

Justice Felix Cacchione, on June 14, 1994, found the appellant guilty of possession of cocaine and cannabis resin for the purpose of trafficking: s. 4(2) of the **Narcotic Control Act**.

During the trial, a **voir dire** was held to determine the validity of a search warrant issued by a justice of the peace and also to determine the admissibility of the evidence seized as a result of the execution of that warrant. The appellant's application was pursuant to ss. 8 and 24(2) of the **Charter**. He alleges that there were fatal defects in the Information to obtain the warrant to search the appellant's house. An R.C.M.P. constable swore that Information, setting forth 17 grounds which concluded with his belief that the appellant was presently keeping a quantity of hashish at his residence for the purpose of trafficking. Although cocaine was mentioned in other grounds it was not mentioned in the concluding paragraph. The warrant was issued on the stated basis that there were reasons to believe that there was cocaine in the appellant's house.

The transcript contains some 94 pages of examination and cross-examination of the constable and submissions of counsel on the **voir dire**. The trial judge took some time to compose his 11 page decision concluding that the Information:

...did not contain sufficient reasonable and probable grounds to allow the J.P. to conclude that cocaine was to be found in the accused's residence, that some of the information was embellished while some information was not expanded upon, thereby leaving the Justice of the

Peace with the impression that more sources were contacted than, in fact, was the case. The informant did not pledge his belief in the information he presented, which was derived from other sources, and, finally, there was no information tending to show that cocaine was to be found in that particular residence.

He held that the warrant was invalid and the search was a warrantless search: in effect the appellant's rights under s. 8 of the **Charter** had been violated.

Without presenting further evidence, counsel for the appellant and the Crown then argued whether the evidence seized as a result of the search should be excluded pursuant to

s. 24(2) of the **Charter**. Those arguments were detailed, consisting of some 21 pages of transcript. Again the trial judge reserved and the next morning rendered his eight page decision concluding:

Under Section 24 sub-section (2) of the **Charter**, the evidence obtained as a result of a **Charter** breach, is **prima facie** admissible, unless it is established that its admission into evidence would bring the administration of justice into disrepute.

What would a reasonable person fully apprised of the circumstances of this case think. Would that person, that reasonable person, consider that the administration of justice is brought into disrepute by admitting this evidence. I think not. The reasonable person viewing the circumstances of this case, would conclude that the police investigated a case and considered the applicant's rights by applying for a warrant. They executed the warrant and found the drugs they were looking for. To exclude this evidence because the warrant was poorly drafted would, in my view, bring the administration of justice into further disrepute.

Accordingly, I am not satisfied that the applicant has discharged his burden under Section 24, sub-section (2), and the application is dismissed.

Trial then continued. As earlier mentioned the trial judge found the appellant guilty as charged.

The appellant now appeals alleging that the trial judge, having found after the first application that the justice of the peace was misled by some of the grounds in the Information and consequently the search warrant was invalid, erred in failing by virtue of s. 24(2) of the **Charter**, to exclude the evidence seized under the search warrant.

The Crown, by notice of contention, challenges the trial judge's finding that s. 8 of the **Charter** was violated.

In respect to the appellant's appeal concerning the s. 24(2) decision, it is of importance that the two applications were held one after the other. The trial judge, when considering the appellant's second motion was clearly cognizant of the reasons he gave on

the first motion. He remarked:

Having determined that the warrant issued to search the accused's residence was invalid, the search conducted as a result of the use of that warrant, was a warrantless search and, therefore, **prima facie**, unreasonable and a violation of the accused's rights under Section 8 of the **Charter**.

The thrust of the appellant's argument, ably presented by counsel, is that the trial judge findings in respect to the s. 24(2) application are contradictory to, or at variance with, his first decision and thus cannot be sustained.

The trial judge had to determine the appropriate remedy for the **Charter** violation. He commented upon the fact that the burden is upon the applicant (the appellant here) to establish on a balance of probabilities that the admission of the evidence could bring the administration of justice into disrepute. He then analyzed the applicable law in relation to this case.

The trial judge remarked:

A review of the totality of the evidence, reveals that the police did have reasonable and probable grounds, however, they did not display this to the Justice of the Peace.

This information, had it been properly put before the J.P., would have shown reasonable and probable grounds. As such, this information can be considered on the application to exclude the evidence.

The trial judge had the opportunity, not given to us, of seeing and hearing the constable. He assessed the constable's credibility. In so doing he properly took into consideration that the constable's first language is not English; that some of the deficiencies in the Information can be attributed to the constable's lack of proficiency with the English language; that this was the constable's first attempt at preparing an Information; that the constable considered that he had a responsibility not to disclose information which might tend to identify his sources in the small community in which the appellant resides; and that

it was not established that the s. 8 breach was committed in bad faith or flagrantly and that the constable believed that he was executing a valid warrant.

The trial judge decided that the appellant had not discharged the burden under s. 24(2) of the **Charter** and concluded that to exclude the evidence obtained as a result of the search would bring the administration of justice into disrepute.

It is our unanimous opinion that the trial judge did not err in his conclusion in respect to the s. 24(2) application. We dismiss the appeal.

In consequence, it is not necessary, in our opinion, to consider the notice of contention.

J.A.

Concurred in:

Hallett, J.A.

Roscoe, J.A.

