1990
PROVINCE OF NOVA SCOTIA
COUNTY OF LUNENBURG SS C.BW. 8028

IN THE COUNTY COURT OF DISTRICT NUMBER TWO

JUDGE'S CRIMINAL COURT

BETWEEN:

DOUGLAS KEVIN JANES

APPELLANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

Heard before The Honourable Judge Gerald B. Freeman at Bridgewater, Nova Scotia on February 6, 1990.
David F. Walker, Q.C. counsel for the Appellant
Anthony W. Brown, Esq. on behalf of the Respondent

D E C I S I O N

1990, FEBRUARY 26TH, FREEMAN, C.C.J.: The Appellant Douglas Kevin Janes has appealed against his conviction on a charge that he operated a motor vehicle with more than 80 milligrams of alcohol per 100 millilitres of his blood, and from his sentence to a fine of $2,000.

At 1:15 a.m. on April 25, 1989, Constable Colin Brian Gray stopped Mr. Janes' vehicle in Bridgewater, N.S., after following it for half a kilometer and noting that it had driven left of centre on "numerous occasions". Constable Gray testified that Mr. Janes had a strong smell of alcohol on his breath and bloodshot eyes. He observed that Mr. Janes was unsteady on his feet when he walked back from his own vehicle to the police car.

"At that time I formed the opinion that the accused was impaired by alcohol and gave him the breathalyzer demand." Constable Gray said. He included Mr. Janes' unsteadiness on his feet among the indicia upon which that opinion was based.

Mr. Janes was informed of his right to counsel under the Charter of Rights and given a breathalyzer demand. He did not ask to consult with a lawyer. He took the breathalyzer test and both readings were 150 milligrams of alcohol per 100 millilitres of blood. The breathalyzer test results were proven by certificate.

The issues raised by the notice of appeal are that the trial judge, His Honour Joseph Kennedy of the Provincial Court, erred in law in holding that R. v. Baroni (1989) 49 C.C.C. (2d) 55 (N.S.C.A.) was not applicable to the present facts; that the breathalyzer unit was improperly designated in the technician's certificate; that the Crown had failed to prove the suitability of the fluid in the test ampoule used in the breathalyzer test; and that the Defence had raised a reasonable

doubt that the certificate evidence was reliable.

The basis of the first ground is that Mr. Janes was detained but had not been advised of his right to counsel under s. 10(b) of the Charter when he was asked to walk from his vehicle back to the police car. He argues that evidence of his unsteady walk should have been excluded under s. 24(2) of the Charter on the authority of the Baroni case.

In Baroni the accused was asked to perform certain "sobriety" tests, the results of which were included by police as reasonable and probable grounds for a belief that his abilities were impaired. He was given a breathalyzer demand based on that belief and refused the test. Evidence of the test results was excluded under s. 24 of the Charter because the accused had been detained and conscripted against himself to create that evidence without having been informed of his right to retain and instruct counsel.

In the present case there can be little doubt that the Appellant was detained. He was not informed of his right to counsel before he was asked to walk back to the police vehicle. His counsel contends he was under no more of a duty to do so than Baroni was under a duty to perform the sobriety tests. Observations made by the police officer of his manner of walking between the vehicles became part of the evidence of reasonable and probable grounds for the belief on which the demand was made. In the absence of that evidence a reasonable doubt may exist as to whether the requisite belief was based on the proper

grounds.

While there are clearly parallels between the two situations, Judge Kennedy distinguished them by considering the intent of the police officers.

> "The act of walking back to the police car in and of itself is innocuous. The request to do so was not I find designed to cause the accused to incriminate himself."

In a Baroni situation the intention of the police was to conscript an accused person to create evidence against himself. In the present situation the request to walk from one vehicle to the other may be seen as a routine incident of detention, a virtual necessity when other persons are present in the vehicle of the detained driver, and at worst a convenience to police when the driver is alone. Performance of a contrived sobriety test may be likened to a confession, observations of impaired capacity made while walking between vehicles to real evidence. But that does not fully answer the question raised by the Appellant.

The Appellant was detained from the moment he lost the liberty to decide his own actions for himself, probably when the police emergency equipment was engaged to investigate a suspected offence against the Criminal Code, depriving him of the right to continue on his course and incidentally impeding his access to counsel. It was a direction given by the police which he was obliged to obey.

The point at which detention begins has been considered in numerous cases, including the following:

R. v. Thomsen (1988) 40 C.C.C. (3d) LeDain, J.:

> "... there is a detention within 2.10 of the Charter when a police officer or other agent of the state assumes control over the movements of a person by a demand or direction which may have significant legal consequence and which prevents or impedes access to counsel."

R. v. Bazinet (1986) 25 C.C.C. (3d) 273 (Ont. C.A.) Tarnopolsky, J.:

> " . . . LeDain's extension of 'detention' to instances of 'psychological' restraint or compulsion or coercion is predicated upon two requirements: (1) a 'demand or direction' in response to which (2) 'the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes the choice to do otherwise does not exist.'"

R. v. Saunders (1988) 41 C.C.C. (3d) 532, (Ont. C.A.) Cory, J.:

> "There can be no doubt that a citizen pulled over by a police car which activated its flashing red lights would believe that he was detained . . . "
>
> "In the case at bar, the two requirements of 'psychological' restraint were fulfilled. The demand or direction was made by the officer both in directing the appellant's car to pull over and in requiring the appellant to perform the co-ordination tests."

The direction to walk from his own car to the police car would also be an incident of detention. It resulted in a deprivation of liberty and Mr. Janes might reasonably have believed he had no choice to do otherwise.

S. 10 of the Charter says:

> "10. Everyone has the right on arrest or detention;
> (a) to be informed promptly of the reasons therefor;
> (b) to retain and instruct counsel without delay and to be informed of that right ... "

While the reason for the detention may have been apparent, the Appellant was not informed of his right to counsel and clearly suffered an infringement of his Charter rights. If he had been given a demand to provide a breath sample for a roadside screening device, or A.L.E.R.T., numerous cases hold that the infringement would have been justifiable under s. 1 of the Charter which reads:

> "1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

The issue under s. 1 of the Charter is not the magnitude of the infringement, but whether it can be said to be "prescribed by law" and "demonstrably justified," as the A.L.E.R.T. cases illustrate.

In the present case the infringement is not justified under s. 1 of the Charter in the absence of a right in the police to compel a detained individual to obey a routine request to walk to the police vehicle. Upon detention the appellant should have been informed of his right to counsel.

Should the evidence arising as a result of that

Charter infringement be excluded under s. 24(2) of the Charter?

S. 24(2) reads:

> "24 (2). Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

In considering this provision in R. v. Collins [1987] 1 S.C.R. 265 Lamer, J. says:

> "At the outset it should be noted that the use of the phrase "if it is established that" places the burden of persuasion on the applicant, for it is the position which he maintains which must be established. Again, the standard of persuasion required can only be the civil standard of the balance of probabilities. Thus, the applicant must make it more probable than not that the admission of the evidence would bring the administration of justice into disrepute."

> The test is objective: "Would the admission of the evidence bring the administration of justice into disrepute in the eyes of the reasonable man, dispassionate and fully apprised of the circumstances of the case? The reasonable person is usually the average person in the community, but only when that community's current mood is reasonable."

> "... "Real evidence that was obtained in a manner that violated the Charter will rarely operate unfairly for that reason alone. The real evidence existed irrespective of the violation of the Charter and its use does not render the trial unfair. However, the situation is very different with respect to cases where, after a violation of the Charter, the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination. Such evidence will generally arise in the context of an infringement of

> the right to counsel... The use of self-incriminating evidence obtained following a denial of the right to counsel will generally go to the very fairness of the trial and should generally be excluded. ..."

The evidence at issue in the present case, the observance of unsteady walking by the appellant, seems a kind of hybrid, somewhere between glassy eyes and the smell of alcohol which exist independently of any further participation by an accused person, apart from breathing, and the self-incriminatory evidence of sobriety tests which create a special situation designed to make signs of impairment more obvious. If the evidence is to be excluded under s. 24(2), given the routine and inherently neutral character of the request to walk between vehicles, it would seem incumbent on an accused person to establish, to prove to a balance of probabilities, that its admission would bring the administration of justice into disrepute. Such might be the case if an accused person could establish that the walk he was asked to take between vehicles was in reality a disguised sobriety test, intended primarily to give the police an opportunity to observe his condition. That has not been established in the present case and Judge Kennedy made a specific finding to the contrary.

I agree with Judge Kennedy that the evidence should not be excluded under s. 24(2); it is not evidence that would bring the administration of justice into disrepute in the eyes of a reasonable person.

If that evidence is not to be excluded, it is

unnecessary to consider the main distinguishing feature between this case and the Baroni case: the Baroni case dealt with a refusal; this case deals with a breathalyzer test taken and failed. In R. v. Rilling [1976] 2 S.C.R. 183 the Supreme Court of Canada ruled that certificate evidence of breath tests was admissible even when police lacked reasonable and probable grounds for the belief on which their demand was based. That case remains binding authority in Nova Scotia, where it has not yet been decided whether it is changed or modified because of the Charter: R. v. Marshall 91 N.S.R. (2d) 211.(N.S.C.A.). I dismiss the first ground of appeal.

The second ground of appeal is based on the fact that the instrument referred to in the technician's certificate is described by the instrument's registered trade name, "Breathalyzer" followed by a capital "R" raised above the line and the model number, "Model 900A". In the order approving this model in the Canada Gazette the capital "R" is ringed or circled, the conventional sign for a registered trade name. The "R" in the certificate is not ringed. If this was indeed an error in the body of the certificitate, as alleged by the Appellant, it was an error without practical significance on which nothing turned. This could hardly have misled or prejudiced the Appellant. I dismiss this ground of appeal.

The third ground of appeal is that the trial judge erred in law in holding that the burden lies on the appellant to rebut the presumption that the expiry date of the "ethyl alcohol standard" referred to in the certificate was a date later than

April 25, 1989, and/or in holding that the evidence of Cst. Gray that he did not know the expiry date, but that whether or not the expiry date was prior to April 25, 1989, could be a significant factor in determining whether the alcohol solution was "suitable" did not rebut that presumption.

> Constable Gray testified that in administering the breathalyzer test "I followed the normal procedures on the checklist . . .
>
> "Q. O.K.
>
> "A. ... I can't recall exactly what, what I did step by step without referring to the checklist but . . .
>
> "Q. Do you have the checklist with you?
>
> "A. No I have not. ...
>
> "... MR. WALKER: ... Tell me, you've also indicated that there was ah an alcohol standards ah lot number 330 I believe used in connection with the machine. You require -- or do you recall what the expiry date of that ah BDHs standard 330 was?
>
> "A. No I'm afraid I don't. That would be on the checksheet.
>
> "Q. And ah but you don't recall to your own knowledge what that was?
>
> "A. No I don't.
>
> "All right. I take it it would make a difference ah to the acuracy of the S.A.S. test whether or not that BDH standard was still in force or, or whether the expiry date was a date earlier than April 25, 1989.
>
> "A. Are you asking me . . .
>
> "Q. Yeah.
>
> "A. . . . whether it would have made a difference? I assume it would have made a difference yes if it was expired."

Judge Kennedy ruled:

> "As to the expiry date issue in relation to the Certificate, it is not requisite in the Certificate that the expiry date vis a vis the S.A.S. solution be noted ah we have a qualified technician producing evidence as to the accuracy of the machine in questiion. He said that he was dealing with ah an approved instrument. Mr. Walker raised the issue as to whether or not the solution in question had expired but ah received no answer to the question because the officer did not have his checksheet with him. Mr. Walker has not thereby in any way rebutted any presumption that the Crown must rely upon -- not presumption but rebutted any prima facie evidence that the Crown must rely upon in order to obtain a conviction in the matter. The simple suggestion that the, that the solution may have expired is not sufficient to rebut the presumption."

The Appellant submits in his brief:

> "His Honour Judge Kennedy seems to say that the expiry date need not be set out in the Certificate and, therefore, the Certificate is prima facie evidence unless the defence disprove some assertion specifically required to be in the certificate.
>
> "I submit that that is not the law. Once it was established that the expiry date was important to the integrity of the S.A.S. test and the officer did not know the expiry date there was, I submit, a fatal flaw in the Crown's case."

In following the normal procedures on the checksheet Constable Gray says he would have noted the date of the BDH standard 330. He was not asked if he might have entered an expired date. He was not asked if there was a likelihood, or possibility, that it had expired.

The expiry date of a test solution is not one of the facts necessarily included in a certificate under s. 258(1)(g). Such a certificate is evidence of the facts alleged in it, which include the test results. That evidence must be accepted by a

court in the absence of evidence creating a reasonable doubt as to its reliability. The mere inability of a qualified technician to recall the expiry date which he entered on his checksheet while following prescribed procedures is not evidence creating such a reasonable doubt. I dismiss this ground of appeal.

The fourth ground of appeal is that the learned trial judge erred in law in holding that the defence had not raised a reasonable doubt that the certificate evidence was reliable. The Apellant's contention on this ground is that the Appellant testified that the qualified technician tapped the glass of the Breathalyzer instrument several times and uttered an expletive while adjusting it. It was suggested this meant "something was amiss".

Constable Gray could not recall either tapping the glass nor uttering the expletive. He testified that the instrument was working properly. I do not find that incident, if it occurred, in the absence of further explanation, creates a reasonable doubt as to the reliability of the certificate. Judge Kennedy stated:

> "I am satisfied in combination based on the Certificate and the viva voce testimony called that the approved instrument was operating accurately at the time the tests were performed."

I dismiss this ground of appeal.

Grounds five, six and seven, that the trial judge

erred in law in failing to consider all the relevant circumstances, that the decision is unreasonable and cannot be supported by the evidence, and any further grounds disclosed by the transcript, were not separately argued and were not made out by the arguments on any of the grounds discussed above nor by those grounds cumulatively or in any combination. Grounds five, six and seven are dismissed.

Grounds eight and nine relate to the sentence appeal:

> "(8) That the sentence imposed herein was excessive.
>
> "(9) That the learned trial judge applied improper sentencing principles."

It is argued that Judge Kennedy did not deal with:

> "(1) The specifics of this case--that there was no accident, that the incident occured late at night when nobody was about, that the readings were in the middle range for breathalyzer readings, and that the accused was cooperative;
>
> (2) The serious consequences of a loss of license in Mr. Janes' case.

Mr. Janes is a union official who must travel extensively throughout the Maritimes.

At the conclusion of discussion of Mr. Janes' prior offence Judge Kennedy said, ". . . At any rate he's got a prior in 1987 that's, that's all I care about."

The conviction took place in 1987. The offence took place November 12, 1986. The present offence occurred April

25th, 1989. He was convicted November 29, 1989.

In imposing sentence Judge Kennedy said:

> "Second conviction within a period of three years. I'm not restricted to imposing a fine in relation to the matter, as a matter of fact it would not be unheard of or even particularly unusual were I to go by route of incarceration at this point. I treat the matter as a second offence. Fine of this court in the amount of $2,000.00 or in default three months in a provincial institution."

A second impaired driving offence carries a minimum sentence of two weeks incarceration when the Crown gives notice of seeking the increased penalty. The maximum for the monetary penalty is the $2,000 fine which was imposed, but six months incarceration can be imposed in addition to the fine. A maximum sentence is usually reserved for the worst of offenders and the worst of offences. Even with an additional period of incarceration available, the maximum fine should not be used as a routine punishment for all second offenders regardless of circumstances. I am not satisfied all factors relating to Mr. Janes were taken into account when sentence was imposed.

The more-than-three-year period between the first offence and the second conviction, the hardship of a two-year driving prohibition for one required to travel, and the relative absence of aggravating circumstances relating to the offence itself should all be taken into account. I would consider a fit sentence in all the circumstances to be a $1,200 fine. I allow the appeal as to sentence and vary the fine from $2,000 to $1,200. The two-year driving prohibition is confirmed. Success

has been mixed. There will be no order for costs.

JUDGE OF THE COUNTY
COURT OF DISTRICT
NUMBER TWO