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COURT OF APPEAL FOR ONTARIO

Feldman, Lang and LaForme JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Irma Rivera

Applicant/Appellant

Marie Henein and Steven Skurka, for the appellant

David Finley, for the respondent

Heard: September 20, 2010

On appeal from the judgment of Summary Conviction Appeal Judge J.M. Fragomeni of the Superior Court of Justice dated April 9, 2009, dismissing the appeal from the conviction entered by Justice N. Kastner of the Ontario Court of Justice dated February 11, 2008.

H.S. LaForme J.A.:

INTRODUCTION

[1] Section 254(2) of the *Criminal Code*, R.S.C. 1985, c. C-46 provides the legal authority for the police to demand that a driver provide a breath sample through an

approved screening device, if the officer has "reasonable grounds to suspect" that the person operating the motor vehicle has alcohol in their system.[1]

[2] Typically, the breath sample is obtained through the use of a roadside screening device, which the person blows into. Section 254(5) makes it a criminal offence to either fail or refuse to comply with a demand without a "reasonable excuse" for not providing the sample.[2]

[3] The appellant, Irma Rivera, was pulled over by a police officer who was conducting R.I.D.E. checks of motorists. The officer formed the suspicion that she had consumed alcohol and could be impaired. He demanded a roadside sample of the appellant's breath. The appellant made 21 attempts to provide a sample. While attempting to provide a sample, she made various statements to the officer.

[4] The police officer concluded that the appellant was not genuinely trying to provide a sample and charged her with refusal to comply with a demand for a breath sample without reasonable excuse under s. 254(5) of the *Criminal Code*. After a trial, she was convicted as charged.

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[1] The relevant provisions of s. 254(2) are:

> (2) If a peace officer has reasonable grounds to suspect that a person has alcohol … in their body and … has, within the preceding three hours, operated a motor vehicle … the peace officer may, by demand, require the person …:
>
> …
>
> (b) to provide forthwith a sample of breath that, in the peace officer's opinion, will enable a proper analysis to be made by means of an approved screening device and, if necessary, to accompany the peace officer for that purpose.

[2] Section 254(5) provides:

> (5) Everyone commits an offence who, without reasonable excuse, fails or refuses to comply with a demand made under this section.

[5] While the appellant advances five discrete grounds of appeal in this court, two are of particular interest. First, Ms. Rivera contends that the trial judge relied on statements made by her before the right to counsel was provided to draw adverse inferences regarding her credibility. Second, Ms. Rivera argues that the trial judge failed to consider her s. 7 *Charter* argument.

BACKGROUND

[6] On the first day of trial, defence counsel requested an adjournment for the purpose of following up on medical reports that indicated the appellant might have a defence of reasonable excuse to the charge, based on an alleged lack of capacity to blow by reason of a panic attack. The Crown did not oppose the adjournment. Counsel agreed that Constable Tai, the arresting officer who was available in court that day, would testify and that, following his testimony, the trial would be adjourned to accommodate preparation of and the Crown's response to the proposed defence.

[7] In chief, Constable Tai testified that, about 2:02 a.m. on December 7, 2005, he observed a vehicle driven by the appellant exiting a sports bar. Constable Tai, in the course of conducting the R.I.D.E. program, followed the appellant as she turned into a private drive, and drove through the parking lot of a nearby business. Constable Tai stopped her car in the parking lot.

[8] Following the stop, Constable Tai approached the appellant and detected an odour of alcohol on her breath. When the appellant stepped out of her vehicle, Constable Tai observed that she was unsteady on her feet. He formed the suspicion that the appellant

could have been impaired by alcohol. Constable Tai made a demand of the appellant to provide a breath sample into an improved screening device.

[9] At this point in the evidence, defence counsel indicated he would not contest the presence of reasonable grounds for the officer to make the demand. In addition, the defence did not challenge the procedure followed in administering the breath test nor suggest that the screening device was faulty or otherwise not in proper working order.

[10] After the defence concession, the Crown examined Constable Tai concerning what he asked the appellant to do and her responses. Constable Tai testified that the appellant responded on two occasions that she had consumed "three glasses of wine". Later, she said: "I only had two glasses of wine" and, later still, claimed: "I only had one beer."

[11] Constable Tai also explained the process of the appellant's attempts to respond to his instructions on how to furnish a breath sample. He said that, after nine attempts, the appellant said, "I work for you. I work in the office." After 10 attempts, Constable Tai told the appellant that he could charge her criminally if she failed to provide a suitable sample. She responded by saying: "I work for the O.P.P. I'll lose my job, don't do this to me. I only had one beer. I was just taking myself home." After 15 attempts, she said, "Why are you doing this to me? There are criminals out there."

[12] After her 18th unsuccessful attempt, Constable Tai arrested the appellant for failing to provide a proper breath sample. At that point, she stated: "Give me another chance. Don't do this to me. I don't want to lose my job. Why are you doing this to

me?" In response to her request for "another chance", Constable Tai again demonstrated how to give a proper breath sample and provided the appellant three more opportunities to furnish a breath sample. However, the appellant's renewed attempts to provide a sample again failed.

[13] Constable Tai testified that, between about 2:04 a.m., when the breath demand was made, and approximately 2:34 a.m., the appellant made a total of 21 attempts to provide a breath sample. Over that period, and despite repeated instructions from Constable Tai and demonstrations by him on how to breathe into the screening device, no readings resulted from the appellant blowing into the machine. At 2:40 a.m., Constable Tai placed the appellant under arrest and informed her of her right to counsel.

[14] In chief, Constable Tai testified that he did not specifically ask the appellant why she was not providing a proper sample. He also testified that, at no point during their interactions, did the appellant suggest that she was ill or experiencing any medical difficulties. Nor did she offer any other explanation as to why she could not provide a breath sample. While he described the appellant as being initially co-operative, he testified that she gradually became unco-operative and verbally combative, and called him racial names.

[15] In cross-examination, Constable Tai said that the appellant was fidgeting and moving around a lot in the back seat of the police cruiser. He stated that she was unfocused and that he had difficulty getting her to understand what was taking place. He

said that he was not convinced the appellant was "faking" for the first 10 attempts, but he continued in attempting to administer the test beyond the point of forming the opinion that she was wilfully failing to provide a proper sample. He acknowledged that it was possible that the appellant's breathing was quick, but he did not recall her taking shorter than normal breaths or exhibiting shallow breathing.

[16] On re-examination, Constable Tai suggested that the appellant's behaviour was indicative of not physically wanting to be in the back of his cruiser. He also stated that the only short breaths she took were her exhales into the screening device.

[17] When the trial resumed almost one year later, the appellant testified in her own defence. She said that she experienced breathing problems on entering the police cruiser and that pain in her chest prevented her from blowing properly into the screening device. She claimed that she had experienced a panic attack and that she was concerned that she might faint or have a heart attack. She stated that the attack commenced when she entered the police cruiser and continued until her arrest about 30 minutes later.

[18] In cross-examination, the appellant claimed that during this 30-minute period, she experienced several symptoms of a panic attack, including chest pain, an inability to control her breathing and to think clearly, fear that she might faint or have a heart attack, shaking, tingling in her arms, perspiration, and a tendency to say "silly things". She maintained that it would be obvious to an observer that something was wrong with her if she was having a panic attack.

[19] The appellant also indicated that she became impatient, wanted to leave, and did not want to deal with the situation. She acknowledged that, contrary to her statements to Constable Tai, she did not work directly for the O.P.P., but stated that the company she works for makes "devices" for the O.P.P. and Peel Police.

[20] The appellant also testified that she was frustrated she could not provide the sample, that she could not think, and that she did not tell the officer she was having pain or could not breathe. She described her mind as "black and white".

[21] The defence called expert medical evidence regarding the symptoms of anxiety disorder, including panic attacks. Based on their observations of her in 2006, Dr. Roldan, a psychiatrist, and Dr. Morrell-Bellai, a clinical psychologist, both diagnosed the appellant as suffering from panic disorder. The appellant's statements were given a place of prominence in the Crown's cross-examination of the experts. Crown counsel specifically cross-examined each expert about the significance of the appellant's statements to the officer, and inquired whether lying was a symptom or result of a panic attack.

The Trial Judge's Decision

[22] After reviewing the facts, the trial judge accepted that "extreme anxiety, as well as panic" could explain a failure to provide a breath sample and provide a defence to the charge under s. 254(5) of the *Criminal Code*. She also accepted the evidence of Constable Tai and the accuracy of the statements he attributed to the appellant.

[23] The trial judge found that the appellant "rationally and intentionally" told an untruth to the officer when she said that she worked in the policing field. She also found that the appellant subjectively believed that this untruth "may advantage her in some way." The trial judge rejected the appellant's evidence that she did not remember telling the officer that she worked for the O.P.P.

[24] The trial judge noted that the appellant was inconsistent in her statements to the officer about the amount of alcohol she had consumed. She stated: "The lies the appellant told the officer at the roadside clearly undermine her credibility, and undermine the portion of expert opinion evidence based on her self-reporting [to the expert witnesses]."

[25] The trial judge accepted Constable Tai's evidence that there were "no outward symptoms observable of physical distress" during his dealings with the appellant, nor did she complain of any medical problems during these dealings. As stated by the trial judge, Constable Tai "did not notice any shortness of breath, or other signs of extreme anxiety ... [but] only saw indications of nervousness, and later hostility."

[26] The trial judge observed that the appellant's statements to Constable Tai reflected "rational thought" that "belie[d] a severe panic attack." Further, in the trial judge's opinion, the appellant was "slightly inconsistent" in relating her symptoms and the medications she was taking to Drs. Roldan and Morrell-Bellai. She also found that the

appellant tried to avoid the police cruiser by taking a detour through a parking lot, which "bespeaks her subjective assessment that perhaps she had drunk a little too much".

[27] In the end, the trial judge specifically rejected the appellant's evidence and concluded that it did not raise a reasonable doubt.

[28] The trial judge went on to consider if the expert evidence, in combination with Constable Tai's observation that the appellant was nervous at the roadside, raised a reasonable doubt. She noted that both experts "could not be certain" that the appellant was experiencing a panic attack on the night in question, although Dr. Roldan said it was "most likely" and Dr. Morrell-Bellai "felt that was the case."

[29] However, the trial judge was of the view that Dr. Morrell-Bellai "appeared partial", had offered opinion evidence beyond the scope of her admitted experience, and that her view that any inconsistency in the appellant's statements to the officer may have been a language issue or a reflection of her desperation to get out of the situation was not supported by psychological theory.

[30] The trial judge also noted that, while Dr. Roldan testified that if the appellant were experiencing extreme anxiety or a panic attack "she would be unable to control her breathing to the extent necessary to expel an adequate breath sample", the officer "did not notice any shortness of breath, or other signs of extreme anxiety". The trial judge further stated that the appellant "never showed any overt signs of an anxiety or panic attack, nor did she make any complaint to the officer."

[31] In the trial judge's view, the totality of the evidence did not raise a reasonable doubt. Rather, the appellant's failure to comply with the demand for a breath sample was "wilful, in an attempt to avoid the consequences associated with driving with an excessive blood alcohol concentration." She found the appellant guilty of the offence charged.

The Summary Conviction Appeal

[32] The appeal court judge observed, at para. 54, that the standard of review on a summary conviction appeal is "whether, based upon the evidence, the decision made by a trial judge is a finding that could have reasonably been reached." He went on to say that a court on appeal should only allow an appeal of a decision if:

> (a) it cannot be supported by the evidence; or
>
> (b) it is clearly wrong in law; or
>
> (c) it is clearly unreasonable; or
>
> (d) there was a miscarriage of justice.

[33] The appeal court judge was not persuaded that the trial judge had committed any reversible error, or that she had misapprehended the evidence. He did not give effect to the appellant's claim that her right to silence under s. 7 of the *Charter of Rights and Freedoms* was violated. In fact, he failed to address her objection to the trial judge's use of her silence at the roadside regarding a panic attack as a basis for rejecting her evidence of reasonable excuse.

Leave to Appeal

[34] The appellant sought a stay of her driving prohibition in this court and at the same time sought leave to appeal the decision of the summary conviction appeal judge. The grounds for seeking leave to appeal were that the summary conviction appeal court judge erred in five respects, namely:

> (i) by applying the standard of review for unreasonable verdicts to the conviction appeal;
>
> (ii) by failing to consider her argument that the trial judge erred by relying on the appellant's silence at the roadside on the issue of her medical condition to ground adverse credibility findings against the appellant, contrary to her right to silence under s. 7 of the *Charter of Rights and Freedoms*;[3]
>
> (iii) by failing to address whether the trial judge misdirected herself concerning the standard of proof applicable to the defence expert evidence at trial;
>
> (iv) by failing to provide adequate reasons for rejecting the appellant's claim that the trial judge misapprehended the evidence and by conflating the tests for unreasonable verdict and misapprehension of evidence; and
>
> (v) by improperly relying on certain statements that the appellant made to the arresting police officer to undermine her credibility at trial.

[35] The fifth ground was raised for the first time on the appellant's motion for leave to appeal, without objection by the Crown. The grounds advanced on the leave motion are the same grounds that are advanced on this appeal. These grounds are the subject of a

[3] Section 7 of the *Charter* states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

preliminary matter raised by the Crown that is necessary to address prior to considering the merits of the appeal.

[36] The preliminary matter, the Crown argues, is that leave to appeal to this court is limited to the two specific grounds granted by the judge of this court who heard the leave motion. The three remaining grounds, it is submitted, require further leave of this court on the standard mandated by this court in *R. v. R.R.* (2008), 90 O.R. (3d) 641.

The Leave to Appeal Decision

[37] In granting the appellant leave to appeal, Cronk J.A. noted that there are two classes of cases where leave for a second appeal in summary conviction should be granted, as identified by Doherty J.A. in *R.R.*, at para. 32: (i) where the merits of a proposed question of law are arguable and the proposed question of law has significance to the administration of justice beyond the four corners of the case; and, (ii) where there appears to be a "clear" error, even if it cannot be said that the error has significance to the administration of justice beyond the specific case.

[38] Cronk J.A., at para. 32 of her reasons, identified the fifth ground of appeal as falling into the first category from *R.R.* That is, the question of whether the appellant's roadside statements uttered while detained during the roadside screening test but before being advised of her s. 10(b) *Charter* right[4] to counsel were admissible as to credibility

[4] Section 10(b) of the *Charter* states:

> Everyone has the right on arrest or detention
>
> (b) to retain and instruct counsel without delay and to be informed of that right; ...

"is a question of law warranting consideration by this court in the interests of the administration of justice."

[39] Cronk J.A. observed that there are arguably divergent decisions on this issue in the Superior Court of Justice, with two examples being *R. v. Morrison*, 2006 CanLII 12722 (Ont. S.C.) and *R. v. Bijelic*, 2008 CanLII 17564 (Ont. S.C.). She held, at para. 33, that "[t]he question of the permissible use of such roadside statements in a case, like this one, involving a failure to provide a breath sample implicates the administration of justice generally."

[40] Cronk J.A. also determined that the second branch of *R.R.* was met with respect to "how, if at all, the [summary conviction appeal court] judge came to grips with Ms. Rivera's s. 7 *Charter* claim." She went on to note that she was not "expressing any view on whether Ms. Rivera's s. 7 *Charter* right to silence was engaged in this case. Rather, simply put, based on the [summary conviction appeal court] judge's reasons, I cannot be satisfied that the [summary conviction appeal court] judge addressed his mind to this issue."

[41] Finally, at para. 38, Cronk J.A. completed her ruling with these comments:

> I therefore conclude that leave to appeal must be granted in this case. In light of this conclusion, it is unnecessary to consider the other arguments said by Ms. Rivera to justify the granting of leave to appeal.

Discussion

[42] As I noted above, before this court, the Crown contends that the appellant only received leave to appeal on the two issues discussed by Cronk J.A. and that we must be satisfied that the test for granting leave to appeal in *R.R.* is met with respect to the three remaining grounds.

[43] It is a misreading of Cronk J.A.'s reasons to suggest that she left it for this court to apply the *R.R.* test to the three remaining issues that were raised before her on the leave motion. Rather, the clear intention of her decision was to grant the appellant leave to appeal on all the proposed grounds on the motion.

[44] Cronk J.A. simply found it unnecessary to address the other grounds because of her view that the appellant had, at a minimum, raised two grounds of appeal that satisfied the test for granting leave. Where leave to appeal is granted without restriction on the grounds of appeal raised on the leave motion, there is no need for this court to further consider the *R.R.* test on appeal.

ISSUES ON APPEAL

[45] While the five grounds of appeal are the same as those considered on the motion for leave to appeal, I will restate them in the order advanced by the appellant:

> (i) Did the trial judge err by relying on statements the appellant made to the arresting police officer before receiving the right to counsel to undermine her credibility at trial?
>
> (ii) Did the summary conviction appeal court judge err by failing to consider the appellant's argument that the

> trial judge erred by relying on the appellant's silence at the roadside on the issue of her medical condition to ground adverse credibility findings against her, contrary to her right to silence under s. 7 of the *Charter*?
>
> (iii) Did the summary conviction appeal court judge err by applying the standard of review for unreasonable verdicts to the conviction appeal?
>
> (iv) Did the summary conviction appeal court judge err by failing to address whether the trial judge misdirected herself concerning the standard of proof applicable to the defence expert evidence at trial?
>
> (v) Did the summary conviction appeal court judge err by failing to provide adequate reasons for rejecting the appellant's claim that the trial judge misapprehended the evidence and by conflating the tests for unreasonable verdict and misapprehension of evidence?

[46] As I explain below, I would allow the appeal for two reasons. First, I find that the trial judge erred by improperly relying on certain statements that the appellant made to the arresting police officer to undermine her credibility at trial. Although this issue was not raised on the summary conviction appeal, no objection was raised to it being a ground of appeal.

[47] Second, I hold that the summary conviction appeal court judge erred by failing to properly consider the appellant's argument that the trial judge erred by relying on her silence at the roadside about experiencing a panic attack, in violation of her right to silence under s. 7 of the *Charter*. The trial judge's repeated reliance on her "silence" on the issue of the panic attack was not a proper consideration on the issue of her credibility.

ANALYSIS

Issue One: Did the trial judge err by relying on statements made by the appellant to the arresting police officer before receiving the right to counsel to undermine her credibility at trial?

[48] The appellant submits that the trial judge erred in relying on her roadside statements to Constable Tai for purposes of making adverse credibility findings against her in the context of a charge under s. 254(5) of the *Criminal Code*. In advancing this submission, counsel relies on a line of authority from the Supreme Court of Canada and this court in *R. v. Orbanski*; *R. v. Elias*, [2005] 2 S.C.R. 3, *R. v. Milne* (1996), 28 O.R. (3d) 577 (Ont. C.A.), leave to appeal refused, [1996] 3 S.C.R. xiii, and *R. v. Coutts* (1999), 45 O.R. (3d) 288 (Ont. C.A.).

[49] According to the appellant, this line of cases establishes that evidence that is obtained while a motorist is detained at the roadside and before being informed of the s. 10(b) right to counsel is admissible only as a means of confirming or rejecting the officer's suspicion that the motorist might be impaired or over the legal limit. Such evidence, she asserts, may not be used at trial to incriminate an accused or to challenge his or her credibility because such use would render the trial unfair.

[50] Counsel for the appellant acknowledges that an exception arises in respect of statements made by a detained motorist that constitute evidence of the *actus reus* of the offence: see *R. v. Stapleton* (1982), 66 C.C.C. (2d) 231 (Ont. C.A.), at paras. 4-5 and *R. v. Hanneson* (1989), 49 C.C.C. (3d) 467 (Ont. C.A.), at pp. 471-73. Statements of an

accused that constitute the gravamen of the offence are admissible without the need for a *voir dire* to establish voluntariness. I will speak to this in more detail below.

[51] However, counsel takes the position that the roadside utterances at issue in this case were not evidence of the *actus reus*, nor did the Crown introduce them for this purpose, nor did the trial judge use them as such. Rather, as the trial judge was urged to do by the trial Crown in closing submissions, the roadside statements were used to ground adverse credibility findings against the appellant and to reject her evidence. Such use, counsel contends, was not permitted by the *Elias*/*Milne*/*Coutts* line of authority.

[52] The Crown, on the other hand, contends that the *Elias*/*Milne*/*Coutts* line of authority has no application because the roadside statements in issue were evidence of the *actus reus* of the offence. That is, they constituted evidence that the appellant was feigning an attempt to comply with the breath demand.

[53] According to the Crown, the statements were thus admissible regardless of the fact that the appellant had not received her s. 10(b) right to counsel. The Crown further submits that, because the statements were not elicited or conscripted through questioning by the arresting officer, but rather were uttered spontaneously by the appellant, it was open to the trial judge to use the statements in assessing her credibility. The Crown points to *Hanneson*, *R. v. Richards* (2004), 70 O.R. (3d) 737 (Ont. C.A.), at paras. 41-45, *R. v. Ha*, 2010 ONCA 433, and *Bijelic*, at paras. 31-36, in support of his position.

Discussion

[54] No one takes issue with the fact that when the appellant's car was pulled over by Constable Tai, she was detained and was not advised of her right to counsel within the meaning of the *Charter*. This would ordinarily constitute a breach of her rights, including the right to counsel under s. 10(b) of the *Charter*. However, the law now recognizes the constitutionality of traffic stops, like those in this case, to check drivers for sobriety, even where there are no objective grounds for the stop: see *Elias*, at paras. 52-60.

[55] The Supreme Court of Canada has recognized that these stops constitute a reasonable limit on *Charter* rights because of the extreme danger represented by unlicensed or impaired drivers on the roads. In particular, *Elias* holds that this reasonable limit on the s. 10(b) right extends to questioning by a police officer of a detained driver about his or her alcohol consumption as part of the investigation into the sobriety of the driver.

[56] At para. 58 in *Elias*, Charron J. held that the limitation meets the proportionality test because "evidence obtained as a result of the motorist's participation without the right to counsel can only be used as an investigative tool to confirm or reject the officer's suspicion that the driver might be impaired." Further, in that same paragraph and citing with approval this court's decisions in *Milne* and *Coutts*, she held that such evidence "cannot be used as direct evidence to incriminate the driver".

[57] In *Milne*, Moldaver J.A. held at p. 590 that the results of roadside sobriety tests performed by an accused at the direction of a police officer prior to being informed of the right to counsel are not admissible at trial as evidence of impairment on the charge of impaired driving. Such evidence may be used to justify the officer's demand for a breath sample, but it would be unfair to allow the Crown to introduce such evidence at trial to prove impairment. This is because the accused had not been informed of the right to counsel when the tests were performed.

[58] In *Coutts*, the accused at trial sought to introduce "evidence to the contrary" within the meaning of s. 258(1)(d.1) in the *Criminal Code* to challenge the accuracy of breathalyzer readings taken at the police station. This evidence consisted of testimony regarding how much alcohol the accused actually consumed and the opinion of a toxicologist as to what his blood/alcohol ratio would have been based on the actual pattern of consumption.

[59] The trial judge rejected the reliability of that evidence and in so doing, referred to the arresting officer's evidence that the accused failed the roadside screening test. The trial judge found that the evidence of the failed roadside test was inconsistent with the defence evidence concerning the amount of alcohol the accused claimed to have consumed.

[60] This court agreed with the summary conviction appeal court judge that the evidence obtained at the roadside should not have been used by the trial judge to discredit

the defence evidence to the contrary. Moldaver J.A. explained, at p. 293, that his conclusion in *Milne* – that it was constitutionally permissible to require a detained motorist to participate in sobriety and roadside tests without being advised of his or her s. 10(b) rights – "hinged on the fact that such tests were not meant to provide the police with a means of gathering evidence that could later be used at trial to incriminate the motorist on a charge of impaired driving or driving over 80." Rather, he went on to say:

> [T]hey were to be used solely as a means of confirming or rejecting the officer's suspicion that the detained motorist might be impaired or over the legal limit. So long as the tests were confined to that purpose, it could not be said that the evidence resulting from them was obtained unfairly or in a manner which violated the motorist's s. 10(b) *Charter* rights.

[61] However, as Moldaver J.A. noted, *Milne* did not decide whether the Crown can use roadside test results to discredit "evidence to the contrary" adduced by an accused: *Coutts*, at p. 294.

[62] In this regard, after canvassing case law from the Supreme Court of Canada on the distinction between conscriptive and non-conscriptive evidence, Moldaver J.A. was of the view that, although the administration of roadside testing has been found to be constitutionally permissible, roadside test results are admissible only for the purpose of establishing the grounds needed to justify a demand under s. 254 of the *Criminal Code*. After reiterating the rationale for why roadside test results do not infringe a person's s. 10(b) *Charter* right, he added at p. 298:

> In that sense, and that sense alone, fair trial considerations pose no constitutional impediment to the introduction of roadside test results for the purpose of establishing the grounds needed to justify a demand under s. 254 of the *Criminal Code*.

[63] Thus, the use of roadside testing evidence for the purpose of impeaching "evidence to the contrary" would render the trial unfair because "the motorist has been compelled, at the behest of the state, to provide evidence that would not have been obtained but for the motorist's participation in its construction and the evidence is being tendered for a purpose beyond that contemplated by s. 254(2) of the *Code*" (at p. 298).

[64] *Milne*, *Coutts* and *Elias*, however, do not confront the issue of the permissibility of using a motorist's roadside statements for incrimination or impeachment purposes where the offence charged is failing to comply with a breath demand. This issue was considered by Molloy J. in *Morrison* and Hill J. in *Bijelic*.

[65] Before discussing these cases, I would first note that this court has upheld the constitutionality of s. 254(2) and (5) of the *Criminal Code* - the provisions that make it an offence to refuse or fail to provide a breath sample: *R. v. Thompson* (2001), 52 O.R. (3d) 779 (C.A.). *Thompson* also confirmed this court's earlier decisions in *Coutts* and *Milne*, and again pointed out that the results of a failed roadside test could not be admitted as evidence against the accused at trial.

The *Morrison* decision

[66] The Crown in *Morrison* took the position that all statements uttered by an accused at the roadside are admissible in prosecutions for refusing or failing to provide roadside

breath samples, in contrast with prosecutions for impaired driving or the offence of "over 80". The relevant facts in *Morrison* are similar to our case and are as follows.

[67] The arresting officer testified that when he first pulled the accused over, he asked her if she had consumed any alcohol that night and she answered, "Yes, earlier in Newmarket." After the officer's request to provide a breath sample, the accused made seven unsuccessful attempts to give a sample, following which the officer warned her that if she did not provide an adequate sample, she could be charged under the *Criminal Code* with failing to provide a breath sample. He testified that, at that point, the accused responded: "I have asthma. I had my last drink at 10:45 tonight in Newmarket at the bar I work at." The appellant's agent at trial, who was not a lawyer, conceded the voluntariness of these roadside statements.

[68] At trial, the appellant introduced evidence to establish a reasonable excuse based on her asthmatic condition. In the course of her testimony, she said that she consumed only one drink that evening at 10 p.m. In cross-examination, she denied having told the officer that she had the drink at 10:45 and said she had told the officer it was between 10 and 10:30 p.m. She explained that she referred to it as her "last drink" even though it was her only drink, because she meant it was the last thing she had to drink.

[69] In finding that the accused was not a credible witness, the trial judge said, at para. 26:

> It seemed peculiar to me that if someone just had one drink they would describe it as their "last" drink. I would expect

> somebody to say, "I only had one drink and it was at 10:45."
> It made me wonder about her credibility on that point.

[70] On her appeal from conviction, the appellant argued that the trial judge erred in taking the roadside statement about the 10:45 timing of her "last drink" into account when assessing her credibility. Molloy J. concluded that the statement was not admissible for purposes of undermining the appellant's credibility.

[71] In reaching this conclusion, Molloy J. pointed out that roadside statements made without the right to counsel are relevant and admissible to prove the reasonable basis of the officer's demand for a breath sample, citing *Milne* and *Coutts*. Furthermore, she noted that statements that are part of the *actus reus* of an offence are always admissible: see *Stapleton*.

[72] However, Molloy J. concluded that the principles underlying this court's decisions in *Milne* and *Coutts* preclude the use of roadside utterances made without the right to counsel for purposes of impeaching an accused's credibility. In applying this distinction to the roadside utterances of the appellant in that case, Molloy J. held, at paras. 35-36:

> Therefore, any statements made by Ms. Morrison as to the process of attempting to give the breath sample are admissible to demonstrate whether she was really trying or whether there was some valid basis for her not being able to comply. However, her statements as to what she had to drink, and when, have no bearing on whether she properly complied with the demand for a breath sample. They are relevant only to credibility. If Ms. Morrison had taken the breathalyser test and then been charged with impaired driving, her statements at the roadside as to her drinking would not be admissible to attack her credibility: *R. v. Coutts*. I see no principled basis

> for treating those statements differently in the situation before me than would be the case if Ms. Morrison had been charged with impaired driving. Accordingly, in my view, using the roadside statements to undermine her credibility was an impermissible use of that evidence and a breach of her *Charter* rights.
>
> In my view, both statements should be treated the same way. Although the second utterance during the attempts to provide a breath sample was not in immediate response to a question from the officer, it was all part of the same transaction, while Ms. Morrison was still being detained, and in the course of the officer's overall inquiry. It was simply a carry-over of her earlier statement and was so closely connected to the first statement temporally and contextually that there is no rational basis for treating them differently: *R. v. Plaha* (2004), 188 C.C.C. (3d) 289 (Ont. C.A.).

[73] Thus, Molloy J. treated the second statement of the accused as having been made in response to the officer's overall inquiry while the accused was detained, even though the statement was not "in immediate response to a question from the officer".

The *Bijelic* decision

[74] In *Bijelic*, Hill J. also considered the admissibility of roadside statements for purposes of assessing an accused's credibility in the context of a charge of refusal to provide a breath sample, contrary to s. 254(2).

[75] The relevant facts of that case are as follows. The accused was involved in a motor vehicle accident. The investigating officer noted the smell of alcohol and asked the accused if he had been drinking. He replied that he had "approximately two beers" about an hour earlier. The officer read an approved screening device demand, to which the

accused commented to the officer that he had done a test before and "knew what he was doing".

[76] The officer testified that the accused blew four times, but did not do so for long enough to give a reading. After his second attempt, the officer warned the accused that if he was not blowing properly, he would be charged with refusing to provide a breath sample. Prior to his fourth attempt, the officer noted that the accused remarked: "I don't care, charge me, I don't care". The officer then arrested him.

[77] At trial, during the officer's testimony in chief, defence counsel agreed that the officer's evidence about the accused saying he had two beers was admissible to establish reasonable and probable grounds for making the breath demand. The officer went on to testify about the accused's statement that he had done a previous test in the past, as well as his remark "I don't care, charge me, I don't care", without any argument from counsel about the admissibility of these utterances.

[78] In convicting the accused, the trial judge stated that it was "disconcerting" that the accused did not provide legitimate breath samples when he had indicated that he had some experience in doing this before. The trial judge concluded:

> I find that you did not comply with the demand by providing a sample and that in fact there was a refusal when you told the Officer, after so many tests, that you did not care about providing a further sample and that it was okay for him to charge you. So, I do not have a doubt, I do not accept your evidence and I find that the Crown has proven the case beyond a reasonable doubt.

[79] On the appeal of his conviction, one of the appellant's arguments was that the "trial judge improperly used [his] roadside statements … while he was detained with his s. 10(b) *Charter* right suspended, to make essential adverse credibility findings." In rejecting this ground of appeal, Hill J. observed, at para. 26, that it was "by no means clear that the trial judge actually used the appellant's statements as to prior experience with breath-testing to assess his credibility."

[80] As for the appellant's statement, "I don't care, charge me", Hill J. observed that this statement was evidence of the *actus reus* of the offence, quite apart from the evidence regarding the appellant's unsuccessful attempts to provide a sample. However, he went further and, at para. 27, expressed his view that the accused's "prior experience" statement was admissible to assess credibility and the strength of the prosecution case.

[81] Hill J. continued on to explain, at para. 30, that where an accused is charged with refusing to comply, and the issue is whether his conduct amounted to "faking or feigning" an attempt to comply, "the *actus reus* of refusal, depends on the totality of the circumstances. Evidence of a refusal may arise from conduct of the detained motorist, his or her statements to the officer in the course of the ASD [Approved Screening Device] testing process, or from a combination of conduct and statements" (citations omitted).

[82] After noting the limitation placed by the *Elias*/*Coutts*/*Milne* line of authority on the permissible use of roadside evidence arising from compelled direct participation of a detained motorist, Hill J. expressed the opinion, at para. 32, that where a roadside

statement of an accused is made voluntarily, without being elicited by the arresting officer, it is admissible for purposes of assessing guilt or innocence:

> Here, unlike the situation where a police officer asks a detained motorist whether he or she has consumed alcohol, and if so, when and how much, the constable did not ask Mr. Bijelic whether he had been subjected to ASD testing on a prior occasion. The appellant volunteered the statement of prior experience – it was not conscripted or "elicited" as that term is understood in the context of ss. 7 and 10(b) of the *Charter*: *R. v. Smith*, [2008] O.J. No. 623 (C.A.) at para. 19; *R. v. McKenzie*, (2002), 167 C.C.C. (3d) 530 (Ont. C.A.) at para. 4, 29, 35. There is no evidence of a ploy or manipulation of the appellant raising compulsion to inform the officer that he was familiar with a breath-testing device. There was no legal compulsion to speak. The appellant, for his own motives, chose to do so. In these circumstances, the *Elias/Milne/Coutts* line of authority has no application.

[83] He went on to conclude that the voluntariness rule is inapplicable where the statement of the accused forms part of the *actus reus* of the offence, citing this court's decision in *Hanneson*, at pp. 471-3. (See also this court's decisions in *Richards*, at paras. 43-45 and *Ha*, at paras. 6-8.) According to Hill J., the prior experience statement related to the issue of guilt or innocence, because it was relevant to the appellant's "understanding of the constable's directions and the genuineness of his efforts to comply": *Hanneson*, at para. 36.

[84] Thus, it appears that Hill J. concluded that the roadside statements were admissible for two reasons. First, the statements were admissible as the *actus reus* of the offence. Second, it was open to the trial judge to use the prior experience statement for purposes of assessing the accused's credibility because it was not elicited by the police.

Applying the authorities to this case

[85] As noted, the Crown contends that the appellant's roadside statements in this case were properly admitted as evidence of the *actus reus* of the offence. I do not accept this submission for three reasons.

[86] First, the Crown did not rely on the statements as providing evidence of the *actus reus* of the offence, nor did the trial judge use this evidence as such in her reasons for conviction. Indeed, the trial judge does not indicate what evidence she was relying on in finding that the *actus reus* of the offence had been proven. What is clear is that she in no way related the roadside statements to the proof of the commission of the offence.

[87] Instead, the appellant's roadside statements were relied on by the Crown and by the trial judge as a basis for making adverse credibility findings against the appellant and for rejecting the expert evidence, which was based on information the appellant had provided to the experts. For example, in written submissions asking the court to reject the appellant's evidence, the Crown stated: "When put to Ms. Rivera in cross-examination as to why she told the officer that she worked for the O.P.P., her response appeared untruthful and appeared to be fabricated after the fact to explain away her comments to Constable Tai."

[88] The trial judge used the roadside statements to make adverse credibility findings against the appellant and to reject her evidence that she was having a panic attack. At paras. 62-64 of her reasons, the trial judge held:

> She also was inconsistent on the quantity and nature of the alcohol consumed when speaking to the officer, and at the trial. She gave inconsistent statements about the amount of alcohol she had consumed. Her answers varied between three (3) glasses of wine, two (2) glasses of wine, one (1) beer, and one-third of three 750 ml bottles of wine.
>
> The lies Ms. Rivera told the officer at the roadside clearly undermines her credibility, and undermines the portion of expert opinion evidence based on her self-reporting.
>
> The rational thought associated with these utterances also belies a severe panic attack. She was able to put together telling the officer she worked with the police with a desired end result.

[89] In sum, the trial judge's reasons indicate that the appellant's roadside statements were not treated as evidence proving the *actus reus* of the offence.

[90] My second reason for rejecting the Crown's argument is that the appellant's various statements are not of the type described in *Stapleton*, *Ha*, *Hanneson*, *Morrison* or *Bijelic* as being evidence of the *actus reus*. The Crown submits that the statements provided evidence of the *actus reus* because they revealed the appellant's attempts to dissuade the officer from continuing with his investigation by minimizing the amount she had to drink and by trying to elicit sympathy by suggesting that she was a fellow employee of the O.P.P. and would lose her job.

[91] The Crown's proposed characterization of the relevance of the statements, I believe, stretches the concept of *actus reus* beyond its well-established meaning. *Actus reus* is simply the voluntary and wrongful act or omission that constitutes the physical components of a crime. In the context of s. 254(5) – the criminal offence of either

failing or refusing to comply with a demand without "reasonable excuse" – Molloy J. in *Morrison*, at para. 35, described how roadside statements could provide evidence of the *actus reus*:

> [A]ny statements made by Ms. Morrison as to the process of attempting to give the breath sample are admissible to demonstrate whether she was really trying or whether there was some valid basis for her not being able to comply. However, her statements as to what she had to drink, and when, have no bearing on whether she properly complied with the demand for a breath sample.

[92] Clearly, if an accused made a roadside statement that related directly to the refusal, it would then be open to the Crown to lead that evidence as establishing the *actus reus* of the offence. The accused's statement in *Bijelic*, "I don't care, charge me", provides a good example of a statement that is properly admitted as evidence of the *actus reus*.

[93] In contrast, by way of example, the appellant's differing descriptions of the amount and type of alcohol she had to drink and her statements to the effect that she worked for the O.P.P., cannot accurately be characterized as evidence of the *actus reus* of the offence of refusal in the circumstances. Her various statements about the amount she had to drink could not be taken as indicating that she was refusing or failing to give a breath sample. This is also the case with her statements – "I work for the O.P.P. I'll lose my job" and, "*Give me another chance.* Don't do this to me. I don't want to lose my job. Why are you doing this to me?" (emphasis added). These statements cannot be said to

constitute the gravamen or foundation of the offence of refusal or failure to blow, as contemplated by this court in *Stapleton, Hanneson* and *Ha*.

[94] In general, it will fall to the trial judge to determine on the facts of the case whether a particular roadside statement can properly be considered as evidence of the *actus reus*. In this case, there was other evidence of the *actus reus* of the offence based on Constable Tai's testimony. This included the appellant's numerous unsuccessful attempts to provide a breath sample and that she did not appear to be experiencing breathing difficulties. The officer's observations about the motorist's conduct and demeanour while detained at the roadside were clearly admissible to prove the offence, as explained in *Elias*, at para. 58 and *Milne*, at p. 590.

[95] My third reason for rejecting the admission of all the appellant's roadside statements as evidence of th*e actus reus* is in connection with the Crown's suggestion that a court may treat all roadside utterances as evidence of the *actus reus* in a case of a feigned attempt to provide a breath sample. Such a suggestion runs afoul of the *Elias*/*Milne*/*Coutts* line of authority on the limited use to which such evidence may be put.

[96] I acknowledge that this line of authority is directed at the use of roadside statements for purposes of proving the offences of "over 80" or driving while impaired, rather than refusal or failure to provide a breath sample. Nevertheless, I share Molloy J.'s views in *Morrison*, at para. 35:

> If Ms. Morrison had taken the breathalyzer test and then been charged with impaired driving, her statements at the roadside as to her drinking would not be admissible to attack her credibility: *R. v. Coutts.* I see no principled basis for treating those statements differently in the situation before me than would be the case if Ms. Morrison had been charged with impaired driving.

[97] The *Elias*/*Milne*/*Coutts* line of authority establish that it would be unfair to give broad incriminatory scope to evidence obtained from a motorist who is detained at a roadside stop and whose s. 10(b) rights are suspended. As stated at p. 298 of *Coutts*: "The unfairness arises because the motorist has been compelled, at the behest of the state, to provide evidence that would not have been obtained but for the motorist's participation in its construction and the evidence is being tendered for a purpose beyond that contemplated by s. 254(2) of the *Code*". See also *R. v. Smith* (1996), 28 O.R. (3d) 75 (Ont. C.A.), at p. 87.

[98] Contained in the reasoning of these authorities is that the analysis is not limited to situations in which a breath sample was ultimately provided; rather, it is equally applicable to a case involving a failure to provide a breath sample, itself a criminal offence. If the court were to treat roadside statements as evidence of the *actus reus* even if the statements did not indicate the act of refusal, the unfairness averted to in *Coutts* would re-surface.

The Need for a *Voir Dire*

[99] In oral argument, in response to a question from the panel, there was some suggestion that the trial judge ought to have conducted a *voir dire* before permitting the

Crown to lead evidence of the appellant's roadside statements from Constable Tai. The need for a *voir dire* could arise in respect of two discrete issues: (i) in connection with those statements that are relied on by the Crown to constitute the *actus reus*; and (ii) whether the statements, though not evidence of the *actus reus*, were admissible for impeachment purposes.

[100] The statements in issue were made by the appellant to a person in authority without the benefit of the s. 10(b) right to counsel while she was detained. At trial, defence counsel tepidly raised the *voir dire* issue during the Crown's cross-examination of the appellant on her statements to Constable Tai. Defence counsel stated: "I'm a little concerned … In the normal course of an impaired these are pre-right to counsel utterances. The issue of credibility." The trial judge asked: "Well, these are admissible without the necessity of a *voir dire* on a refuse case, are they not?" Counsel responded with "[t]hank you". The issue of the need for a *voir dire* was not pursued.

Statements constituting the *Actus Reus*

[101] Ordinarily, statements of an accused made to a person in authority are subject to the Crown establishing voluntariness, usually through a *voir dire*: *R. v. Erven*, [1979] 1 S.C.R. 926, at pp. 933-43. However, in *Stapleton*, at p. 233, this court, after citing the example of a case where the accused was charged with "failing to or refusing to comply with a valid demand made to him by a police officer", held that "the words of refusal constitute the *actus reus* of the offence charged." Accordingly, the court held it was not necessary to establish on a *voir dire* the voluntariness of the accused's statement.

[102] In *Hanneson*, at pp. 471-77, this court reaffirmed that where the statement of an accused forms part of the *actus reus* of the offence, the voluntariness rule is inapplicable. And, most recently, this court in *Ha*, at paras. 6-8, applied *Hanneson*, and held at para. 8 that "the rationale in *Hanneson* applies equally here where there was a s. 9 breach as well as breaches of s. 10 of the *Charter*."

[103] Thus, where the making of a statement constitutes the very *actus reu*s of the offence charged, a *voir dire* into voluntariness is not required. However, where the Crown seeks to rely on roadside statements of an accused to the police that are made without the right to counsel as evidence of the *actus reus*, the trial judge may be called upon to decide whether the proffered statements are evidence of this element of the offence before admitting them at the Crown's behest.

Statements Tendered for Impeachment Purposes

[104] Where the statements are not admissible as evidence of the *actus reus*, but the Crown proposes to use them for purposes of challenging the accused's credibility, there is no need for a *voir dire* simply because such statements are inadmissible at the Crown's behest for that purpose. This is due to the trial fairness considerations explained in the *Elias*/*Milne*/*Coutts* line of authority described above.

[105] It was made clear in *Coutts* that there is no distinction for constitutional purposes between evidence used to incriminate an accused and evidence used to impeach. In that case, Moldaver J.A. observed that the Supreme Court of Canada in *R. v. Calder*, [1996] 1 S.C.R. 660 held that there is no meaningful distinction for purposes of admitting

unconstitutionally-obtained evidence under s. 24(2) of the *Charter* between evidence used to incriminate and evidence used to impeach an accused's testimony on cross-examination. As Sopinka J. said at para. 34:

> The effect of destroying the credibility of an accused who takes the stand in his or her defence using evidence obtained from the mouth of the accused in breach of his or her *Charter* rights will usually have the same effect as use of the same evidence when adduced by the Crown in its case in chief for the purpose of incrimination.

[106] Of course, there is no constitutional violation in police obtaining statements from motorists without having been advised of their s. 10(b) rights in the roadside stop context, but that is only because roadside stops have been found to be constitutionally permissible under s. 1 of the *Charter*. Critical to the finding that roadside testing is not unconstitutional is the limited use to which evidence obtained during the roadside stop may be put, as explained in *Elias*, at para. 58: "the evidence obtained as a result of the motorist's participation without the right to counsel can only be used as an investigative tool to confirm or reject the officer's suspicion that the driver might be impaired. It cannot be used as direct evidence to incriminate the driver".

[107] In my view, the appellant's roadside statements were not admissible as part of the Crown's case for incrimination or impeachment purposes. I agree with Molloy J.'s conclusion in *Morrison* that roadside statements, whether made in direct response to an inquiry by an officer, or made in the context of the officer's overall inquiry while the motorist is detained, are not admissible for purposes of attacking the accused's credibility

at a trial for failure or refusal to provide a breath sample. The admission of any roadside utterances as part of the Crown's case is forbidden other than on the basis of establishing grounds for the demand or the *actus reus* of the offence.

Issue Two: Did the appeal court judge err by failing to consider the appellant's s. 7 *Charter* argument?

[108] The trial judge made various references to the appellant's silence regarding the reason for her failure to blow at paras. 11, 19, 66, and 75 of her reasons for decision. They are summarized as follows:

> Ms. Rivera did not indicate any illnesses or medical difficulties to the police officer, nor did she indicate any reason(s) why she could not provide a sample … Ms. Rivera did not tell the officer that she was having a panic attack at any time …. I further accept Constable Tai's evidence that there were no outward symptoms observable of physical distress nor did Ms. Rivera complain of any medical problem throughout his dealings with her … She never showed any overt signs of anxiety or panic attack, nor did she make any complaint to the officer.

[109] Before the summary conviction appeal court judge, the appellant's counsel argued that the trial judge erred in her assessment of the appellant's credibility, and in rejecting her testimony that she suffered a panic attack at the roadside, by relying on her failure to say anything to Constable Tai about her supposed panic attack. The appellant contends that the trial judge's repeated reliance on her "silence" on the issue of the panic attack was not a proper consideration on the issue of her credibility because of the right to silence enshrined by s. 7 of the *Charter*.

[110] The Crown concedes that the appeal court judge's reasons for dismissing this ground of appeal leave "something to be desired." He further acknowledges that "[i]t is difficult to discern why this ground of appeal was rejected." Indeed, it is impossible and this court is, therefore, entitled to intervene to address the merits of this ground of appeal. The appeal court judge's complete failure to address this ground of appeal constitutes a clear error in law.

[111] The Crown submits that this ground of appeal should be dismissed on the basis that the right to silence jurisprudence on which the appellant relies is not applicable in this case. This, he says, is because the onus was on the appellant to establish a reasonable excuse for her failure to provide a sample. According to the Crown, an accused ought to make timely disclosure of that excuse to permit the police to address the issue. The Crown cites *R. v. Ferron* (1989), 49 C.C.C. (3d) 432 (B.C.C.A.), at pp. 441-42 and *R. v. Top* (1989), 95 A.R. 195 (Alta. C.A) for this proposition.

[112] Further, the Crown submits that, because the reasonable excuse is extraneous to the elements of the offence (see *Moser* (1992), 7 O.R. (3d) 737, at pp. 750 and 754), when the appellant's silence is used in assessing the credibility of her reasonable excuse, it is not used to prove guilt and thus s. 7 of the *Charter* is not violated. I disagree.

[113] The authorities cited by the Crown do not stand for the principle the Crown asks this court to accept. None of these authorities address whether it is open to the court to use the accused's silence on the issue of a reasonable excuse at the time of arrest in

rejecting the accused's evidence at trial of a reasonable excuse. In other words, because the appellant said nothing at the time of her arrest explaining her failure to blow, can that be a basis for disbelieving her trial evidence of a reasonable excuse?

[114] In *R. v. Poirier* (2000), 133 O.A.C. 352, this court explained, at para. 18, that the choice to invoke the right to silence is irrelevant to any issue at trial:

> However, when it is the accused whose testimony is being impeached, an allegation that he or she did not speak out, or give an explanation of his or her conduct, at an early opportunity, conflicts with his or her right to remain silent. As the authorities have decided, the Crown is precluded from making the allegation, *and no inference can be drawn that if the accused was innocent he or she would have asserted his or her innocence upon arrest.* [Emphasis added.]

[115] This court recently affirmed these principles in *R. v. Rohde* (2009), 246 C.C.C. (3d) 18. Rohde was charged with possession of an unlicensed firearm after a sawed-off shotgun was found under his bed in his condominium unit. Rohde testified that the gun was not his and he did not know where it had come from. He also testified that an acquaintance had used his condo unit shortly before the gun was found. The trial judge rejected Rohde's evidence and found that he was not a credible witness because he did not come forward earlier with his explanation that someone else had been in his condo unit.

[116] Laskin J.A. for the court allowed the appeal and, at para. 18, held that "[b]y linking her rejection of Mr. Rohde's evidence to his pre-trial silence, the trial judge committed a reversible error. She violated his constitutional right not to say anything."

[117] Similarly in *R. v. Palmer*, 2008 ONCA 797, this court concluded that the trial judge erred in using the appellant's silence to reject her evidence. The accused chose to speak to the police at the time of her arrest for possession of cocaine, but she did not give the police the explanation she would later advance at trial as to why the cocaine was in her possession. This court held, at para. 9:

> It was open to the trial judge to reject the appellant's explanation given at trial because it was not believable and to use that finding in assessing the appellant's overall credibility. However, the trial judge went further and used the appellant's silence as a basis for finding her incredible. That he was not entitled to do.

[118] And yet again in *R. v. G.L.* (2009), 250 O.A.C. 266, Blair J.A. for this court concluded, at paras. 37-39, that the appellant had a constitutional right to remain silent during any part of the police interview and this right was not extinguished simply because he chose to speak to the officer with respect to some matters and did not exercise his right to silence completely.

[119] I agree with the appellant's submission that the negative inferences drawn by the trial judge from her failure to advise Constable Tai that she was experiencing a panic attack violate the principles underlying the right to remain silent. It is clear to me that the appellant's silence on the issue of her panic attack at the roadside was a significant factor in the trial judge's assessment of her credibility.

[120] The trial judge, I find, committed reversible error by linking the rejection of the appellant's evidence of reasonable excuse to her silence at the roadside about experiencing a panic attack.

[121] Before concluding my analysis of this issue, I will address one final concern raised by the Crown.

[122] The Crown, in its factum, placed some importance on the fact that the trial Crown questioned the appellant about whether she had said anything to Constable Tai about difficulties she was having in providing a breath sample. Defence counsel did not object to these questions. In addition, in written submissions provided to the trial judge, the Crown relied on the fact that the appellant never alerted Constable Tai to her distress, again without any apparent objection by defence counsel.

[123] I would not treat defence counsel's failure to object as fatal in circumstances where the concern on appeal is the use made by the trial judge of the accused's silence in arriving at her decision to convict. Moreover, this is not a case where there may have been some tactical advantage that could explain the absence of an objection by defence counsel.

CONCLUSION

[124] I conclude that the trial judge erred by improperly relying on certain statements that the appellant made to the arresting police officer to undermine her credibility at trial. I also conclude that the appeal court judge erred by failing to properly consider the

appellant's argument regarding her right to silence under s. 7 of the *Charter*. After examining the merits of this ground of appeal, it is my opinion that the trial judge's repeated reliance on the appellant's "silence" on the issue of the panic attack was not a proper consideration on the issue of credibility.

[125] There is no need to conduct an analysis of the admissibility of evidence under s. 24(2) of the *Charter*. The roadside statements are inadmissible for impeachment purposes not because of a breach of s. 10(b) of the *Charter*, but rather because of the limited use to which such evidence may be put to ensure a fair trial as explained in *Elias/Milne/Coutts*. Thus, s. 24(2) is not engaged. Similarly, the s. 7 claim relates to the trial judge's improper use of the appellant's silence on the issue of the panic attack, rather than to unconstitutionally-obtained evidence, and so there is no need to assess admissibility under s. 24(2).

[126] Because my conclusions on the first two grounds resolve the appeal, I find it unnecessary to address the three remaining grounds of appeal.

[127] The appropriate remedy is that the conviction be set aside and a new trial ordered.

RELEASED:

"MAR 23 2011"

"KF"

"H.S. LaForme J.A."

"I agree K. Feldman J.A."

"I agree Susan Lang J.A."