S.C.C. No. 02613

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Jones, Hallett and Matthews, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN Appellant - and - DANIEL JOSEPH INNOCENTE, LAWRENCE JAMES PACE and JOHN MICHAEL QUINN Respondents	Gregory A. Cann for the Appellant Warren K. Zimmer for the respondent Innocente Respondents Lawrence James Pace and John Michael Quinn not appearing Appeal Heard: May 29, 1992 Judgment Delivered: June 4, 1992

THE COURT: Appeal dismissed per reasons for judgment of Hallett, J.A.; Jones and Matthews, JJ.A. concurring.

HALLETT, J.A.

This is an appeal from a decision of a Trial Division Judge who quashed a search warrant obtained by a peace officer. The learned trial judge found that as the manner of obtaining the warrant was improper the search conducted thereunder contravened s. 8 of the **Charter** and pursuant to s. 24(2) of the **Charter** he ruled that the admission at trial of the evidence found as a result of the search would bring the administration of justice into disrepute. The peace officer who obtained the search warrant had 22 years experience. On the 24th of February, 1989, he had been requested by his supervisor to obtain a search warrant pursuant to s. 12 of the **Narcotic Control Act**. He became aware that other officers were conducting an authorized interception of private communications in connection with an investigation of a murder. One of the places where the intercepts could occur was the hotel room occupied by two of the respondents, being Room 715 of the Holiday Inn in Halifax. After listening to a number of intercepted calls the peace officer, without consultation with legal counsel, swore out an information to obtain the search warrant. He was of the opinion that the warrant had to be obtained quickly for obvious reasons and listed in the Information the basis of his reasonable grounds for believing that an offence under the **Narcotic Control Act** had been or was about to be committed as follows:

> " (1) That ..(the peace officer) through previous drug and criminal investigations that various human sources including other police officers and police agencies, I have personal knowledge that Daniel Innocente, John Fee Quinn and Terry Marriott are involved in an organization of major drug suppliers, supplying street level drug dealers in the Halifax Metro area.
>
> (2) Information from a confidential and reliable source, of known reliability in the past, that Daniel Innocente and Terry Marriott were travelling to Montreal by airplane

and then by motor vehicle to Toronto to purchase a large amount of cocaine for resale in the Halifax Metro area.

(3) As a result of surveillance conducted by Cst. Eldon Vickers of the Halifax City Police, at the Halifax International Airport, on February 18, 1989, one Terry Marriott was observed at the Halifax International Airport disembarking from an airplane returning from Montreal.

(4) Information received from Air Canada is that one Daniel Innocente flew to Montreal on Monday, February 20, 1989, with no return date.

(5) Information from a known and reliable source of known reliability in the past stated that these travels of Innocente and Marriott were in fact to arrange a shipment of cocaine for resale in Halifax.

(6) Information received from a known and reliable source, of known reliability in the past, that Daniel Innocente returned to Halifax, means unknown, on Thursday night, February 23, 1989, and went to the Holiday Inn where he rented room 715.

(7) That as a result of surveillance it has been confirmed that Daniel Innocente is in fact in room 715 at the Holiday Inn.

(8) That information received from a known and reliable source of known reliability in the past, Daniel Innocente at the present time is awaiting the arrival of John Fee Quinn at the Holiday Inn, Room 715, so that the cocaine can be cut up for street level dealing.

(9) That John Fee Quinn has a criminal record for drugs.

(10) That Terrance Marriott has a criminal record for drugs.

(11) That at the present time physical surveillance is being conducted on John Fee Quinn and Daniel Innocente."

The fact is that the information in paragraphs 2, 6 and 8 was based on conversations intercepted by the police as a result of the authorized interception. This fact was not communicated to the justice of the peace to whom the peace officer applied for the search warrant. Paragraphs 2, 6 and 8 made reference to obtaining information from previous reliable sources, the clear impression created was that the information had been provided by an informant. The peace officer testified that his motive in using the phraseology in the information to obtain the search warrant was to keep information regarding the on-going murder investigation by wire tap from becoming public.

The warrant was issued and executed by the peace officer and others. The respondent Mr. Innocente was in hotel room 715 and 7.5 grams of cocaine were seized along with cash in excess of $15,000.00. The respondent Mr. Quinn was also present.

The appellant raised three grounds of appeal as follows:

> " THAT the Learned Trial Judge erred in law in holding that the search of room 715 of the Holiday Inn on February 24, 1989, pursuant to a search warrant, contravened Section 8 of the **Canadian Charter of Rights and Freedoms.**
>
> THAT the Learned Trial Judge erred in law in quashing the search warrant to search room 715 of the Holiday Inn on February 24, 1989.
>
> THAT the Learned Trial Judge erred in law in excluding the evidence seized during the search of room 715 of the Holiday Inn on February 24, 1989, pursuant to Section 24(2) of the **Canadian Charter of Rights and Freedoms.**"

The first two grounds of appeal have been abandoned.

THE LAW

In **Collins v. The Queen** (1987), 1 S.C.R. 265 and more recently in **R. v. Kokesch** (1990), 61 C.C.C. (D) 207, the Supreme Court of Canada has outlined the criteria to be applied by a trial judge in dealing with applications to exclude evidence pursuant to s. 24(2) of the **Charter**. In **Kokesch** Sopinka J. speaking for the majority at p. 225 stated:

> " The factors to be considered in assessing the admissibility of evidence under section 24(2) fall into three broad categories: (1) factors concerning the effect of admission on the fairness of the trial; (2) factors concerning the seriousness of the violation, and (3) factors concerning the effect of exclusion on the reputation of the administration of justice."

Factors concerning the seriousness of the violation were referred to by Cory J., writing for the majority in **Wise v.The Queen** (Feb. 27, 1992), No. 22050, unreported, (S.C.C.). He stated at pp. 14-15:

> " II. *The Factors Affecting the Seriousness of the Violation*
>
> In this case, I have concluded that the admission of the evidence would not affect the fairness of the trial. How then should the violation be assessed? Lamer J. in **Collins** at p. 285 quoted the following passage from Le Dain J.'s reasons in **R. v. Therens**, [1985] 1 S.C.R. 613, at p. 652:
>
> > *The relative seriousness of the constitutional violation has been assessed in the light of whether it was committed in good faith, or was inadvertent or of a merely technical nature, or whether it was deliberate, wilful or flagrant. Another relevant consideration is whether the action which constituted the constitutional violation was motivated by urgency or necessity to prevent the loss or destruction of the evidence.*

> Were the police actions in this case undertaken in bad faith or were they wilful and flagrant violations of **Charter** rights?"

(a) Good Faith

> Bad faith has been found in situations where there has been a blatant disregard for the **Charter** rights of an accused or where more than one **Charter** right has been violated (see **R. v. Gregge, supra** and **R. v. Genest**, [1989] 1 S.C.R. 59). Good faith has been established in situations where the violation stemmed from police reliance upon a statute or from the following of a procedure which was later found to infringe the **Charter** (see **R. v. Duarte**, [1990] 1 S.C.R. 30, and **R. v. Simmons**, [1988] 2 S.C.R. 495)."

Mr. Justice Cory also considered the threat of violence and urgency that existed in that case as a relevant matter in considering the seriousness of the violation. The matter or urgency is relevant to the case we have under consideration.

THE TRIAL JUDGE'S DECISION

After concluding that the justice of the peace acting judicially could not have determined that there were reasonable grounds for issuing the warrant, the trial judge went on to deal with the s. 24(2) **Charter** issue. He made reference to the decision of the British Columbia Court of Appeal in **R. v. Donaldson et al.** (1990), 58 C.C.C. (3d) 294, where that court did not interfere with the trial judge's determination that the justice of the peace who issued the warrant was deceived by the informant. The trial judge in that case had found that the admission of the evidence obtained by the search would bring the administration of justice into further disrepute as it would amount to judicial condonation of unacceptable investigatory conduct by the police.

After referring to the **Donaldson** case the learned trial judge in the decision we have under review stated at p. 23:

> " I find that the failure to disclose the source of the crucial information in this matter, and implying it was a human source, did have the effect of deceiving the Justice of the Peace."

The learned trial judge then made reference to the three pronged test as enunciated by Lamer J. in the **Collins** case for determining if evidence obtained as a result of a **Charter** violation should be excluded where it was obtained in a manner that infringed or denied a **Charter** right.

The learned trial judge concluded:

> " I have considered the impact of this matter on the basis of the application of s. 24(2) of the **Charter**, and guided by the above quotation by now Chief Justice Lamer of the Supreme Court of Canada, and by the decision of Nunn, J. in **R. v. Howell and Briand, supra,** I feel it appropriate under all of these circumstances to exclude the evidence in question under s. 24(2)."

ISSUES ON APPEAL

The parties agree that the admission of the evidence would not affect the fairness of the trial as it was real evidence (cocaine and money) that were found. The respondent, however, vehemently asserts that the information of the police officer presented to the justice of the peace in support of the application for the warrant was deceptive and therefore was a very serious violation of the s. 8 **Charter** right.

The position of the appellant is that there was no finding by the trial judge that the justice of the peace had been intentionally deceived by the peace officer. The appellant submits that the main thrust of both the evidence and the ruling by the learned trial judge was that the focus of the non-disclosure was on protection of an on-going investigation rather than creating

a false impression in the mind of the justice of the peace and that this has a mitigating effect on the seriousness of the **Charter** violation. The appellant asserts that the learned trial judge did not do a proper s. 24(2) analysis.

I am of the opinion that paragraphs 2, 6 and 8 of the sworn Information were misleading and were known to the peace officer to be misleading as to the source of the information. The phraseology would have created in the mind of the justice of the peace that the information was obtained from an informant. It was the intention of the peace officer to mask the fact that the information was obtained from an intercepted communication. While there was no advantage gained by the peace officer in proceeding as he did and it is clear that he had reasonable and probable grounds to believe the facts that an offence was being committed or about to be committed as opposed to mere suspicion as in **R. v. Greffe** (1990), 55 C.C.C. (d) 161, **R. v. Kokesch** (1990), 61 C.C.C.(d) 207 and **Collins v. R.** (1987), 1 S.C.R.. 265, the fact is he filed a deliberately misleading affidavit. I understand and can appreciate the good intentions of the peace officer in hiding the true source of the information but the court cannot condone the presentation to judicial officials of deliberately misleading information sworn to as true in support of an application for the issuance of a court order or warrant. If the court were to do so the integrity of the judicial process would be seriously damaged. There were other methods available to the peace officer to protect the ongoing investigation such as an application to seal the envelope. To rule that the evidence obtained should be admitted at the trial of the respondents would be to encourage similar conduct in the future. The integrity of the police in the judicial process is fundamental. Although there was an element of good faith and urgency in the peace officer's conduct, the information was deliberately misleading not merely inadvertent.

Under the circumstances, to admit the evidence would bring the administration of justice into further disrepute.

I am satisfied the learned trial judge considered the relevant principles when dealing with a s. 24 application to exclude the evidence, he did not err. The appeal should be dismissed.

J.A.

Concurred in:

Jones, J.A.

Matthews, J.A.