JAMES EATON O'CONNOR .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1966

*Feb. 21, 22
Apr. 26

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Driving while ability impaired—Prisoner refused permission to contact lawyer after arrest—"Full answer and defence"—Criminal Code, 1953-54 (Can.), c. 51, s. 709(1)—Canadian Bill of Rights, 1960 (Can.), c. 44, s. 2(e).

Evidence—Admissibility—Breathalizer tests obtained after arrest—Accused not informed beforehand of arrest—Subsequently allowed to place a telephone call for legal assistance—Refused further calls when first proved abortive—Whether violation of s. 2(c)(ii) of Canadian Bill of Rights, 1960 (Can.), c. 44—Whether evidence of breathalizer admissible.

The accused, who was represented by counsel at trial, was convicted of impaired driving. The evidence included evidence of breathalizer tests. The accused was not told that he was under arrest until after the tests had been taken. When he was so informed, he was allowed to place a telephone call to his solicitor. When this call proved abortive, he was refused permission to make a second call to obtain legal assistance. His appeal by way of a stated case was allowed on the ground that the breathalizer evidence should not have been admitted. On appeal by the Crown to the Court of Appeal, the conviction was restored. The accused was granted leave to appeal to this Court.

Held: The appeal should be dismissed.

* PRESENT: Taschereau C.J. and Fauteux, Ritchie, Hall and Spence JJ.

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Per Taschereau C.J., and Fauteux, Ritchie and Hall JJ.: The refusal by the police to allow the accused to make a second telephone call was not a denial of his right to make "his full answer and defence" within the meaning of s. 709 of the Criminal Code. That section relates solely to the procedure at trial.

The accused cannot derive any assistance from s. 2(c)(ii) of the *Canadian Bill of Rights*, 1960 (Can.), c. 44, which provides that no law of Canada shall be construed or applied so as to deprive a person who has been arrested or detained of the right to retain and instruct counsel without delay. The contention that the mere denial to the accused of his right to retain and instruct counsel without delay of itself automatically nullifies the subsequent proceedings was rejected. *Regina v. Steeves*, [1964] 1 C.C.C. 266 at 268, adopted.

The alternative contention that the evidence of the breathalizer should be ignored, could not be entertained either. The facts submitted for the stated case in no way suggested that the presence of counsel after the tests had been completed could have resulted in his ascertaining any factors which would have affected the admissibility of this evidence. The Magistrate did not see fit to draw the inference that had the accused been informed of the charge against him he would have then and there decided to obtain and instruct counsel, and therefore no question of law based upon that inference arose out of the stated case. Furthermore, the decision that the evidence of the breathalizer tests should be ignored was a decision on a question of law which did not arise out of the stated case and which did not form one of the grounds upon which leave to appeal to this Court was granted.

In any event, the evidence of the breathalizer tests was clearly admissible, even if it had been shown that the absence of counsel deprived the accused of being advised of his right to refuse to take the tests.

Per Spence J.: Under the particular circumstances of this case and on the basis upon which the case was stated and the questions put therein, the accused's appeal should be dismissed. A Court, upon an appeal by way of stated case upon the questions as put in this case, could not consider the inference that the accused, had he been informed as he ought to have been that he was under arrest, would there and then have determined upon obtaining and instructing counsel.

Droit criminel—Conduite d'automobile alors que la capacité de le faire est affaiblie—Permission refusée de communiquer avec un avocat après mise en arrestation—«Réponse et défense complète»—Code criminel, 1953-54 (Can.), c. 51, art. 709(1)—Déclaration canadienne des droits, 1960 (Can.), c. 44, s. 2(e).

Preuve—Admissibilité—Épreuve d'haleine obtenue après arrestation—Accusé non informé préalablement de son arrestation—Permission subséquente de téléphoner à son avocat—Permission refusée de placer d'autres appels lorsque le premier a été sans succès—Est-ce qu'il y a eu contravention de l'art. 2(c)(ii) de la Déclaration canadienne des droits, 1960 (Can.), c. 44—La preuve d'haleine était-elle admissible—Code criminel, 1953-54 (Can.), c. 51, art. 224.

L'appelant, qui était représenté à son procès par un avocat, a été trouvé coupable d'avoir conduit une automobile pendant que sa capacité de le faire était affaiblie. La preuve comprenait une preuve d'un examen d'haleine. L'appelant a été averti qu'il était en état d'arrestation seulement après que les épreuves d'haleine eurent été prises. C'est alors qu'on lui a permis de placer un appel téléphonique à son avocat. Lorsque cet appel s'avéra sans résultat, permission de placer un second appel pour obtenir de l'aide légale lui fut refusée. Son appel en vertu d'un dossier soumis fut maintenu pour le motif que la preuve de l'examen d'haleine n'aurait pas dû être admise. Sur appel par la Couronne à la Cour d'appel, le verdict de culpabilité fut rétabli. L'appelant a obtenu permission d'appeler devant cette Cour.

Arrêt: L'appel doit être rejeté.

Le Juge en chef Taschereau et les Juges Fauteux, Ritchie et Hall: Le refus par la police de permettre à l'appelant de placer un second appel téléphonique n'était pas un déni de son droit de présenter «une réponse et défense complète» dans le sens de l'art. 709 du *Code criminel*. Cet article traite seulement de la procédure lors du procès.

L'appelant ne peut obtenir aucun bénéfice de l'art. 2(*c*)(ii) de la *Déclaration canadienne des droits*, 1960 (Can.), c. 44, qui prévoit que nulle loi du Canada ne doit s'interpréter ni s'appliquer comme privant une personne arrêtée ou détenue du droit de retenir et de constituer un avocat sans délai. La prétention que le seul déni du droit de retenir et de donner des instructions à un avocat sans délai *per se* annule automatiquement les procédures subséquentes doit être rejetée. *Regina v. Steeves*, [1964] 1 C.C.C. 266 à la page 268, adoptée.

La prétention alternative que la preuve de l'examen d'haleine devrait être ignorée ne peut pas être entretenue non plus. Les fait relatés au dossier soumis ne suggèrent d'aucune façon que la présence d'un avocat après que les épreuves eurent été complétées aurait eu pour résultat de faire constater des faits qui auraient affecté l'admissibilité de cette preuve. Le magistrat n'a pas jugé à propos de tirer la conclusion que, si l'accusé avait été notifié de l'accusation portée contre lui, il aurait décidé dès ce moment d'obtenir et de donner des instructions à un avocat, et en conséquence aucune question de droit basée sur cette déduction n'était soulevée par le dossier soumis. Bien plus, la décision que la preuve de l'examen d'haleine devrait être ignorée était une décision sur une question de droit qui ne se soulevait pas dans le dossier soumis et qui ne formait pas un des motifs pour lesquels permission d'appeler devant cette Cour avait été accordée.

A tout événement, la preuve de l'examen d'haleine était clairement admissible, même si on avait pu démontrer que l'absence d'un avocat avait privé l'appelant d'être avisé de son droit de refuser de se soumettre à cette épreuve.

Le Juge Spence: Dans les circonstances particulières de cette cause et vu la base sur laquelle le dossier a été soumis et les questions ont été posées, l'appel doit être rejeté. Une Cour, sur appel sur des questions telles que posées dans cette cause en vertu d'un dossier soumis, ne peut considérer

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l'inférence que l'accusé, s'il avait été notifié qu'il était en état d'arrestation, tel qu'il aurait dû l'être, aurait dès ce moment décidé d'obtenir un avocat et de lui donner des instructions.

APPEL d'un jugement de la Cour d'appel de l'Ontario[1], rétablissant un verdict de culpabilité. Appel rejeté.

APPEAL from a judgment of the Court of Appeal for Ontario[1], restoring a conviction. Appeal dismissed.

E. Patrick Hartt, Q.C., for the appellant.

W. C. Bowman, Q.C., for the respondent.

The judgment of Taschereau C. J. and Fauteux, Ritchie and Hall J.J. was delivered by

RITCHIE J.:—This is an appeal brought by leave of this Court from a judgment of the Court of Appeal for Ontario[1] setting aside a judgment of Mr. Justice Haines and ordering that an affirmative answer should be given to the three questions submitted by Magistrate F. W. Bartram, Q.C., in the case stated by him at the request of the appellant's counsel following the appellant's conviction of an offence contrary to s. 223 of the *Criminal Code*.

As we are limited on this appeal to the facts stated by the learned Magistrate, I think it desirable to set out the whole of the case stated by him:

1. On the 5th day of February, 1964, an information was laid under oath before a Justice of the Peace for the County of York by the above named Peter Campbell for that the said James Eaton O'Connor on the 5th day of February, 1964, in the Municipality of Metropolitan Toronto, in the County of York, unlawfully did while his ability to drive a motor vehicle was impaired by alcohol or a drug, drive a motor vehicle contrary to the Criminal Code.

2. On the 20th day of February, 1964, the said charge was duly heard before me in the presence of the accused and after hearing the evidence adduced and the submissions made by Counsel on behalf of the Crown and the accused, I found the said James Eaton O'Connor guilty of the said offence and convicted him thereof, but at the request of Counsel for the said James Eaton O'Connor, I state the following case for the consideration of this Honourable Court:

James Eaton O'Connor was driving a Dodge motor vehicle south on Weston Road at about 1:20 a.m. on February 5th, 1964, when he was stopped by Constable Graham of the Metropolitan Toronto Police

[1] [1965] 2 O.R. 773, 47 C.R. 287, [1966] 2 C.C.C. 28, 52 D.L.R. (2d) 106.

Department. James O'Connor got out of his car and as a result of his observations of Mr. O'Connor, Constable Graham formed the opinion that Mr. O'Connor's ability to drive a motor vehicle was impaired by alcohol. Constable Graham placed Mr. O'Connor under arrest on a charge of driving while his ability to drive a motor vehicle was impaired by alcohol but did not tell Mr. O'Connor this.

James O'Connor was interviewed by Constable Thomas McBrian on February 5th, 1964, at about 1:45 a.m. at the Police Station. As a result of his observations of Mr. O'Connor and the results of tests attempted by Mr. O'Connor for Constable McBrian, Constable McBrian formed the opinion that the accused's ability to drive a motor vehicle was obviously impaired by alcohol. A breathalyzer test reading of 2.0 parts per thousand blood alcohol was recorded at 2:00 a.m. and at 2:15 a.m. a second breathalyzer test reading of 1.9 parts per thousand blood alcohol was recorded. I found as a fact that Mr. O'Connor was not told that he was going to be charged and did not know that he was under arrest until after the breath tests were taken and he was being placed in a cell for the night. At that time, he requested permission to contact his solicitor. He was allowed to make one telephone call but when he was informed that the solicitor was away, he was refused permission to make a further telephone call to obtain legal assistance. The refusal to telephone was made after the tests were taken.

Counsel for James Eaton O'Connor desires to question the validity of the said conviction on the ground that it is erroneous in point of law, the questions submitted for the judgment of this Honourable Court being:

(1) Was I right in holding that the refusal by the police to allow the accused while under arrest to contact a lawyer did not amount to a denial to the accused to make his full answer and defence?

(2) Was I right in holding that the refusal by the police to allow the accused while under arrest to contact a lawyer did not amount to a denial of natural justice?

(3) Was I right in convicting the accused under the circumstances when I found as a fact, that he, while under arrest, had been denied the right to contact a lawyer?

It is to be noted that no further questions have been submitted by the appellant's counsel at any stage of these proceedings and that the questions of law upon which the application for leave to appeal to this Court was based were confined to challenging the answers given by the Court of Appeal to these three questions, as indeed the grounds upon which such leave to appeal was granted were also confined.

I take it from reading the reasons for judgment of Mr. Justice Haines that the negative answer which he gave to the first question posed by the learned Magistrate was based on his having equated the refusal by the police to allow the appellant to make a second telephone call, for the purpose of contacting a lawyer while he was in the cells at

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the Police Station at 2:15 a.m. with a denial of his right to make "his full answer and defence" within the meaning of s. 709 of the *Criminal Code* which reads as follows:

709(1) The prosecutor is entitled personally to conduct his case and the defendant is entitled to make his full answer and defence.

(2) The prosecutor or defendant as the case may be may examine and cross-examine witnesses personally or by counsel or agent.

(3) Every witness at a trial in proceedings in which this Part applies shall be examined under oath.

I think it desirable to dispose of this phase of the matter at the outset and to say that I am in full agreement with Mr. Justice Roach that this section "relates solely to the procedure at trial" and that I accept the statement which he made in the course of the reasons for judgment which he delivered on behalf of the Court of Appeal when he said:

At the trial the accused was represented by able, experienced counsel and in the case stated there is no suggestion that any right given to the accused by that section (i.e. s. 709) was withheld from him.

In my opinion the questions submitted by the learned Magistrate are to be answered in accordance with the interpretation to be placed on the relevant provisions of the *Canadian Bill of Rights* which read as follows:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely, . . .

(*b*) the right of the individual to equality before the law *and the protection of the law*; . . .

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to . . .

(*c*) *deprive* a person who has been arrested or *detained*

(i) of the right to be informed promptly of the reason for his arrest or detention,

(ii) of the right to retain and instruct counsel without delay, or

...

(*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations; . . .

The italics are my own.

In submitting that this appeal should be allowed and the three questions answered in the negative, counsel for the

appellant asked that a verdict of acquittal be entered and, in so far as this request is based on the contention that the mere denial to the appellant of his "right to retain and instruct counsel without delay" of itself automatically nullifies the subsequent proceedings, I reject it. In this regard I adopt the view expressed by Ilsley C.J. in *Regina v. Steeves*[1], where he said:

> Nor, in my opinion, is there any general rule that if a person who has been arrested has been deprived by the police of the right to instruct counsel without delay, the charge against that person must be dismissed if he is brought to trial and the accused go forever free.
>
> Reflection on the consequences of such a rule, if it were to exist in, for example, the case of capital murder, will indicate, I think, that the relevant provision of the *Canadian Bill of Rights* cannot mean that.

Counsel for the appellant, however, asked in the alternative that the conviction be quashed and "the matter remitted back to the learned Magistrate to dispose of the case on the other evidence only, ignoring the evidence of the breathalizer", in accordance with the order made by Haines J.

On the facts as stated by the learned Magistrate it is not suggested that the appellant had been deprived of his rights under s. 2(*c*)(ii) until after he had voluntarily submitted to the two breathalizer tests being administered to him and it is a little difficult to understand the grounds upon which Mr. Justice Haines decided that this evidence should be excluded.

In the early stages of his reasons for judgment, the learned judge of first instance observed:

> It was only after the taking of two breathalizer tests that the accused sought permission to contact his solicitor, and, indeed, it can hardly be gainsaid that the police were under no duty to advise him of his rights in that respect. One might therefore be prompted to conclude that all proceedings taken by the police up to and including the taking of the breath tests were regular and proper, and that the complaints of the accused, if any, must necessarily be confined to subsequent events.
>
> However, on the basis of the facts placed before me it is manifest that from the very first two seemingly obvious rights inherent in an accused person were violated. Mr. O'Connor was not informed of or made aware of the fact that he was under arrest, and further, and more importantly, he was not informed of the charge upon which he was arrested. It was only upon the completion of the breath tests and their analysis that these things were made known to him, and it was upon the acquisition of this knowledge that Mr. O'Connor sought permission to contact counsel. I have

[1] [1964] 1 C.C.C. 266 at 268, 42 C.R. 234, 49 M.P.R. 227, 42 D.L.R. (2d) 335.

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no doubt but that had the police fulfilled their very obvious duty in making known to the accused the charge against him at the time of apprehension that he would there and then have determined upon the obtaining and instructing of counsel as was his right under sec. 2(*c*)(ii) of the *Canadian Bill of Rights* . . .

In my opinion, therefore, nothing in this case turns on the question of when the attempt to retain and instruct counsel was exercised, . . .

It would appear from this part of his decision that the learned judge was expressing the view that the failure of the police to tell the appellant at the time of his apprehension that he was under arrest or that he was charged with driving his motor vehicle while his ability to do so was impaired resulted in his being subjected to the breathalizer tests before he had any reason to believe that he was in any need of legal assistance and thus deprived him of his right to retain and instruct counsel before the tests were administered. This interpretation of the judgment, however, appears to me to be inconsistent with what the learned judge later said. After he had expressed the view that there had been a complete violation of the appellant's rights he then continued:

And here I am not speaking of the initial failure of the police to inform the accused of the offence with which he was charged or of the fact of his arrest. These things of course are as unacceptable as their apparent notion that persons in custody are permitted only one phone call completed or otherwise.

My reference for the purposes of deciding this case is directed solely to the conduct of the police in denying to the accused the right to retain and instruct counsel without delay. Inherent in that denial was a denial of the right in the accused to confrontation in fact development at a crucial stage to demonstrate his lack of guilt according to law. Had counsel been present to gather evidence he might possibly have ascertained factors which would have determined the innocence of the accused. For example, and only by way of example, he might have unearthed some physical disability under which the accused laboured which would have pointed to some other explanation than impairment by alcohol. Alternatively, he might have discovered some defect in the breathalizer apparatus and sought the taking of a blood test which would negate the presence of alcohol. As applied to this case, having regard to the materials before me, these things are of course speculation, . . .

If these speculative considerations formed any part of the judge's reasoning in reaching his conclusions that the breathalizer tests were to be ignored, then I think he was in error in considering them because, in my opinion, the facts submitted in the stated case in no way suggest that the

presence of counsel in the Police Station after the tests had been completed at 2:15 a.m. could have resulted in his ascertaining any factors which would have affected the admissibility of this evidence.

If, on the other hand, the breathalizer test evidence was excluded on the ground that the appellant was deprived of counsel before the tests were taken by reason of the fact that he was not told of the charge against him when he was apprehended, then any such ruling must be based on the assumption that if he had been given this information "he would there and then have determined upon the obtaining and instructing of counsel". This is an inference which the learned Magistrate did not see fit to draw from the evidence and in my opinion no question of law based upon it arises out of the stated case.

A judge to whom a stated case is transmitted under s. 734 of the *Criminal Code* is confined to the questions of law stated by the Magistrate and to any other question of law necessarily arising out of the facts stated, in the sense that no evidence could alter it. This is made plain by McRuer C.J.H.C. in the course of his reasons for judgment in *Regina v. C. P. R.*[1], where he said:

> On the argument I had some doubt as to whether I could deal with points of law not stated in the stated case. I have, however, come to the conclusion that since the matter before me is in the nature of an appeal and so stated to be, by s. 734 of the *Criminal Code,* the respondent is entitled to support the conviction on any matter of law arising out of the stated case *as long as no evidence could alter it:*...

The italics are my own.

As I have indicated, I am of opinion that when Mr. Justice Haines decided that the evidence of the breathalizer tests should be ignored, he was deciding a question of law which did not arise out of the stated case and which does not form one of the grounds upon which leave to appeal to this Court was granted.

In view, however, of the fact that the question of the admissibility of the evidence of the breathalizer tests was dealt with in both the Courts below, I think it desirable to say that this evidence in my opinion was clearly admissible and even if it had been shown that the absence of the

[1] (1962), 36 C.R. 355 at 365, 366, [1962] O.R. 108, 31 D.L.R. (2d) 209.

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appellant's lawyer deprived him of being advised of his right to refuse to take the tests, my opinion would be the same having regard to the provisions of s. 224(3) of the *Criminal Code* which read as follows:

> 224(3) In any proceedings under section 222 or 223, the result of a chemical analysis of a sample of the blood, urine, breath or other bodily substance of a person may be admitted in evidence on the issue whether that person was intoxicated or under the influence of a narcotic drug or whether his ability to drive was impaired by alcohol or a drug, *notwithstanding that he was not, before he gave the sample, warned that he need not give the sample or that the results of the analysis of the sample might be used in evidence.*

The italics are my own.

This subsection was considered by this Court in *Re the Validity of s. 92(4) Of the Vehicle Act 1957 (Sask.)*[1] and the general law establishing the admissibility of such evidence was fully reviewed by Mr. Justice Fauteux in the course of his reasons for judgment in the case of *Attorney General for Quebec v. Begin*[2].

The evidence in the present case does not, in my opinion, disclose that the circumstances under which the police refused "to allow the accused while under arrest to contact a lawyer" were such as to in any way deprive him "of the right to a fair hearing in accordance with the principles of fundamental justice" and I am accordingly of opinion that no question arises as to the effect which the *Canadian Bill of Rights* might have upon such circumstances if they did exist.

In view of all the above I would answer each of the questions submitted by the learned Magistrate in the affirmative and thereby confirm the conviction.

I would therefore dismiss this appeal.

SPENCE J.:—I have had the privilege of reading the reasons for judgment of my brother Ritchie. I agree that under the particular circumstances in this appeal the appeal must be dismissed.

I feel, however, that I must limit my concurrence strictly to the basis upon which the case was stated by the learned

[1] [1958] S.C.R. 608, 121 C.C.C. 321, 15 D.L.R. (2d) 225.

[2] [1955] S.C.R. 593 et 600 *et seq.*, 21 C.R. 217, 112 C.C.C. 209, 5 D.L.R. 594.

magistrate and the questions put by him which were as follows:

(1) Was I right in holding that the refusal by the police to allow the accused while under arrest to contact a lawyer did not amount to a denial to the accused to make his full answer and defence?

(2) Was I right in holding that the refusal by the police to allow the accused while under arrest to contact a lawyer did not amount to a denial of natural justice?

(3) Was I right in convicting the accused under the circumstances when I found as a fact, that he, while under arrest, had been denied the right to contact a lawyer?

I agree, with respect, that Haines J. had no basis upon which he could conclude that the accused "would there and then have determined upon obtaining and instructing counsel" had he been informed as he ought to have been that he was under arrest on a charge of impaired driving. In my view, such an inference could not be considered by the court upon an appeal by way of stated case upon the questions as put therein. It certainly was not one which could not be altered by evidence. See McRuer C.J.H.C. in *Regina v. C.P.R.*[1].

There may well be cases where the same failure to warn the accused that he is under arrest and to state the charge against him results in the obtaining of evidence which it could not otherwise have been obtained. It is not my view that we are in any way bound in the consideration of such cases by the result in the present appeal.

Appeal dismissed.

Solicitor for the appellant: E. P. Hartt, Toronto.

Solicitor for the respondent: The Attorney General for the Province of Ontario.

[1] (1962), 36 C.R. 355 at 365, 366, [1962] O.R. 108, 31 D.L.R. (2d) 209.