S.C.C. No. 01886

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Macdonald, Pace and Matthews, JJ.A.

BETWEEN:

DAVID MacDONALD CARROLL and PATRICK WILLIAM BARKER Appellants - and - HER MAJESTY THE QUEEN Respondent	D. R. Beveridge for the Appellants D. W. Giovannetti for the Respondent Appeal Heard: November 16, 1988 Judgment Delivered: January 4, 1989

THE COURT: Appeal of the appellant, David MacDonald Carroll, dismissed. Appeal of the appellant, Patrick William Barker, allowed, search warrant set aside and items seized ordered returned as per reasons for judgment of Macdonald, J.A.; Pace and Matthews, JJ.A. concurring.

MACDONALD, J.A.:

This is an appeal by the appellants, David MacDonald Carroll (Carroll) and Patrick William Barker (Barker) from the decision of Mr. Justice Davison in Trial Division Chambers (reported in (1988), 84 N.S.R. 2nd 309) whereby he dismissed their applications for orders in the nature of certiorari to quash search warrants and for the return of items seized under such warrants.

The background of this matter may be briefly stated. Sometime around mid afternoon on March 7, 1988 the body of a man later identified as Trevor Lawlor was found in the Chezzetcook area of Halifax County. He apparently had died of gun shot wounds. The appellant, David MacDonald Carroll, was subsequently charged with first degree murder in relation to the death of Mr. Lawlor. Following a preliminary inquiry he was committed to stand trial on a charge of second degree murder. His trial is slated for hearing in February 1989. The appellant Barker has not been charged with any offence in relation to the death of Mr. Lawlor.

On the late afternoon or early evening of March 7, 1988 Constable D. R. Williams of the R.C.M. Police applied to and obtained from Stewart Duffie, a Justice of the Peace, search warrants to search the vehicle and residence of Carroll; the residence of Barker and the vehicle of one John Ambrose Long. The warrants were executed and certain items were seized. All seized items have now been returned to their owners except

for three shot gun shells found in the residence of Mr. Barker and a set of keys found in the Long vehicle. The keys are not an issue on this appeal. The warrant to search the Long vehicle was quashed by Mr. Justice Davison on the ground that there was no evidence upon which Mr. Duffie, acting judicially, could determine that a search warrant should be issued to search that vehicle.

Mr. Justice Davison however held that there was sufficient evidence to satisfy the requirements of s. 443 of the Code and declined to quash the warrants issued to search the residences of Carroll and Barker and the vehicle of Carroll.

The grounds of appeal that call for consideration here allege:

> "That the Learned Judge erred in finding that there was some evidence upon which a Justice of the Peace could have reasonable and probable grounds to issue the Search Warrant to the Appellant Barker's house.
>
> That the Learned Judge erred in finding that there was some evidence upon which a Justice of the Peace could have reasonable and probable grounds to issue the Search Warrant to the Appellant Carroll's house."

The issuance of search warrants is governed by s. 487(1) (formerly s. 443(1)) of the Criminal Code which reads as follows:

> "487. (1) A justice who is satisfied by information on oath in Form 1 that there is reasonable grounds to believe that there is in a building, receptacle or place
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> (a) anything on or in respect of which any offence against this Act or any other Act of Parliament has been or is suspected to have been committed,

> (b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence against this Act or any other Act of Parliament, or
>
> (c) anything that there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant,
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> may at any time issue a warrant under his hand authorizing a person named therein or a peace officer
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> (d) to search the building, receptacle or place for any such thing and to seize it, and
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> (e) subject to any other Act of Parliament, to, as soon as practicable, bring the thing seized before, or make a report in respect thereof to, in the justice or some other justice for the same territorial division in accordance with section 489.1."

From its earliest beginnings English Law has recognized the sanctity of a person's home and, therefore, the issuance of a warrant to search a private dwelling is not a perfunctory matter. Warrants must not be issued to enable the police to go on a "fishing expedition" but rather can only be issued after the justice of the peace is satisfied that the information offered in support of the request for a search warrant meets the requirements of s. 487(1) of the Code.

In Re United Distillers Limited, [1947] 3 D.L.R. 900, 88 C.C.C. 338 at page 341, Chief Justice Farris pointed out:

> "It has been recognized that a warrant to search is the result of a statutory enactment and is repugnant to the old

> common law that a man's home or premises is his castle. That such a warrant should not be lightly granted seems to be recognized by all of the leading authorities and properly so, and that the Magistrate in granting such warrant should have reasonable information before him to entitle him to judicially decide whether such warrant should issue or not."

A justice of the peace in deciding to grant a search warrant is performing a judicial function. The scope of review of his decision is limited to an inquiry whether or not there was some evidence upon which he, acting judicially, could be satisfied that reasonable grounds existed for believing any of the things set out in s. 487(1)(a) to (c) of the Criminal Code. The reviewing court cannot substitute its opinion as to the sufficiency of the evidence. The test is, therefore, not whether the justice of the peace should have been satisfied on the evidence presented to him, but rather could he have been satisfied on such evidence that there were reasonable and probable grounds for believing that the articles sought would be of assistance in establishing the commission of an offence and would be found in the premises sought to be searched. See: Re Church of Scientology and The Queen (6) (1987), 31 C.C.C. 3rd 449 (Ont. C.A.).

The search warrants we are concerned with authorize the search of the residences of Carroll and Barker. The warrant issued to search Carroll's car is not challenged. All the warrants were led by the affidavits of Constable Williams and were in Form 1 as required by s. 487 of the Code.

The Carroll Warrant

Mr. Carroll resided at the material time at Civic No. 6178 Chebucto Road in the City of Halifax. Constable Williams in his sworn information stated that there were reasonable grounds for believing that in Mr. Carroll's residence would be found things including a hand gun, clothing, ammunition, rope and gloves that would afford evidence that Carroll on or about the 7th day of March, 1988 "did unlawfully cause the death of John Doe and did thereby commit first degree murder, contrary to Section 218(1) of the Criminal Code". The Constable stated in the sworn information that his grounds for such belief were:

> "That we have a confidential source who observed the accused's vehicle at the scene of a murder and copied license number of vehicle. That a body was found at the scene with obvious suspicious circumstances surrounding the death. The license number supplied ATN763, registered owner of vehicle is David MacDonald Carroll."

The identity of the deceased had not been established when the search warrants were applied for and issued hence the reference to John Doe.

On the strength of the information contained in Constable Williams' affidavit, the justice of the peace issued a warrant to search Carroll's residence. The warrant was executed and numerous items seized. A report was subsequently made to the justice of the peace who ordered that all items seized be detained. As already mentioned, all items seized from the Carroll residence under the search warrant have now

been returned.

In dismissing the appellants' applications to quash the search warrants, Mr. Justice Davison said (p. 313):

> "I have no difficulty in finding that the justice had information before him which constituted reasonable grounds to believe that the necessary conditions for a warrant to search the residence and motor vehicle of David MacDonald Carroll and the residence of Patrick William Barker were present.
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> Information was available to the effect that a motor vehicle registered in the name of David MacDonald Carroll was seen at the scene in the 'murder' and that a body was found at the scene 'with obvious suspicious circumstances'.
>
> Information was presented to the effect that Patrick William Barker was seen in the company of David MacDonald Carroll 'hours after the fact'. It is obvious the 'fact' was related to the time of death or discovery of the body.
>
> I find there was evidence by which the justice could be satisfied that the residences and the motor vehicles of the applicants would afford evidence of the commission of the offence."

I agree with the learned Chambers judge that the issue is not whether on the information he had before him, the justice of the peace should have issued the search warrant. Rather the sole issue is whether the sworn information of Constable Williams set forth facts upon which Mr. Duffie, acting judicially could be satisfied that there were reasonable grounds to believe that the hand gun, etc. would be found at the residence of Carroll and would afford evidence that he had caused the death of "John Doe and did thereby commit first degree murder contrary to Section 218(1) of the Criminal

Code.".

The presence of Carroll's vehicle at the scene of the crime was some evidence that would support and justify the issuance of the warrant to search such vehicle. Indeed that warrant is not challenged on this appeal. Under the circumstances the same evidence introduced on the application for the warrant to search Carroll's residence was considered by the learned Chambers judge to be "some" evidence upon which Mr. Duffie could be satisfied that the application for the warrant to search Carroll's residence should be granted.

I must say that it seems to me that the validity or otherwise of the Carroll warrant appears perhaps to be "moot" or academic given the fact that all items seized under the warrant have been returned. In any event, the presence of Carroll's car at the scene of the murder created a somewhat tenuous and rebuttable nexus between Carroll and the crime. I am therefore not persuaded that Mr. Justice Davison misdirected himself in law or misinterpreted material evidence of fact in reaching the conclusion that the warrant to search Carroll's evidence was validly issued. I would therefore dismiss Mr. Carroll's appeal.

The Barker Warrant

In deciding whether reasonable grounds existed for the belief required under s. 487 (1)(a) to (c) of the Code to justify the issuance of a warrant to search Barker's residence, the justice of the peace was bound by and restricted to the information supplied to him by Constable Williams under

oath and in Form 1. (See: Re Worrall, [1965] 2 C.C.C. 1 Ont. C.A.).

In the Form 1 information tendered by Constable Williams in support of his application for a warrant to search Mr. Barker's residence, he said that there were reasonable grounds for believing that certain things including a hand gun, ammunition, rope, clothing and gloves were in the Barker residence and would afford evidence that Mr. Barker on or about March 7, 1988 "did unlawfully cause the death of John Doe and did thereby commit first degree murder, contrary to Section 218(1) of the Criminal Code." The Constable's stated grounds for such belief were:

> "The person named within was in the company of David MacDonald Carroll, suspect in the murder of John Doe, located in the city of Dartmouth only hours after the fact."

What does that information establish? It does no more than place Barker in Carroll's company some hours after the murder and at a location quite removed from the murder scene. Without more there is nothing to connect Barker to the murder or to the murderer at the time the killing occurred; and indeed nothing to implicate him in any way with the killing. The fact that he was in Carroll's company in another person's car hours after the killing and in a different location does not in my opinion sufficiently connect Barker to the murder so as to justify the issuance of a warrant to search his residence. The warrant was issued on the alleged basis that evidence would be found in Barker's residence implicating

him in the murder or that at least was relevant to the murder investigation. No support for such allegation appears from the record. I have, therefore, concluded that there was no factual basis revealed by Constable Williams' affidavit upon which a justice of the peace acting judicially could be satisfied that reasonable grounds existed for believing any of the things set out in s. 487 (1)(a) to (c) of the Code. The lack of such essential factual basis renders invalid the issuance of the search warrant and the warrant itself.

The search of Barker's residence having been done without the benefit of a valid search warrant was prima facie unreasonable - see Hunter et al v. Southam Inc., [1984] 2 S.C.R. 145, 14 C.C.C. (3d) 97 - the issue then becomes whether the warrantless search was in fact unreasonable.

Not every warrantless search is necessarily unreasonable under s. 8 of the Charter. I agree with the following comment of Martin, J.A. in R. v. Harris et al (1987), 57 C.R. (3d) 356 at page 378:

> "I find it difficult to think, however, that mere minor or technical defects in the warrant automatically make an ensuing search or seizure unreasonable under s. 8 of the Charter where the officer executing the warrant reasonably believes that he or she is acting under a valid warrant and where the defect is not such as to prejudice the interests that s. 8 was designated to protect."

In Harris Mr. Justice Martin also said (page 377-378):

> "In my view, a search or seizure conducted under a search warrant that is invalid in substance because it was issued upon an information that does not set out facts upon which the justice acting judicially could be satisfied that there are reasonable grounds to believe that an offence has

> been committed and that there is evidence to be found at the place of search is unreasonable under s. 8 even though the officer executing the warrant believed that he or she was lawfully authorized by the warrant to conduct the search."

In my opinion, the Barker warrant was, in substance, fundamentally invalid and therefore, the illegal search and seizure under it were unreasonable under s. 8 of the Charter and could not be converted into a reasonable search and seizure even if it could be said that the police officers had reasonably relied on the warrant. In my view, even objectively reasonable good faith cannot transform an illegal search, where the illegality is one of substance, into a reasonable one. - R. v. Harris et al, supra, at p. 378.

In the unreasonable and warrantless search of the Barker residence the police seized three shot gun shells. Barker now asks that they be ordered returned to him. The Crown contends that they should be ordered retained because they have already been tendered in evidence at Carroll's preliminary hearing and it is contemplated that they will be required for his trial.

Apart altogether from the issue of the appropriate remedy for breach of Barker's right to be secure against unreasonable search and seizure, this Court has a discretion to order the shot gun shells returned to Mr. Barker or retained by the Crown. That discretion is founded on the inherent power of the Court incidental to its jurisdiction to quash the search warrant - see In Re Chapman and The Queen (1984), 12 C.C.C. (3d) 1 (Ont. C.A.).

In Chapman certain items were seized under a search warrant. No return was subsequently made to the justice of the peace who issued the warrant and the police hampered the accused's lawyer in his efforts to obtain a copy of the warrant. The warrant was quashed because the alleged offence was insufficiently particularized and because there was no apparent connection between the alleged offence and the things seized. Notwithstanding the fact that the items seized were required by the Crown at a pending trial the motions court judge, Reid, J., ordered the seized items returned to the accused because:

> "The failure to make a return and the treatment of accused's representatives disclose an indifference to the requirements of the Code and to the rights of citizens that should not be condoned by the exercise of a court's discretion."
>
> (See 6 C.C.C. (3d) 296 at p. 300)

In upholding that decision, MacKinnon, A.C.J.O. speaking for the Court of Appeal said (p. 7):

> "As has been pointed out by other courts, it seems strange, if the Crown's position is to be accepted, that a citizen could move successfully to quash a search warrant but if a charge is laid and the Crown alleges the articles seized are needed in the prosecution of that charge, the court has no discretion to order the articles returned, regardless of the conduct of the police and serious deficiencies in the warrant. If that is the law, it would be pointless, in most cases, for the citizen to bring an application to quash the search warrant. His remedy would, in a practical sense, be meaningless. In **Re Gillis and The Queen** (1982), 1 C.C.C. (3d) 545 at p. 556, 2 C.R.R. 369 **sub nom. Gillis v. Breton et al.**, Mr. Justice Boilard stated the point as follows:
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> The only sanction that may be truly

> effective when faced with an illegal search is to order the return of the things unlawfully seized. Any other solution seems to me to be inadequate."

After referring to ss. 8 and 24(1) and (2) of the Charter associate Chief Justice MacKinnon said (p. 9):

> "The order made by Reid J. could be considered to have been made under s.24(1) although his inherent jurisdiction to order the return of the article has not been taken away by the Charter. Under either approach, he had the grounds and the power to make the order he did."

Some courts have taken the position that since the advent of the Charter there is no discretion in a court and that articles seized under an illegal search warrant must be returned - see Re Weigel and The Queen (1983), 7 C.C.C. (3d) 81 at p. 86 a decision of the Saskatchewan Court of Queen's Bench and cases therein referred to.

In Re Dobney Foundry Limited et al and The Queen (No. 2) (1985), 19 C.C.C. (3d) 465 (B.C.C.A.), Esson J.A. summarized what he concluded to be the factors relevant to the exercise of the discretion to order seized goods returned or retained. This is what he said (p. 474):

> "I summarize my conclusions as to the relevant law:
>
> (1) A reviewing court, on quashing a search warrant, has power to order return of any goods seized under the warrant.
>
> (2) If the Crown shows that the things seized are required to be retained for the purposes of a prosecution, either under a charge already laid or one intended to be laid in respect of a specified chargeable offence, the court may refuse to order the return.
>
> (3) No particular formality is required

> in order for the Crown to show the requisite element of necessity to retain the things.
>
> (4) The power to order return of goods is incidental to the power to quash but may also arise under s. 24(1) of the Charter if the search and seizure was unreasonable as well as illegal.
>
> (5) The conduct of the prosecuting authorities in relation to the search and seizure is a factor to be considered in deciding whether to exercise the discretion.
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> (6) Other factors to be considered in exercising the discretion may be the seriousness of the alleged offence, the degree of potential cogency of the things in proving the charge, the nature of the defect in the warrant and the potential prejudice to the owner from being kept out of possession."

In Commodore Business Machines Limited v. Calvin S. Goldman et al. (File No. 759/86 - unreported - judgment delivered March 16, 1988) the majority of the Ontario Court of Appeal (Cory and McKinlay, JJ.A.) upheld the decision of the judge of first instance who after quashing a search warrant permitted the Crown to retain copies of those documents seized that were necessary for the prosecution of the offences with which the appellant was charged. The originals of all the documents seized had previously been returned to the appellant. In the majority judgment the following appears:

> "Section 24(1) of the Charter of Rights, by its wording, contemplates the exercise of a discretion in the face of a breach of a Charter right. The trial judge carefully considered all the legal issues involved. He determined that he should follow the reasoning of Justice Esson of the British Columbia Court of Appeal in Re Dobney Foundry Ltd. et al. and The

Queen (No. 2) (1985), 19 C.C.C. (3d) 465.

> On the facts of this case, it was appropriate for the judge of first instance to quash the authorization but to permit the respondents to retain the copies of the documents needed for the prosecution, and the imminent preliminary hearing which awaits yet the outcome of this application. No serious prejudice is occasioned to the appellant by this exercise of judicial discretion which permits the Crown to retain copies of the documents."

The majority then went on to sound the following note of caution with respect to Re Dobney Foundry Ltd., supra:

> "... It may be that any one of the members of this Court would have reached a different decision as to whether the decision in Re Dobney Foundry Ltd., supra, should be adopted. It may be that in many, if not most, of the situations where a search has been conducted in violation of Charter rights the goods seized should be returned." (my emphasis)

As already mentioned, the shot gun shells seized from Barker's residence were introduced in evidence on the preliminary inquiry into the murder charge against Carroll. The Crown now submits that they are needed for the prosecution of the murder charge against Carroll and should, therefore, not be ordered returned to Barker. In this submission reference is made to the following statement of MacKinnon, A.C.J.O. in Re Chapman and The Queen, supra, (p. 8):

> "I conclude that prior to the passage of the **Canadian Charter of Rights and Freedoms** there was a discretion in the court to determine, once a search warrant was quashed, whether articles illegally seized should be retained. Usually it was a sufficient 'justification' for the court to exercise its discretion in favour

> of the Crown's retention of the articles if they were said to be needed for the prosecution of an offence charged." (my emphasis)

The basis for the claim that the shot gun shells are relevant to the charge of murder against Carroll is as follows: Staff Sergeant Swim of the R.C.M. Police testified on the preliminary inquiry into the murder charge against Carroll. He said that two of the shells taken from Barker's residence were twelve gauge shot gun shells of the Imperial brand manufactured by IVI and were marked as containing special SSG shot. On examination he said that they were found to contain SSG shot. Special SSG shot is .33 inches in diameter and is the largest size shot. SSG shot is only marginally smaller with a diameter of .32 inches. A special SSG shot shell contains 12 pieces of lead shot as does a SSG shot shell. The third shell taken from Barker's residence contained bird shot which is the smallest size shot having a diameter of .22 inches.

Crown counsel says that the evidence at Carroll's trial will establish that Mr. Lawlor died as a result of shot gun wounds. He says that at least 18 pieces of lead associated with the shooting were recovered by the police. Staff Sergeant Swim testified that 4 of such pieces were consistent with being special SSG shot and that 14 pieces (12 of which were found in the deceased skull and brain) were consistent with SSG shot. He said they may or may not have originally been special SSG shot.

Staff Sergeant Swim testified that SSG and special

SSG shot shells are not lawful for hunting and are not usually found in the possession of civilians. He went on to say, however, that SSG and special SSG shot were legal for hunting up until a few years ago and that "... Lots of people still have it around their houses, but they just don't take it hunting, ..."

I have considered this factual background against the authorities and have concluded that either as a remedy under s. 24(1) of the Charter or in the exercise of our inherent jurisdiction, an order should issue directing that the three shot gun shells seized from Barker's residence be returned to him - provided of course they are still intact and are physically capable of being returned.

I have reached this conclusion basically for the following reasons:

(1) The warrant to search Barker's residence was fundamentally defective in that the grounds set forth for its issuance completely failed to meet the requirements of Code s. 487(1). The search was unreasonable and was a violation of Barker's right guaranteed by s. 8 of the Charter to be secure against unreasonable search or seizure.

(2) The purported justification for the issuance of the search warrant was that items would be found in Barker's residence that would afford evidence that he murdered the deceased. In actual fact, he was never charged with such murder and indeed has not been charged with any offence arising out of the killing. There is nothing in the record to show upon what grounds he was suspected of murdering Mr. Lawlor

except for the innocuous statement that he was seen in Carroll's company some hours after the killing. Indeed, as I have already pointed out, the information supplied to the justice of the peace did not disclose any grounds for believing that articles relevant to the murder or to the murder investigation would be found at Barker's home.

(3) The shot shells did not belong to the accused Carroll but rather to a third party, namely Barker. There is nothing in the record before us indicating upon what reasonable grounds, if any, the police believed that he is involved in the murder either as an accessory or otherwise. There is also no evidence of any close association between Carroll and Barker apart from the fact that the two were together in Long's vehicle on the evening of the murder.

(4) On the record, there appears to be a real question as to the admissibility of the shot gun shells at Carroll's trial. Admissibility of evidence is, of course, a matter for the trial judge but the relevancy or lack of it appears to me to be a proper matter for the court to consider when determining whether to order illegally seized items returned or detained. Even assuming that the shot gun shells are admissible at Carroll's trial, their cogency or weight appears to be minimal.

The fact that the shot gun shells were exhibits on Carroll's preliminary inquiry and are considered by the Crown to be required for his trial does not, in my opinion, deprive this Court of jurisdiction to order the shells returned to Barker. See: In Re Chapman and The Queen, supra.

Particularily do I believe this to be so when the return is ordered not only on the basis of inherent jurisdicition but also as a remedy under s. 24(1) of the Charter.

In result, I would dismiss the appeal of Carroll but would allow the appeal of Barker, set aside the decision and order of Mr. Justice Davison with respect to him; quash the warrant issued to search his residence and order that the three shot gun shells seized from his premises be forthwith returned to him.

J.A.

Concurred in:

Pace, J.A.

Matthews, J.A.