

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

NESSIM AARON CARTY

Respondent

REASONS FOR JUDGMENT
OF THE HONOURABLE MR. JUSTICE W. E. WILSON

[1] I have concluded that the Crown appeal should be dismissed. I agree with the trial judge's disposition of this matter on the breach of the Charter rights of the accused. I am also incidentally of the view, which I expressed at the hearing, that the roadside test device warning given by the Constable at the scene was not made in accordance with the Criminal Code, as it did not advise the accused that he must give this test sample *forthwith*: [See *R. v. Cardinal*, Appeal #9203-0998 (Alta. C. A.)]. As Defence has abandoned the appeal against a Section 24(2) relief under the Charter of Rights and Freedoms, and the Crown argues (and it is apparent from the reasons for judgment) that the learned trial judge did not consider Section 24(2) in giving his judgment, I must rule on that aspect of the appeal. In my opinion, the Court below should, in these circumstances, have made a Section 24(2) analysis. Failure to do so should result in a new trial, so that this aspect of the matter may be considered. Accordingly, the appeal is allowed to the extent that a new trial is ordered.

[2] In arriving at this conclusion I find myself in agreement with the analysis of Defence Counsel. The trial judge accepted the position of the Accused that a police officer who has already detained someone believed to have committed a drinking and driving offence is required to respect the detainee's right to counsel. It is conceded that if the purpose of the detention is for the *proper* purpose of conducting a screening test, then the provisions of Section 254 of the Criminal Code justify a limitation on the detained motorist's right to counsel for a short period, to allow that test to be conducted.

[3] In this case the trial judge found as a fact that the investigating Constable was not using the screening device as a means of screening this accused. The officer had already concluded that the

accused was driving while impaired. I agree with defence counsel that the Constable was using the screening device as a means of eliciting self-incriminating evidence from someone whom he believed had committed a criminal offence. Those actions did not fall within the ambit of Section 254(2). The provision cannot be used to justify a failure to comply with the Charter. This is all based on a finding of fact that the officer's actions in carrying out the screening test were not merely investigatory. *Re Lloyd* (unreported, January 30th, Court of Appeal, Alberta) and *R. v. Jackson* (1993) 147 A.R. 173 (Q.B.) are distinguishable on the facts.

[4] The learned trial judge made the comment that an arrest must ensue when a police officer finds someone committing an indictable offence. That, I believe, is an error, but as Defence Counsel contends, it is narrow and technical and not essential to the decision. It should not affect the disposition of the case.

[5] The appeal is dismissed.

J.C.Q.B.A.

DATED at the City of Edmonton,
in the Province of Alberta, this
19th day of January A.D. 1998.

COUNSEL:

S. Bilodeau for the Appellant

R.S. Prithipaul for the Respondent