

1992

C.D. 3300

IN THE SUPREME COURT OF NOVA SCOTIA

HER MAJESTY THE QUEEN

Appellant

- versus -

ELAINE BONITA STATES

Respondent

HEARD: At Digby, Nova Scotia, on the 10th day of
February, A.D., 1993

BEFORE: The Honourable Mr. Justice Charles E.
Haliburton

CHARGE: Section 253 (a) of the **Criminal Code**.

DECISION: Orally on the 10th day of February, A.D., 1993.

COUNSEL: **V. Blaine Allaby, Q.C.**, for the Appellant
Michele Cleary, for the Respondent

D E C I S I O N O N A P P E A L

1.

HALIBURTON, J. (Orally)

This is an appeal by the Crown from the acquittal of Elaine Bonita States on a charge under Section 253(b) of the **Criminal Code** that:

"On or about the 8th day of February, 1992, at or near Smith's Cove in the County of Digby, Province of Nova Scotia, did having consumed alcohol in such a quantity that the concentration thereof in her blood exceeded eighty milligrams of alcohol in one hundred millilitres of blood, did operate a motor vehicle, contrary to Section 253 (b) of the Criminal Code."

The appeal, as Defence Counsel has pointed out, is on the narrow ground that the Judge erred in finding that rights of Miss States under the **Canadian Charter of Rights and Freedoms** had been abridged by Corporal Prosper, a Military Policeman, on the night in question.

While Judge Nichols does not specify which "right" in his decision, the issue relates to Section 10 (b), that is the right to counsel or particularly perhaps, the right to be informed of the right to counsel.

The circumstances are very simple. Miss States on the night in question, the early morning hours of the morning in question, I should say, was observed by Corporal Prosper who is employed at C.F.B. Cornwallis as a Military Policeman. He was operating a Military Police vehicle. He was in Military Police uniform. He observed this vehicle when

2.

returning to the Base from the Town of Digby. It was being driven in an erratic fashion, causing him some concern. As a result of his perception that the driver was impaired, he made radio contact with the R.C.M.P. Detachment in Digby and was instructed to stop the vehicle and ask the driver to remain until the R.C.M.P. could arrive.

He did so. He stopped the vehicle by using the emergency equipment on his vehicle. When the vehicle pulled over and stopped, he approached the driver; asked a few preliminary questions, as a policeman would have done; obtained her license and insurance card and so on; and made some observations of the occupant. Whether he "asked" her or "told" her to remain there is a matter of dispute between the parties but I've concluded a matter of no great import in how I must deal with the matter.

They remained there, the Cpl. Prosper in his car and the accused in her car for some 20 to 30 minutes when the Police Constable arrived, the R.C.M.P. Constable arrived who made a proper breathalyzer demand and properly advised Ms. States of her right to counsel as required by the **Charter**.

For purposes of the record, perhaps it should be noted that as a result of that breathalyzer demand, Miss States was co-operative. She did go with the Police Officer to the R.C.M.P. Detachment in Digby where breathalyzer samples

3.

of her breath were made at 3:29 and at 3:50 in the morning, registering readings of 230 and 220 respectively. The driver was seriously impaired. There's no question about that.

Judge Nichols, at the conclusion of the trial, found that:

"Miss States was unduly denied her rights under the Charter... she was detained by the MP and as a result of him not giving her her rights the delay was longer than approximately half an hour so I'm satisfied that... (her Charter rights were abridged), and I find her not guilty of that offence."

I am conscious of the fact that this appeal is taken on the narrow ground that Judge Nichols incorrectly found that the Charter rights of the accused had been abridged.

I invited discussion from Counsel as to whether the exclusion of the Certificate evidence was the only or even the appropriate remedy in the circumstances. Defence Counsel, arguing in relation to that point, urges that this Court need not refer to Section 24 of the Charter, at all. The remedy to be granted, which is granted by the trial judge under Section 24 may or may not be a matter that is entirely within his province to decide. But Defence Counsel argues that whether or not the remedy granted was the correct one, is not before this Court to decide, that the only thing to be reviewed on this appeal is whether or not the rights of the accused under the Charter of Rights were abridged.

4.

Defence Counsel has reminded the Court of the findings in **Therens** case which was well known after 1985, less current today. The situation here was that, circumstances were such that Miss States would have had every reason to think that she was being stopped by an agent of the state who had authority to stop her. There was the uniform; there was the police vehicle; there was the emergency equipment. Whether or not the Police Constable, the M.P., Military Policeman had the right to arrest her or not arrest her or an obligation to... whether he had the right to arrest her or not arrest her, is not in issue.

The perception that Miss States would have had of the circumstances is perhaps the important factor in considering the **Therens** argument.

Perhaps I can gratuitously say that it might have been more appropriate had Corporal Prosper assumed that he had all of the authority of a police officer and done what he knew was correct and advise her why she was stopped and indicate to her that she had an immediate right to counsel. He might then, I suppose, have faced an action for wrongful arrest as a citizen not clothed with that authority. It's a troubling scenario.

In any case, on the narrow grounds on which the appeal has been taken, I find that I agree with the conclusion

5.

of Judge Nichols that Miss States, at least subjectively, was detained and that the Charter required that she be given her right to counsel and on that narrow ground, I would dismiss the appeal without costs to the Respondent.

DATED at Digby, in the County of Digby and Province of Nova Scotia, this 10th day of February, A.D., 1993.

J.

TO: J. R. Patrick McIntyre, Esq.
Prothonotary
Court House
DIGBY, Nova Scotia
BOV 1A0