S.C.C. No. 02565

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Clarke, C.J.N.S.; Hart and Jones, JJ.A.

BETWEEN:

GEOFFREY WILLIAM STANLEY SIDDALL)) Appellant)) - and -)) HER MAJESTY THE QUEEN)) Respondent)))))))))	Douglas B. Shatford for the Appellant Douglas L. Richard, Q.C. for the Respondent Appeal Heard: January 31, 1992 Judgment Delivered: February 18, 1992

THE COURT: Appeal dismissed per reasons of Hart, J.A.; Clarke, C.J.N.S. and Jones, J.A. concurring.

HART, J.A.:

The appellant appeals his conviction for unlawfully having in his possession a narcotic, to wit, cocaine, for the purpose of trafficking contrary to s. 4(2) of the **Narcotic Control Act.**

Only July 28, 1990 Constable Beaver of the R.C.M.P. obtained a warrant under the **Narcotic Control Act** to search the residence of the appellant at 40 Willow Street in Amherst upon the following grounds:

> "On the 28th day of July 1990 I received reliable confidential information from a source of proven reliability that stated that Geoff Siddall of 40 Willow St. was in possession of at least one half ounce of Cocaine.
>
> Through intelligence reports and other sources of both Amherst Police Dept. and the Royal Canadian Mounted Police Siddall is known as a trafficker of Cocaine.
>
> Through Royal Canadian Mounted Police records it is shown that Siddall has two previous convictions for possession of a narcotic under the Narcotic Control Act.
>
> Through Royal Canadian Mounted Police records it is shown that Geoffrey Siddall lives at 40 Willow St., Amherst, Nova Scotia."

A preliminary motion before jury trial was made to declare the search warrant bad as being contrary to s. 8 of the **Charter of Rights and Freedoms** and to prevent the evidence found from being presented to the jury under s. 24(2) as to admit it would bring the administration of justice into disrepute. Mr. Justice Davison ruled that the Justice of the Peace did not have sufficient information before him to justify the issuance of the warrant and found the warrant to be fundamentally defective and void. He declared that the search was therefore a violation of the appellant's rights as guaranteed by s. 8 of the **Charter.** No appeal has been taken from this ruling.

The trial judge then reviewed the law relating to the exclusion of evidence obtained in such a warrantless search.

Section 24(2) reads:

> 24. (1) . . .
>
> (2) 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.

Mr. Justice Davison referred to the decisions of this Court in **R. v Brown** (1987), N.S.R. (2d) 64 and **R. v. Bailey** (1988), 87 N.S.R. (2d) 245 and the Supreme Court of Canada decisions in **R. v. Simmons**, [1988] 2 S.C.R. 495 and **Sieben v. R.**, [1987] 1 S.C.R. 295 and then stated:

> ". . . it has not been shown that the officer acted in any way other than in good faith or acted in any way that could be considered scandalous nor did he commit a flagrant violation of the rights of the accused."

He concluded:

> " I find that in this case the accused has not met the burden which rests upon him to convince me that I should exclude the evidence found as a result of the search and the application is refused."

The trial then proceeded and the jury found the appellant guilty as charged.

The only ground of appeal alleges that the trial judge erred in admitting the evidence obtained as a result of the warrantless search of the appellant's residence.

The appellant refers to a case decided by this Court similar to the

case at bar. In **Her Majesty the Queen v. David R. Smith**, S.C.C. 02460 (as yet unreported), a trial judge had rejected evidence obtained after a warrantless search of a residence after having made some negative remarks about the manner in which the police had conducted their search. The court stated:

> " With regard to ground number two, we cannot say that the trial judge erred in the exercise of his discretion to reject the evidence obtained during the warrantless search. Though the general rule is that such physical evidence is **prima facie** admissible since it was not generated by the breach of the **Charter**, see **R. v. Collins** (1987), 33 C.C.C. (3d) 1, it may be rejected if its submission would bring the administration of justice into disrepute. For a recent discussion of the right to exclude evidence under s. 24(2) of the **Charter**, see the majority and minority judgments of the Supreme Court of Canada in **R. v. Kokesch**, [1990] 3 S.C.R. 3."

The **Kokesch** case discusses at length and "**de novo**" the effect of admitting or rejecting evidence on the repute of the administration of justice. The three main factors a trial judge must consider when exercising his or her discretion under s. 24(2) of the **Charter** are:

(1) factors concerning the effect of admission in the fairness of the trial;

(2) factors considering the seriousness of the violation;

(3) factors concerning the effect of exclusions on the reputation of the administration of justice.

The Court split four to three in its decision. All judges agreed that the admission of real evidence obtained would not affect the fairness of the trial. They disagreed on whether the violation (a trespass by the police to obtain evidence upon which to base a search warrant) was a serious one.

Dickson C.J., speaking for the minority, said at p. 25:

> " Similarly, in the case at bar, although a **Charter** violation preceded the lawful search undertaken pursuant to prior judicial authorization, I do not find the subsequent search sufficiently

'tainted' to render the fruits of that lawful search inadmissible. The nature of the unconstitutional intrusion was minimal, and the police infringed an interest for which the objective expectation of privacy was comparatively low. The motivation behind the **Charter** infringement was to obtain evidence in a situation in which other avenues of investigation seemed to have been foreclosed. Finally, it is significant that the police did obtain a search warrant prior to the actual search of the dwelling-house. In my view, these factors reinforce the trial judge's determination of 'good faith' on the part of the authorities, and the combination of all of these elements leads me to conclude that the 'seriousness of the **Charter** violation' does not militate against the admission of the evidence."

Sopinka J., speaking for the majority, said at p. 29:

" Where the police have nothing but suspicion and no legal way to obtain other evidence, it follows that they must leave the suspect alone, not charge ahead and obtain evidence illegally and unconstitutionally. Where they take this latter course, the **Charter** violation is plainly more serious than it would be otherwise, not less. Any other conclusion leads to an indirect but substantial erosion of the **Hunter** standards. The Crown would happily concede s. 8 violations if they could routinely achieve admission under s. 24(2) with the claim that the police did not obtain a warrant **because** they did not have reasonable and probable grounds. The irony of this result is self-evident. It should not be forgotten that **ex post facto** justification of searches by their results is precisely what the **Hunter** standards were designed to prevent: see **Hunter, supra,** per Dickson J. (as he then was), at p. 160; and **Greffe, supra**, per Lamer J., at pp. 790 and 798."

Mr. Justice Sopinka continued at p. 30:

" An equally important aspect of the seriousness of the violation is the manner in which the police conducted themselves in deciding to execute this warrantless perimeter search. Was the s. 8 violation committed in 'good faith', or was it 'flagrant'? Both are terms of art in s. 24(2) cases. To decide whether either term is appropriate in the circumstances it is necessary to examine the evidence . . ."

After reviewing the evidence he concluded (at p. 32):

" This finding is vulnerable on two grounds. First, on its own terms, the finding of good faith is equivocal. The 'shortcut' referred to in the emphasized passage was a search conducted in the

knowledge that legal search powers were unavailable. The evidence clearly discloses that the police officers knew that they had insufficient grounds either to exercise the power to search without a warrant granted by s. 10(1)(a) of the **Narcotic Control Act**, or to obtain a search warrant pursuant to s. 10(2). The best answer provided to the question of any alternative source of lawful authority was a tentative 'I'm not sure'.

Second, even if Judge Cashman found that the Constable honestly but mistakenly believed that he had the power to search, it is my view that in these circumstances the Constable simply cannot be heard to say that he misapprehended the scope of his authority. As Dickson C.J. has amply demonstrated in his reasons in this appeal, '[t]his Court consistently has held that the common law rights of the property holder to be free of police intrusion can be restricted only by powers granted in clear statutory language' (p. 17). The contrary contention is, in Dickson C.J.'s words, 'without foundation'. The police must be taken to be aware of this Court's judgments in **Eccles** and **Colet**, and the circumscription of police powers that those judgments represent.

Either the police knew they were trespassing, or they ought to have known. Whichever is the case, they cannot be said to have proceeded in 'good faith', as that term is understood in s. 24(2) jurisprudence."

Sopinka J. concluded this issue as follows (p. 34):

" In conclusion on this point, the **Charter** violation at issue was very serious, and was in no sense mitigated by good faith on the part of the investigating officers."

When discussing the third factor to be considered, Dickson C.J., for the minority said (p. 25):

" Finally, it is necessary to consider, in a review of the factors for consideration in determining whether evidence is admissible pursuant to s. 24(2), the impact upon the repute of the legal system from the admission or exclusion of the evidence. As indicated in **Jacoy, supra**, '[t]he administration of justice may be brought into disrepute by excluding evidence essential to substantiate the charge where the breach of the **Charter** was trivial' (p. 559). Although not trivial, the breach of the appellant's **Charter** rights was far less severe than would be the case in a search of his person. Moreover, in **Jacoy, supra**, this Court made some general comments on the effect on the legal system of the exclusion of real evidence of narcotics (at p. 560):

> The offences with which the appellant was charged constitute serious social evils. The narcotics are an essential piece of evidence to substantiate the charge . . . . In my view, the decision to exclude the evidence in light of all the circumstances would do violence to the repute of the justice system.
>
> I find this dictum of particular relevance to the instant case. The manifest culpability of the appellant, in combination with the low level intrusion on his reasonable expectation of privacy from the **Charter** breach, in my view weighs heavily in favour of the admissibility of real evidence of marijuana cultivation."

Sopinka J. for the majority, after consideration of the evidence before them, concluded (p. 35):

> " However, I have concluded, not without reluctance, that the administration of justice would suffer far greater disrepute from the admission of this evidence than from its exclusion. This Court must not be seen to condone deliberate unlawful conduct designed to subvert both the legal and constitutional limits of police power to intrude on individual privacy. As Dickson C.J. stated in **Genest, supra,** at p. 92: 'the breach was not merely technical or minor'. The violation of s. 8 of the **Charter** that occurred in this case must be regarded as flagrant, and the disrepute to the justice system that would necessarily result from the admission of the impugned evidence cannot be counterbalanced by speculation about the disrepute that might flow from its exclusion."

It should be noted that the majority judgment made a distinction between the facts of the case before them and other cases where police acted in accordance with statutory authority. It seems that the crucial matter is the role played by the police. Mr. Justice Sopinka stated at p. 33:

> "There is, in my opinion, a world of difference between the police conduct said to constitute good faith in this case and the police conduct endorsed by this Court in **R. v. Sieben,** [1987] 1 S.C.R. 295; **R v Hamill,** [1987] 1 S.C.R. 301; **R. v. Duarte,** [1990] 1 S.C.R. 30; and **R v. Wiggins,** [1990] 1 S.C.R. 62. In each of those cases, the police acted pursuant to express statutory authority that rendered the particular search lawful. The police are entitled, indeed they have a duty, to assume that the search powers granted to them by Parliament are constitutionally valid, and to act

> accordingly. The police cannot be expected to predict the outcome of **Charter** challenges to their statutory search powers, and the success of a challenge to such a power does not vitiate the good faith of police officers who conducted a search pursuant to the power. Where, however, police powers are already constrained by statute or judicial decisions, it is not open to a police officer to test the limits by ignorning the constraint and claiming later to have been "in the execution of my duties". This excuse has been obsolete since, at least, the decision of this Court in **Colet** (see Ritchie J., at p. 9)."

In **R. v. Sieben** a search of a dwelling house was made pursuant to a writ of assistance later found to be constitutionally invalid.

Lamer J. (as he then was) delivered the unanimous decision of the Court when he said (p. 299):

> "The sole issue then is whether the admission of the evidence would bring the administration of justice into disrepute. In deciding this issue, I rely upon the principles, rules, and remarks in my judgment rendered this same day in **R. v. Collins**, [1987] 1 S.C.R. 265. It is obvious to me that the use of this evidence in the proceedings would in no way cause the trial to be unfair. The appellant seeks the exclusion of the evidence on the ground that the police officers carried out the search under a writ of assistance when a search warrant was necessary. This breach is made more serious by the fact that the search took place in a dwelling-house. However, I do not consider the breach to be sufficiently serious that the admission of the evidence would bring the administration of justice into disrepute. The trial judge held that one of the police officers had reasonable grounds to enter and search the premises, thus satisfying an obviously desirable requirement of the statute. The only reason that they did not obtain a search warrant is that they believed in good faith that a writ of assistance was sufficient. At that time, the statute authorizing a search under a writ of assistance had not been declared to be inconsistent with the **Charter**. Finally, there was no suggestion that the police officers had carried out the search in an unreasonable manner."

In the case at bar, the warrant to search the appellant's residence was issued pursuant to the **Narcotic Control Act**. At the time it was executed it was apparently valid to the police officers. The trial judge found as a fact that these police officers acted in good faith and that the breach of the appellant's

rights under the **Charter** was not flagrant or so serious that the admission of the evidence obtained would bring the administration of justice into disrepute.

I can see no error on the part of the trial judge in his application of the law or the exercise of his discretion in the manner that he did and would therefore dismiss the appeal.

J.A.

Concurred in:

Clarke, C.J.N.S.

Jones, J.A.

CANADA

PROVINCE OF NOVA SCOTIA

1990 S.AM. No. 1732

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

on appeal from the

SUPREME COURT OF NOVA SCOTIA TRIAL DIVISION

BETWEEN:

HER MAJESTY THE QUEEN

- and -

GEOFFREY WILLIAM STANLEY SIDDALL

HEARD BEFORE:	The Honourable Mr. Justice J.M. Davison (and Jury)
PLACE HEARD:	Amherst, N.S.
DATES HEARD:	June 13,24 & 25, 1991 JULY 19, 1991 (Sentence)

COUNSEL:

Anthony J. Morley, Esq., counsel for the Crown
Deborah M. Gass, counsel for the Defence

C A S E O N A P P E A L