S.C.C. No. 02634

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Hallett, Matthews and Roscoe, JJ.A.

Cite as: R. v. Berryman, 1992 NSCA 10

BETWEEN:

SHANE PETER BERRYMAN Appellant - and - HER MAJESTY THE QUEEN Respondent	)	Warren K. Zimmer for the appellant James C. Martin for the respondent Appeal Heard: November 12, 1992 Judgment Delivered: November 25, 1992

THE COURT: Appeal allowed and a new trial ordered per reasons for judgment of Hallett, J.A.; Matthews and Roscoe, JJ.A. concurring.

HALLETT, J.A.

The appellant was convicted by a jury of having possession of a narcotic for the purpose of trafficking contrary to **s. 4(2)** of the **Narcotic Control Act**. The issue in this appeal relates to the

trial judge's ruling to admit into evidence tapes of intercepted telephone communications to which the appellant was a party.

Section 189(1) of the **Criminal Code**, R.S.C. 1985, c. C-46 provides:

> " 189. (1) A private communication that has been intercepted is inadmissible as evidence against the originator of the communication or the person intended by the originator to receive it unless
>
> (a) the interception was lawfully made, or
>
> (b) the originator thereof or the person intended by the originator to receive it has expressly consented to the admission thereof,
>
> but evidence obtained directly or indirectly as a result of information acquired by interception of a private communication is not inadmissible by reason only that the private communication is itself inadmissible as evidence."

This section requires a trial judge to be satisfied on a *voir dire* that: (i) the authorization to intercept was validly made; (ii) the interceptions were made in accordance with the terms of the authorization; (iii) the statutory requirements as to notice (**s. 189(5)**) were complied with; and (iv) the authorization included as a named or unnamed party, any of the parties to the communication. (**R. v. Parsons** (1977), 37 C.C.C. (2d) 497 (Ont. C.A.)) The reasons given by the court were approved by the Supreme Court of Canada in **Charette v. The Queen** (1980), 51 C.C.C. (2d) 350.

The onus is, of course, on the Crown to prove that the conditions of admissibility were met in a particular case.

A very careful review of the transcript of the *voir dire* proceedings discloses that the sole focus of the trial judge was directed towards determining if the authorizations, not the interceptions, had been lawfully made. In his ruling the trial judge stated after dealing solely with the manner in which the authorizations were obtained:

> " I hold that the authorizations were lawfully made and were based upon reasonable and probable grounds disclosed before they were issued. There is no defect in the procedure leading up to the issue of the

> authorizations. The communications intercepted as a result of the authorizations were admissible into evidence."

The learned trial judge did not direct his attention to determine if the interceptions were carried out in accordance with the authorizations as he is required to do as a condition of admitting the otherwise inadmissible evidence. There is nothing on the record that the appellant or his counsel on his behalf clearly admitted this requirement of admissibility. The following is an excerpt from the transcript which sets out the only evidence relevant to this issue; this exchange occurred after the Crown had adduced its evidence on the *voir dire:*

> " CROWN PROSECUTOR: My lord, as well we - the Crown showed that these authorizations were lawful. Questioning Cst. Walsh he noted that both of the ...
>
> THE COURT: Is this an issue here? You mentioned at the beginning that there were two issues.
>
> A. I only point that out, My Lord, because that is the Crown's duty, to show that under Section 189(1) that the authorizations are lawful. Now, My Lord, if there are no objections from ...
>
> THE COURT: No, I want to know. You said at the beginning that there were two issues. One is that it must be based on reasonable and probable grounds. Is the second issue that the authorizations are lawful?
>
> A. Yes.
>
> THE COURT: Yes?
>
> A. My learned friend has indicated that he is not disputing that, he is admitting the lawfulness of the ...
>
> DEFENCE COUNSEL: Lawfulness, My lord, in the sense that reasonable notice was given to Mr. Berryman.
>
> THE COURT: The statutory requirements.
>
> DEFENCE COUNSEL: Statutory requirements.
>
> CROWN PROSECUTOR: My lord, those are my submissions on behalf of the Crown. Thank you."

It would appear considering the transcript of the *voir dire* proceedings as a whole that the

Crown prosecutor may have been using the word "authorizations" where he meant "interceptions".

Immediately following the above exchange the defence counsel made his submission on the question of admissibility of the tapes. He argued that there were not reasonable and probable grounds for the justices to have issued the authorizations. He did not suggest that the interceptions were not carried out in accordance with the terms of the authorizations.

The respondent argues on appeal that the defence counsel by the above exchange admitted the statutory requirement for the admission of the evidence had been complied with. When one considers that the defence counsel argued at trial that the requirements for the granting of the authorizations had not been complied with coupled with the defence counsel's statement that he admitted the lawfulness of the interceptions "in the sense that reasonable notice was given", it is not clear to me that there was any admission that the interceptions were carried out in accordance with the authorization. In the absence of such an admission the learned trial judge was required to determine this issue. Having failed to do so the evidence was improperly admitted by the trial judge.

The authorizations were not entered into evidence on the *voir dire* although they were referred to by the police officer as he testified. He gave general evidence that the telephone numbers intercepted were those authorized to be intercepted; he described who made the interceptions and the dates between which the interceptions were carried out confirming that they were within the time period provided in the authorizations. Although there is nothing on the record, presumably the trial judge had copies of the authorizations. The authorizations were not before us. The record of the *voir dire* proceeding is such that this court is unable to determine if the taped conversations were admissible notwithstanding the learned trial judge's failure to determine if the interceptions had been carried out in accordance with the terms of the authorizations. Under the circumstances there is no alternative but to allow the appeal and order a new trial.

It is not necessary to deal with the other grounds of appeal; with one possible exception

they have no merit whatsoever. The exception being the instructions by the learned trial judge to the jury on the meaning of constructive possession and joint possession; it was confusing in part. The trial judge's statement to the jury "Your common sense will tell you that people normally intend the natural consequences of their actions" in the context of his instruction on the question of the appellant's knowledge of the possession of the narcotic by his companion was inappropriate. However, the learned trial judge immediately thereafter properly instructed the jury they would have to look at all of the circumstances in order to determine whether or not the appellant knew the narcotic was in the possession or control of one of his companions in the motor vehicle. I would not have allowed the appeal on this ground.

J.A.

Concurred in:

Matthews, J.A.

Roscoe, J.A.

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Appellant	)	REASONS FOR JUDGMENT BY:
	)	
- and -	)	
	)	HALLETT, J.A.
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	
	)	
	)	
	)	
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