1991 C.K. No. 3240

IN THE COUNTY COURT OF DISTRICT NUMBER FOUR

BETWEEN:

MICHAEL RICHARD ROACHE

APPELLANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

HEARD: At Kentville, Nova Scotia, on the 16th day of June, 1992.

BEFORE: The Honourable Judge Donald M. Hall, J.C.C.

DECISION: October 16, 1992.

COUNSEL: C. Palmer, Esq.,
Counsel for the Appellant.

D. Carmichael, Esq.,
Counsel for the Respondent.

HALL, D.M., J.C.C.:

This is an appeal of a conviction on a charge of failing to comply with a breathalyzer demand contrary to section 254(5) of the Criminal Code entered against the appellant in Provincial Court at Kentville, Nova Scotia, on December 12, 1991.

The issue argued on this appeal is whether the trial Judge, His Honour J.A. MacLellan, erred in ruling that the appellant's right to counsel under section 10(b) of the Canadian Charter of Rights and Freedoms had not been infringed.

The facts are not in dispute and are accurately summarized in the appellant's pre-hearing brief as follows:

> On June 14, 1991 at 2:32 a.m. the Appellant's vehicle was stopped by the Kentville Town Police on School Street as a result of suspicious driving.
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> Upon the appellant, who was driving, showing signs of impairment Constable Boon administered an alert test which the appellant failed. The appellant was then requested to perform a breathalyzer test at which point the appellant said "Take me home boys". The appellant was then advised of his Charter Rights and taken to the Kentville Police Station where the breathalyzer demand was read to him again and where the Appellant indicated that he would not take the test. The Appellant was then provided with a list of legal aid lawyers and their phone numbers at which point the Appellant indicated that he did not want them whereupon he was placed in a private room with a telephone.
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> The Appellant was observed to make a call lasting approximately two minutes. When the Appellant appeared from the telephone room, Constable Boon asked him if he had called his lawyer to which the Appellant said no, he had called his mother.
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> Constable Boon immediately asked him if he was

going to take the breathalyzer to which the Appellant replied that he was not blowing into anything. This was at 2:54 a.m. As a result the Appellant was charged with refusal.

Because the accused refused to sign his Appearance Notice he was taken to the lock up in the basement of the Kentville Court House. While being processed there the Appellant received a phone call from Mr. Peter Van Feggelen, a lawyer with Waterbury, Newton and Johnson. Because Mr. Van Feggelen could not speak in private with the Appellant at the lock up, the Appellant was taken back to the Kentville Police Station, which was next door, and the Appellant spoke with Mr. Van Feggelen there on the phone for approximately five to ten minutes.

After finishing his conversation with Mr. Van Feggelen the Appellant asked Constable Boon if he could take the breathalyzer test now. It was approximately 3:30 a.m. at this point. Constable Brown, the Breathalyzer Technician, refused to allow this and the charge of refusal against the Appellant remained.

At the trial before His Honour Judge J.A. MacLellan, the Appellant was acquitted of the charge under Section 253(a) but convicted of the charge under Section 254(5). Judge MacLellan found that there was only one binding refusal of the breathalyzer by the Appellant which occurred immediately after he appeared from the telephone room.

It should be added that the appellant did not testify at the trial nor present any evidence.

The appellant's counsel argued that since the appellant had indicated to the police his desire to speak to counsel and at no time expressly waived the right to do so, there was a burden on the police to ascertain in no uncertain terms whether the appellant was waiving his right to counsel and whether he fully understood his rights with respect to counsel at that time. In particular, counsel contended that when the appellant emerged from

"telephone room" and responded to the police officer's question as to whether he had contacted a lawyer, "No, I called my wife", the police officer was obligated to make further inquiries as to whether the appellant wished to make further efforts to contact counsel instead of simply asking him again "if he was going to take the breathalyzer". Mr. Palmer submitted that the officer's failure to make such further inquiries resulted in the appellant being denied his right to counsel. In support of his position Mr. Palmer relied on the decision of the Supreme Court of Canada in R. v. Tremblay, [1987] 2 S.C.R. 435.

Counsel for the respondent agreed that there was no evidence before the court which established that the appellant wanted to consult counsel. In the absence of this, Crown counsel contended that there was no obligation on the police to do anything more than they did.

The following are the applicable legislative provisions:

> Criminal Code:
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> 254(5) Every one commits an offence who, without reasonable excuse, fails or refuses to comply with a demand made to him by a peace officer under this section.
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> The Canadian Charter of Rights and Freedoms:
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> 10. Everyone has the right on arrest or detention
>
> (b) to retain and instruct counsel without delay and to be informed of that right;

In R. v. Tremblay (supra) Lamer, J., as he then

was, stated at page 438:

> In this case the accused was promptly informed of his right to counsel, asked for a lawyer, was given a phone and placed a call to his wife. It appears, though the evidence on this point is not all that clear, that she was to call a lawyer for him. Right after that call, the police officers requested that the accused give his first sample of breath, a request he complied with. When that request was made, there remained ample time to comply with the requirements set down in the Criminal Code as regards the time limits for the taking of breath samples; there was thus no urgency to proceed, and to do so right after his first call was what, in my opinion, triggered the violation of this accused's rights.

And further at page 439:

> Generally speaking, if a detainee is not being reasonably diligent in the exercise of his rights, the correlative duties set out in this Court's decision in R. v. Manninen, [1987] 1 S.C.R. 1233, imposed on the police in a situation where a detainee has requested the assistance of counsel are suspended and are not a bar to their continuing their investigation and calling upon him to give a sample of his breath.

In R. v. Manninen, [1987] 1 S.C.R. 1233, Lamer, J., in delivering the judgment of the Court said at pages 1241 - 1243:

> In my view, s. 10(b) imposes at least two duties on the police in addition to the duty to inform the detainee of his rights. First, the police must provide the detainee with a reasonable opportunity to exercise the right to retain and instruct counsel without delay. The detainee is in the control of the police and he cannot exercise his right to counsel unless the police provide him with a reasonable opportunity to do so. This aspect of the right to counsel was recognized in Canadian law well before the advent of the Charter. In Brownridge v. The Queen,

[1972] S.C.R. 926, a case decided under the Canadian Bill of Rights, Laskin, J., as he then was, wrote at pp. 952-53:

> The right to retain and instruct counsel without delay can only have meaning to an arrested or detained person if it is taken as raising a correlative obligation upon the police authorities to facilitate contact with counsel. This means allowing him upon his request to use the telephone for that purpose if one is available.

In my view, this aspect of the right to counsel was clearly infringed in this case. The respondent clearly asserted his right to remain silent and his desire to consult his lawyer. There was a telephone immediately at hand in the office, which the officers used for their own purposes. It was not necessary for the respondent to make an express request to use the telephone. The duty to facilitate contact with counsel included the duty to offer the respondent the use of the telephone. Of course, there may be circumstances in which it is particularly urgent that the police continue with an investigation before it is possible to facilitate a detainee's communication with counsel. There was no urgency in the circumstances surrounding the offences in this case.

Further, s. 10(b) imposes on the police the duty to cease questioning or otherwise attempting to elicit evidence from the detainee until he has had a reasonable opportunity to retain and instruct counsel. The purpose of the right to counsel is to allow the detainee not only to be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights. In this case, the police officers correctly informed the respondent of his right to remain silent and the main function of counsel would be to confirm the existence of that right and then to advise him as to how to exercise it.

> For the right to counsel to be effective, the detainee must have access to this advice before he is questioned or otherwise required to provide evidence. I discussed the duty imposed on the police in the context of a breathalyzer demand in R. v. Therens, [1985] 1 S.C.R. 613, at p. 624:

The Court also considered this issue in R. v. Leclair and Ross, [1989] 1 S.C.R. 3. This case was concerned with accused persons being asked to participate in a police line-up for identification purposes after having clearly indicated their desire to assert their right to counsel. The Court outlined the obligation of police officers with respect to a detained person exercising his or her right to counsel. At pages 10 and 11, Lamer, J., who delivered the majority judgment said:

> The appellants were obviously detained and that they had the right to retain and instruct counsel is not in dispute. Moreover, the police complied initially with s. 10(b) and advised Ross and Leclair of their right to retain and instruct counsel without delay. As this Court held in R. v. Manninen, [1987] 1 S.C.R. 1233, s. 10(b) imposes at least two duties on the police in addition to the duty to inform detainees of their rights. The first is that the police must give the accused or detained person who so wishes a reasonable opportunity to exercise the right to retain and instruct counsel without delay. The second is that the police must refrain from attempting to elicit evidence from the detainee until the detainee has had a reasonable opportunity to retain and instruct counsel. I am of the view that in this case the police fulfilled neither duty.
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> . . . Although an accused or detained person has the right to choose counsel, it must be noted that, as this Court said in R. v. Tremblay, [1987] 2 S.C.R. 435, a detainee must be reasonably

> diligent in the exercise of these rights and if he is not, the correlative duties imposed on the police and set out in Manninen are suspended. Reasonable diligence in the exercise of the right to choose one's counsel depends upon the context facing the accused or detained person. On being arrested, for example, the detained person is faced with an immediate need for legal advice and must exercise reasonable diligence accordingly. By contrast, when seeking the best lawyer to conduct a trial, the accused person faces no such immediacy.

And at page 12:

> Having seen that the appellants got no answer to their phone calls, the police officers placed them in police cells and a few minutes later, the appellants were told to participate in a line-up, which they did.
>
> The police were mistaken to follow such a procedure. As this Court held in Manninen, the police have, at least, a duty to cease questioning or otherwise attempting to elicit evidence from the detainee until he has had a reasonable opportunity to retain and instruct counsel. In my view, the right to counsel also means that, once an accused or detained person has asserted that right, the police cannot, in any way, compel the detainee or accused person to make a decision or participate in a process which could ultimately have an adverse effect in the conduct of an eventual trial until that person has had a reasonable opportunity to exercise that right.

Counsel for the appellant referred the Court to R. v. Pittman (1991) 89 Nfld. & P.E.I. 65, a decision of the Newfoundland Supreme Court, Trial Division, and Belinda Ann Conrad v. R., November 7, 1989, CBW 7711 (unreported), a decision of the Honourable Judge Freeman, as he then was, in the County Court of District Number Two. In both of those cases the defendants, on facts somewhat similar to the facts in the present case, were successful in establishing that their right to counsel under section 10(b) had been infringed. In both cases,

however, the defendants' had made it clear to the police that they wished to consult counsel.

It is interesting to note that in Conrad Judge Freeman, after finding that the defendant's Charter rights had been violated, did not go on to consider whether the evidence ought to be excluded under 24(2) of the Charter. At page 9 he said:

> In R. v. Therens [1985] 1 S.C.R. 613, LeDain, J. stated:
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> > "In my opinion the right to counsel is of such fundamental importance that its denial in a criminal law context must prima facie discredit the administration of justice."
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> The remedy in Leclair and Ross was exclusion of the evidence that followed the Charter infringement. That was followed in the ruling of Judge Charron, D.C.J. in a voir dire in R. v. Jaime Freitas, May 29, 1989 (unreported).
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> However, it does not appear necessary to invoke what is by its nature an extraordinary constitutional remedy under s. 24 of the Charter in the present circumstances. The remedy appears to lie in the provisions of the Criminal Code. The Appellant is charged that she "unlawfully and without reasonable excuse did refuse to comply with a demand. . ."
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> Because she had asserted her right to counsel under s. 10(b) of the Charter and had not waived that right at the time of refusal, I would find that she refused the demand lawfully because she had a reasonable excuse.

With respect I would suggest that the decision of the Supreme Court of Canada in Brownridge v. The Queen (1972) 7 C.C.C.(2d) 417, supports the position taken by Judge Freeman. In Brownridge, Laskin, C.J., held that the denial of an accused person's right to counsel under the Canadian Bill of Rights provided a lawful excuse for

refusing to provide samples of breath under then section 235 of the Code.

One might wonder why this point was not raised in R. v. Tremblay (supra) where Lamer, J., after finding that Tremblay's right to counsel had been violated, went on to hold that because of Tremblay's obnoxious conduct the evidence of the refusal should not be excluded under s. 24(2) of the Charter.

It is significant that in the foregoing cases the detained persons indicated to the police that they wished to consult counsel. In the present case, however, as the learned trial judge found, there was no evidence that the appellant tried or even wanted to call a lawyer. At no time did he tell the police that he wanted to call a lawyer. When asked by the police officer on emerging from the "telephone room" whether he had called a lawyer he replied that he had called his mother.

There was thus no evidence that the appellant had asserted his right to counsel nor that he was reasonably diligent in the exercise of that right.

Accordingly, I agree with the conclusion of the learned trial judge that the appellant's right to counsel was not violated.

The appeal is therefore dismissed. I trust that Crown counsel will draft an appropriate order.

Donald M. Hall
Judge of the County Court
of District Number Four