**C.A.C. No. 127861**

# NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. M.R.M., 1997 NSCA 85

**Chipman, Roscoe and Pugsley, JJ.A.**

**BETWEEN:**

| | | |
|---|---|---|
| **HER MAJESTY THE QUEEN** | ) | Paula Taylor<br>for the Appellant |
| Appellant | ) | |
| - and - | ) | |
| **M. R. M.** | ) | Mona Lynch<br>for the Respondent |
| Respondent | ) | |
| | ) | Appeal Heard:<br>January 23, 1997 |
| | ) | Judgment Delivered:<br>April 1, 1997 |

**THE COURT:** The appeal is allowed and a new trial ordered, per reasons of Pugsley, J.A.; Chipman and Roscoe, JJ.A., concurring.

**Editorial Note**

Identifying information has been removed from this electronic version of the judgment.

**Pugsley, J.A.:**

The principal issue in this case is whether the rights of a junior high school student under s. 8 and s. 10(b) of the **Canadian Charter of Rights and Freedoms** were violated when he was directed to attend at the vice-principal's office, and there subjected to a search for drugs, in the presence of a member of the RCMP.

The judge of the Youth Court, in a ruling following a *voir dire*, concluded there were "several **Charter** violations" and excluded the evidence of marijuana discovered in the student's sock. The Crown offered no additional evidence, and the judge accordingly dismissed the charge brought pursuant to s. 3(1) of the **Narcotic Control Act**.

The Crown appeals submitting that the Youth Court judge erred in concluding that the student's **Charter** rights under ss. 8 and 10 were violated, and that the judge further erred when, pursuant to s. 24(2) of the **Charter**, he excluded the evidence of marijuana found in the student's sock.

**Background**

The evidence given on the *voir dire* by M. C., vice-principal of a high school in Halifax County, Cst. Siepierski, a member of the R.C.M.P., and MRM, the accused, with a few minor exceptions, is consistent.

Mr. C. testified that he was in charge of enforcing the school policies mandated by both the school, and the county school board. One of those policies, known to the student body, provided that any student in possession of drugs, or alcohol, on school property, either during the course of the school day, or at a school sponsored event, would be immediately suspended. The policy further provided that where the vice-principal concluded any breach involved a criminal matter, he was to call the RCMP.

About three weeks before the regular monthly school dance scheduled to be held in October, 1995, three or four students, on more than one occasion, advised Mr. C. that MRM, a 13-year old student, was selling drugs on school property.

Mr. C. had reason to believe the information "because I knew that they knew MRM, they hung around with MRM . . . If anyone in the school would have known what MRM was or wasn't doing, it would be these particular students".

He had further reason to accept the information as one of the informants had advised him, on an earlier occasion, that another student had drugs in his locker, and this information had later been verified as correct.

Approximately two weeks before the dance, three of the informants, at different times, again advised Mr. C. that MRM was selling drugs on school property. Two of the informants advised they were present when the drug transactions took place.

On the day of the dance, one of the informants told Mr. C. that he believed that MRM would be "carrying tonight".

Upon seeing MRM arrive at the dance shortly after 7:00 p.m., Mr. C. called the Sackville detachment of the RCMP to request that an officer attend at the school.

Mr. C. testified that "I felt there was a likelihood that I might find drugs and also it's a matter of timing. . . there are times when you call the RCMP about something you consider to be important and they may not show up for an hour, an hour and a half...". Mr C. then approached MRM, and his friend, and asked them both to come to his office. Mr. C. closed the office door after the three entered. Mr. C. requested the students to sit down across from his desk and asked each student in turn if he was possessing drugs. The evidence does not disclose whether a response was made. Mr. C. then advised the students that he was going to search them. At about this time there was a knock on the door. Mr. C. left his office for a moment and returned with Cst. Siepierski. The office door was again closed. Cst. Siepierski, dressed in plain clothes,

showed both students his I.D., identified himself verbally, and then sat on the edge of a table. Mr. C. returned to his chair behind his desk.

Mr. C. then had a brief conversation (undisclosed) with MRM. MRM stood up and turned out the inner lining of his pants pockets. After requesting MRM to pull up his pants, Mr. C. noticed a bulge in MRM's sock. The bulge was concealing a cellophane bag "with a substance in it". Mr. C. removed the bag from MRM's sock and handed it to Cst. Siepierski. Cst. Siepierski identified the contents of the bag as marijuana, advised MRM that he was under arrest for the possession of a narcotic, and read the police caution and the right to counsel to him. He also advised MRM that he had the right to contact a legal parent or adult. MRM responded that he understood the advice given to him and attempted, unsuccessfully, to reach his mother by phone. MRM advised that he did not wish to contact anybody else.

Mr. C. carried out a search of the other student, found nothing, and advised the student that he could leave.

Cst. Siepierski and MRM then walked to MRM's locker. It was locked, but when opened, no drugs were found.

**Reasons of the Youth Court Judge**

The Youth Court Judge concluded there were "several **Charter** violations". Although not explicit in his comments, it is a reasonable inference that he was referring to ss. 8 and 10.

He said in part:

> Siepierski seated himself close by and thereafter conducted himself as an observer. C. seated himself behind his desk and from there requested and directed personal searches.
>
> Siepierski said nothing else to either youth after introducing himself. At that stage, neither the accused nor his companion were informed of their rights under the **Charter**

> or cautioned with respect to the possible consequences of what was about to unfold [i.e. the search], by either the school official or the officer. If detention was ambiguous in law to this point, I find any ambiguity dissolved upon the officer's appearance. I am satisfied that MRM then believed (as he did when C. first confronted him) that he had no choice but to remain in the office and submit to the search. He had no reason to believe otherwise for no information was given to him. No explanation was given as to why the officer did not give any rights or cautions prior to C.'s personal search. There was every opportunity to do so.
>
> . . .
>
> The present case involved a young person and a school official, initially. The police officer attended at C.'s request, but allowed C. to conduct a personal search. I find there was an agreed strategy that C. conduct the search with a view to the officer laying a possession charge if the search was productive. By this stage a criminal investigation was in full flight. By virtue of this, I find that C. thereby became an agent of the police, not withstanding outward appearances in the absence of a formal declaration of roles upon re-entry of the office. . . . I am satisfied on the evidence that C. was acting in law as a person in authority as contemplated by the **Young Offenders Act.** I am satisfied that the accused was detained in law, if not upon C.'s initial personal intervention, then upon police intervention before the search commenced.
>
> Actual police intervention before the search in the present case, in my opinion, imposes a different standard of conduct. I do not think this can be avoided under by (sic) thinly veiled delegation of the task to another.
>
> . . .
>
> Even in adult cases, if waiver of the s. 8 right is argued (i.e. accused consented to the search) the person purporting to consent must be possessed of the requisite foundation for a valid waiver. The right to choose includes not only the notions of voluntariness and free choice, but also enough information to make an informed choice. . . . In cases involving young persons, the standard to be met is (and should be) much higher as evidenced, for example, by the stringent requirements of s.56 of the **Young Offenders Act** in regard to confessions.

After finding the violations "to be more than trifling", the Youth Court Judge concluded:

> If the evidence is excluded it is my opinion that the administration of justice will not be brought into disrepute. Acquittal in this instance on these facts is unlikely to be so offensive as to render the result wrong on ordinary principles of fairness and justice. Having regard to all of the circumstances, I am satisfied that exclusion is the appropriate remedy.

Accordingly, he ruled the search results inadmissible.

## Analysis

### S.32(1) of the Charter

The first issue to be considered is whether the **Charter** applies to the actions of Mr. C..

Section 32(1) reads:

> This **Charter** applies:
>
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Is a public school in Nova Scotia an extension of government? Is the staff subject to the provisions of the **Charter** respecting the students in their care?

The trial judge, while not specifically directing his attention to s. 32, appears to have justified the applicability of the **Charter** on the ground that Mr. C. was acting as an agent of the RCMP, that Cst. Siepierski "allowed" C. to conduct a personal search of MRM and that there was "an agreed strategy" between them.

In my opinion the evidence does not support these conclusions. My reasons will be set forth when I deal with the alleged violation of MRM's s. 8 **Charter** rights.

Cogent arguments could be made, however, that:

- Mr. C., an educator in a public school, was exercising a government function as an educational state agent, and his actions were therefore subject to the limitations of the **Charter** (see Professor A. Wayne Mackay, *Students as Second Class Citizens under the Charter* (1987) 54 C.R. (3rd) 390);
- If the Crown was relying on the statutory powers given to school boards, and school staff, pursuant to the **Education Act**, Ch. 136, R.S.N.S. (1989) to justify Mr. C.'s actions, then the **Charter** restricts the scope of those actions. (See Hogg, *Constitutional Law of Canada,* 3rd Ed., Vol. 2, p. 34-13.)

No evidence was led before the trial judge, nor were any submissions directed to him, or to this Court, concerning the applicability of s. 32. I therefore consider it inappropriate to come to any conclusion on this issue.

For the purposes of the appeal, I will assume that Mr. C. was subject to the **Charter** respecting his dealings with MRM.

**Section 8 of the Charter:**

Section 8 of the **Charter** provides:

> Everyone has the right to be secure against unreasonable search or seizure.

The Supreme Court of Canada has determined that the rights expressed under s. 8 apply to those cases where a person has a reasonable expectation of privacy, following the American analysis that privacy, rather than property, is the interest to be protected.

The Supreme Court has further determined that **Charter** rights should not be considered in a vacuum; rather, the context in which the right is asserted must be taken into account as it could affect the individual's reasonable expectation of privacy.

Justice Cory put it this way in **R. v. Wholesale Travel Group Inc.**, [1991] 3 S.C.R. 154 at 216:

> It is now clear that the **Charter** is to be interpreted in light of the context in which the claim arises. Context is relevant both with respect to the delineation of the meeting and scope of the **Charter** rights, as well as the determination of the balance to be struck between individual rights and the interests of society. (emphasis added)

The Supreme Court has, for example, placed limits on the public's reasonable expectation of privacy viewed in a regulatory context as contrasted with conduct viewed solely in a criminal context (**R. v. Potash** (1994), 91 C.C.C. (3d) 315 - powers of an agency charged with implementing a government decree in a regulated industrial sector; **R. v. Fitzpatrick** (1996), 102 C.C.C. (3d) 144 - use of statutorily required fishing logs and hail reports, in the regulatory prosecution of fishers).

The individual rights of young persons are statutorily prescribed in s. 3(1)(e) of the **Young Offenders Act**, R.S.C. 1985, CY-1, under the heading "Declaration of Principle" in these words:

> It is hereby recognized and declared that . . .
>
> (e) young persons have rights and freedoms in their own right, including those stated in the **Canadian Charter of Rights and Freedoms** or in the **Canadian Bill of Rights**, and in particular a right to be heard in the course of, and to participate in, the processes that lead to decisions that affect them, and young persons should have special guarantees of their rights and freedoms . . .

The interests of society are clearly advanced by the maintenance of a strong, orderly educational system.

Professor Mackay writes, in his text, *Education Law in Canada* (1984) Edmond-Montgomery Publications Ltd. (at p. 40):

> As early as 1954, education was described as "the most important function of state and government" in the celebrated case of **Brown v. Board of Education** (1954), 347 U.S. 483. This description is, if anything, more compelling in the 1980's than it was in the 1950's.

The same comment is appropriate for the 1990's.

The rights of young students must, therefore, be interpreted in light of the important function which education serves in society.

Some additional assistance in defining the interests of society can be gained by reviewing the provisions of the **Education Act**.

The **Education Act** was substantially amended by virtue of Chapter 1 of the **Acts** of 1995-96. The amendments express, in clear terms, the vital importance of the system of education to the future of the province, and outline the responsibilities of both students and teaching staff to contribute to the system. The new **Act**, however, only came into force on January 16, 1996, a few months after the incident involving MRM arose.

Under the provisions of s.33(2) of the **Education Act**, a school board had a positive duty to provide for the education and instruction of pupils resident in the area within its jurisdiction. Regulation 62 of the **Education Act**, with some specific exceptions, required every child in the province, between the age of six and sixteen, to attend the school serving the section in which he resided.

In the environment of October, 1995, it was in the interest of society to ensure that children attend a safe educational environment. A safe educational environment could only be maintained if authority was granted to principals, and staff, to ensure proper order and discipline. Unfortunately, the times dictated that young people attending school required, and continue to require, protection from those who wish to traffic in drugs.

While there was no express authority in the **Education Act** authorizing search and seizure powers by the principal or staff, s.54 provided:

> It is the duty of a teacher in a public school to . . .
>
> (b) <u>maintain proper order and discipline in the school or room in his charge</u> and report to the principal or other

> person in charge of the school the conduct of any pupil who is persistently defiant or disobedient;
>
> . . .
>
> (g) give constant attention to the health and comfort of the pupils, to the cleanliness, temperature, and ventilation of the school rooms, and to the aesthetic condition of the rooms, grounds and buildings;
> (emphasis added)

A principal was defined in s.2(n) of the **Education Act** as the person responsible for supervising and administering the educational program in the school as directed by the employing board through the superintendent . . ."

Regulation 3(9) in setting forth the obligations assumed by a vice-principal provides:

> A vice-principal is responsible for:
>
> (a) Assisting the principal in carrying out his duties as directed by the school board or the principal;
> (b) Assuming the duties of the principal in his absence.

Mr. C., as vice-principal in charge of discipline, was clearly mandated to supervise the dance, and activities sponsored by the school, on the evening in question.

A provision similar to s. 54(b) of the **Education Act** was the focus of attention of the Ontario Court of Appeal in **R. v. JMG** (1986), 29 C.C.C. (3d) 455 (leave to appeal to the Supreme Court of Canada refused January, 1987).

In **R. v. JMG**, the principal of a junior high school in Thunder Bay received information from one of his teachers that a fourteen year old Grade 7 student had been seen outside the school placing drugs in his socks. After receiving advice from a policeman on how to handle this situation, the principal requested the accused to come to his office, informed him that he had reason to suspect that he was in possession of drugs, and asked him to remove his shoes and socks. The principal recovered marijuana from the accused's socks. Mr. Justice Grange, on behalf of the court stated at p. 460:

> In my view, the search of the accused in the case at Bar was not only justified at its inception but indeed was dictated by the circumstances. The principal had received information that this particular student harboured illegal drugs on a particular part of his person.
>
> The **Education Act**, R.S.O. 1980, c-129, s. 236, requires the principal:
>
> (a) to maintain proper order and discipline in the school.
>
> In light of the duty imposed on the principal, it is not unreasonable that the student should be required to remove his socks in order to prove or disprove the allegation. In other words, the search here was reasonably related to the desirable objective of maintaining proper order and discipline. Moreover, the search was not excessively intrusive . . .

The Ontario Court of Appeal went on to consider the lesser standard proposed by the U.S. Supreme Court when determining the expectation of privacy existing in the school environment.

Mr. Justice Grange referred with approval to a decision of the United States Supreme Court (**New Jersey v. T.L.O.**, 105 S.Ct. 733 (1985)), and in particular, to the following words of Justice White at 743:

> We join the majority of the courts that have examined this issue in concluding that the accommodation and the privacy interests of school children with the substantial need of teachers and administrators for freedom to maintain order in the school does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search is violated or is violating the law. Rather, the legality of the search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a two-fold inquiry: first, one must consider "whether the...action was justified at its inception", . . . second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place". . . Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence

> that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction . . . By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense.

I am satisfied that the evidence in this case meets both criteria of the New Jersey two-step test.

Mr. C. had received reliable information from three or four students, associates of MRM, over a period of several weeks that MRM was selling drugs on school property. He considered the informants to be reliable, and indeed two of them stated they were present when a sale transaction took place.

This information mandated that Mr. C. take appropriate action to determine if the information was accurate.

The second part of the New Jersey test was also met in that the search conducted by Mr. C. was "reasonably related in scope to the circumstances which justified the interference in the first place". The search was conducted in the privacy of Mr. C.'s office, and the search was not overly intrusive.

The trial judge determined that once MRM established the search conducted by C. was warrantless, that the burden then shifted to the Crown to establish on a balance of probabilities that the search was reasonable.

The trial judge's consideration of this issue was limited to the following comments:

> As indicated elsewhere, the Crown submits legal justification may be found in the need to maintain order and discipline in the school, that there was a nexus between that objective and the search, and the conduct was not unduly intrusive. While it may be argued the locker was not personally invasive (it being a search through school property), it is my

> opinion that the search of the accused person was intrusive, going to personal integrity and privacy. I am not convinced on the evidence that the accused by virtue of his student enrolment knowingly or by implication, gave up all rights to privacy and gave up all of his other rights, for rule infractions and internal discipline purposes, and also for incidental criminal prosecutions. If I am wrong, I am still not persuaded the import of the **Education Act** is to carry these losses through police detention.

This summary failed to take into account the Crown's submission that the "totality of the circumstances" respecting the information that had been supplied to Mr. C. rendered the search reasonable. It also failed to give sufficient weight to the lower expectation of privacy of students attending junior high school.

The trial judge, in my opinion, erred when he failed to give any consideration to the factors that prompted Mr. C. to question MRM, or conduct a search.

The Supreme Court of Canada has stipulated that, in considering the evidence relied upon by the police to justify a warrantless search, all the circumstances should be considered.

Justice Wilson's oft quoted comments in **R. v. Debot** (1989), 52 C.C.C. (3d) 193, at 215, set forth the prerequisites:

> First, was the information predicting the commission of a criminal offence compelling? Secondly, where that information was based on a "tip" originating from a source outside the police, was that source credible? Finally, was the information corroborated by police investigation prior to making the decision to conduct the search? I do not suggest that each of these factors forms a separate test. Rather, I concur with Martin, J.A.'s view that the "totality of the circumstances" must meet the standard of reasonableness. Weakness in one area may, to some extent, be compensated by strengths in the other two.

The first two prerequisites were abundantly satisfied in this case. While the third was not, it was, in my opinion, not an essential prerequisite in the context of the school environment in which the search took place.

The phrase "totality of the circumstances" involves a consideration of the level, or extent, of an individual's expectation of privacy, and the reasonableness of that expectation will vary depending upon the circumstances of each case. In this particular case, the totality of the circumstances involves a consideration of the reasonable expectation of privacy enjoyed by junior high students in the face of the societal interest of maintaining a safe environment in schools.

Justice Grange contrasted the relationship of a policeman and citizen to that of a principal and student and commented in **R. v. JMG** at 461:

> Although, as I have said, I am prepared to presume that the **Charter** applies to the relationship between principal and student, that relationship is not remotely like that of a policeman and citizen. First, the principal has a substantial interest not only in the welfare of the other students but in the accused student as well. Secondly, society as a whole has an interest in the maintenance of a proper educational environment, which clearly involves being able to enforce school discipline efficiently and effectively. It is often neither feasible nor desirable that the principal should require prior authorization before searching his or her student and seizing contraband.

The Supreme Court of Canada has recognized that persons should anticipate a lower expectation of personal privacy when they pass, for example, through border customs (**R. v. Simmons** (1989), 45 C.C.C. (3d) 296 per Dickson, C.J.C. at 320).

The distinction between the approach to be followed in criminal, or quasi-criminal matters, and that to be followed in administrative or regulatory matters, was stressed by Sopinka and Iacobucci, JJ. in the later case of **B.C. (Securities Commission) v. Branch** (1995), 38 C.R.(4th) 133 (S.C.C.) in these words, at p. 158:

> It is clear that the standard of reasonableness which prevails in the case of a search and seizure made in the course of enforcement in the criminal context will not usually be the appropriate standard for determination made in an administrative or regulatory context . . .The greater the departure from the realm of criminal law, the more flexible will be the approach to the standard of reasonableness.

I agree with the Ontario Court of Appeal in its recognition of the value of the U.S. Supreme Court jurisprudence under the Fourth Amendment (**R. v. JMG** per Grange, J.A., at 459).

In **New Jersey v. TLO**, a teacher at a New Jersey High school discovered the respondent, a 14-year old freshette, and her companion smoking cigarettes in a school laboratory in violation of the school rule. The two students were taken to the vice-principal who, upon opening the respondent's purse, discovered marijuana.

Both Justice Powell and Justice O'Connor concurred in Justice White's opinion, but also added additional reasons. Notwithstanding the historical and constitutional differences between the United States and Canada, their comments at pages 746 and 747 are, in my view, particularly appropriate to the Nova Scotian context. They stated:

> I would place greater emphasis, however, on the special characteristics of elementary and secondary schools that make it unnecessary to afford students the same constitutional protections granted adults and juveniles in a non-school setting. . . It is simply unrealistic to think that students have the same subjective expectation of privacy as the population generally . . . However one may characterize their privacy expectations, students properly are afforded some constitutional protections. In an often quoted statement, the Court said that students do not "shed their constitutional rights . . .at the school house gate." . . . The Court has balanced the interests of the student against the school officials' need to maintain discipline by recognizing qualitative differences between the constitutional remedies to which students and adults are entitled. . . . The special relationship between teacher and student also distinguishes the setting within which school children operate . . . There is a commonality of interest between teachers and their pupils. The attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education.

Justices Powell, and O'Connor, concluded their remarks by stating:

> The primary duty of school officials and teachers, as the Court states, is the education and training of young people. A state has a compelling interest in ensuring that the schools meet this responsibility. Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the

> obligation to protect pupils from mistreatment from other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern. For me, it would be unreasonable and at odds with history to argue that the full panoply of constitutional rules applies with the same force and effect in the school house as it does in the enforcement of criminal laws.

I conclude that students' reasonable expectation of privacy in the context of the school environment should be significantly lower than that reasonably expected in a non-school environment.

Young people do not, however, abandon their **Charter** rights when they enter the school yard.

Justice Grange touched on the issue in **R. v. JMG** at 460:

> With respect to the nature of the infraction, it is suggested that the principal should have turned the whole matter over to the police upon his initial receipt of the report. There may indeed be circumstances where that would be advisable. For instance, the crime might be so obvious and so heinous that police participation was inevitable. But those circumstances did not exist here. There was no indication of the extent of the crime; nor was there any certainty that an offence had actually occurred.

In this case, while the information received by Mr. C. required him to take action, which I conclude was entirely appropriate, the evidence of a crime was not "so obvious" that police participation was inevitable.

Mr. C. appreciated the dividing line between school responsibility and police responsibility, as will appear from the following responses:

> I understand that if someone is found with an illegal narcotic in their possession that it's a police matter. I understand that . . .
> Q. What about when the school is trying to determine whether there are drugs present?
> A. I would consider that to be a school matter.
> Q. And at what point does it become a police matter?
> A. When you find them.

In order to determine the reasonableness of the search, it is essential to consider the nature and manner in which the search was conducted. The age and sex of the student may also, under certain circumstances, be a significant factor in this consideration. Here, Mr. C. only conducted a search of the exterior of MRM's person. This was not a highly invasive search as compared with a strip and bodily cavity search, nor was it conducted, for example, by a male teacher of a young female student which could, in certain circumstances, amount to a violation under s. 8.

Taking into account the facts of this particular case, the regulatory administrative regime imposed under the **Education Act**, the location of the search, the manner in which it was conducted, the age and sex of the offender, the nature of the relationship between the offender and Mr. C., the information which Mr. C. had received, I conclude that the search was reasonable in the circumstances and that MRM's reasonable expectation of privacy in the context of the school environment was not infringed.

Earlier in this opinion I expressed my disagreement with the conclusion of the trial judge that Mr. C. was acting as an agent of the RCMP.

In considering this topic, the following issue should be assessed:

- What was the purpose of the search? Was it carried out by Mr. C. in his capacity of vice-principal in charge of discipline, or in aid of a criminal investigation?
- What was the degree of direct, or indirect involvement, of the police?
- Was there a pre-arranged plan with the police as to the manner in which the investigation should be carried out?

With respect to the purpose of the search, Mr. C. properly considered his role as vice-principal in charge of discipline, was to enforce school policies, one of which was to prevent the possession, or use, of narcotics on school property. This policy, he testified, was well known to the students.

In the event of the discovery of illicit drugs, then a variety of avenues were, according to Mr. C., available to him. He testified:

> My job is to ensure that the . . . policies of the school are followed. If those policies include, and they do, not allowing students to drink on school property, to use narcotics on school property and they do, then it's my job to enforce those policies and rules and they are set down, not only by our school, but also by the Halifax County-Bedford District School Board . . .Any student caught in possession of or using drugs and alcohol on school property, and this includes either during the school day or out-of-school sponsored events, they are treated exactly the same. That that student will be suspended immediately, that the parents would be contacted. Where you believe it involves a criminal matter, you are to contact the RCMP . . .

The search conducted by Mr. C. was not, in my opinion, as an agent of the RCMP, but rather in satisfaction of the duty imposed upon him by the **Education Act**, the School Board, and the principal. His actions were eminently reasonable.

There is no evidence of any direct involvement by Cst. Siepierski while a search was conducted. It is relevant that part of the search was conducted, according to MRM, before Cst. Siepierski arrived. It was happenstance that Cst. Siepierski arrived in time to be present when the search disclosing the narcotics occurred. After the constable arrived, MRM testified that the constable was "just sitting there watching".

Mr. C. was, at all times, the person in charge of the questioning and the search. The element of control is decisively illustrated when Mr. C. advised MRM's companion that he could leave the office, after Mr. C.'s search of that student failed to reveal possession of any drugs.

The evidence does not disclose, or even suggest, that there was any pre-arranged plan with Cst. Siepierski as to the manner in which the investigation was to be carried out.

The decision of this court in **R. v. Spidell** (1996), 151 N.S.R. 290, is instructive in this regard. (Leave to appeal to S.C.C. denied.)

The issue was whether a doctor, who had provided police with medical information regarding the accused's state of impairment, was acting as a state agent. Justice Roscoe on behalf of the Court concluded that the doctor was not acting on any instructions from the police in either directing questions, or reporting answers to the police. There was no pre-arranged plan, or procedure involving the supply of information to the police.

Justice Roscoe commented at p. 298-299:

> The process by which the information was given to the police is also relevant. The police in this case did not demand or request that the particulars be given, as in **Dersch,** or surreptitiously diverted to their own use as in **Colarusso**. They did not seek or search for it. . . . [Dr. Kidd] was not acting on any instructions from the police in either asking the questions or reporting the answers to the police. There was no pre-arranged plan or procedure involving the supply of information to the police.

In the present case there was no evidence to justify the trial judge's finding that there was any agreed strategy between Mr. C. and Cst. Siepierski.

Once the officer arrived at the school, Mr. C. met him in the main office area. Cst. Siepierski testified that "prior to my going into the office, Mr. C. briefly explained the reason why these individuals were in his office. What he intended to do at that particular time was not discussed . . ."

Mere police presence during a search and seizure, without more, is not sufficient to conclude that Mr. C. was acting in tandem with, and as agent of, the police. None of the usual indicators of advice being given by the police, or a pre-arranged plan or procedure for seizing evidence exist in this case.

The Supreme Court of Canada in **R. v. Broyles** (1992), 68 C.C.C. (3d) 308 considered the question of whether a person who allegedly subverted the right of an accused to silence, was an agent of the state.

Justice Iacobucci, on behalf of the Court, adopted the following test at p. 319:

> Would the exchange between the accused and the informer have taken place, in the form in which it did take place, but for the intervention of the state or its agents?

It is clear from the evidence of both Mr. C., as well as MRM, that the request to attend at Mr. C.'s office, the subsequent questioning and search, would have occurred without the presence of Cst. Siepierski.

The following response of MRM, in cross-examination, is telling:

> Q. Did you feel that his presence [Cst. Siepierski] affected the relationship that you had with the principal . . . or vice-principal, Mr. C.?
> A. No.

MRM acknowledged that he thought he had no choice but to go with Mr. C., because he was "the boss of the school".

It is my opinion that there is no evidence on which the trial judge could have concluded that Mr. C. was acting as an agent of the police.

The only issue remaining to be considered under s. 8 is whether the subsequent seizure of the evidence by Cst. Siepierski caused the initial search and seizure to become unreasonable.

In **R. v. Colarusso** (1994), 87 C.C.C. (3d) 193 (S.C.C.), the accused had been charged with several offences relating to impaired driving. The coroner, pursuant to statutory authority, seized a blood sample from the accused. The police offered to transport the sample to the laboratory and, unknown to the coroner, they proceeded to use the analysis for criminal prosecutorial purposes.

I interpret **Colarusso** as standing for the proposition that seizure by a state agent, other than police, must be reasonable, and will only be reasonable while the evidence is used for the purposes set forth in the authorizing statute. Once the evidence has been appropriated by the criminal law enforcement of the state for use in criminal proceedings there may be no foundation on which to argue that the initial seizure continues to be reasonable.

There are several features in the present case that serve to distinguish this situation from that in **Colarusso**:

- MRM had not been charged with an offence at the time Mr. C. handed the drugs to Cst. Siepierski. In **Colarusso**, a criminal investigation had already commenced when the police took the sample from the coroner, and in fact criminal charges had already been laid;
- Mr. C. volunteered the evidence, there is no direct evidence that Cst. Siepierski demanded, or requested, that the drugs be handed over to him to aid in a criminal prosecution;
- Mr. C. was still acting within the scope of his authority of the **Education Act** at the time he conducted the search and delivered the evidence to the police. Mr. C. had a duty to report an inquiry into illegal activity on the school's premises. The handing over of the drugs to Cst. Siepierski did not of itself convert Mr. C.'s actions undertaken for "administrative" purposes, into actions intended exclusively for "criminal law enforcement" purposes.

I conclude that the seizure by Mr. C. was not rendered unreasonable because the Crown has attempted to use the evidence in aid of prosecution.

I further conclude that the circumstances in which the drugs were handed over to Cst. Siepierski did not constitute a seizure by him, but rather an acceptance of an article volunteered by Mr. C..

It was Mr. C. who first contacted the RCMP and requested an officer attend at the school. It was Mr. C. who carried out the search and seizure from MRM. Cst. Siepierski played no part other than of an observer. There is no evidence to suggest that Cst. Siepierski demanded or requested that Mr. C. turn any evidence over to him.

It was Mr. C. who examined the contents of the plastic bag and then handed it over to Cst. Siepierski.

I conclude that there was no seizure of the narcotics by Cst. Siepierski.

If a seizure by the RCMP is considered to have taken place, Cst. Siepierski had the power to search and to seize arising under s. 10 and s.11 of the **Narcotic Control Act**, R.S.C. 1985, Chap. N-1, alternatively he could have relied on his authority under the common law to search and seize incident to arrest.

Professor Stuart (*Charter Justice in Canadian Criminal Law***,** 2nd ed. (1996)) writes at p. 193:

> This common law power is undoubtedly the most important and frequently exercised police power to search the person. It has been held that the search may actually precede the arrest and that, although there must be reasonable grounds for the arrest, the power to search is automatic in the sense that there need not be reasonable grounds for the search itself.

Cst. Siepierski had the necessary reasonable grounds to believe that an offence had been committed in order to justify exercising his authority under these powers to seize the drugs.

I conclude that the seizure was lawful and therefore did not infringe MRM's rights under s.8 of the **Charter.**

**Section 10 of the Charter**

Under s.10 of the **Charter**

> Everyone has the right on arrest or detention . . .
>
> (b) to retain and instruct counsel without delay and to be informed of that right;

MRM was not advised of his right to retain and instruct counsel until after he was arrested by Cst. Siepierski.

There are two issues raised:

- Was MRM detained, within the meaning of s. 10, at any time by Mr. C.?
- Was MRM detained, within the meaning of s. 10, upon Cst. Siepierski entering the office and disclosing his identity?

The extent of MRM's right to counsel is defined by the context in which his right is asserted, namely that of a student attending a school providing instruction to Grades 7, 8 and 9 (see comments of Hallett, J.A., on behalf of the court in **Lenihan v. The Queen**, C.A.C. No. 129710, judgment delivered February 25, 1997).

It is helpful to refer to the evidence.

MRM testified:

> ... I felt I didn't have any choice whether to go to his office or not.
> Q. When he asked you questions, what did you feel about whether or not you could refuse to say anything?
> A. The same, I felt like I had no choice . . . I couldn't say "no" to the search.
>
> . . .
>
> Q. Mr. C., what is your understanding of what his job is?
> A. Vice-principal to like keep everyone in line . . . He's like discipline . . .
> Q. Where did your understanding of Mr. C.'s job come from?
> A. It was from, like, other kids and it's his job . . .

In cross-examination MRM agreed that he had no choice but to go along with the request of Mr. C., because he was the "boss" of the school and that MRM's role was to "listen to him".

The following questions to MRM and his answers, expand on the role of MRM and Mr. C..

> Q. Did you feel that his [Cst. Siepierski's] presence affected the relationship that you had with the vice-principal, Mr. C.?
> A. No.
> Q. Was he actively involved in searching you or what was his role? What was he doing while Mr. C. was . . .
> A. He was just sitting there watching.
> Q. . . . did he have any involvement in questioning you, in searching you . . .

A. No.
Q. Did he at any time tell Mr. C. what to do or instruct Mr. C.?
A. No, no I am not sure.
Q. So who was . . . in charge then of the search itself?
A. It seemed like Mr. C. . . .
Q. If you decided to leave prior to that [i.e. the arrest] who would you have been disobeying?
A. Mr. C..
Q. Prior to the time the drugs were found?
A. Probably both of them.

In **Regina v. Therens** (1985), 18 C.C.C. (3d) 481, the Supreme Court of Canada in commenting on the meaning that should be given to the word "detention" in s. 10, considered the purpose underlying the section by examining the nature of the interests the section was meant to protect.

Justice LeDain, although in dissent on the result, spoke for the majority with respect to the meaning of detention and stated at p. 503:

> The purpose of s. 10 of the **Charter** is to ensure that in certain situations a person is made aware of the right to counsel and is permitted to retain and instruct counsel without delay. . . In its use of the word "detention", s. 10 of the **Charter** is directed to a restraint of liberty other than arrest in which a person may reasonably require the assistance of counsel but might be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee.
>
> In addition to the case of deprivation of liberty by physical constraint, there is, in my opinion, a detention within s. 10 of the **Charter** when a police officer or other agent of the state assumes control over the movement of a person by a demand or direction which <u>may have significant legal consequences</u> in which prevents or impedes access to counsel. (emphasis added)

This analysis was examined by Justice Grange in **R. v. JMG** and he commented as follows at p. 462:

> Clearly by one reading of this dicta the accused's **Charter** rights in this case were violated. There was an assumption of control over the movement of the accused by a demand which might have significant legal consequences in which impeded access to counsel. Nevertheless, I do not think that conclusion is properly drawn.

> First of all this is not in my opinion a "detention" within the meaning of s. 10(b). The accused was already under detention of a kind throughout his school attendance. He was subject to the discipline of the school and required by the nature of his attendance to undergo any reasonable disciplinary or investigative procedure. The search here was but an extension of normal discipline such as, for example, the requirement to stay after school or to do extra assignments or the denial of privileges. I have already found the search to be eminently reasonable.
>
> The only distinction between this search and other disciplinary action is that it carried with it possible "significant legal consequences". I concede that there may come a time when such consequences are inevitable and the principal becomes an agent of the police in detecting crime. But this is not so here; nor was such a position argued. I have read the evidence carefully and there is no suggestion that the principal was doing anything other than performing his duty to maintain proper order and discipline as required by the **Education Act**.

I agree with the analysis conducted by Justice Grange which I find directly applicable to the situation in the present case. As there was no detention within the meaning of s. 10(b) by Mr. C., the latter was not obliged to inform MRM of his s.10(b) rights.

There remains the question of whether MRM was detained by Cst. Siepierski by reason of his presence.

It is clear that Cst. Siepierski did not direct the movements of MRM in any way or that he physically restrained him. He took no part in the search and no part in the questioning. It was not until Cst. Siepierski determined the nature of the contents of the plastic bag that a detention occurred. The detention, however, was immediately followed by the officer giving MRM his s.10(b) rights.

MRM's evidence discloses that he felt he was obliged to respond to Mr. C.'s direction and that Cst. Siepierski's presence did not in any way affect MRM's obligation to continue to remain in the vice-principal's office.

Even if the trial judge was correct in determining there was a detention and a violation of MRM's right to counsel, such a violation does not affect the reasonableness of the search.

In **R. v. Debot**, Lamer, J., writing for the majority, concluded that it was only:

> In exceptional circumstances that the denial of the right to counsel will trigger a violation of s. 8. Such would be the case when the lawfulness of the search is dependent on the consent of the person detained . . . Apart from a situation such as this or other situations analogous to those dealt with in **R. v. Simmons**, **supra**, where the s.10(b) violation goes to the very lawfulness of the search, I have not been able to imagine situations where the right to counsel will be relevant to a determination of the reasonableness of the search. (p.198-9)

This is not a situation where the advice of counsel would have had any effect on the discovery of the evidence.

No amount of legal advice or legal assistance could have affected MRM's obligation to submit to the search (**R. v. Guberman** (1985), 23 C.C.C. (3d) 406 (Man. C.A.) at 414, cited with approval by Grange, J. in **R. v. JMG** at 463).

I conclude that there was no detention of MRM by Mr. C. within the meaning of s. 10, and further conclude that Cst. Siepierski properly advised MRM of his rights pursuant to the **Charter**, and the **Young Offenders Act**, upon detaining MRM after the drugs were located.

**Conclusions**

In view of my conclusion that MRM's **Charter** rights under s. 8 or s. 10(b) were not violated, it is not necessary to consider the provisions of s. 1 or s. 24(2) of the **Charter**.

I would allow the appeal and order a new trial.

Pugsley, J.A.

Concurred in:

Chipman, J.A.

Roscoe, J.A.

C.A.C. No. 127861

**NOVA SCOTIA COURT OF APPEAL**

**BETWEEN:**

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| **HER MAJESTY THE QUEEN** | ) | |
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| Appellant | ) | |
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| - and - | ) | REASONS FOR JUDGMENT BY: |
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| | ) | PUGSLEY, J.A. |
| **M. R. M.** | ) | |
| Respondent | ) | |
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