PROVINCE OF NOVA SCOTIA C. AT. No. 2655

ANTIGONISH

IN THE COUNTY COURT OF DISTRICT NUMBER SIX

BETWEEN:

RICHARD LEMUEL BENNETT

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

Gerald MacDonald, Esq., Solicitor for the Appellant
Ronald J. MacDonald, Esq., Solicitor for the Respondent

1992, September 17, MacLellan, J.C.C.:-

This is an appeal by Mr. Bennett against the conviction entered against him in Provincial Court in Sherbrooke, Nova Scotia on February 11th, 1991 on a charge that:-

> "he did on the 29th day of July, 1990, unlawfully operate a motor vehicle, having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded eighty milligrams of alcohol in one hundred millilitres of blood, contrary to Section 253(b) of the Criminal Code."

The Appellant filed a Notice of Appeal dated February 19th, 1991, wherein he sought to have the conviction overturned. His appeal was heard before this Court on September 15th, 1992, at which time the Court heard the parties and reserved decision.

The facts are that the Appellant was stopped by a member of the Royal Canadian Mounted Police while driving his motor vehicle at the Cross Roads, County Harbour, Guysborough County on July 29th, 1990. The police officer, Constable Sheila House, indicated that she detected a smell of alcohol from the Appellant and at 1:32 a.m. asked the Appellant to go with her to the police vehicle. At the police vehicle, she read the Appellant the A.L.E.R.T. demand, to which he consented. Following a failure on the A.L.E.R.T., Constable House read a Breathalyzer demand at 1:45 a.m. and requested that the Appellant return with her to the police detachment at Sherbrooke. She did not read the Appellant his Charter rights at this time.

Constable House and the Appellant arrived at the Sherbrooke detachment of the R.C.M.P. at 2:14 a.m. and at 2:20 a.m., prior to taking the Breathalyzer test, another officer, Constable Roach, read the Appellant his Charter rights. This was at 2:20 a.m. At 2:29 a.m. a breath test was administered and a subsequent one at 2:50 a.m. The Appellant failed both tests and was charged with the offence under Section 253(b) of the Criminal Code.

The issues raised by the Appellant are the following:

1. That the trial judge erred in law in

refusing to grant a stay of proceedings based on failure of the Crown Prosecutor to provide the Defence with a Breathalyzer checksheet.

2. That the trial judge erred in law in failing to exclude the evidence obtained as a result of taking the Breathalyzer test because the Appellant's rights to Counsel without delay were not given as required by the **Charter of Rights.**

3. The trial judge erred in law in failing to exclude the Breathalyzer readings because the Appellant was not informed of his rights to Legal Aid Counsel.

Dealing with issue No. 1, the evidence before the trial judge indicated that Defence Counsel wrote to the Crown Prosecutor on August 30th, 1990 requesting a copy of the Breathalyzer checksheet used by the Breathalyzer technician in giving the tests to the Appellant. No such sheet was forthcoming from the Crown Prosecutor and on the day set for the trial (November 13, 1990), the Appellant applied for a stay of proceeding. The learned trial judge refused to issue a stay of proceeding but rather adjourned the matter for a month to enable the Crown Prosecutor to provide the necessary checksheet. The trial judge made a finding that the failure to provide the checksheet was simply an oversight on the part of

the Crown Prosecutor and that it could be remedied by an adjournment of the trial.

The Appellant has suggested that the trial judge should have granted a stay of proceeding instead of simply an adjournment and points to the case of **R v. Crouse,** (1990) 98 N.S.R. (2d) 204 as authority for the principle that where a checksheet is not provided, a stay of proceeding should be issued.

In the **Crouse** case the Crown had taken the position that they would not provide the checksheet after a number of Defence requests but that the checksheet could be perused by Defence Counsel at the time of the trial. The trial judge in that case refused a Defence request for a stay of proceeding and simply adjourned the trial. On appeal to the County Court, Freeman, J.C.C. (as he then was) found that an adjournment was not an appropriate remedy under the Charter and issued a stay of proceeding.

In this case, Crown Counsel takes the position that the trial judge's decision to grant an adjournment instead of a stay is a discretionary one under the Charter and should not be interfered with unless there is a very good reason to do so. He also submitted that this case should be governed by the principles set out in **R v. Stinchcombe** (Supreme Court of Canada, November 7th, 1991, unreported). There, the Court dealt with the issue of Crown disclosure and pointed out the obligation on the Defence to bring to the attention of the Court any failure on the part of the Crown to disclose appropriate information so that the Court could deal with the matter. He therefore suggested that Defence Counsel should have contacted the

Crown after realizing that the checksheet had not been provided and that this would have resulted in compliance with the request because it was simply an oversight on the Prosecutor's part. He points out that once it was brought to the Prosecutor's attention, the checksheet was provided.

On this issue I find that the remedy granted by the trial judge was appropriate in the circumstances.

In the **Crouse** case, Freeman, J.C.C. (as he then was) indicated at page 213:-

> "I find the adjournment granted by Judge Carver was not an appropriate remedy; a stay of proceedings should have been ordered. It might have been otherwise if the Crown's failure in its duty to disclose had been innocent or inadvertent rather than deliberate, or if it had been based on a demonstrated principle. (Emphasis added)."

On the second issue raised by the Appellant the Crown and the Defence both agree that there was a failure on the part of the police officer to give the Charter rights at the time of detention and there is also agreement that the **Charter of Rights** were given prior to the taking of the Breathalyzer test.

The Appellant's Counsel has referred to the case of **The Queen v. Mitchell Wade Brison** (November 14th, 1990) a decision of Judge Donald Hall of the County Court of District Number Four wherein he found that a failure by the police officer to permit an accused to contact his lawyer from his home instead of waiting to do so at the police station should result in a stay of proceedings.

The Crown have submitted that the cases of R **v. Baccardax,** (1986) 75 N.S.R. (2d) at 152, and **R v. Hylkema,** (1985) 70 N.S.R. (2d) at 368, both cases of the Nova Scotia Supreme Court Appeal Division are clearly on point in that they dealt with this issue. In both cases the Court found that a failure to give Charter rights at the roadside would not result in a stay of proceedings provided that the rights were given prior to the actual taking of the tests.

In the **Baccardax** case, Matthews, J.A. said at page 156:-

> "Here, as in **Comeau** and **Hylkema**, any violation of the appellant's rights under s. 10(b) of the **Charter** was of such an inconsequential or technical nature that to admit the results of the breath analysis tests into evidence would not bring the administration of justice into disrepute."

Here, the Breathalyzer demand was made at 1:45 a.m. and the Charter rights were read to the Appellant at 2:20 a.m., a delay of 35 minutes. The trial judge considered the issue and concluded that the violation of Charter rights was not significant. He said at page 21:-

> "The accused has no right to a telephone along the way. There are various cases that indicate an accused made certain requests that they go to their own residence, or to a place nearby and so on, and I think the cases are very conclusive in that the only time they, the first opportunity they get to use the telephone is at the detachment. At that point, there was the opportunity given, and the Rights were read,

> so while there was a breach I think under the circumstances in this situation I do not feel that the admission of the evidence resulting from that breach where the accused said he understood his rights and declined to exercise them at what I think was the first opportunity that he had to do so in any event would not bring the administration of justice into disrepute. So, while I find there was a breach I do not feel the evidence should be excluded, and will so rule."

I find that the trial judge applied proper principles in deciding this Charter issue and his decision reflects the approach set out by the Nova Scotia Supreme Court Appeal Division in the cases mentioned above. Therefore, I find that this ground of appeal must fail.

The third and final issue raised by the Appellant was the question of the content of the Charter rights given to the Appellant. The police officer indicated that he was not positive that he had indicated in his right to Counsel that the Appellant had the right to Legal Aid Counsel. His confusion was as a result of a change in wording of the rights to Counsel which occurred as a result of the ruling of the Supreme Court of Canada in R **v. Brydges**, (1990) 53 C.C.C. (3d) 330. There, the Court found that the normal police right to Counsel wording was deficient because there was no reference to the right to Legal Aid Counsel. However, the Court granted a transition period of 30 days to permit the police to issue revised cards with the necessary new wording. The **Brydges** decision was rendered on February 1st, 1990, and therefore the new rules would be clearly in effect on July 29th, 1990, when the Appellant was stopped.

Constable Roach was cross-examined about whether he had read from the newly issued cards or from his old card. On that point, he was not certain but he did indicate that he thought he had read from the new card.

The trial judge in his decision said (p. 21):-

> "Defence Counsel admits Cst. Roach was very forthright, as was Cst. House, in admitting what happened on this occasion, and Cst. Roach said that he wasn't absolutely sure but he thought the wording was the same, and he was specifically asked about the Legal Aid provision, and he again said he believed but couldn't be absolutely sure.
>
> That's the only evidence I have as to what was said and what Rights were read. There's a possibility that the Rights to legal Aid were not given, but it's only a possibility, and it's the only evidence I have before me, and in my opinion a possibility does not give rise to a reasonable doubt. So, I am satisfied on the evidence that, and beyond a reasonable doubt that the Rights to Legal Aid were granted, or were read as well as the other Rights to Counsel, based upon what was read in evidence by Cst. Roach, and his evidence in relation thereto."

The Crown point out that any Charter violation has to be established by the accused (**R v. Sawler**, (1991) 104 N.S.R. (2d) 408) and here where the trial judge had only the evidence of Constable Roach on that point (the Appellant did not testify) it was within the power of the trial judge to find as he did that the Legal Aid reference was included in the right to Counsel rights given by Constable Roach.

I find here that the Defence has not established that there was a failure on the part of Constable Roach to give the Legal Aid rights and that it was reasonable for the trial judge to conclude that the rights were in fact given. Once he made that finding, there is no merit in suggesting that there was a Charter violation, therefore, this ground of appeal must fail.

In light of my decision on each issue raised by the Appellant, I hereby dismiss this appeal and confirm the conviction, sentence and prohibition imposed by the trial judge.

Judge Douglas L. MacLellan
County Court Judge
District Number Six