
CANADA / JUDGMENT

R. v. Nolan

[1987] 1 SCR 1212

COURT

Supreme Court of Canada

DECIDED

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R. v. Nolan

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Report

[1987] 1 SCR 1212

Case number

17422

Judges

Dickson, Robert George Brian; Beetz, Jean; Estey, Willard Zebedee; McIntyre, William Rogers; Wilson, Bertha; Le Dain, Gerald Eric; La Forest, Gérard V.

On appeal from

Nova Scotia

Subjects

Criminal law

Notes

SCC Case Information: 17422

Decision Content

R. v. Nolan, [1987] 1 S.C.R. 1212

John Patrick Nolan Appellant

v.

Her Majesty The Queen Respondent

indexed as: r. v. nolan

File No.: 17422.

1987: March 6; 1987: June 25.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Wilson, Le Dain and La Forest JJ.

on appeal from the nova scotia supreme court, appeal division

Criminal law -- Scope of authority of the military police -- Breathalyzers -- Failure to provide breath samples -- Demand made by a military policeman to a civilian outside a military base following a traffic violation on the base -- Whether military policeman a "peace officer" within the meaning of s. 2 (f) of the Criminal Code -- Criminal Code, R.S.C. 1970, c. C-34, ss. 2(f), 235 -- National Defence Act, R.S.C. 1970, c. N-4, s. 134 -- Queen's Regulations and Orders for the Canadian Forces, s. 22.01 -- Defence Establishment Trespass Regulations, C.R.C. 1978, c. 1047, ss. 2, 3, 28(1).

The accused, a civilian, was seen driving out of a military base at an excessive speed and was followed by two military policemen and detained on a public highway. After observing the accused's staggering, his glassy eyes, and the strong smell of alcohol on his breath, the military police brought the accused to a police station and asked him to provide a breath sample. The accused refused. He was then charged with refusing to comply with a breathalyzer demand contrary to s. 235(2) of the Criminal Code . At trial, the accused was acquitted. The judge found that the military police officer was not a peace officer as defined in s. 2 (f) of the Criminal Code and that, therefore, he was not authorized to issue a breathalyzer demand to a civilian. The Crown's appeal by way of a stated case was allowed. The Court of Appeal held that any person appointed under s. 134 of the National Defence Act is a "peace officer" for all purposes of the Criminal Code . This appeal is to determine whether a military police officer is a "peace officer" within the meaning of s. 2 (f) of the Criminal Code when he is purporting to exercise authority over a civilian who is not subject to the Code of Service Discipline.

Held: The appeal should be dismissed.

The military policeman had no authority under s. 2(f)(i) of the Code to demand that the accused provide a breathalyzer sample. That section, which prescribes that "peace officer" includes "officers and men of the Canadian Forces who are appointed for the purposes of section 134 of the National Defence Act ", does not extend the authority of military police to act as "peace officers" throughout a province and in relation to all residents of a province, duplicating the role and function of the civil police. Section 2 of the Code serves only to grant additional powers to enforce the criminal law to persons who must otherwise operate within the limits of their

statutory or common law sources of authority. In the case of military policemen, the purposes of s. 134 are clear: the section provides that they may exercise authority over persons subject to the Code of Service Discipline. That is the full extent of the grant of power. Section 2 (f)(i) must be construed, therefore, as extending to persons appointed for the purposes of s. 134 of the National Defence Act the additional authority to enforce the Criminal Code , but only in relation to persons subject to the Code of Service Discipline.

The authority to demand that the accused provide a breathalyzer sample can be derived in this case, however, from the definition of "peace officer" in s. 2(f)(ii) of the Code. Section 2 (f)(ii) establishes that "officers and men" of the Canadian Forces are peace officers when "employed on duties that the Governor in Council, in regulations made under the National Defence Act for the purposes of this paragraph, has prescribed to be of such a kind as to necessitate that the officers and men performing them have the powers of peace officers". Under s. 22.01(2) of the Queen's Regulations and Orders for the Canadian Forces, made under the National Defence Act for the purposes of s. 2(f)(ii) of the Code, military policemen have the powers of peace officers when they perform any lawful duties "as a result of a specific order or established military custom or practice" when those duties are related to certain matters including the maintenance and protection of law and order and the protection of property or persons. Here, the officer had authority under the Government Property Traffic Regulations to enforce the applicable speed limits against a civilian driving on the base and, having stopped him for the purposes of enforcing the speed limit, the officer derived further authority from s. 28(1) of the Defence Establishment Trespass Regulations. This section, which applies to persons not subject to the Code of Service Discipline, prescribes that a military policeman is "authorized to arrest without warrant any person found committing any criminal offence ... on or with respect to any defence establishment or whom on reasonable and probable ground he believes to have committed such offence" A military police officer who has clear statutory authority to enforce the law and who is sent out on a patrol on a base is abiding by "established military practice" in fulfilling his role by attempting to enforce the law and he meets the conditions imposed by s. 22.01(2). Therefore, when s. 22.01(2) of the Queen's Regulations and Orders for the Canadian Forces is read with s. 28(1) of the Defence Establishment Trespass Regulations, the arresting officer was a peace officer within the meaning of s. 2(f)(ii) of the Code and he was entitled to invoke the statutory authorization of s. 235(1) of the Code. The fact that the accused was arrested outside the military base did not deprive the military policeman of his authority. Given the instantaneous police warning to the accused to stop his vehicle and the detention immediately outside the gates of the base, there was such a clear nexus between the offence committed on the base and the detention off the base that the military police retained their status and authority as peace officers.

Cases Cited

Referred to: R. v. Smith (1982), 67 C.C.C. (2d) 418 (B.C.S.C.), aff'd (1983), 2 C.C.C. (3d) 250 (B.C.C.A.); R. v. Harvey (1979), 18 A.R. 382; R. v. Pile (1982), 66 C.C.C. (2d) 268; Di Iorio v. Warden of the Montreal Jail, [1978] 1 S.C.R. 152; Attorney General of Quebec and Keable v. Attorney General of Canada, [1979] 1 S.C.R. 218; Manitoba (Attorney General) v. Metropolitan Stores Ltd., [1987] 1 S.C.R. 110; R. v. Dean (1965), 47 C.R. 311; R. v. Therens, [1985] 1 S.C.R. 613.

Statutes and Regulations Cited

Constitution Act, 1867, s. 92(14) .

Criminal Code, R.S.C. 1970, c. C-34, ss. 2 "peace officer" [am. 1972, c. 13, s. 2(2); am. 1976-77, c. 35, s. 21], 235 [rep. & subs. 1974-75-76, c. 93, s. 16].

Criminal Law Amendment Act, 1972, S.C. 1972, c. 13, s. 2(2).

Defence Establishment Trespass Regulations, C.R.C. 1978, c. 1047, ss. 2, 3, 28, 29.

Government Property Traffic Regulations, C.R.C. 1978, c. 887.

National Defence Act, R.S.C. 1970, c. N-4, ss. 12(1), 55(1), 134 [am. 1972, c. 13, s. 73.1].

Queen's Regulations and Orders for the Canadian Forces (1968 Revision), s. 22.01 [am. O.C., P.C. 1976-1799], 22.02.

APPEAL from a judgment of the Nova Scotia Supreme Court, Appeal Division (1982), 66 C.C.C. (2d) 417, 135 D.L.R. (3d) 530, 51 N.S.R. (2d) 188, 102 A.P.R. 188, 14 M.V.R. 297, allowing the Crown's appeal by way of stated case from the acquittal of the accused on a charge of refusing to comply with a demand for a breath sample contrary to s. 235(2) of the Criminal Code . Appeal dismissed.

David J. Bright and David G. Coles, for the appellant.

Kenneth W. F. Fiske and John D. Embree, for the respondent.

The judgment of the Court was delivered by

1. The Chief Justice--The sole issue raised in this appeal is whether a military police officer is a "peace officer" within the meaning of s. 2 of the Criminal Code, R.S.C. 1970, c. C-34, as amended, when he or she is purporting to exercise authority over a civilian who is not subject to the Code of Service Discipline. Although the point is a narrow one, it is important to define the scope of authority of the military police with clarity so as to avoid a confusing overlapping of jurisdiction with the civil police.

I

The Facts

2. John Patrick Nolan was driving a brown Chevrolet van on the grounds of Canadian Forces Base Shearwater. The van was observed by Private Steven Ettinger, a military police officer appointed under s. 134 of the National Defence Act, R.S.C. 1970, c. N-4, as amended. Private Ettinger was on patrol in a marked military police truck and was accompanied by Corporal Chevrier. When observed by Private Ettinger, the brown van was travelling out the main gates of C.F.B. Shearwater at approximately 50 kilometres per hour in a 15 kilometres per hour speed zone. The two military police officers pursued the van through the gate, activated the siren and emergency lights on the police vehicle, and stopped the van on the public highway.
3. Mr. Nolan was the driver and only occupant of the van. He was asked by the military police officers to step out of the van. Private Ettinger testified that Mr. Nolan staggered slightly, that his eyes were glassy, that his breath smelled strongly of alcohol, and that Mr. Nolan appeared to be unsteady when he stooped to pick up his driver's license which had fallen to the ground. Corporal Chevrier testified to similar effect. Prompted by these observations, the military police officers placed Mr. Nolan in the back seat of the military police truck, drove him to the Military Police Section of C.F.B. Shearwater and Private Ettinger there issued a breathalyzer demand. The trial judge found as a fact that Private Ettinger had reasonable and probable grounds to issue the breathalyzer demand. Mr. Nolan was then driven to the Dartmouth Police Station where a breathalyzer technician was available to administer the test, but the appellant refused to take the breathalyzer test. No breathalyzer demand was ever issued to Mr. Nolan by a civilian police officer.
4. It is common ground that Mr. Nolan was a civilian at the time of his detention by the military police officers and that he was not subject to the Code of Service Discipline.
5. An Information was sworn charging that Mr. Nolan:

At or near C.F.B. Shearwater, in the County of Halifax, Nova Scotia, on or about the 5th day of June, 1981, did unlawfully, without reasonable excuse, refuse to comply with a demand made to him by a peace officer, to provide samples of his breath suitable to enable a proper analysis to be made in order to determine the proportion, if any, of alcohol in his blood, contrary to Section 235(2) of the Criminal Code .

AND FURTHER

At the same time and place aforesaid, did unlawfully have the control of a motor vehicle while his ability to drive a motor vehicle was impaired by alcohol or a drug, contrary to Section 234 of the Criminal Code .

It is clear that the first charge could only be supported if the Crown could show that Private Ettinger was a "peace officer" when he made the breathalyzer demand.

II

The Relevant Statutes and Regulations

6. The question whether an individual is a "peace officer" for the purposes of enforcing the Criminal Code must be answered by reference to the definition of "peace officer" contained in s. 2 of the Code:

2. In this Act

...

"peace officer" includes

(a) a mayor, warden, reeve, sheriff, deputy sheriff, sheriff's officer and justice of the peace,

(b) a warden, deputy warden, instructor, keeper, gaoler, guard and any other officer or permanent employee of a prison;

(c) a police officer, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process,

(d) an officer or person having the powers of a customs or excise officer when performing any duty in the administration of the Customs Act or the Excise Act ,

(d.1) a person appointed or designated as a fishery officer under the Fisheries Act when performing any of his duties or functions pursuant to that Act,

(e) the pilot in command of an aircraft

(i) registered in Canada under regulations made under the Aeronautics Act , or

(ii) leased without crew and operated by a person who is qualified under regulations made under the Aeronautics Act to be registered as owner of an aircraft registered in Canada under those regulations,

while the aircraft is in flight, and

(f) officers and men of the Canadian Forces who are

(i) appointed for the purposes of section 134 of the National Defence Act , or

(ii) employed on duties that the Governor in Council, in regulations made under the National Defence Act for the purposes of this paragraph, has prescribed to be of such a kind as to necessitate that the officers and men performing them have the powers of peace officers;

7. Of particular relevance to the present case is s. 2(f) of that definition which defines specifically when members of the Canadian Forces may be classed as "peace officers". Section 2(f)(i) refers the reader to s. 134 of the National Defence Act , which at the relevant time read:
134. Such officers and men as are appointed under regulations for the purposes of this section may
- (a) detain or arrest without a warrant any person who is subject to the Code of Service Discipline, regardless of the rank or status of that person, who has committed, is found committing, is suspected of being about to commit, or is suspected of or charged under this Act with having committed a service offence;
 - (b) (Repealed, Chapter 13, s. 73.1, Statutes of Canada, 1972); and
 - (c) exercise such other powers for carrying out the Code of Service Discipline as are prescribed in regulations made by the Governor in Council.

Section 2 (f)(ii) of the Criminal Code definition of "peace officer" refers to "regulations made under the National Defence Act for the purposes of this paragraph". The applicable regulations are found in the Queen's Regulations and Orders for the Canadian Forces, passed pursuant to s. 12(1) of the National Defence Act and amended by Order in Council, P.C. 1976-1799, July 13, 1976 (hereinafter Queen's Regulations):

22.01--OFFICERS AND MEN--PEACE OFFICERS

- (1) Section 2 of the Criminal Code provides in part that "peace officer" includes:

"(f) officers and men of the Canadian Forces who are

- (i) appointed for the purposes of section 134 of the National Defence Act , or
 - (ii) employed on duties that the Governor in Council, in regulations made under the National Defence Act for the purposes of this paragraph, has prescribed to be of such a kind as to necessitate that the officers and men performing them have the powers of peace officers;"
- (2) For the purposes of subparagraph (f)(ii) of the definition of "peace officer" in section 2 of the Criminal Code , it is hereby prescribed that any lawful duties performed as a result of a specific order or established military custom or practice, that are related to any of the following matters are of such a kind as to necessitate that the officers and men performing them have the powers of peace officers:
- (a) the maintenance or restoration of law and order;
 - (b) the protection of property;
 - (c) the protection of persons;
 - (d) the arrest or custody of persons;

- (e) the apprehension of persons who have escaped from lawful custody or confinement;
 - (f) the enforcement of warrants issued by the Minister pursuant to section 218 of the National Defence Act ;
 - (g) the enforcement of the Customs Act and regulations made thereunder, or
 - (h) the enforcement of the Boating Restriction Regulations and the Small Vessel Regulations.
8. The facts of the present appeal are such that certain sections of the Defence Establishment Trespass Regulations, C.R.C. 1978, c. 1047 (here-inafter Trespass Regulations) are also relevant:

2. In these Regulations,

...

"security guard" means any peace officer, security policeman, provost, military policeman or member of the Corps of Commissionaires, and includes any officer or man of the Canadian Forces or employee of the Department of National Defence or of the Defence Research Board who has been assigned duties relating to the enforcement of these Regulations. (agent de sûreté)

3. These Regulations do not apply to any person who is subject to the Code of Service Discipline, but apply to all other persons except as provided in section 29 of these Regulations.

...

28.(1) Every security guard is authorized to arrest without warrant any person found committing any criminal offence or infraction of these Regulations on or with respect to any defence establishment or whom on reasonable and probable ground he believes to have committed such offence or such infraction.

- (2) Where the use of force is necessary to effect an arrest, a security guard shall use no more force than is necessary in the circumstances.

29. Notwithstanding anything contained in these Regulations, the officer in command or person in charge of a defence establishment may in respect of such establishment, in his sole discretion, and from time to time, exempt any person from the application of these Regulations, but such exemption shall be in writing and shall be for such period, not exceeding three months, as may be specified therein.

III

Procedural History

1. Provincial Magistrate's Court

9. Mr. Nolan was tried on the Information before Judge Elmer J. MacDonald of the Provincial Magistrate's Court in Dartmouth. The appellant pleaded not guilty on both counts. After the close of the case for the Crown, Defence Counsel made a motion for non-suit in relation to Count One. The case was adjourned and written submissions from the Crown and the Defence Counsel were received. When the Court reconvened, the trial judge dismissed the motion for non-suit. Counsel for the accused presented no evidence relating to either charge on the Information.
10. Judge MacDonald found Mr. Nolan not guilty on both counts. He held that Private Ettinger was not a peace officer as defined in the Criminal Code and that, therefore, he was not authorized to issue a breathalyzer demand to a civilian under s. 235 of the Code. The Judge further held that there was not sufficient evidence to prove that the appellant had been driving while impaired.
11. The Crown applied to Judge MacDonald to state a case. He did so, setting out his findings of fact and agreeing to the question as set by the Crown:

Did I err in law in holding that a military police officer appointed pursuant to Section 134 of the National Defence Act, R.S.C. 1970, c. N-4, as amended, is not a peace officer within the meaning of Section 2 of the Criminal Code, R.S.C., 1970, c. C-34, as amended, when exercising powers in relation to persons not subject to the Code of Service Discipline?

The Stated Case clearly referred only to Count One of the Information. The not guilty verdict on the Second Count was not appealed.

2. The Nova Scotia Supreme Court, Appeal Division
12. A three-judge panel of the Appeal Division of the Supreme Court of Nova Scotia held unanimously that Judge MacDonald had indeed erred in his interpretation of the definition of "peace officer" in s. 2 of the Criminal Code : (1982), 66 C.C.C. (2d) 417. In a concise opinion, Hart J.A. relied solely upon s. 2(f)(i) of the Code, and held that any person appointed under s. 134 of the National Defence Act is a "peace officer" for all purposes of the Criminal Code . He rejected the argument that the words in s. 2 (f)(i) "appointed for the purposes of section 134 of the National Defence Act " should be read as words of limitation. Military police officers appointed under that section were not limited to acting as "peace officers" when carrying out specific duties under the National Defence Act or subordinate authority.
13. It followed that, in Justice Hart's view, the Magistrate had erred in holding that the military police officer, Private Ettinger, was not a "peace officer" for the purposes of enforcing s. 235 of the Criminal Code . He was vested with the authority to make a breathalyzer demand. The acquittal was therefore set aside and the case remitted to the trial judge.
3. Supreme Court of Canada

14. Leave to appeal was granted by this Court, [1982] 2 S.C.R. ix. By motion, the appellant asked the Court to issue an order nunc pro tunc extending the time within which service and filing of a notice of appeal was required. The order was issued, and notice of appeal was filed subsequently.

IV

The Definition of "Peace Officer" in s. 2 (f)(i) of the Criminal Code

15. Section 2 (f) of the Criminal Code was introduced by the Criminal Law Amendment Act, 1972, S.C. 1972, c. 13. Prior to that amending legislation, the s. 2 definition of "peace officer" contained no reference to military personnel. The scope of authority of military police was established solely by s. 134 of the National Defence Act , and by regulations made thereunder, specifically by s. 22.02 of the Queen's Regulations. Section 134 provided that military police could exercise authority over only those persons "subject to the Code of Service Discipline". That Code consists of Parts IV-IX of the National Defence Act and it is designed primarily to regulate the conduct of members of the Canadian Armed Forces. Those subject to the Code are set out in s. 55(1) of the National Defence Act . It bears reiteration that the trial judge found as a fact that the appellant, Mr. Nolan, was not subject to the Code.
16. Under s. 134(b) of the Act prior to the 1972 amendments, military police had been granted specific authority to issue a breathalyzer demand pursuant to s. 235 of the Criminal Code , but only "in respect of any person subject to the Code of Service Discipline":
134. Such officers and men as are appointed under regulations for the purposes of this section may
- ...
- (b) exercise the authority vested in a peace officer under section 235 of the Criminal Code in respect of any person subject to the Code of Service Discipline....

This paragraph was repealed in 1972 and the new para. (f) was added to the definition of "peace officer" in s. 2 of the Criminal Code . As we have seen, s. 2 (f)(i) thereafter included in the definition of "peace officer" all "officers and men of the Canadian Forces" who are "appointed for the purposes of section 134 of the National Defence Act ". It was the opinion of the Nova Scotia Supreme Court, Appeal Division, that these amendments were intended to broaden the scope of authority of military police. Military police officers would no longer be limited to exercising authority over persons subject to the Code of Service Discipline, but could act as "peace officers" in relation to all residents of Canada. Hart J.A. stated at p. 420:

The obvious intention of this amendment was to cloak these trained [military] policemen with authority to deal with persons not subject to the Code of Service Discipline. Although it may not be desirable that this authority be exercised on too broad a basis, Parliament has, in my opinion, created peace officers under the Criminal Code of all military personnel appointed under s. 134

of the National Defence Act to carry out police duties within the Armed Forces. They have been vested with power to exercise their duties as peace officers not only when dealing with members of the Armed Forces but also with other persons not subject to the Code of Service Discipline.

No other court in Canada has adopted such a broad interpretation of s. 2 (f)(i) and it should be underscored that the Nova Scotia Court itself stated that "it may not be desirable that this authority [of military police] be exercised on too broad a basis." Although he argued for a very broad interpretation of s. 2 (f)(i), even the respondent Attorney General in this case argued in his factum that it would be "contrary to his interest" to submit that the military police could "exercise a general jurisdiction throughout the Province". He asked that the "judgment in the case at bar be confined to the particular circumstances of this case".

17. The view that the 1972 amendments to the National Defence Act and the Criminal Code were intended to broaden the scope of authority of the military police was rejected expressly by the Supreme Court of British Columbia in *R. v. Smith* (1982), 67 C.C.C. (2d) 418. Andrews J. held that the words in s. 2 (f)(i) "appointed for the purposes of section 134 of the National Defence Act " served not only to direct attention to the source of authority of the "peace officer", but also imposed an important limitation upon that authority (at p. 424):

In this case the words "for the purposes of section 134 of the National Defence Act " must . . . be taken to mean something. Section 134 of the National Defence Act clearly limits the scope of the purposes of this section to a grant of authority to an officer or man appointed thereunder to deal only with persons subject to the Code of Service Discipline. [Emphasis in original.]

This interpretation of s. 2(f)(i) of the Code was upheld by the B.C. Court of Appeal (1983), 2 C.C.C. (3d) 250, and it is entirely consistent with the judgment of the Court of Appeal of Alberta in *R. v. Harvey* (1979), 18 A.R. 382, where Clement J.A. held, at p. 386:

The jurisdiction of [the military police officer] is both defined and limited by the terms of s. 134 of the National Defence Act which is imported by reference into the definitions given by s. 2 of the Criminal Code . The military police are empowered as police officers with respect to persons who are subject to the Code of Service Discipline.

Callaghan J. of the Ontario High Court reached the same conclusion in *R. v. Pile* (1982), 66 C.C.C. (2d) 268, at p. 272.

18. The weight of authority points, therefore, to the conclusion that s. 2 (f)(i) does not extend the authority of military police to act as "peace officers" throughout a province and in relation to all residents of a province, duplicating the role and function of the civil police. Of course, the mere preponderance of authority is not sufficient in itself to justify a particular conclusion before this Court, unless that authority is grounded in reason and fairness. In the present case, however, authority, common sense and principle all lead to the same conclusion.

19. On the level of principle, it is important to remember that the definition of "peace officer" in s. 2 of the Criminal Code is not designed to create a police force. It simply provides that certain persons who derive their authority from other sources will be treated as "peace officers" as well, enabling them to enforce the Criminal Code within the scope of their pre-existing authority, and to benefit from certain protections granted only to "peace officers". Any broader reading of s. 2 could lead to considerable constitutional difficulties. Section 92(14) of the Constitution Act, 1867 provides that the administration of justice falls within provincial legislative competence. See *Di Iorio v. Warden of the Montreal Jail*, [1978] 1 S.C.R. 152, and *Attorney General of Quebec and Keable v. Attorney General of Canada*, [1979] 1 S.C.R. 218. Although the ability of the federal Parliament to create a national police force has never been challenged and any such exercise of authority is presumptively valid, to treat s. 2 of the Criminal Code as a broad grant of authority to thousands of persons to act as "peace officers" in any circumstances could well prompt a constitutional challenge. In the context of division of powers, legislation should be interpreted, when possible, so that it is not ultra vires. The assessment of legislation under the Canadian Charter of Rights and Freedoms is, of course, subject to different considerations. See *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110.
20. I would therefore conclude that the definition of "peace officer" in s. 2 of the Criminal Code serves only to grant additional powers to enforce the criminal law to persons who must otherwise operate within the limits of their statutory or common law sources of authority.
21. This interpretation is buttressed by a close textual analysis of s. 2 (f) itself. Like Andrews J. of the British Columbia Supreme Court, I am convinced that the words in s. 2 (f)(i), "appointed for the purposes of section 134 of the National Defence Act " must indeed "mean something". The respondent Crown submits that "for the purposes of section 134 " means nothing more than "under section 134 ". The reference is simply to describe those members of the Armed Forces--military police--who are "peace officers" within the meaning of s. 2 (f) (i). No limitation of authority is implied. I cannot agree with that interpretation. Section 2(f) (i) of the Code speaks of the purposes of s. 134 , not merely of the group defined by s. 134 . The purposes of s. 134 are clear: the section provides that officers and men appointed under regulations pursuant to the section may exercise authority over persons subject to the Code of Service Discipline. That is the full extent of the grant of power. Under this reading, s. 2(f) (i) of the Code allows such officers and men the additional authority to enforce the Criminal Code but only in relation to persons referred to in s. 134 itself.
22. The context of s. 2(f)(i) of the Code lends further support to this interpretation. Under section 2(c), persons "employed for the preservation and maintenance of the public peace or for the service or execution of civil process" are peace officers. Section 2(d) states that an officer or person "having the powers of a customs or excise officer" is a peace officer "when performing any duty in the administration of the Customs Act or the Excise Act ". In section 2(d.1) it is established that a "fishery officer" is a peace officer "when performing any of his duties or functions" under the Fisheries Act. Similarly, under s. 2 (e) the pilot of an aircraft

registered in Canada is a peace officer "while the aircraft is in flight". All military personnel are peace officers, under s. 2 (f)(ii), when they are employed on duties prescribed by regulation that necessitate the powers of a peace officer. Thus, it will be seen that s. 2 (f)(i) falls within a series of definitions all of which contain express functional or temporal limitations. In this context, it is difficult to imagine that the words in s. 2 (f)(i), "for the purposes of section 134 of the National Defence Act " are not to be treated as words of limitation.

23. Finally, it must be stressed that a reading of s. 2 (f)(i) that recognizes no limitation on the power of military police to act as "peace officers" would have the effect of broadening considerably the power of the military police to arrest without warrant. That power is granted by s. 134 of the National Defence Act . In *R. v. Dean* (1965), 47 C.R. 311, at p. 319 (Ont. C.A.), Laskin J.A. warned that "the Courts ought not to adopt a construction to enlarge the power to arrest without warrant unless the construction is plainly demanded by the words used in the relevant statute". I would endorse that view without reservation. As emphasized by Le Dain J. in *R. v. Therens*, [1985] 1 S.C.R. 613, at p. 644, when a citizen is confronted with police authority, there is always a strong element of "psychological compulsion" in any police demand. Although this "compulsion" may be useful in the maintenance of a peaceful society, the citizen should not be subject to the demands of a confusing array of authority figures. One of the hallmarks of our free and democratic society is the relatively low level of interference by officers of the state in the daily lives of the Canadian people. The exigencies of crime prevention and detection do not require an interpretation of s. 2 (f)(i) of the Criminal Code that would permit military police officers to exercise the powers of a "peace officer" in relation to all Canadians and throughout the country. I would therefore read s. 2 (f)(i) as according to persons appointed for the purposes of s. 134 of the National Defence Act the additional powers of peace officers under the Criminal Code , but only in relation to men and women subject to the Code of Service Discipline.
24. The arresting military police officer in the present case could not derive authority from s. 2 (f)(i) to demand of Mr. Nolan, a civilian, that he provide a breathalyzer sample. It remains to be seen whether such authority can be derived from the definition of "peace officer" in s. 2 (f) (ii) of the Criminal Code .

V

The Definition of "Peace Officer" in s. 2 (f)(ii) of the Criminal Code

25. As I have indicated, the Nova Scotia Supreme Court, Appeal Division, held in the instant case that the arresting military police officer had derived his authority from s. 2 (f)(i) of the Criminal Code . It was therefore unnecessary to discuss s. 2 (f)(ii). Indeed, the only reported case which explores s. 2 (f)(ii) in any detail is *R. v. Pile*, supra, a decision of Callaghan J. The facts in *Pile* were very similar to those of the case at bar. The accused was observed driving on a military base by a military police officer. The officer had reasonable and probable

grounds to believe that the accused was impaired by alcohol. The military police officer followed the accused off the base and arrested him on a public highway. In these circumstances, Callaghan J. held that the arresting officer was a peace officer within the meaning of s. 2 (f)(ii) of the Criminal Code . I agree, but my reasons for so concluding are somewhat different than those advanced by Callaghan J.

26. Section 2 (f)(ii) of the Criminal Code establishes that any "officer or man" of the Canadian Forces is a peace officer when

(ii) employed on duties that the Governor in Council, in regulations made under the National Defence Act for the purposes of this paragraph, has prescribed to be of such a kind as to necessitate that the officers and men performing them have the powers of peace officers;

The Governor in Council has promulgated such regulations in s. 22.01(2) of the Queen's Regulations which, for the sake of convenience, I will set out again:

(2) For the purposes of subparagraph (f)(ii) of the definition of "peace officer" in section 2 of the Criminal Code , it is hereby prescribed that any lawful duties performed as a result of a specific order or established military custom or practice, that are related to any of the following matters are of such a kind as to necessitate that the officers and men performing them have the powers of peace officers:

- (a) the maintenance or restoration of law and order;
- (b) the protection of property;
- (c) the protection of persons;
- (d) the arrest or custody of persons;
- (e) the apprehension of persons who have escaped from lawful custody or confinement;
- (f) the enforcement of warrants issued by the Minister pursuant to section 218 of the National Defence Act ;
- (g) the enforcement of the Customs Act and regulations made thereunder, or
- (h) the enforcement of the Boating Restriction Regulations and the Small Vessel Regulations.

There can be no doubt that the detection and arrest of inebriated drivers falls within the "matters" enumerated in s. 22.01(2). It could be said to relate to the maintenance or restoration of law and order, to the protection of property, or to the protection of persons. It certainly relates to the arrest or custody of persons. That is not the final hurdle, however, for the regulation imposes further conditions upon military personnel claiming to act as peace officers under s. 2(f)(ii) of the Code. A member of the armed forces is not given leave by s. 22.01(2) of the Queen's Regulations to act as a peace officer in all circumstances. Military personnel only fall within the definition when they are performing "lawful duties" that are the "result of a specific order or established military custom or practice".

27. It is therefore necessary to determine whether a demand made to a civilian driver for a breath sample falls within the scope of the lawful duties of a military police officer and whether the officer in the case at bar was acting pursuant to a specific order or established military custom or practice. To deal with these issues properly it is important to remember that when Mr. Nolan was observed by the military police officer, Mr. Nolan was driving at 50 kilometres per hour in a 15 kilometres per hour speed zone on C.F.B. Shearwater. Mr. Nolan was committing an infraction on the base, and the officer of course had authority to enforce the applicable speed limits against a civilian driving on the base (Government Property Traffic Regulations, C.R.C. 1978, c. 887).
28. Having stopped Mr. Nolan for the purposes of enforcing a speed limit, the officer derived further authority from the Trespass Regulations. These Trespass Regulations expressly do not apply to any person who is subject to the Code of Service Discipline, but they apply to all other persons, with certain stipulated exceptions. (See sections 3 and 29 of the Trespass Regulations.) They did apply to Mr. Nolan.

29. Section 28(1) of the Trespass Regulations provides:

28.(1) Every security guard is authorized to arrest without warrant any person found committing any criminal offence or infraction of these Regulations on or with respect to any defence establishment or whom on reasonable and probable ground he believes to have committed such offence or infraction.

The definition of "security guard" in s. 2 of the Trespass Regulations includes the "military policeman". There can be no doubt that the military police officer in the present case had the authority of a "security guard" under the Trespass Regulations. The facts found at trial established that he also had reasonable and probable grounds to believe that a criminal offence had been committed. Finally, the suspected criminal infraction of driving while impaired by alcohol took place on a "defence establishment", fulfilling the last requirement of s. 28(1) of the Trespass Regulations. The military police officer in the instant case therefore had statutory authority to arrest Mr. Nolan without warrant to enforce the criminal law.

30. I have no difficulty in concluding as well that a military police officer who has clear statutory authority to enforce the law and who is sent out on a routine patrol on a base is abiding by established military practice in fulfilling his role by attempting to enforce the law. The military police officer in the present case therefore met the final condition imposed by s. 22.01(2) of the Queen's Regulations. He was acting "as a result of a specific order or established military custom or practice".
31. In summary, the authority vested in the military police by virtue of s. 28(1) of the Trespass Regulations was sufficient to fulfil the requirements of s. 22.01(2) of the Queen's Regulations: the military police officer was performing "lawful duties" flowing from a "specific order or established military custom or practice". To perform those duties of enforcing the criminal law against civilians on a military base, it was necessary, furthermore, to have the powers of a peace officer. I have already emphasized that the detection of inebriated drivers clearly

falls within a number of the enumerated "matters" in s. 22.01(2). I would conclude, therefore, that the arresting officer was a peace officer within the meaning of s. 2 (f)(ii) of the Criminal Code when read with s. 22.01(2) of the Queen's Regulations and s. 28(1) of the Trespass Regulations. Being a "peace officer", the military police officer in the instant case was entitled to invoke the statutory authorization of s. 235(1) of the Criminal Code and to issue a breathalyzer demand. I expressly leave aside the question what authority is vested in military personnel for the purposes of Part XI of the National Defence Act which relates to extraordinary use of the military in aid of the civil power. That question clearly is not raised on the facts of the case at bar.

32. One issue must yet be resolved. Although the offence took place on a defence establishment, the actual detention of the accused occurred on a public highway after the military police had followed Mr. Nolan out of the gates of the base. The question arises whether the military police retained their status and authority as peace officers once they left C.F.B. Shearwater. On the particular facts of the instant case, I have no difficulty in concluding that they did. The accused was seen committing a traffic offence on the base. The officers only saw the accused as he was speeding out of the gates of the base and, in order to enforce the law, the military police officers had to follow Mr. Nolan off the base. There is absolutely no evidence that the accused attempted to evade the military police, so the circumstances do not really raise the issue of "hot pursuit". Given the instantaneous police warning to the accused to stop his vehicle and the detention immediately outside the gates of the base, there was such a clear nexus between the offence committed on the base and the detention off the base that I am convinced that the military police retained their status and authority as peace officers.

VI

Conclusion

33. The appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant: Boyne Clarke, Dartmouth.

Solicitor for the respondent: Department of the Attorney General of Nova Scotia, Halifax.

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