C.K. 10,137

IN THE COUNTY COURT JUDGE'S CRIMINAL COURT

OF DISTRICT NUMBER FOUR

BETWEEN:

ALAIN BLAINE RENNIE

APPELLANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

HEARD: At Kentville, N.S., on the 21st day of November, 1989.

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

DECISION: February 6, 1990

COUNSEL: Robert C. Stewart, Esq.,
Counsel on behalf of the Appellant.

D. Carmichael, Esq.,
Counsel on behalf of the Respondent

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

This is an appeal of a conviction entered against the appellant with respect to a charge of operating a motor vehicle while his blood-alcohol level exceeded the allowable limit contrary to section 237(b) of the Criminal Code. The appellant was found guilty of the offence by His Honour Judge K.L. Crowell of the Nova Scotia Provincial Court at Kentville on February 9, 1989. A companion charge of impaired operation contrary to section 237(a) of the Code was dismissed.

The issue to be determined is whether the breath samples were obtained as a result of a lawful demand by a peace officer and if not whether the results of the breath analyses ought to have been excluded from the evidence.

The facts are that at approximately 2 a.m. on September 18, 1988, Sergeant John S. Ives, a military police officer, who was a passenger in a marked military police vehicle at the time, observed the appellant driving a motor vehicle in an erratic manner on Ward Road in Greenwood. The appellant subsequently turned his vehicle on to Loch Lomond Road in the "new P.M.Q. area", which is between a half and one kilometer west of Canadian Forces Base Greenwood. The military police vehicle followed the appellant and eventually the appellant came to a stop as directed by Sergeant Ives. Sergeant Ives then approached the appellant and observed symptoms of

impairment by alcohol. He read the so-called ALERT demand to the appellant. The appellant appeared to be upset by all this but he subsequently accompanied Sergeant Ives to the military police office at C.F.B. Greenwood. Upon arrival there Sergeant Ives informed Corporal Joseph Benoit, an on duty military police officer, of his observations respecting the appellant.

Following this Corporal Benoit read the ALERT demand to the appellant who blew into the ALERT instrument and registered a fail. Corporal Benoit then read the so-called breathalyzer demand to the appellant. The appellant agreed to provide samples of his breath and was taken to the R.C.M.P. detachment in nearby Kingston where samples were obtained resulting in readings of 180 and 160 milligrams of alcohol per 100 millilitres of blood.

In the evidence of Sergeant Ives and Corporal Benoit, the appellant was referred to interchangably as "Corporal Rennie" or "Mister Rennie".

In his decision the learned trial judge said the following:

> In this instance, the Military Police were not in pursuit of a civilian who had exited D.N.D. property (as in the Nolan case). Here, if the accused had been stopped on the "Ward Road" (which local citizens, and the Court, know to be a public highway), and there is no evidence that the vehicle had been driven on D.N.D. property, there would be no authority to give a breathalyzer demand (particularly if the accused was a civilian).

> However, the accused is an individual subject to the Code of Service Discipline and had driven onto the "new P.M.Q. area" (which in local and common parlance refers to the Post Married Quarters on Department of National Defence property). Further, the accused was transported directly onto the "base" and to the Military Police Section where the ALERT instrument was located, and where the final determination was made to give to the accused the breathalyzer demand.

Mr. Carmichael, counsel for the respondent, candidly acknowledged that the evidence did not support the findings of Judge Crowell with respect to the alleged offence occurring on National Defence Property and that the appellant was a person subject to the Code of Service Discipline. With the greatest of respect to Judge Crowell, I must say that I agree with and adopt Mr. Carmichael's position in this respect.

Mr. Carmichael went on to argue, however, that despite this the demand for breath samples pursuant to section 238 was a lawful demand because at the time it was made the appellant was in fact on National Defence property and Corporal Benoit was unquestionably a "peace officer" within the meaning of the Criminal Code at the time.

Mr. Stewart, for the appellant, however, maintained that since the driving complained of, the actus reas, did not take place on National Defence property and the appellant was not a person subject to the Code of Service Discipline, Corporal Benoit had no authority to give the demand because he did not come within the definition of peace officer vis a vis the appellant.

"Peace officer" is defined in the Criminal Code, in part, as follows:

> 2. "Peace officer" includes
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> (g) officers and non-commissioned members of the Canadian Forces who are
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> (i) appointed for the purposes of section 156 of the National Defence Act, or
>
> (ii) employed on duties that the governor in Council, in regulations made under the National Defence Act for the purposes of this paragraph, has prescribed to be of such a kind as to necessitate that the officers and non-commissioned members performing them have the powers of peace officers;

Section 156 of the National Defence Act is as follows:

> Such officers and men as are appointed under regulations for the purposes of this section may
>
> (a) detain or arrest without a warrant any person who is subject to the Code of Service Discipline, regardless of the rank or status of that person, who has committed, is found committing, is suspected of being about to commit or is suspected of or charged under this Act with having committed a service offence; and
>
> (b) exercise such other powers for carrying out the Code of Service Discipline as are prescribed in regulations made by the Governor in Council.

The applicable regulations are found in the Queen's Regulations and Orders for the Canadian Forces pursuant to s. 12(1) of the National Defence Act as follows:

22.01(2) For the purposes of subparagraph (f)(ii) of the definition of 'peace officer' section 2 of the Criminal Code, it is hereby prescribed that any lawful duties performed as a result of a specific order of established military custom or practice, that are related to any of the following matters are of such a kind as to necessitate that the officers and men performing them have the powers of peace officers:

(a) the maintenance or restoration of law and order;

(b) the protection of property;

(c) the protection of persons;

(d) the arrest or custody of persons;

(e) the apprehension of persons who have escaped from lawful custody or confinement;

(f) the enforcement of warrants issued by the Minister pursuant to section 218 of the National Defence Act;

(g) the enforcement of the Customs Act and regulations made thereunder, or

(h) the enforcement of the Boating Restriction Regulations and the Small Vessel Regulations.

The Supreme Court of Canada considered the jurisdiction of military police officers as peace officers under the Criminal Code in R. v. Nolan, (1987) 79 N.S.R.(2d) 394.

In that case, Mr. Nolan, a civilian drove through the gate at Canadian Forces Base Shearwater at an excessive rate of speed. He was immediately pursued by military police officers who stopped him on a public highway beyond National Defence property. On observing Mr. Nolan the officers concluded that he was driving under the influence

of alcohol and one of them, Private Ettinger, gave him the breathalyzer demand. Nolan was then taken to the Dartmouth police office where he refused to provide samples of his breath and was charged with "refusal" under then section 235(2) of the Criminal Code.

He was acquitted at trial on the ground that the military police officer, was not a "peace officer" under the provisions of the Criminal Code. This decision was reversed on appeal by way of stated case to the Appeal Division of the Nova Scotia Supreme Court.

The issue before the Supreme Court of Canada was whether the military police officer who gave the demand was a "peace officer" at the time the demand was given.

Chief Justice Dickson, in delivering the unanimous decision of the Court said at page 396:

> It is clear that the first charge (the refusal) could only be supported if the Crown could show that Private Ettinger was a "peace officer" when he made the breathalyzer demand.

He went on to consider whether Private Ettinger came within the definition set out in the Criminal Code. With respect to section 2(g)(i), formerly section 2(f)(i), he said at page 401:

> The weight of authority points, therefore, to the conclusion that s. 2(f)(i) does not extend the authority of military police to act as "peace officers" throughout a province and in relation to all residents of a province, duplicating the role and function of the civil police. Of course, the mere preponderance of authority is not sufficient in itself to justify a particular conclusion before this court, unless that authority is grounded in reason and fairness. In the present case, however,

authority, common sense and principle all lead to the same conclusion.

And further,

> . . . Section 2(f)(i) of the Code speaks of the purposes of s. 134 (now s. 156 of the National Defence Act) not merely of the group defined by s. 134. The purposes of s. 134 are clear: The section provides that officers and men appointed under regulations pursuant to the section may exercise authority over persons subject to the Code of Service Discipline. That is the full extent of the grant of power. Under this reading, s. 2(f)(i) of the Code allows such officers and men the additional authority to enforce the Criminal Code but only in relation to persons referred to in s. 134 itself.

He concluded at page 402:

> . . . The exigencies of crime prevention and detection do not require an interpretation of s. 2(f)(i) of the Criminal Code that would permit military police officers to exercise the powers of a "peace officer" in relation to all Canadians and throughout the country. I would therefore read s. 2(f)(i) as according to persons appointed for the purposes of s. 134 of the National Defence Act the additional powers of peace officers under the Criminal Code, but only in relation to men and women subject to the Code of Service Discipline.
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> The arresting military police officer in the present case could not derive authority from s. 2(f)(i) to demand of Mr. Nolan, a civilian, that he provide a breathalyzer sample. It remains to be seen whether such authority can be derived from the definition of "peace officer" in s. 2(f)(ii) of the Criminal Code.

The Chief Justice then went on to consider the application of the relevant regulations referred to in sub-paragraph (g)(ii). He cited s. 22.01(2) of the Queens Regulations and said at page 403:

> There can be no doubt that the detection and arrest of inebriated drivers falls within the "matters" enumerated in s. 22.01(2). It could be said to relate to the maintenance or

> restoration of law and order, to the protection of property, or to the protection of persons. It certainly relates to the arrest or custody of persons. That is not the final hurdle, however, for the regulation imposes further conditions upon military personnel claiming to act as peace officers under s. 2(f)(ii) of the Code. A member of the armed forces is not given leave by s. 22.01(2) of the Queen's Regulations to act as a peace officer in all circumstances. Military personnel only fall within the definition when they are performing "lawful duties" that are the "result of a specific order or established military custom or practice".

He then referred to the Government Property Traffic Regulations and the Defence Establishment Trespass Regulations.

He held that the military police had authority under the Traffic Regulations to enforce the speed limits on the Base. Thus they had authority to stop Mr. Nolan as they did.

Section 28(1) of the Trespass Regulations provides that every security guard, which includes military police, is authorized to arrest without warrant any person found committing or on reasonable and probable grounds believed to have committed any criminal offence on any defence establishment.

Chief Justice Dickson noted at page 404:

> . . . Finally, the suspected criminal infraction of driving while impaired by alcohol took place on a "defence establishment", fulfilling the last requirement of s. 28(1) of the Trespass Regulations. The military police officer in the instant case therefore had statutory authority to arrest Mr. Nolan without warrant to enforce the criminal law.

He went on to say:

> In summary, the authority vested in the military police by virtue of s. 28(1) of the Trespass Regulations was sufficient to fulfill the requirements of s. 22.01(2) of the Queen's Regulations: the military police officer was performing "lawful duties" flowing from a "specific order or established military custom or practice". To perform those duties of enforcing the criminal law against civilians on a military base, it was necessary, furthermore, to have the powers of a peace officer. I have already emphasized that the detection of inebriated drivers clearly falls within a number of the enumerated "matters" in s. 22.01(2). I would conclude, therefore, that the arresting officer was a peace officer within the meaning of s. 2(f)(ii) of the Criminal Code when read with s. 22.01(2) of the Queen's Regulations and s. 28(1) of the Trespass Regulations. Being a "peace officer", the military police officer in the instant case was entitled to invoke the statutory authorization of s. 235(1) of the Criminal Code and to issue a breathalyzer demand.

Finally, he stated at pages 404 - 405:

> One issue must yet be resolved. Although the offence took place on a defence establishment, the actual detention of the accused occurred on a public highway after the military police had followed Mr. Nolan out of the gates of the base. The question arises whether the military police retained their status and authority as peace officers once they left C.F.B. Shearwater. On the particular facts of the instant case, I have no difficulty in concluding that they did. The accused was seen committing a traffice offence on the base. The officers only saw the accused as he was speeding out of the gates of the base and, in order to enforce the law, the military police officers had to follow Mr. Nolan off the base. There is absolutely no evidence that the accused attempted to evade the military police, so the circumstances do not really raise the issue of "hot pursuit". Given the instantaneous police warning to the accused to stop his vehicle and the detention immediately outside the gates of the base, there was such a clear nexus between the offence committed on the base and the detention off the base that I am convinced that the military police retained their status and authority as peace officers.

Applying the principles stated by Chief Justice Dickson to the present appeal, due to the fact that I have concluded with the approbation of the respondent's counsel that the appellant was not a person subject to the Code of Service Discipline and the suspected criminal infraction did not occur on a defence establishment or National Defence property, it appears at first blush that Corporal Benoit was not a "peace officer" at the time of making the demand. The question remains, however, whether, as contended by Mr. Carmichael, the fact that when he made the demand Corporal Benoit and the appellant were on a defence establishment provides a sufficient nexus between the offence committed off the base and the making of the demand to clothe Corporal Benoit with the authority of a peace officer. In my opinion it does not.

In the course of argument I posed a hypothetical situation to counsel, somewhat as follows: A, a civilian, is observed by B driving in an impaired state on a public highway some distance from a military base. B manages to stop A and persuade him to accompany B to the military base. Upon arrival at the base B sees a military police officer and says to him "This man, A, was just driving his car in an intoxicated condition. He has committed an offence. You should deal with him". The military police officer responds by demanding that A submit to a breathalyzer test. Is that a lawful demand?

In my opinion it clearly is not and it is analogous to the facts in this appeal. As Chief Justice Dickson said in Nolan at page 401:

> On the level of principle, it is important to remember that the definition of "peace officer" in s. 2 of the Criminal Code is not designed to create a police force. It simply provides that certain persons who derive their authority from other sources will be treated as "peace officers" as well, enabling them to enforce the Criminal Code within the scope of their pre-existing authority, and to benefit from certain protections granted only to "peace officers". Any broader reading of s. 2 could lead to considerable constitutional difficulties.

In both my hypothetical and the facts of the case on appeal it is apparent that the locale of the offence was a place other than a military base, the person apprehending the driver had no lawful authority over him, and the driver was not a person subject to the Code of Service Discipline. The only connection with the military establishment was the fact that the "demand" was made there.

In my opinion it would be entirely unreasonable and against the public interest to hold that military police officers could assume control or jurisdiction over civilians by such means. At the risk of overstating the case, to do so, in my opinion, could give rise to suggestions of improper and unfair tactics and all sorts of abuse. Accordingly, I have concluded that there is not, in law or fact, a sufficient nexus here to bestow upon Corporal Benoit the authority of a peace officer

at the time of making the demand. Therefore it was not a lawful demand and the evidence obtained as a result of it was illegally obtained and ought to have been excluded from the evidence, specifically, the certificate of analysis. Without it the conviction cannot stand.

Accordingly, the appeal is allowed, the conviction set aside and an acquittal entered.

There will be no order for costs.

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