Supreme Court
of Canada

Cour suprême
du Canada

July 30, 2007

Gunn & Prithipaul
#100, 9924 - 106th Street
Edmonton, Alberta
T5K 1C4

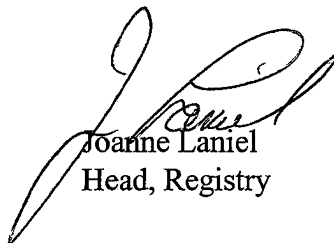
Attention: Shannon K.C. Prithipaul

Dear Ms. Prithipaul,

RE: Bennett Parker Rhyason
v.
Her Majesty the Queen
File No.: 31772

Enclosed please find a copy of the Notice of Deposit of Judgment and the Judgment of this Court in the above proceedings.

Yours truly,



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Head, Registry

Encl.

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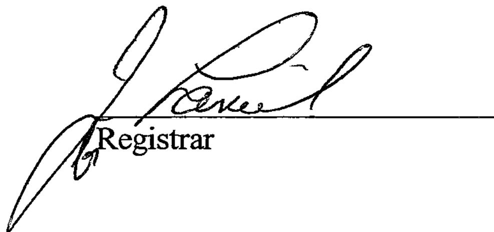
NOTICE OF DEPOSIT OF JUDGMENT

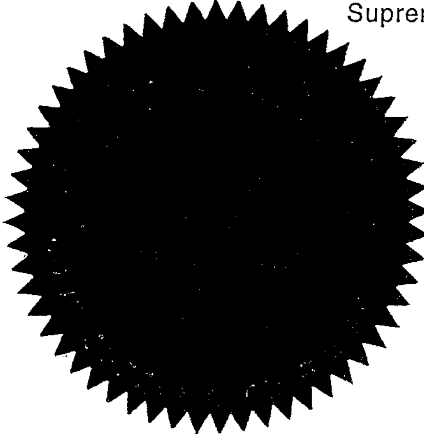
RE: Bennett Parker Rhyason
v.
Her Majesty the Queen
File No.: 31772

Take notice that on the 27th day of July 2007 the Court delivered judgment in this case by depositing judgment with the Registrar pursuant to paragraph 26(1)(b) of the *Supreme Court Act*.



Registrar

Dated this 30th day of July 2007.



Supreme Court of Canada

Cour suprême du Canada

No. 31772

July 27, 2007

Coram: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

BETWEEN:

Bennett Parker Rhyason

Appellant

- and -

Her Majesty the Queen

Respondent

JUDGMENT

The appeal from the judgment of the Alberta Court of Appeal, Number 0603-0031-A, dated November 30, 2006, heard on May 17, 2007, is dismissed, McLachlin C.J. and Binnie, Fish and Charron JJ. dissenting.

Le 27 juillet 2007

Coram : La juge en chef McLachlin et les juges Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron et Rothstein

ENTRE :

Bennett Parker Rhyason

Appelant

- et -

Sa Majesté la Reine

Intimée

JUGEMENT

L'appel interjeté contre l'arrêt de la Cour d'appel de l'Alberta, numéro 0603-0031-A, en date du 30 novembre 2006, entendu le 17 mai 2007, est rejeté. La Juge en Chef McLachlin et les juges Binnie, Fish et Charron sont dissidents.

J.S.C.C.
J.C.S.C.

SUPREME COURT OF CANADA

CITATION: R. *v.* Rhyason, 2007 SCC 39

DATE: 20070727
DOCKET: 31772

BETWEEN:

Bennett Parker Rhyason
Appellant
v.
Her Majesty The Queen
Respondent

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

REASONS FOR JUDGMENT: (paras. 1 to 21)	Abella J. (Bastarache, LeBel, Deschamps and Rothstein JJ. concurring)
DISSENTING REASONS: (paras. 22 to 30)	Charron J. (McLachlin C.J. and Binnie and Fish JJ. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

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r. *v.* rhyason

Bennett Parker Rhyason *Appellant*

v.

Her Majesty The Queen *Respondent*

Indexed as: R. *v.* Rhyason

Neutral citation: 2007 SCC 39.

File No.: 31772.

2007: May 17; 2007: July 27.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

on appeal from the court of appeal for alberta

Criminal law — Impaired driving causing death — Reasonable and probable grounds to demand breath samples — Distinction between consumption and impairment — Whether trial judge applied wrong test for determining whether police officer had reasonable and probable grounds to demand breath samples — Whether misstatements in trial judge's reasons sufficiently undermining to warrant appellate intervention — Criminal Code, R.S.C. 1985, c. C-46, ss. 253, 254(3), 255(3).

After the accused spent a number of hours consuming alcohol, the vehicle he was driving struck and killed a pedestrian. At the scene, the arresting officer noticed that the accused had bloodshot eyes, blinked slowly, was shaking, and had an odour of alcohol on his breath. The officer arrested the accused for impaired driving causing death and demanded he provide evidential breath samples. The samples indicated blood alcohol levels that exceeded the legal limit when operating a motor vehicle. At trial, the accused applied to exclude the breath samples. In concluding that the officer had reasonable and probable grounds to have demanded the samples, the trial judge stated that there a“is no strict requirement that the officer . . . have evidence of impairment (as distinct from, and additional to, mere consumption) before proceeding with the arrest or demand”. The trial judge found the accused guilty. The majority of the Court of Appeal affirmed the conviction, holding that when his reasons were read in their entirety he had applied the correct test in determining whether there were reasonable and probable grounds to demand a breath sample. The dissenting judge would have ordered a new trial, being of the view that the breath samples should not have been admitted because the trial judge applied the wrong test.

Held (McLachlin C.J. and Binnie, Fish and Charron JJ. dissenting): The appeal should be dismissed.

Per Bastarache, LeBel, Deschamps, **Abella** and Rothstein JJ.: While the impugned passages in the trial judge's reasons are, by themselves, a misstatement, when his reasons are read as a whole they reflect the application of the proper test. The trial judge referred to s. 254(3) of the *Criminal Code* as containing the appropriate test and, at numerous times, he signalled that he was relying on more than just evidence of consumption as a basis for his finding that the arresting officer had reasonable and

probable grounds to demand a breath sample. The trial judge correctly considered the relevant testimony of the officer about the circumstances of the accident, as well as signs of the accused's impairment. He also reviewed the relevant jurisprudence emanating from similar fact situations and appropriately took into consideration the presence of an unexplained accident. There is accordingly no basis for appellate intervention. [9] [14-17] [19-20]

Per McLachlin C.J. and Binnie, Fish and **Charron** JJ. (dissenting): It is precisely the trial judge's erroneous holding on the critical issue of reasonable and probable grounds to demand a breath sample when read in the context of his reasons as a whole, and in light of the evidence presented at trial, that leads to the conclusion that he erred in law and applied the wrong legal test. No meaning can be given to the trial judge's holding other than that conveyed by the clear language that he used. Nowhere, before or after the impugned passage, is there an accurate statement of the test that requires something more than the evidence of alcohol consumption to substantiate the officer's reasonable and probable grounds for demanding a breath sample. Moreover, the combination of objective facts listed by the trial judge, which refer to alcohol consumption only or are silent as to the accused's condition, do not indicate he understood that mere consumption did not constitute reasonable and probable grounds. To the contrary, the trial judge's statement that the combination of facts reasonably indicates the offence of impaired driving causing death compounds rather than corrects his erroneous holding. While the circumstances of an accident, along with other evidence, can be taken into account in determining whether an officer had the requisite grounds, what defeats the argument here is that the circumstances of the accident did not form part of the evidential basis upon which the officer based his demand. [7-8] [3-4] [6-8]

Cases Cited

By Abella J.

Referred to: *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26; *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17; *R. v. Jacquard*, [1997] 1 S.C.R. 314; *R. v. Bernshaw*, [1995] 1 S.C.R. 254; *R. v. Eliuk* (2002), 299 A.R. 364, 2002 ABCA 85; *R. v. Pedersen* (2004), 193 B.C.A.C. 206, 2004 BCCA 64; *R. v. Turner* (2004), 1 M.V.R. (5th) 191; *R. v. Gairdner* (1999), 40 M.V.R. (3d) 133.

By Charron J. (dissenting)

R. v. Bernshaw, [1995] 1 S.C.R. 254.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, ss. 253(*a*), (*b*), 254(3), 255(3).

APPEAL from a judgment of the Alberta Court of Appeal (McFadyen, Hunt and Slatter JJ.A.) (2006), 397 A.R. 163, 384 W.A.C. 163, 70 Alta. L.R. (4th) 66, 214 C.C.C. (3d) 337, 40 M.V.R. (5th) 38, [2007] 3 W.W.R. 195, [2006] A.J. No. 1498 (QL), 2006 ABCA 367, affirming a decision of Lee J. of the Court of Queen's Bench (2006), 389 A.R. 277, [2006] A.J. No. 58 (QL), 2006 ABQB 60. Appeal dismissed, McLachlin C.J. and Binnie, Fish and Charron JJ. dissenting.

Shannon K.C. Prithipaul, for the appellant.

Susan D. Hughson, Q.C., for the respondent.

The judgment of Bastarache, LeBel, Deschamps, Abella and Rothstein JJ. was delivered by

1 ABELLA J. — Over the course of a number of hours on July 30, 2004, Bennett Parker Rhyason and two friends consumed alcohol at three different bars. In the early hours of July 31, the vehicle Mr. Rhyason was driving struck and killed a 17-year-old pedestrian who was crossing the street at a marked, well-lit crosswalk.

2 Arriving at the scene of the accident, Constable Darren Stevens, the arresting officer, observed a motionless body lying at the edge of the road south of the crosswalk. He was advised by another constable that the body on the road had no pulse. The road was straight, dry and lit.

3 Constable Stevens was approached by Mr. Rhyason, who asked whether the pedestrian who had been struck was dead. When he was told that he was, Mr. Rhyason said, "I was the driver. Oh, God, He's dead." While speaking with him, Constable Stevens noticed that Mr. Rhyason had bloodshot eyes, an unusually blank stare, blinked slowly, was shaking, and had an odour of alcohol on his breath.

4 Constable Stevens then arrested Mr. Rhyason for impaired driving causing death and demanded an evidential breath sample under s. 254(3) of the *Criminal Code*, R.S.C. 1985, c. C-46. His breath samples indicated 120 and 100 mg of ethanol per 100 ml of blood, more than the legal limit of 80 mg per 100 ml of blood.

5 Counsel for Mr. Rhyason applied to exclude the breath samples. The trial judge found that the arresting officer had "in his subjective awareness a combination of objective facts (deceased pedestrian at accident site, and admitted driver with a smell of alcohol on his breath, together with other minor evidence consistent with the driver's alcohol consumption), which together reasonably indicate[d] the offense of impaired driving causing death": (2005), 27 M.V.R. (5th) 262, 2005 ABQB 988, at para. 23. Accordingly, he concluded that Constable Stevens had reasonable and probable grounds to demand a breath sample from Mr. Rhyason and to arrest him.

6 The trial judge concluded that alcohol had impaired the ability of Mr. Rhyason to drive at the time of the accident ((2006), 398 A.R. 277, 2006 ABQB 60). In his reasons, he examined the evidence of causation, including the accident reconstruction and the victim's conduct before the accident, finding that Mr. Rhyason's impairment contributed in more than a *de minimis* way to the fatal accident. He found Mr. Rhyason guilty of operating a motor vehicle while having more than 80 mg of alcohol per 100 ml of blood and of impaired driving causing death under ss. 253(*b*) and 255(3) respectively of the *Criminal Code*.

7 At the Court of Appeal, McFadyen J.A. for the majority held that the trial judge had applied the correct test in determining whether there were reasonable and probable grounds to demand a breath sample. She also held that the record supported the trial judge's factual finding that the appellant's ability to drive was impaired by alcohol and his conclusion about causation. Accordingly, she dismissed the appeal: (2006), 397 A.R. 163, 2006 ABCA 367.

8 In dissent, Slatter J.A. was of the view that the breath samples should not have been admitted because the trial judge applied the wrong legal test on the issue of reasonable and probable grounds. He would have ordered a new trial because it was not clear that the decision would have been the same if the breath samples were excluded.

Analysis

9 The central issue is whether two sentences containing misstatements in the trial judge's reasons are sufficiently undermining to warrant appellate intervention. In my view, they are not.

10 This Court has repeatedly observed that a trial judge's reasons should be read as a whole, not held to "some abstract standard of perfection":

> It is neither expected nor required that the trial judge's reasons provide the equivalent of a jury instruction.
>
> (*R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26, at para. 55; see also, *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17, at para. 19.)

Even in cases dealing with jury instructions, this Court has confirmed that the jury charge must be read as a whole. A misstatement will not necessarily be fatal (*R. v. Jacquard*, [1997] 1 S.C.R. 314, at paras. 53-54).

11 The test for when a police officer may demand a breath sample is set out in s. 254(3) of the *Criminal Code*:

> Where a peace officer believes on reasonable and probable grounds that a person is committing, or at any time within the preceding three hours has committed, as a result of the consumption of alcohol, an offence under section 253 [impaired driving], the peace officer may, by demand made to

> that person forthwith or as soon as practicable, require that person to provide then or as soon thereafter as is practicable
>
> (*a*) such samples of the person's breath as in the opinion of a qualified technician, ...
>
> . . .
>
> are necessary to enable proper analysis to be made in order to determine the concentration, if any, of alcohol in the person's blood, and to accompany the peace officer for the purpose of enabling such samples to be taken.

12 As explained by this Court in *R. v. Bernshaw*, [1995] 1 S.C.R. 254, the test for reasonable and probable grounds has both a subjective and objective component:

> [Section] 254(3) of the *Code* requires that the police officer subjectively have an honest belief that the suspect has committed the offence and objectively there must exist reasonable grounds for this belief. [para. 48]
>
> ...
>
> The decision as to whether a peace officer believes on reasonable and probable grounds that an offence is being committed and, therefore, that a demand is authorized under s. 254(3) of the *Criminal Code*, R.S.C., 1985, c. C-46, must be based on the circumstances of the case. It is, therefore, essentially a question of fact and not one of pure law. [para. 46]

13 Mr. Rhyason's argument that the trial judge applied the wrong test for determining whether or not the officer had reasonable and probable grounds for demanding a breath sample was based on the following passage from the reasons:

> There is no strict requirement that the officer deciding to arrest or demand a breath sample have evidence of impairment (as distinct from, and additional to, mere consumption) before proceeding with the arrest or demand. Therefore, it is clear that the argument of the Accused, to the effect

> that the officer must have evidence of impairment as well as consumption, fails. [para. 24 M.V.R.]

14 The dissenting judge relied on these two sentences to conclude that the trial judge erred determinatively. He also pointed to parts of the trial judge's reasons where, in his view, the trial judge had failed adequately to distinguish between consumption and impairment. There is no dispute that these passages are, by themselves, a misstatement. Evidence of consumption alone is an insufficient basis for making a demand for a breath sample. However, when the trial judge's reasons are read as a whole, it is apparent that this was not the test that he applied.

15 The trial judge properly referred to s. 254(3) as containing the test for an officer's entitlement to demand a breath sample. He also correctly considered the relevant testimony of the arresting officer about the circumstances of the accident, the smell of alcohol on Mr. Rhyason's breath, other minor signs of impairment such as bloodshot eyes and a blank stare, and Mr. Rhyason's admission that he had driven the car involved in the accident.

16 He also, again correctly, reviewed the relevant jurisprudence emanating from similar fact situations, noting that in all but one of those cases, "a combination of facts closely similar to those which Constable Stevens used in his decision to arrest the Accused here [existed]" (para. 18 M.V.R.).

17 As McFadyen J.A. noted, none of the cases relied upon by the trial judge found that evidence of alcohol consumption alone was sufficient to establish reasonable and probable grounds. The trial judge himself noted that it was a "combination of facts"

that formed the reasonable and probable grounds, not evidence of mere consumption, as the following passage from his reasons reveals:

> [I]t is clear that Stevens did not arrest the Accused arbitrarily. On the contrary, when deciding to arrest, Stevens had in his subjective awareness a combination of objective facts (deceased pedestrian at accident site, and admitted driver with a smell of alcohol on his breath, together with other minor evidence consistent with the driver's alcohol consumption), which together reasonably indicate the offense of impaired driving causing death. [Emphasis added; para. 23. M.V.R.]

He also noted that signs of alcohol consumption merely "suffice to contribute to reasonable grounds" (emphasis added; para. 24 M.V.R.), not establish their existence.

18 Of additional relevance are the two paragraphs immediately following the two impugned sentences. The trial judge found the accident to be significant, noting that "[i]f Constable Stevens had merely detected signs of alcohol consumption in the absence of an accident, there may have been a valid argument to the effect that evidence of alcohol consumption does not itself constitute evidence of impairment" (para. 25 M.V.R.). As the trial judge observed, there is abundant jurisprudence confirming that the circumstances of an accident can be taken into account, along with other evidence, in determining whether an officer had reasonable and probable grounds to arrest an individual for impaired driving. (See, for example, *R. v. Eliuk* (2002), 299 A.R. 364, 2002 ABCA 85, at para. 12; *R. v. Pedersen* (2004), 193 B.C.A.C. 206, 2004 BCCA 64, at para. 30; *R. v. Turner* (2004), 1 M.V.R. (5th) 191 (Ont. C.J.), at para. 8; and *R. v. Gairdner* (1999), 40 M.V.R. (3d) 133 (B.C.S.C.), at para. 15.)

19 This is not to suggest that consumption plus an unexplained accident always generates reasonable and probable grounds or, conversely, that it never does. What is

important is that determining whether there are reasonable and probable grounds is a fact-based exercise dependent upon the circumstances of the case. In this case, the presence of an unexplained accident was one factor that the trial judge appropriately took into consideration when determining that those grounds existed.

20 At numerous times in his reasons, the trial judge signalled that he was relying on more than just evidence of consumption as a basis for his finding that the arresting officer had reasonable and probable grounds to demand a breath sample. Read as a whole, those reasons reflect the application of the proper test.

21 I would dismiss the appeal.

The reasons of McLachlin C.J. and Binnie, Fish and Charron JJ. were delivered by

22 CHARRON J. — Mr. Rhyason was convicted of impaired driving causing death and driving with more than 80 mg of alcohol in 100 ml of his blood ((2006), 389 A.R. 277, 2006 ABQB 60). His convictions were affirmed by McFadyen J.A. (Hunt J.A. concurring) of the Alberta Court of Appeal ((2006), 397 A.R. 163, 2006 ABCA 367). Slatter J.A., in dissent, would have ordered a new trial on both counts. Mr. Rhyason appeals as of right. The narrow question is whether the trial judge applied the correct legal test in deciding whether the arresting officer had reasonable and probable grounds to demand from Mr. Rhyason samples of his breath for the purpose of analysis to determine the concentration of alcohol in his blood.

23 Section 254(3) of the *Criminal Code*, R.S.C. 1985, c. C-46, requires that "the police officer subjectively have an honest belief that the suspect has committed [an offence under s. 253] and objectively there must exist reasonable grounds for this belief": *R. v. Bernshaw*, [1995] 1 S.C.R. 254, at para. 48. Evidence that Mr. Rhyason had consumed alcohol, in and of itself, would not suffice to ground Constable Stevens's demand for breath samples, because it is not an offence to operate a motor vehicle after having consumed alcohol. It was necessary, rather, for the officer to have reasonable grounds for believing that Mr. Rhyason had operated his motor vehicle, either while *impaired* by the consumption of alcohol (s. 253(*a*)), or having consumed alcohol in such a *quantity* that the concentration in his blood exceeded the legal limit (s. 253(*b*)). For ease of reference, I will refer to the condition of the driver in respect of both offences under s. 253 as one of impairment.

24 This distinction between consumption and impairment was crucial because, as the trial judge noted the case was "borderline" ((2005), 27 M.V.R. (5th) 262, 2005 ABQB 988, at para. 22), with the officer's testimony revealing "no obvious sign of impairment, or else, signs equally consistent with both alcohol consumption and emotional distress" (para. 21). The accident happened around 3:00 a.m. Constable Stevens testified that, upon his arrival at the scene of the accident, he was approached by Mr. Rhyason who asked him if the pedestrian was dead. Mr. Rhyason, who admitted immediately to being the driver of the car, was crying, shaking and had bloodshot eyes. After being told that the pedestrian had died, he blinked slowly and had a blank stare. The officer smelled a moderate odour of alcohol on his breath. Constable Stevens immediately placed Mr. Rhyason under arrest for impaired driving causing death, explaining his grounds for doing so as follows (AR, at p.64):

> Q. Why did you place him under arrest?
>
> A. Well, my observations impaired, or excuse me, of alcohol consumption indicia, as well as my belief that the victim was deceased, and based on the fact that he had stated he was the driver.
>
> Q. And that led you to what?
>
> A. I formed the opinion that Mr. Rhyason had consumed alcohol in such a quantity that impaired his ability to operate a motor vehicle, and subsequently caused the death of — of the victim.

25 The defence specifically argued at trial that, without some evidence of impairment in addition to the evidence of alcohol consumption upon which to base his opinion, Constable Stevens did not have the requisite grounds to arrest Mr. Rhyason or to demand that he provide breath samples for analysis. The trial judge expressly rejected this argument, stating as follows (at para. 24; M.V.R.):

> There is no strict requirement that the officer deciding to arrest or demand a breath sample have evidence of impairment (as distinct from, and additional to, mere consumption) before proceeding ... Therefore, it is clear that the argument of the Accused, to the effect that the officer must have evidence of impairment as well as consumption, fails.

Abella J. agrees that "[e]vidence of consumption alone is an insufficient basis for making a demand for a breath sample" and that the trial judge's reasons on this point constitute "a misstatement" (para. 14). However, she concludes that "when the trial judge's reasons are read as a whole, it is apparent that this was not the test that he applied" (para. 14). With respect, I disagree. It is precisely because I read the trial judge's erroneous holding on this critical issue in the context of his reasons as a whole, and in light of the evidence presented at trial, that I am led to conclude that he erred in law.

26 After reproducing the relevant parts of s. 254(3) and summarizing the officer's testimony, the trial judge reviewed what he described as "[a] selection of recent Canadian appellate decisions for fact-situations closest to that in the present case (no slurring, no staggering, apparently no unusual driving)" (para. 14; M.V.R.). McFadyen J.A. and my colleague finds it noteworthy that none of the cases relied upon by the trial judge found that evidence of alcohol consumption alone was sufficient to establish the requisite grounds for making a demand (C.A. reasons at para. 23, and para. 17 of Abella J.'s reasons). That is true — indeed, the question of whether evidence of alcohol consumption without evidence of impairment could provide a sufficient basis for making a demand did not even arise in the cases reviewed by the trial judge. However, for that same reason, I am unable to find anything in the trial judge's summary of the case law that sheds a different light on his clear and erroneous holding in para. 24 (M.V.R.). Nor do I find comfort in the balance of his reasons on this issue. I reproduce the full text of these reasons here:

> Some of the evidence from Constable Stevens differs from the above, in that Stevens testified as to the gait, demeanor, and eyes of the Accused at the scene of the accident. Nonetheless, the content of this testimony is somewhat ambiguous, in that it reveals no obvious sign of impairment, or else, signs equally consistent with both alcohol consumption and emotional distress.
>
> The present case is clearly close to both *Lesuk* and *Legere*. The opposite outcomes in those two cases indicate that the present case is borderline, when it comes to "reasonable and probable grounds" to arrest and demand a breath sample.
>
> However, it is clear that Stevens did not arrest the Accused arbitrarily. On the contrary, when deciding to arrest, Stevens had in his subjective awareness a combination of objective facts (deceased pedestrian at accident site, and admitted driver with a smell of alcohol on his breath, together with other minor evidence consistent with the driver's alcohol consumption), which together reasonably indicate the offense of impaired driving causing death.
>
> With the possible exception of *Legere*, all the above cases (especially *Pedersen*, with its sparse Information to Obtain) indicate that signs of

> alcohol consumption suffice to contribute to reasonable grounds to arrest or search for "impaired driving causing". There is no strict requirement that the officer deciding to arrest or demand a breath sample have evidence of impairment (as distinct from, and additional to, mere consumption) before proceeding with the arrest or demand. Therefore, it is clear that the argument of the Accused, to the effect that the officer must have evidence of impairment as well as consumption, fails. [Emphasis added.]
>
> My conclusion herein may have been different if there had been no accident. Many of the reported cases to the contrary, which the Accused submitted, were no-accident cases. If Constable Stevens had merely detected signs of alcohol consumption in the absence of an accident, there may have been a valid argument to the effect that evidence of alcohol consumption does not itself constitute evidence of impairment. However, the above cases (other than *Legere*) suggest that an accident is itself a valid component of an officer's reasonable grounds to arrest or search. See also *R. v. Turner* (2004), 1 M.V.R. (5th) 191 (Ont. C.J.), para. 8.
>
> This difference between the no-accident scenario and the accident scenario is in and of itself reasonable. Although facts other than impairment may have caused or contributed to the accident, the mere fact that there was an accident with no other obvious cause reasonably suggests that the driver's alcohol consumption has actually impaired the driver's conduct. That is so, even in the absence of evidence of unusual driving before or after the accident. [paras. 21-26; M.V.R.]

27 Nowhere before or after the impugned passage do we find an accurate statement of the test. My colleague appears to read the combination of facts listed by the trial judge at para. 23 (M.V.R.) as indicating that the trial judge understood that mere consumption did not constitute reasonable and probable grounds that a suspect committed an offence (para. 17). The "combination of objective facts" listed by the trial judge bear repeating: a deceased pedestrian at the accident site; an admitted driver with an odour of alcohol on his breath; and other minor evidence consistent with the driver's alcohol consumption (para. 23; M.V.R.). With respect, the latter two items in this list refer to alcohol consumption only, and the first, a deceased pedestrian at the accident site, while a tragic consequence, says nothing about Mr. Rhyason's condition. Yet, according to the trial judge, it is this combination of facts that "reasonably indicate[s] the offense of impaired driving causing death" (para. 23; M.V.R.). In my view, the trial

judge's statement about the combination of facts in para. 23 compounds rather than corrects his erroneous holding at para. 24.

28 Abella J. also takes particular comfort in the trial judge's discussion at paras. 25 and 26 (M.V.R.) about the significance of the accident in this equation (para. 18). This discussion, she says, further signals that the trial judge was relying on more than just evidence of consumption as a basis for finding that the officer had reasonable and probable grounds to demand a breath sample (para. 20). I agree with my colleague that the circumstances of an accident, along with other evidence, can be taken into account in determining whether an officer had the requisite grounds. What defeats the argument here is that the circumstances of the accident did not form part of the evidential basis upon which Constable Stevens based his demand. Had Constable Stevens given evidence about his observations of the scene of the accident, and relied on inferences drawn from those observations as part of his basis for making his demand, the situation might have been different. But Constable Stevens nowhere said that an "accident with no other obvious cause" formed part of his grounds for believing that an offence had been committed. In addition, the evidence reveals that, at the time Constable Stevens arrested Mr. Rhyason and demanded that he provide breath samples for analysis, the officer had been at the scene for about two minutes. Other than being advised that the pedestrian had died, there is no evidence that the officer had received any information about how the accident happened. What is at issue here are the *officer*'s reasonable and probable grounds *at the time of making the demand*, not the *ex post facto* inferences that can be drawn from the evidence at trial.

29 The question on the application to exclude the breath samples therefore remained: Did Constable Stevens need something more than evidence of alcohol consumption to substantiate his reasonable and probable grounds for demanding a breath sample? The only correct answer to this question is yes. The trial judge's erroneous answer at para. 24 was no. Given the context and the totality of his reasons, I am unable to give any meaning to the trial judge's holding on this critical legal question other than that conveyed by the clear language that he used. Had the trial judge instructed himself according to the correct legal test, he may have turned his mind to the fact that there was little evidence supporting the proposition that an unexplained accident formed part of the officer's grounds. This might very well have affected the trial judge's conclusion on the admissibility inquiry.

30 I therefore agree with the dissenting reasons of Slatter J.A. I would allow the appeal, set aside the conviction and order a new trial on the charge of operating a motor vehicle while having more than 80 mg of alcohol per 100 ml of blood. In addition, because the blood alcohol readings formed an integral part of the evidentiary basis for convicting Mr. Rhyason of impaired driving causing death, I would, like Slatter J.A., set aside the conviction and order a new trial on that charge as well.

Appeal dismissed, MCLACHLIN C.J. *and* BINNIE, FISH *and* CHARRON JJ. *dissenting.*

Solicitors for the appellant: Gunn & Prithipaul, Edmonton.

Solicitor for the respondent: Attorney General of Alberta, Edmonton.