused stating: "I'm not going to do this". This was a refusal to PC D'Andrea's demand. [97] Ms. M. C. asked to use the washroom. PC Azzano said he would permit her to use the washroom after her first test as they would have to wait 15 minutes in between the two tests. Ms. M. C. refused again stating "I'm not going to cooperate". She remained strident in her position that PC D'Andrea treated her unfairly.

[98] Atthis point, PC Azzano testified he "made a demand" and waited about 36 minutes before he was satisfied that she was not going to cooperate. She was charged accordingly.

[99] Returning to the legal issue, no evidence was lead about the exact demand made by PC Azzano. This is not meant as a criticism, but | do not know what he read to Ms. M. C.. This gap in the evidence is enough to dispose this issue. However, even if PC Azzano's demand was fulsome, there's no evidence that it was any different than PC D'Andrea's. In other words, no evidence was lead explaining if he formed independent grounds that Ms. M. C.

had committed a s.253 offence in the preceding three hours or simply relied on the grounds given to him by PC D'Andrea. It would appear he did the latter. If so, then his demand does not amount to a "fresh start" for constitutional purposes.

[100] It would appear that PC Azzano made observations of Ms. M. C. that he said were consistent with impairment. For example, he smelled alcohol on her breath, she was despondent, argumentative and upset. While this could be construed as impairment, there's an equally available inference it was due to her upset at being treated poorly in her home. As | said, she had valid reasons to feel upset. PC Azzano's perceived indicia of impairment do not cure PC D'Andrea's deficient grounds to arrest. The Crown has not proven a valid demand.

[101] In arriving at the above conclusion, | would be remiss if | did not observe that PC Azzano should be commended for his professionalism, diligence and empathy. This case presented as a difficult one for him as Ms. M. C. was a difficult detainee. She was confused, scared and vulnerable. While she was acting on the misapprehension of being targeted due to her race, he was respectful of her views while at the same time mindful of his duties. He was not dismissive or condescending. | wish to be clear that my conclusion on the Charter issues including my conclusion about the seriousness of the breaches, which | will review below, are in no way shaped by his conduct.

[102] | now turn to the issue of any remedy which Ms. M. C. must prove on a balance of probabilities. (vii) If there were Charter violation(s), has Ms. M. C. proven ona balance of probabilities that the evidence should be excluded under s.24(2) of the Charter?

[103] | have concluded that the Crown has not proven the elements of the refuse offence, thus my consideration of the s.24(2) inquiry is being undertaken on the assumption that | have somehow erred.

[104] The legal test for exclusion of evidence under s. 24(2) of the Charter was described by the Supreme Court in R. v. Grant, [2009] 2 S.C.R. 353, 245 C.C.C. (3d) 1. Ms. M. C. must prove on a balance of probabilities the evidence sought to be excluded was obtained in a manner that infringed a Charter right and the admission of the evidence would bring the administration of justice into disrepute.

[105] The relevant evidence is assessed during a three-part analysis, which addresses the following factors:

(i) The seriousness of the Charter-infringing state conduct;

(ii) The impact of the breach on the Charter-protected interests of the accused; and

(iii)Society's interest in an adjudication on the merits.

The Threshold Issue

[106] | have considered the threshold issue of whether the evidence of the refusal was "obtained in a manner" that violated the Charter entitling her to a remedy.

[107] In R. v. Edwards, 2016 ONCA 389, Laskin J.A. explained that although evidence obtained after a breach was generally thought not to meet the s.24(2) "obtained in a manner' threshold, the generous approach taken to this issue in the jurisprudence did not preclude such a finding. He outlined the following principles that should guide a trial court's analysis of the issue at para. 72:

- the approach should be generous, consistent with the purpose of s.24(2);
- the court should consider the entire "chain of events" between the accused and the police
- the requirement may be met where the evidence and the Charter breach are part of the same transaction or course of conduct;
- the connection between the evidence and the breach may be causal, temporal or contextual or any combination of these three connections;
- But the connection cannot be either too tenuous or too remote.

[108] In this case, the refusal was after the unlawful arrest and after the unconstitutional search of Ms. M. C.'s home to retrieve her personal effects. However, | find that the refusal was "part of the same transaction or course of conduct" because the common link was the arrest. If Ms. M. C. had not been arrested, the police would not have entered her home to retrieve her personal effects — nor would have any reason to. Nor would they have any basis to read her a breath demand into an approved instrument.

[109] Moreover, the connection between the evidence and the breaches is both temporal and contextual, and is neither too tenuous nor too remote. The connection is temporal because the three breaches are relatively close in time and are part of a continuum anchored by Ms. M. C.'s arrest.

[110] In R. v. Pino, 2016 ONCA 389, Laskin J.A. at para. 74 explained that the word "contextual" pertains to the surroundings or situation in which something happens. Like Pino, the something that happened in this case was Ms. M. C.'s arrest. The refusal was obtained in a manner that violated a Charter right.

The Grant Factors

[111] Turning next to whether the evidence would bring the administration of justice into disrepute.

[112] In the first line of inquiry, the court must consider the nature of the police conduct and locate it on a continuum that runs between minor and technical breaches and those that result from a blatant and flagrant disregard for the Charter. The more severe the violation, the greater the need for the court to disassociate itself from the police conduct in order to maintain confidence in the administration of justice. See R. v. Kitaitchik, [2002] OJ No. 2476 (CA) at para. 41.

The Deficient Grounds to Arrest and Arbitrary Detention

[113] In this case, there were two separate s.8 violations along with a s.9 violation. The unlawful arrest based on a lack of reasonable grounds triggered the arbitrary detention under s.9 so there is some overlap in these Charter violations. In Grant, the Supreme Court said the s.24(2) analysis must focus on the impact of the breach on the accused's protected interests. Because different Charter rights protect different interests, if there are different rights violated, each must be considered separately at this stage.

[114] | find the arrest and detention was moderately serious because PC D'Andrea jumped to an arrest due to frustration and an assumption that he had crossed the rubicon of reasonable and probable grounds based on confirmation of an accident. This was insufficient. See for example, R. v. Merko, 2018 ONSC 7336 (Ont. Sup. Ct.) at para. 18 where an arrest based on insufficient grounds was upheld on appeal. Moreover, there is no evidence of good faith to reduce the seriousness of the violation and the need for the court to disassociate itself from the police conduct.

[115] On the second Grant factor, | am reminded that in R. v. Jennings, 2018 ONCA 260 (CA), the Court of Appeal dealt with a case in which the accused was arrested, like here, due to deficient grounds, which also lead to a s.9 arbitrary detention based on the same conduct. In Jennings, the accused provided breath samples thus the evidence sought to be excluded were breath samples, which isn't the case here as Ms. Mulunda- Chizelu refused to provide breath samples. Jennings clarified that there will be a minimal intrusion on an accused's Charter protected interests in many cases in which there is a breach respecting the arrest and breath demand, which necessarily leads to a detention and transportation to the police station for the taking of a breath sample.

[116] In my view Jennings isn't entirely dispositive of this issue because the detention in this case was coupled with an arrestee who was inappropriately dressed and escorted out of her own house without any shoes. While Ms. M. C. did not advance a breach of her right to counsel or a breach of s.7, she was not permitted to call her husband until much later on and remained dazed, confused and helpless in a police station for a long time. All of this impacts the quality of her detention. See for example R. v. McGuffie (2016), 336 C.C.C. (3d) 486 (Ont. C.A.), at paras. 38, 39, 44 and 79. | find that there was more than just a minimal intrusion on her Charter protected interests based on the s.9 violation and weighs in favour of exclusion of the evidence. | say this even if the s.8 violation based on deficient grounds may fall on the lower end of the seriousness continuum.

[117] In terms of the third inquiry, the evidence of the refusal is essential to the Crown's case because it forms the actus reus (assuming a lawful demand). The third Grant criterion weighs against exclusion.

The Search of Ms. M. C.'s Home & Seizure of Personal Items

[118] With respect to the second violation of s.8 involving entry into Ms. Mulunda-Chizelu's home, | find the Charter offending conduct to be quite serious. The police had no lawful authority to enter the house, did not seek Ms. M. C.'s consent and ultimately went into her bedroom to retrieve her personal effects. The fact that PC D'Andrea saw fit to leave

without any shoes at all because she was upset, represents an absence of good faith and suggests a strong need for the court to disassociate itself from the police conduct. Whether it was the product of negligence, willful blindness or a willful and flagrant disregard for Ms. M. C.'s Charter rights, it was "a significant departure from the standard of conduct expected of police officers" and such "leans this aspect of the inquiry in favour of exclusion of the evidence: Rehil/ at para. 28.

[119] There is simply no evidence as to why PC D'Andrea did not see fit to ask Ms. M. C. to get dressed before he took her to the police station. There was no urgency, exigency or officer safety issues. He could have avoided the issue of tasking PC Knowler to retrieve her driver's license if he took steps to confirm her identity when he knocked on the door. He did not. The fact that he likely would have been able to do at the roadside as opposed to at the door doesn't ameliorate the seriousness of the breach.

[120] The entry into the home, which seemed to have persisted beyond a simple cursory inspection of the foyer was neither technical in nature nor fleeting in time and in my view constituted a significant and substantial abrogation of her Charter protected interests. | am buttressed in this conclusion by a recent decision of Justice Moore who considered a similar issue where a police officer entered a defendant's home for the purpose of serving her papers related to a refuse investigation. It was not to search and seize personal items, which arguably is more serious. Moore J. found the entry into the front foyer of the home to be a serious Charter violation. This was despite an absence of bad faith. She excluded the evidence under s.24(2). See R. v. Reilly [2018] OJ No. 5613 (Ont. Prov. Ct.) After recognizing that policing is not easy and sometimes officers will make mistakes in the heat of the moment, she stated the following, which | find to be apt in this case as well:

62 At every stage of an investigation police officers should ask themselves, "what authority do | have to take this step?" This includes the decision to detain, the decision to arrest, the decision to search, the decision to hold someone for a bail hearing, the decision to enter a dwelling, and so forth. A police officer must be able to clearly articulate the authority he or she has for each decision made, especially where those decisions impact upon a person's Charter rights. A police officer must also understand which obligations arise at each stage of the investigation.

[121] In terms of the third Grant factor, the evidence relating to the search of the home and seizure of personal effects, including Ms. M. C.'s personal effects isn't pivotal to the Crown's case, especially because | have concluded that identity was otherwise proven. This remains a neutral factor in terms of exclusion or inclusion.

The Balancing

[122] Ultimately, balancing the Grant factors in this case, mindful of the different and multiple Charter violations, | conclude that the evidence should be excluded. While there is a strong interest in adjudicating a matter on the merits, especially in the case of a clear refusal, the Charter violations in this case simply can't be cast aside. The entry into the home and the circumstances of the detention were serious. In my view, admitting the evidence would send the message to the public that courts condone deviations from the

rule of law by failing to disassociate themselves from the fruits of an unlawful conduct: Rehill at para. 28. This is particularly so because the police conduct in entering Ms. M. C.'s home without any authority represents a casual indifference to one's high expectation of privacy in their home.

[123] For the above reasons, | would exclude the evidence of the refusal under s.24(2) of the Charter.

(viii) Has the Crown proven the offence of impaired care or control?

[124] Given my conclusion that PC D'Andrea lacked reasonable and probable grounds for the arrest of impaired care or control, it naturally follows that the offence can't be proven beyond a reasonable doubt.

[125] However, | will go on to consider whether the Crown has proven the offence if | am wrong that PC D'Andrea did have grounds for an arrest. . [126] It is well settled that impairment of the ability to operate a motor vehicle which must be proven, and not just "impairment" generally: R. v. Andrews (1996), 104 C.C.C. (3d) 392 (Alta. C.A.), leave to appeal refused [1996] S.C.C.A. No. 115, 106 C.C.C. (3d) vi (S.C.C.).

[127] Any degree of impairment ranging from slight to great, establishes the offence: R. v. Stellato (1993), 78 C.C.C. (3d) 380 (Ont. C.A.) at p. 384; aff'd (1994), 90 C.C.C. (3d) 160 (S.C.C.). Slight impairment to drive relates to a reduced ability, in some measure, to perform a complex motor function whether impacting on perception or field of vision, reaction or response time, judgment, regard for the rules of the road, and the like: R. v. Censoni, [2001] O.J. No 5189 (S.C.J.) at para. 4; R. v. Michitsch, [2004] O.J. No. 1296

(S.C.J.).

[128] Videotaped actions of a detainee at the scene or at the police station can be compared to other evidence to assess whether or not the person is impaired: R. v. Brijeski, [1999] O.J. No. 736 (C.A.); R. v. Singh, [1997] O.J. No. 1164 (Ont. Ct. Gen.

Div.) at para. 6.

[129] Bad driving coupled with the absence of physical signs of intoxication other than the odour of alcohol might not give rise to impairment to the slightest degree: R. v. Jones, [2004] A.J. No. 735 (C.A.); R. v. MacCoubrey, [2015] O.J. No. 2820 (S.C.J.) at

para. 27.

[130] In my view, this is one of those cases. There were no measurable physical signs of intoxication other than the odour of alcohol on her breath. I'm simply unsure when she consumed alcohol. | don't accept that Ms. M. C. was slouching on her porch, which was attributed to impairment by alcohol. She was attempting to provide a breath sample and was on her 6" attempt. | accept she was trying her best and it just wasn't working. Moreover, | have reviewed the parade and breath room videos and Ms. M. C. does not present as impaired. She is confused, scared and visibly upset — not due to alcohol

consumption but because of how she was treated in her home and her embarrassment of being inappropriately dressed.

[131] Ms. M. C. is presumed to be innocent until this burden is displaced by the Crown beyond a reasonable doubt. A reasonable doubt is based on reason and common sense and logically derived from the evidence or the absence of

evidence. In R. v. Villaroman, 2016 SCC 22, 338 (CCC) (3d) 1, Jutsice Cromwell noted (at para. 38) that the basic question is whether the circumstantial evidence "viewed logically and in light of human experience, is reasonably en of supporting an inference other than the accused is guilty".

[132] When | consider the evidence as a whole, there are inferences that are inconsistent with guilt based on the absence of evidence, including inattentive driving due to fatigue, not alcohol consumption. | conclude that the Crown has not met their heavy burden on this issue. D. Conclusion

[133] For the above reasons, | have concluded that the arrest was unlawful which means the Crown has not proven the actus reus of the refuse allegation.

. [134] If lam wrong that the arrest was lawful, | would still conclude that the combined impact of the proven Charter violations in this case means that the evidence of the refusal should be excluded under s.24(2). In addition, the evidence still falls short of proving impairment of the ability to drive beyond a reasonable doubt.

[135] Accordingly, both counts are dismissed.

Released: December 21, 2018

"Signed: Justice F. Javed"