

PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Russell, 2010 NSPC 2

Date: 2010-01-29

Docket: 1959275, 1959280,
1959281, 1959283,
1959285, 1959286

Registry: Bridgewater

Between:

R.

v.

William Oswald Russell

Judge: The Honourable Judge James H. Burrill

Heard: January 29, 2010, in Bridgewater, Nova Scotia

Charge: 32 EA1, 39(1)(a) RVA, 39(1)(b) RVA,
32 EA1, 39(1)(a) RVA, 39(1)(b) RVA

Counsel: Joshua Bryson, for the Federal Crown
Paul Scovil, for the Provincial Crown
Alan G. Ferrier, for the Defence

By the Court,

Introduction:

[1] On August 27, 2008 R.C.M.P. officers served two search warrants on the accused. The first warrant was issued by a Justice of the Peace and authorized the search of the accused's vehicle and a flea market stall he was operating out of in Mahone Bay, N.S.

The second warrant was issued by another Justice of the Peace after the first search this warrant authorized the search of the accused's residential property in Barss Corner, N.S.

The search of the accused's vehicle resulted in the seizure of six cartons containing 200 cigarettes not stamped in accordance with the Excise Act nor the Revenue Act.

The search of a garage at the accused's residence resulted in the seizure of 231 cartons containing 46,200 cigarettes which were also not stamped in accordance with the Federal and Provincial legislation.

At an earlier hearing I had delivered an oral judgement quashing both warrants after considering the Informations to Obtain (ITO's) for those warrants. I had ruled that the grounds contained in those ITO's were incapable of constituting a basis upon which the issuing justices could have concluded or inferred that there were reasonable grounds for the searches.

Since the warrants were quashed the searches were not authorized by law and resulted in breaches of s. 8 of the Charter.

ISSUES

[2] As a result of the s.8 Charter breach the defence seeks exclusion of the seized cigarettes from evidence under the authority of s. 24(2) of the Charter while the crown argues that despite the breach the seized cigarettes should be admitted at trial. Section 24(2) reads:

“Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.”

[3] Recently, the Supreme Court of Canada in R. v. Grant, [2009] S.C.J. No. 32 has revised the manner in which the analysis under s. 24(2) should be undertaken.

[4] The phrase “bring the administration of justice into disrepute” is to be understood with consideration to the long term. The court observed that while the exclusion of the evidence in an individual case may provoke immediate criticism, it is the overall repute of the justice system in the long term that must be the focus.

[5] Once a breach is established some damage to the administration of justice has already been done, but the system must ensure that the inclusion of the evidence obtained does not do further damage. The Supreme Court also makes it clear that the section is not aimed at punishing the police or other state authorities, but is instead aimed at systemic concerns.

[6] In conducting the analysis the Supreme Court of Canada in Grant (supra) sets out a three step process with the following factors to be considered:

1. Seriousness of the Offending Conduct
2. Impact of the Breach on Charter Interest

3. Society's Interest in Determining the Case on its Merits

Seriousness of the Offending Conduct

[7] At this first stage, the court considers the seriousness of the offending conduct by the state authorities that infringed the Charter and led to the discovery of the evidence. As the Supreme Court made clear, the more severe or deliberate the state conduct that led to the Charter violation, the greater the need for the court to disassociate itself from that conduct by excluding evidence linked to that conduct in order to preserve public confidence in and ensure state adherence to the rule of law.

As Campbell J. said in R. v. M.(D.B.), [2009] N.S.P.C. 38 at para. 40:

“A court must assess whether the admission of the evidence would, in effect, send a message to the public that state deviation from the rule of law was being condoned”

[8] As the Supreme Court of Canada noted in R. v. Harrison, [2009] S.C.J. No. 34 the issue of state misconduct may range from blameless to negligent to flagrant.

[9] In this case there is no suggestion that the informant set about to flagrantly trample the accused's right. The informant recognized the need to obtain judicial authorization for both searches, but in the end presented the justices with information that was, as I found, incapable of supporting an inference or conclusion that there were reasonable grounds for the searches.

[10] In the case of the first search the informant presented little more than the word of a source of unproven reliability. This source had a criminal record, freely associated with criminals and was motivated to provide the information for financial gain. The information was not particularly detailed and the only confirmation was of generally available information.

[11] In the case of the second search the grounds were essentially the same although this time the informant was described as being of proven reliability. The justice of the peace, however, was never told how such reliability was proven,

although from the facts argued at the hearing it is obvious that it was as a result of the first successful search.

[12] In this case there was no bad faith on the informant's part and before he conducted the searches he obtained the required judicial authorization. His conduct can be described as negligent in that he presented grounds that were incapable of meeting the standard for authorization of reasonable grounds.

Impact of the Breach on Charter Interest

[13] This second consideration calls for an evaluation of the extent to which the breach actually undermined the interests protected by the infringed right. As the Supreme Court of Canada noted in Grant (supra) the impact of the breach may range from fleeting and technical to profoundly intrusive. The more serious the impact, the greater the risk that the admission of the evidence would send a signal to the public that Charter Rights are of little value. The Supreme Court commented on the rights that may be impacted by an unreasonable search contrary to s. 8. Those interests could be described as interests in privacy and human dignity. An unreasonable search that intrudes on areas where there is a higher expectation of

privacy or that demeans the person's dignity is more serious than one that does not.

[14] There is a reduced, but yet significant expectation of privacy with regard to the contents of one's vehicle while there is an extremely high expectation of privacy with regard to a person's home property. I find the impact of the breaches here to be significantly intrusive with regard to the motor vehicle and profoundly intrusive with regard to the search of the residential property.

Society's Interest in Determining the Case on it's Merits

[15] The issue under this heading is whether the truth-seeking function of the trial process would be better served by the admission of the evidence or by exclusion. The court has to consider both the negative impact of the admission of the evidence on the repute of the administration of justice and the impact of failing to admit the evidence.

[16] When considering this, the reliability of the evidence is an important factor. The admission of unreliable evidence does not serve the public interest in

uncovering the truth nor does it serve the public interest in ensuring fair trials. Of course, excluding highly reliable evidence may reflect negatively on the system of justice when the remedy “effectively guts the prosecution”.

[17] Section 24(2) operates independently of the seriousness of the offence although it is a valid consideration that the Supreme Court suggests could “cut both ways”. Failure to prosecute serious offences due to excluded evidence may have an immediate impact on how people view the system, but the focus is the long term. The Charter rights of those accused of the most serious crimes must be respected if the rights are to have any meaning.

[18] With respect to physical evidence, such as the cigarettes in this case, the Supreme Court in Grant noted at para. 115:

“Reliability issues with physical evidence will not generally be related to the Charter breach. Therefore this consideration tends to weigh in favour of admission”

The cigarettes in this case are of course physical evidence and reliable just as the 35 kilograms of cocaine was in Harrison where the majority ruled that, in the totality of the circumstances, the cocaine should be excluded.

[19] At the end of the day it is a qualitative balancing exercise as the Supreme Court noted in Harrison at para. 36:

“The balancing exercise mandated by s. 24(2) is a qualitative one, not capable of mathematical precision. It is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case. The evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute. Dissociation of the justice system from police misconduct does not always trump the truth-seeking interests of the criminal justice system. Nor is the converse true. In all cases, it is the long-term repute of the administration of justice that must be assessed”

[20] Having examined this case in that context I have concluded that the applicant has established on balance that the seized cigarettes in each instance should be excluded from evidence. In each instance there was the negligent presentation of insufficient grounds to a judicial officer who, in turn, failed to identify the insufficiency of the grounds presented. In the first instance the accused’s vehicle was searched and in the second instance, where the grounds were arguably closer to the reasonable grounds standard, it was the accused’s house property that was searched.

[21] In conducting the 24(2) analysis I find that the court should also consider the justice system's own failure to adhere to the requirement of reasonable grounds before issuing warrants. It is a systemic failure that would diminish the long term repute of our justice system if I were to admit the evidence. In all the circumstances I have concluded that the seized cigarettes should be excluded from evidence.