

C A N A D A
PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX

CH 11693

I N T H E C O U N T Y C O U R T
OF DISTRICT NUMBER ONE

BETWEEN:

HER MAJESTY THE QUEEN,

Respondent

- and -

RODNEY EDWARD BRUNT,

Appellant

Brian Norton, Esq., for the Attorney General of Nova Scotia,
respondent.

W. M. Ryan, Esq., for the defendant, appellant.

1976, February 10, O Hearn, J.C.C.:— This defendant is appealing from a conviction for having a care or control of a motor vehicle in a situation prohibited by *Criminal Code*, s.236. The evidence on the trial *de novo* showed quite clearly that at all material times he was occupying the passenger's seat in the front of the vehicle, which he owned, and that the driver was actually Barbara Ann Hyland, who had only a beginners license. Under our *Motor Vehicle Act*, R.S.N.S. 1967 c.191, s.62, as amended, with certain exceptions not applicable to the present case, the holder of a beginners license may drive a motor vehicle upon the highways, only when accompanied by a licensed operator or a licensed chauffeur who is actually occupying a seat beside the driver and there is no other person in the vehicle. That is the situation here.

The defendant was tested on the Breathalyzer machine according to the prescribed legal procedures and was found to have a blood-alcohol level of 110 milligrams of alcohol per 100 millilitres of blood.

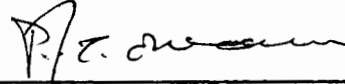
Some argument was directed as to whether *Criminal Code*, s.237(1)(a) was applicable. Clearly, it was not, but that does not dispose of the matter under our jurisprudence, which

has long since established that the owner can have control of a vehicle, although he is not actually driving it. The exercise of such control much be proved however, and that proof is lacking here.

The Crown, therefore, must rely on an inference of law: that is, that the *Motor Vehicle Act*, s.62(1) puts the person in a position of the defendant in ultimate control of the vehicle, where he is the licensed driver accompanying a licensed beginner. Such was the conclusion of Bence, J.M.C. in the Saskatchewan Provincial Court at Regina, in *R. v. Rhodes* (1975), 18 C.L.Q. 129. While I think there is a great deal to be said for the reasoning of Bence, J.M.C., as well as for the conclusion of the learned judge of first instance in this case, the jurisprudence since 1957 and thus the weight of authority has been to the contrary: see *Re Lumiala*, [1957] O.W.N. 417, McRuer, C.J.H.C. See also, *R. v. Slessor*, [1970] 1 O.R. 664, 7 C.R.N.S. 379, [1970] 2 C.C.C. 247, C.A.

The situation is not without its difficulties from the point of view of the *Motor Vehicle Act*: the beginner who chooses an obviously intoxicated licensed operator to accompany her or him, is clearly doing something not contemplated by the legislature and a licensed operator who went along in the circumstances where he or she was unable through intoxication to assist the beginner by skill and experience, would also be frustrating the intention of the legislature. Such concerns, however, are properly those of the provincial legislature and ought not to be used to imply a control by operation of law, where the accused was not doing anything to exercise control and was, in fact, avoiding any exercise of control. I, therefore, conclude that the offence has not been proved in the absence of proof of the actual exercise of control, and the appeal will be allowed with the usual order as to costs. In

that respect, counsel for the appellant provided a useful brief and should be entitled to a brief fee, in addition to the other usual counsel fees.



Judge of the County Court of
District Number One