



The appellant was acquitted in Provincial Court on a charge of refusal of the breathalyzer contrary to s. 254(5) of the **Criminal Code**. An appeal by the Crown to the Summary Conviction Appeal Court was allowed and a conviction entered. The appellant's appeal therefrom to this court is on a question of law alone.

On May 12, 1991, at about 2:00 a.m. the appellant was driving a truck near Green Bay, Lunenburg County. The R.C.M.P., in the course of investigating complaints of rowdiness in the area, stopped the appellant and on observing evidence of consumption of alcohol administered the A.L.E.R.T. demand. The test on the A.L.E.R.T. device resulted in a failure. The appellant was then given his **Charter** rights and the breathalyzer demand and taken by the officer to the R.C.M.P. Detachment at Bridgewater. They arrived at about 2:30 a.m. and the R.C.M.P. constable took the appellant into the detachment and again told him he could call a lawyer. He offered him a telephone and a telephone book and asked if he wished to call a lawyer. The response was with words to the effect:

"No, I don't think so it's late."

The officer said that he would prepare the breathalyzer. The appellant responded that he would not take it. He was then returned to his home.

The Provincial Court judge, after dealing with a number of issues not before us, stated that judicial notice was taken of the fact that there was no system of duty counsel in Lunenburg County other than to give a detainee a list of lawyers and wish him good luck in finding one at an early morning hour. The court found that the appellant's right to counsel was violated:

". . . not by the police officer, who did everything required of him under the present system but by the justice system in this province and county which has a duty to provide both police and accused persons a reliable system of duty counsel, available 24 hours a day to all accused persons regardless of means for initial consultation on arrest."

The charge was dismissed.

On appeal to the Summary Conviction Appeal Court, Judge Carver, as he then was, reviewed the evidence and the trial judge's finding that the appellant was properly advised of his right to counsel and his right to Legal Aid. The court said:

"He took no action to attempt to contact a lawyer. Section 10(b) of the **Charter** contemplated nothing further than was done for this accused and what was available. There is no duty to provide duty counsel as set forth by [the trial judge]. I, therefore, find the trial judge erred."

The appellant refers to a number of authorities in his submission that Judge Carver was wrong in finding that there was no violation of his **Charter** rights. However, the facts of this case simply do not support the conclusion that those rights were violated. The trial judge's finding is clear. The police officer complied with the requirements of the **Charter**. The appellant rejected the offer of the telephone book and the telephone, clearly indicating his election not to exercise the right to counsel which was properly given to him. In our opinion these crucial findings are sufficient to dispose of the appeal. See **R. v. Prosper** (1992), 113 N.S.R. (2d) 156; **R. v. Hollis** (British Columbia Court of Appeal, unreported, Vancouver Registry CA014414 (1992) B.C.J. No. 2066).

The appeal is dismissed.

J.A.

Concurred in:

Clarke, C.J.N.S.

Jones, J.A.