PROVINCE OF NOVA SCOTIA
COUNTY OF SHELBURNE SS

C. SB. No. 2603

IN THE COUNTY COURT
OF DISTRICT NUMBER TWO

BETWEEN:

JOHN CHIPMAN EARLE

APPELLANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

HEARD BEFORE: The Honourable Judge G. B. Freeman

PLACE HEARD: Shelburne, Nova Scotia

DATE HEARD: January 27, 1989.

COUNSEL: Joel E. Pink, Q.C. for the Appellant
James H. Burrill, ESq. for the Crown

DECISION ON APPEAL

This is an appeal from a sentence of ninety days incarceration imposed on the accused by His Honour Judge P. R. Woolaver on July 6, 1988, following a plea of guilty to a charge of impaired driving under s. 237 of the Criminal Code.

There had been two previous convictions in 1981 and two more in 1985. No custodial sentences had been imposed. In the present case the Crown served notice of intention to proceed by way of increased penalty.

The accused is a 52-year-old clergyman, married, with a parish in Shelburne, N.S. He has been involved since 1981 with the drug dependency program and took the 28-day program in 1981 and again in 1985. He has consulted with five psychiatrists, including Dr. Edwin M. Rosenberg, who gave expert testimony on his behalf, counsellors, and other clergymen. He has been diagnosed as suffering from manic-depressive illness. His recidivist alcoholism is associated with recurring depression.

The grounds of appeal are as follows:

> "1. The Learned Trial Judge erred in law by misinterpreting the conditional discharge provisiions of s. 239 (5) of the Criminal Code, R.S.C. 1970, c. C-34 as amended.
>
> "2. The Learned Trial Judge erred in law by failing to give appropriate or sufficient consideration to a disposition under s. 239 (5) of the Criminal Code.
>
> "3. The Learned Trial Judge erred in law and in principle by imposing a sentence of ninety days imprisonment in all the circumstances of the case. . . "

It had been urged on behalf of the accused that he be considered a candidate for a conditional discharge under s 239 (5) of the Criminal Code which was proclaimed in Nova Scotia as of January 1, 1988.

That subsection is as follows:

> "(5) Notwithstanding subsection 662.1(1), a court may, instead of convicting a person of an offence committed under section 237, after hearing medical or other evidence, if it considers that the person is in need of curative

> treatment in relation to his consumption of alcohol or drugs and that it would not be contrary to the public interest, by order direct that the person be discharged under section 662.1 on the conditions prescribed in probation order, including a condition respecting his attendance for curative treatment in relation to his consumption of alcohol or drugs."

Thus there are two statutory conditions to be met before the sentencing judge is to exercise his discretion to order a discharge under s. 239(5). He must be satisfied, presumably to a civil standard,

1. That the accused is in need of curative treatment in relation to his consumption of alcohol or drugs, and

2. That a discharge would not be contrary to public interest.

The statutory conditions were more particularized in R. v. Beaulieu (1980) 53 C.C.C. 342, 7 M.V.R. 9 (N.W.T.S.C.), which is summarized in Martin's Criminal Code as follows:

> " . . . notwithstanding the accused has a lengthy record for Criminal Code driving offences the subsection may be resorted to where evidence adduced shows that the appropriate treatment for the accused's condition is available and that the accused is now well-motivated and has a good chance of overcoming his alcoholism."

That is, there must a good prospect that the program will succeed--that it will be genuinely "curative". The elements of Beaulieu, availability of appropriate treatment, motivation of the accused and a reasonable expectation that his alcoholism will be overcome, are all implied in that word. The

likelihood of success is also a factor in assessing public interest. Thus the commonsense considerations of Beaulieu are not additional requirements but a practical guide for applying the two statutory requirements.

His Honour Judge Woolaver found it would not be in the public interest to grant a conditional discharge to the accused.

> " . . . the Court considers the paramount factors to be - one, at the time and place of the event, the accused was clearly a serious menace to life and limb of any motorist, any motor vehicle passenger, or any pedestrian in the area in which this driving took place. Two, the accused has a record of four previous offences in relation to drinking and driving. Taking all factors into consideration, it is the view of the Court that it would not be in the public interest to invoke a conditional discharge under section 239(5) of the Criminal Code."

It would therefore appear that the learned trial judge considered the factor of deterrence as the overriding consideration. With respect, he would not have precluded from exercising his discretion in favour of a discharge for the reasons he mentioned. That appears to be the main thrust of the appeal.

As Hall, C.C.J. noted in R. v. MacDonald (C.T. No. 10,706, October 27, 1988--Unreported), the question of whether the granting of a discharge is not contrary to the plublic interest "is stated in s. 239(5) in the negative, in other words, it need only be shown that the granting of a discharge would not be contrary to the public interest. It does not have

to be shown that the granting of a discharge is in the affirmative sense in the public interest".

I do not find that the evidence suports a finding that in the present case the granting of a s. 239(5) discharge would be contrary to the public interest.

Danger to the public at the time of driving is inherent in all driving offences involving alcohol. The Beaulieu case and others cited by the Appellant make it clear that numerous previous covictions will not stand in the way of a discharge. Repeated offences suggest underlying causes requiring curative treatment. When fines and jail sentences have failed to keep a drinking driver off the roads, some other approach seems indicated. That would appear to Parliament's purpose in enacting s. 239(5).

Tallis, J., said in the Beaulieu case:

> "Having regard to the plain language of s. 236(2) I do not think that a court can now assume that a conditional discharge is not in the best interests of society. Once this section has been procclaimed in a jurisdiction, the Court is entitled to assume that adequate facilities will be provided for curative treatment. In some cases the evidence adduced may indicate that appropriate therapy or curative treatment will probably result in the accused overcoming his problems with alcohol. If such is the case it is probably in the best interests of society to take that route because such a solution is clearly preferable to repeated incidents of impaired driving which are not deterred by jail terms imposed on a person suffering from chronic alcoholism. In such cases society is only protected when the offender is in jail. In any given case the public interest may be best served by curative treatment as long a proper safeguards are imposed. Each case must be judged on its own

merits. If rehabilitation is accomplished, then the public will be protected in the future."

The late Chief Justice McKinnon said in his respected judgment in R. v. Grady 5 N.S.R. (2d) 264 that:

> "It has been the practice of this court to give priority considerations to protection of the public, and then to consider whether this primary objective could best be attained by:
>
> 1. Deterrence, or
> 2. Reformation and rehabilitation o the offender, or
> 3. Both deterrence and rehabilitation."

S. 239(5) (as the subsection is numbered at relevant times) gives the courts an important new instrument for the protection of the public by the rehabilitation of the offender. Deterrence has long been emphasized in ss. 239(1)(a)(ii) and (iii). It is unusual for an offender to reach his fifth conviction without a previous experience of the deterrent effect of incarceration. If genuine prospects for rehabilitation are before the court, however, it is not fair to the accused to ignore them because he should have been punished more severely in the past.

In "taking all factors into consideration" Judge Woolaver had fresh in mind the evidence presented by the appellant at the sentencing as well as Mr. Pink's able argument in favour of a discharge. He did not refer to the option of curative treatment in his sentencing remarks. On the basis of past performance it was open to him to remain unimpressed by the Appellant as a candidate for curative treatment, but present circumstances must govern.

It is to be noted that s. 239(5) refers to curative treatment in relation to the consumption of alcohol or drugs, while in the present case it appears to be the expert conclusion that such consumption by the appellant is merely a function of the underlying manic depressive illness from which he suffers, for which he is already receiving medication, and which must be controlled before the drinking problem can be effectively addressed. The present incident was preceded by a three-year period of abstinence from alcohol. While it would be too narrow to restrict a s. 239(5) discharge to situations where a problem of alcohol or drug consumption exists independently of underlying mental or emotional factors, an effective program would have to address both conditions. The appellant's response to treatment has been disappointing in the past.

No clear-cut program of curative treatment for the Appellant was outlined in the evidence or presented for the consideration of the trial judge. There is no intention to book the Appellant into a clinic. However the evidence does disclose that a curative scheme is in place, which is worthy of greater consideration than it appears to have received.

Gaston Leopold d'Entremont, Regional Coordinator for the Drug and Alcoholism Program for the Annapolis Valley Region, qualified as an expert on alcoholism, testified that he had kept in contact with the appellant since he was first referred to him by Bishop Leonard Hatfield in 1981. At that time he took first a five-day and then a 28-day program. In 1985 he took a second

28-day program after a referral by Bishop Arthur Peters. He was assessed on his second admission by Dr. Linda Watt, a psychiatrist from the United Kingdom in Canada for a year, who recommended long-term psychotherapy for which he was referred to Dr. O'Brien, another psychiatrist, in Dartmouth.

He did not continue long with Dr. O'Brien, Mr. d'Entremont said. "The letter that we got back from Dr. O'Brien suggested that he was only upset about the fact that he didn't have a license and he didn't see any reason for seeing him again, even though that Dr. Watt had strongly recommended long-term psychotherapy."

The Appellant was then referred to Dr. Poulos, a third psychiatrist, but Mr. d'Entremont did not know why that treatment was short-term. After the first admission the appellant had also seen Dr. Wood, another psychiatrist, whose conclusions were similar to Dr. Watts'. Mr. d'Entremont said he felt inadequate as far as offering any deep long-term psychotherapy himself.

He was asked by Mr. Pink:

> " . . . is there a rehabilitative program in your opinion, sir, that can help try to cure Reverend Earle of his present problem?"
>
> "A. Well, I believe that, as far as his alcoholism is concerned, that Reverend Earle has done fairly well, especially knowing the underlying problems that he has and its very difficult for a person to achieve contented sobriety if they have, you know, serious other problems that are not met, and I believe that if those problems were met that Reverend Earle's prognosis for continued sobriety

would be good."

Mr. d'Entremont said on cross-examination that he understood the appellant had not been drinking from 1985 until the present incident. Since 1985 the appellant had received guidance from Fr. Edward Theriault, a priest connected with the dependency program as a contact person, and with his help plus that of Rosie Keown, a counsellor, his family, Mr. d'Entremont and the Bishop the appellant had been staying sober in the sense of "putting the cork in the bottle, which is not what . . . what our aim in treatment is."

He said Fr. Theriault had declined to continue sessions with the appellant because he was "frustrated like many of us were that we were not being . . . not able to get to the problem.

> ". . . I think that drinking was one of the problems. But I'm sure there was something else that was preventing him from making a meaningful, contented recovery . . . "
>
> Mr. d'Entremont was asked:
>
> "Are you of the opinion, sir, that if Reverend Earle was allowed to have his license, the problem would go away?"
>
> "A. I think he could recover much better if he did have his license, but I understand that that's not the case, and therefore, he would have to learn through some special help to cope with the fact he doesn't have a license and will not have one."

Dr. Rosenberg testified he met with the appellant and his wife on April 12, 1988, for an evaluation session lasting 1 1/2 to 1 3/4 hours, before which Dr. Rosenberg had reviewed

copies of the notes of other professionals.

"My diagnostic conclusions were as follows. I felt that Mr. Earle was most certainly suffering from a chronic alcoholism as part of a substance abuse disorder and that it was equally likely that the relapses that he as was experiencing were due to a recurrent mood disorder. The technical term for this illness, under current classification, is a primary affective disorder--affective referring to the mood state--bipolar, meaning that there were swings both high and low, a term that used to be subsumed under the (inaudible) manic-depressive illness."

He said " . . . Most certainly Mr. Earle is obsessed about driving; however, part and parcel of depressive illness is obsessional thinking. . . "

"The condition which I feel Mr. Earle is suffering from is certainly one of the most treatable within my specialty area. Most depressive episodes will get better by themselves if you wish to wait for the length of time and the length of time can vary from months to well over five years. With the symptoms that Mr. Earle did have and he did not have them only on this occasion, but on occasions in the past as well, he was an ideal candidate for anti-depressant medication which he is currently taking. In addition, to prevent further relapses of the condition, there are at least two medications which are currently available. One, the most accepted treatment, which is lithium carbonate, a simple salt, which is given on a daily basis and which is monitored by routine blood tests, generally on a bi-monthly level. There is another medication called Carbamazepine which is a second line of prophylaxis, but is also efficacious. My object with Mr. Earle would be to treat both the depression presently and to prescribe lithium for which the investigations have already been completed as a means of prophylaxis and as a means of aiding the anti-depressant."

At the conclusion of Dr. Rosenberg's testimony he was asked:

"Q. Now, if one was able to control his manic-depressive phases, how do you feel , sir, as a psychiatrist, that that will effect the treatment of his alcoholism?

"It is my feeling that with control of the recurrent mood disorder, he would be relieving a significant, if not the most significant, stresser to his recidivous alcoholism.

"Q. And as a result of your diagnosis and treatment, are you able to say, doctor, as to what, in your opinion, would be the diagnosis . . . or prognosis, of Reverend Earle's recovery?"

"A. In general, the prognosis for bipolar affective disorder or manic-depressive illness is excellent."

On cross-examination Dr. Rosenberg was asked:

"Q. After the initial treatment, what would you prescribe? What other treatment do you prescribe besides the pills. You said 'initialy ' you prescribed the pills. What else?

"A. By no means do I discount what my colleagues have said regarding the obsessive nature of Mr. Earle's thinking regarding driving and I think that that is something that has to be explored. My concern, however, is that I have not seen Mr. Earle in any other but a depressed state and within the confines of my clinical practice. In a depressed state, when a person is obsessively obsessiveness (?), it is due primarily to the depression. I would consider talking about that as well as any number of other things."

"Q. So, if . . . you haven't treated him with medications you would have prescribed as of yet. Is that correct?"

A. No-no. He's been taking anti-depressants for approximately six weeks now.

"Q. Is it too early to ,. . . haven't you not seen him in that six week period in a state of . . .

"A. I have seen Mr. Earle approximately six times since my initial contact with him."

He said the appellant was still depressed, but a trial period for an anti-depressant was six to eight weeks, longer if sress was present. The purpose of the medication was to help the depression, not the obsession to drive. But obsessive thinking was characteristic of depressive illness. If the depression was cured and the obsessive thinking remained

there were "any number of ways of dealing with it." The prognosis for dealing with obsessive illness was good.

> "Q. There is nothing, Dr. Rosenberg, that would prevent Reverend Earle from continuing this treatment after a period of incarceration. Is that correct? If the period of incarceration is approximately three months? You could still treat him after that. Is that correct?"
>
> "A Providing that the medication is continued if he is incarcerated."

The conclusions which the learned trial judge may have drawn from the expert evidence are that the appellant is in the continuing care of Dr. Rosenberg and is on a course of medication for depression. Successful treatment of the depression may correct his obsession with driving. He has suffered from recidivist alcoholism and with help was able to stay sober from 1985 until March of 1988. Previous psychiatric consultations and the help of family and consultants were able to help him keep sober but did not affect his underlying problems. The treatment he is receiving from Dr. Rosenberg could continue despite a period of incarceration. The prognosis for depressive-obsessive illness is good, but it was too early to evaluate the effect of the medication which had been prescribed.

At the hearing of the appeal the following letter from Dr. Rosenberg to Mr. Pink, dated January 11, 1989, was admitted with the consent of the Crown.

> "As you know, I have been seeing Mr. Earle on a regular basis since my initial contact with him in April, 1988. Since that time, Mr. Earle has been seen regularly, at times with his wife, for

> supportive psychotherapy. In addition, he has been treated for a depressive illness with Tofranil, which has recently been discontinued, and has been maintained on Lithium Carbonate, as a means for both prophylaxis and active treatment of an abnormal mood state (depression).
>
> "Both Mr. Earle and his wife report that he is doing well, and may very well be functioning better now than he has for years. He remains active within his community, enjoys his work, and looks forward to the future."

To qualify as curative treatment under s. 239(5) a scheme or program of treatment must be "in relation" to a person's consumption of alcohol or drugs. It may be necessary to treat an underlying condition as well, but a curative treatment program must be aimed at least in part directly, as opposed to indirectly, toward correction of the consumption problem. The strategy disclosed in Dr. Rosenberg's evidence focuses directly upon the underlying depression. If effective, that may correct the obsessive behavior. If it does not, the obsession must be separately addressed. Presumably the alcohol consumption problem is third on the list. But that is the problem that brought the appellant before the court. That is the problem that must be the primary target, or at least one of the primary targets, of a curative treatment program within the meaning of s. 239(5).

However, as Appellant's counsel points out, the psychotherapy and medication the Appellant is receiving from Dr. Rosenberg is not the whole of the curative treatment program in which he is involved. In the actual management of alcohol consumption the Appellant is assisted by a team consisting of his wife, his bishop, Mr. D'Entremont and Ms. Keown. Their

joint efforts may be credited with the three-year period of abstinence which ended with the present offence.

Fr. Theriault, a former member of that team, dropped out because of his frustration with the failure of efforts to identify and deal with the underlying problem. Mr. d'Entremont said that frustration was shared by himself and others associated with the Appellant.

The Appellant contends that Dr. Rosenberg is the first of the five psychiatrists consulted by the Appellant to identify and treat the underlying problem--the manic-depressive illness of the Appellant. Now the Appellant is responding to treatment and the prognosis is good.

Thus it would appear that the Appellant, for the first time, is involved in a program that promises to be curative in the full sense of the word, and in particular with respect to his consumption of alcohol. Mr. d'Entremont's goal of "contented sobriety" seems attainable.

Evidence before the trial judge that the appellant was not well-motivated to deal with his alcoholism, a Beaulieu criterion, pre-dates the present program involving Dr. Rosenberg and is no longer relevant. Presence of proper motivation may be inferred from the positive results reported by Dr. Rosenberg.

The offence occurred during a period when the Appellant, despite impressive efforts to help him, had not been

properly diagnosed. To a degree his responsibility for his own actions, including his apparent lack of enthusiasm for reformation, was diminished by the mental illness from which he suffered. That must have a bearing on the weight to be attached to deterrence in his sentencing. The mandatory terms of imprisonment set out in s. 239(1) of the Criminal Code must be considered "last resort coercion of offenders who willfully refuse to comply with other sanctions." Here the willfulness of the refusal must be considered in light of the underlying mental illness. Incarceration is unlikely to be an effective deterrent without management of the illness that resulted in the present offence and, in likelihood, the previous ones.

I find that the criteria for applying s. 239(5) have been satisfied by the Appellant. It has been proven that he is in need of curative treatment within the meaning of the statute as specified in the Beaulieu case. After a period of some eight years of discouraging progress a program of curative treatment appears to have been achieved that holds the promise of protecting the public permanently from further impaired driving exploits by the accused. When likely rehabilitation is at hand, the time does not appear appropriate for belated emphasis on deterrence. I find that the evidence discloses that the public will be better protected by rehabilitation of the Appellant than by the specific deterrence afforded by incarceration. A discharge under proper conditions is not contrary to the public interest.

The general deterrence of severe penalties is not

notoriously effective in impaired driving cases. As LeDain, J., said of them in another context in R. v. Thomsen, (1988) 63 C.R.(3d) 1,

> "Increased penalties have not been an effective deterrent."

Whether or not to grant a s. 239(5) discharge is a question preeminently in the discretion of the trial judge. My discretion should not be substituted for his unless there are good reasons for doing so.

He found that a discharge would not be in the public interest. With great respect, I find that he misdirected himself as to the criteria to be applied. I find as well that he did not direct himself regarding the curative treatment scheme proposed by the Appellant; in fairness he did not have before him the updated report of Dr. Rosenberg indicating that the regimen of psychotherapy and medication is having the desired effect.

The position of the summary convicton appeal court was stated by Hall, C.C.J., in the MacDonald case, supra, as follows:

> "The role of an appeal court on an appeal respecting sentence is set out in section 614(1) of the Criminal Code.
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> That subsection provides:
>
> Where an appeal is taken against sentence the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may upon such evidence, if any, as it thinks fit to require or to

receive,

(a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted, or

(b) dismiss the appeal.

"The duty of the court in considering the fitness of a sentence was considered by the Appeal Division of the Nova Scotia Supreme Court in Regina v. Cormier (1974) 9 MN.S.R. (2d) 687. At page 694 Mr. Justice Macdonald speaking fo the court said:

"Thus it will be seen that this court is required to consider the "fitness" of the sentence imposed, but this does not mean that sentence is to be deemed improper merely because the members of this court feel that they themselves would have imposed a different one; apart from misdirection or non-direction on the proper principles a sentence should be varied only if the court is satisfied that it is clearly excessive or inadequate in relation to the offence proven or to the record of the accused."

Taking all circumstances into consideration, I find that a s. 239(5) discharge is the fit sentence for the Appellant, as opposed to mandatory incarceration under s. 239(1)(a)(iii).

I allow the appeal and grant the Appellant a discharge under s.239(5) and s. 662.1 conditional upon his being on probation for a period of three years subject to an order containing the following terms:

1. He shall keep the peace and be of good behavior.

2. He shall report to a probation officer not less than once a month or as often as such officer shall direct.

3. He shall refrain from owning or operating a motor

vehicle.

4. He shall abstain absolutely from the consumption of alcohol.

5. He shall continue under the care of Dr. E. M. Rosenberg, and shall keep all appointments made with Dr. Rosenberg or specialists recommended by Dr. Rosenberg and co-operate fully with respect to medication and other treatment.

6. He shall continue counselling with Mr. Gaston Leopold d'Entremont and shall keep all appointments made with Mr. d'Endremont, and with all other counsellors to whom he may be directed by Mr. d'Entremont.

7. He shall undergo such further and other counselling or therapy as his probation officer may recommend upon appropriate counsultation.

The matter is returned to the Provincial Court for imposition of the probation order.

JUDGE OF THE COUNTY COURT

OF DISTRICT NUMBER TWO

CANADA

PROVINCE OF NOVA SCOTIA

IN THE PROVINCIAL MAGISTRATE'S COURT

BETWEEN:

HER MAJESTY THE QUEEN

- and -

JOHN CHIPMAN EARLE

HEARD BEFORE: His Honour Judge P.R. Woolaver

PLACE HEARD: Barrington, Nova Scotia

DATE HEARD: July 6, 1988

CHARGE: "That he, at or near Barrington, in the County of Shelburne, Nova Scotia, on or about the 9th day of March, 1988, did unlawfully operate a motor vehicle while his ability to operate the vehicle was impaired by alcohol or a drug, contrary to Section 237(a) of the Criminal Code."

COUNSEL:

James Burrill, Esq., for the Prosecution

Joel Pink, Esq., for the Defence

TRANSCRIPT OF PROCEEDINGS