

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

**HER MAJESTY THE QUEEN**

Appellant

- and -

**DAVID ANGNETSIAK**

Respondent

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**Appeal from a finding of "not guilty" on charges as a result of the arbitrary detention of the accused following his arrest. Appeal allowed.**

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**REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J. E. RICHARD**

Heard at Yellowknife, Northwest Territories  
on July 10, 1996

Reasons filed: August 7, 1996

Counsel for the Appellant: Bernadette Schmaltz

Counsel for the Respondent: Thomas Boyd

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**REASONS FOR JUDGMENT**

1           At issue on this appeal is the appropriate remedy to be afforded an accused person for a Charter infringement that is collateral to the question of his guilt or innocence on the offence charged,

2           The accused was charged with drinking and driving offences, i.e., (a) impaired driving, contrary to s.253(a) C.C. and (b) driving while over 80 mg %, contrary to s.253(b) C.C. At trial a police officer gave evidence of his observations of the accused's driving and of the events that transpired at the detachment before, during and after the taking of the breathalyzer samples. A certificate of analysis indicating that the accused's blood/alcohol level had exceeded the legal maximum was tendered as evidence.

3           The last breathalyzer sample was taken at midnight. The police officer then lodged the accused in the detachment cells "to sober up". The accused was released from cells

at 10:00 a.m. the following day. During cross-examination the police officer was questioned further as to why he did not release the accused after the breathalyzer tests were completed instead of detaining him overnight. The officer stated that it was his policy to detain all suspected impaired drivers until they sobered up and that he made no exceptions.

4 The trial judge held that the police officer acted contrary to s.495 C.C. That section provides that an officer is not to arrest a person in any situation where:

"he believes on reasonable grounds that the public interest, having regard to all the circumstances including the need to

- (i) establish the identity of the person
- (ii) secure or preserve evidence of or relating to the offence, or
- (iii) prevent the continuation or repetition of the offence or the commission of another offence,

may be satisfied without so arresting the person." (emphasis added)

5 The trial judge further held that the arbitrary detention of the accused amounted to a breach of his constitutional rights:

s.9 Everyone has the right not to be arbitrarily detained or imprisoned.  
*Canadian Charter of Rights and Freedoms*

6 Finally, as a result of this Charter infringement, the trial judge found the accused "not guilty" of the offences charged. In granting this particular remedy, the trial judge, with respect, erred.

7 There was no nexus between the arbitrary detention and the evidence touching upon the issue of the accused's drinking and driving. The trial was an inquiry to determine, on relevant evidence, whether the accused committed the specified offences.

The accused's detention subsequent to the alleged commission of the offences, and the gathering of evidence by the police, was not relevant to that inquiry.

8           Not all Charter infringements ought to be addressed, or redressed, during the criminal trial. The test is "does the breach equate to a recognized defence in law or did the breach create evidence which should be excluded under the application of s.24(2) of the Charter of Rights and Freedoms?" *R v Cutforth* (1987) 40 C.C.C. (3d) 253, per McClung J.A. at p.261.

9           The trial transcript indicates that the trial judge had a legitimate and commendable concern about the unlawful conduct of the police officer subsequent to his investigation of these offences. However, in my respectful view, she moved too quickly to fashion a remedy for the accused. Her finding of "not guilty" amounted, in effect, to a judicial stay of proceedings.

10           As stated by this Court in *R. v Claus* [1990] N.W.T.J. No. 13 (a case with facts very similar to those present here) a judicial stay of proceedings should only be granted in the clearest of cases. As held in *Claus*, unlawful detention for several hours following arrest for impaired driving cannot, in itself, justify a stay of the criminal proceedings.

11           Here, the breach of the accused's constitutional rights was not a defence to the charges, nor did it create evidence which had to be suppressed. It was therefore not appropriate to grant a remedy to the accused during the trial proper.

12 In an early Charter case, Esson J.A. stated:

"...I will assume that for every breach of a Charter right there is some remedy. It simply does not follow that every breach must lead to some remedy being granted at trial. The purpose of the trial is as it was before the Charter, to decide whether the accused is guilty." *R. v Erickson* (1984) 13 C.C.C. (3d) 269 (B.C.C.A.)

13 The remedy afforded the accused in the present case ought not to have been granted. There were other remedies available to the accused, e.g. an application for damages in this Court, or a request in the trial court for a reduction in sentencing.

14 The decisions in *Claus*, and herein, are consistent with various decisions of the appellate courts in other jurisdictions. See *Erickson, supra*; *Cutforth, supra*; *R. v Davidson* (1988) 46 C.C.C. (3d) 403 (N.S.C.A.); *R. v Pigeon* (1992) 73 C.C.C. (3d) 337 (B.C.C.A.); *R. v MacPherson* (1995) 100 C.C.C. (3d) 216 (N.B.C.A.). In the latter two cases a reduction in sentencing was held to be an appropriate remedy, in circumstances similar to those extant here.

15 For these reasons I allow the Crown's appeal.

16 The trial judge acquitted the accused on both charges. Both acquittals were appealed. During the course of oral argument in this Court, however, Crown counsel conceded that it was open to interpretation, from the transcript, that the trial judge acquitted the accused on the "impaired" charge in any event, on the merits, and Crown counsel thus withdrew the appeal with respect to that acquittal.

17           The acquittal on the s.253(b) C.C. charge is therefore set aside and a new trial ordered on that charge.

J. E. Richard

J.S.C.

Dated at Yellowknife, Northwest Territories  
this 7th day of August, 1996

Counsel for the Appellant: Bernadette Schmaltz

Counsel for the Respondent: Thomas Boyd

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