COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Ho, 2015 ONCA 559
DATE: 20150728
DOCKET: C59485

Doherty, Gillese and Brown JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Tim Ho

Applicant (Appellant)

Peter Lindsay and Maleeka Mohamed, for the applicant (appellant)

John Patton, for the respondent

Heard: July 24, 2015

On appeal from the conviction entered by Justice McIsaac of the Superior Court of Justice, dated August 29, 2014.

APPEAL BOOK ENDORSEMENT

[1]   We agree with the Summary Conviction Appeal Court judge that the trial judge failed to consider the reasonableness of the officer's belief that the test result was reliable, but instead focussed on whether the officer actually knew whether the result was reliable. The trial judge failed to consider whether the

officer's reliance on his fellow officers to follow the established protocol for testing provided a basis upon which it could be said that the officer's belief in the accuracy of the test was reasonable.

[2]   As to the appropriate remedy, we cannot say that had the trial judge made the appropriate inquiry, he would necessarily have concluded that the officer's reliance on the other officers to follow protocol provided a basis for a reasonable belief. There were circumstances in this particular case that may have led a trial judge to conclude that the officer's belief was not reasonable. The officer who the testifying officer relied on to have performed the test was a rookie officer and the officer who testified had no idea whether that officer had undergone the appropriate training. In that circumstance, we think the reasonableness of the officer's belief that the proper protocol had been followed would reasonably be viewed as inadequate to provide the necessary grounds for a reasonable belief. It is for a trial judge to decide that question on the entirety of the evidence.

[3]   The appeal is allowed to the extent that the Summary Conviction Appeal Court order directing a conviction is set aside and a new trial is ordered.