NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Shiers*, 2003 NSCA 138

Date: 20031209
Docket: CAC 194315
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

John Gregory Shiers

Respondent

Judges:	Cromwell, Hamilton, Fichaud, JJ.A
Appeal Heard:	November 18, 2003, in Halifax, Nova Scotia
Held:	Appeal from acquittal allowed, substitute a conviction and remit the matter to the Provincial Court for sentence as per reasons of Fichaud, J.A.; Cromwell and Hamilton, JJ.A. concurring.
Counsel:	Gordon S. Campbell, for the appellant Christopher Manning, for the respondent

Reasons for judgment:

[1] This is an appeal from an acquittal. On January 14, 2002, further to a warrant, police searched the apartment of John Shiers finding 292 grams of marihuana, electric scales and score sheets. Mr. Shiers was charged with possession for the purpose of trafficking in a controlled substance contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, SC 1996, c. 19. Mr. Shiers through counsel acknowledges that if evidence of the seizure is admissible, the result is a conviction. If not, as determined by the Provincial Court, there is insufficient evidence and an acquittal. Whether evidence of the seizure is admissible depends on the validity of the search warrant. This turns on whether the Information to Obtain the Warrant satisfies s. 8 of the *Charter of Rights and Freedoms.*

[2] The justice of the peace issued the search warrant on January 13, 2002 further to the Information sworn by Corporal MacGillivray of the RCMP.

[3] At the trial in the Provincial Court, Judge Claudine MacDonald heard (then) Sergeant MacGillivray testify about the events leading to the Information and the search warrant. Mr. Shiers applied for an order that evidence related to the seizure be excluded because (1) the Information to Obtain the Warrant was insufficient under s. 8 and (2) the admission of this evidence would bring the administration of justice into disrepute under s. 24(2) of the *Charter*.

[4] The Provincial Court judge agreed with Mr. Shiers, excluded the evidence under s. 24(2) and, in the absence of further evidence from the Crown, acquitted Mr. Shiers.

[5] The Crown appeals under s. 676 of the *Criminal Code*.

[6] There are two issues:

1. Does the Information to Obtain the Warrant satisfy s. 8 of the *Charter?*
2. If not, should the evidence be excluded under s. 24(2) of the *Charter?*

[7] I will refer to the justice of the peace as the “issuing judge” and to the Provincial Court judge as the “reviewing judge”.

[8] Section 8 of the *Charter* states:

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

In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 168 the Supreme Court stated:

> In cases like the present, reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search, constitutes the minimum standard, consistent with s. 8 of the Charter, for authorizing search and seizure.

In *R. v. Morris (W.R.)* (1998), 173 N.S.R. (2d) 1 (C.A.), at pp. 9 - 12, this Court expanded on the principles which govern the issuance of a search warrant.

[9] The issue here is not whether the Court of Appeal believes that the Information was sufficient. The issue is whether the reviewing judge applied the appropriate standard of review to the issuing judge's determination that the Information was sufficient.

[10] Whether the reviewing court applied the appropriate standard of review to the decision of the lower tribunal is an issue of law which is reviewable by this Court under the principles stated in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at ¶ 8 - 9 and *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] S.C.J. 18, 2003 SCC 19 at ¶ 43 - 44.

[11] In *R. Garofoli*, [1990] 2 S.C.R. 1421 at p. 1452 Justice Sopinka stated the basis upon which a reviewing judge may reverse the issuance of a search warrant:

> . . . The correct approach is set out in the reasons of Martin J.A. in this appeal. He states, at p. 119:
>
> > If the *trial judge* concludes that, on the material before the authorizing judge, there was no basis upon which he could be satisfied that the pre-conditions for the granting of the authorization exist, then, it seems to me that the trial judge is required to find that the search or seizure contravened s. 8 of the Charter.

> The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge. [emphasis in original passage]

[12] Later decisions have adopted these principles from *Garofoli*: *R. v. Grant*, [1993] 3 S.C.R. 223 at 251; *R. v. Morris (W.R.) supra* (NSCA) at p. 12.

[13] By wording the test as whether the issuing judge "could" determine that a search warrant should issue, Justice Sopinka assigned to the issuing judge the function of drawing reasonable inferences from the evidence in the Information.

[14] In *R. v. Shrubsall* (2000), 186 N.S.R. (2d) 52 (S.C.), at pp. 59-60 Justice Saunders adopted the following passage from the decision of the New Brunswick Court of Appeal in *R. v. Allain (S)* (1998), 205 N.B.R. (2d) 201:

> Moreover, the reviewing court must not assess the substantive quality of the Information by confining itself to the evidence which is explicitly set out in it. The court must bear in mind the undoubted power of the issuing judge to draw reasonable inferences from such explicitly stated evidence. This power has been recognized by our Court on several occasions. See. R. v. MacDonald (F.D.) (1992), 128 N.B.R. (2d) 447 (C.A.), and Valley Equipment Ltd v. R. (1998), 198 N.B.R. (2d) 211 (C.A.). It has also been acknowledged by the Ontario Court of Appeal in the oft-quoted case of R. v. Breton (1994), 93 C.C.C. (3d) 171 (Ont. C.A.). In that case, the Court had no hesitation in deciding that the issuing judge had the power to draw the inference from the stated evidence that a particular individual had committed an offence, and that a narcotic was present at a particular location. It is settled law that the issuing judge is fully empowered to make all reasonable deductions which flow logically from the evidence stated in the Information, and this power must be factored into the review process.

[15] Based on these principles, the reviewing judge should have applied the following test. Could the issuing judge, on the material before her, have properly issued the warrant? Specifically, was there material in the Information from which the issuing judge, drawing reasonable inferences, could have concluded that there were reasonable grounds to believe that a controlled substance, something in which it was contained or concealed, offence-related property or any thing that would afford evidence of an offence under the *CDSA* was in Mr. Shiers' apartment?

[16] Here, the reviewing judge cited the appropriate passages from *Hunter*, *Garofoli* and *Shrubsall* and summarized the principles from those authorities.

[17] With respect, however, the reviewing judge did not properly apply those principles. In particular, she did not consider whether the issuing judge could have drawn reasonable inferences from the evidence in the Information.

[18] The reviewing judge acknowledged that the material in the Information "connects Mr. Shiers with the drugs" . She acknowledged that the Information showed that Mr. Shiers' residence was 751 King Street. She found, however, that the Information did not sufficiently connect the drugs to 751 King Street, the intended place of search:

> I find that I cannot make that connection between, and nor could the Justice of the Peace have made a connection between Mr. Shiers and the drugs and his residence. Yes there was information connecting Mr. Shiers to drug use or drug possession. Yes there was information connecting Mr. Shiers to 751 King Street but where there is a gap and a significant gap is connecting Mr. Shiers and drugs to the 751 King Street residence. That's really where there is a significant gap in this Information to Obtain a Search Warrant. For example there was nothing set out in the Information to Obtain a Search Warrant - and I just do this by way of example - to suggest that Mr. Shiers had been seen entering or leaving that residence let alone seen entering or leaving approximate in time to when source A had contact with Mr. Shiers. There was nothing in the Information to Obtain a Search Warrant to suggest when Mr. Shiers had last been seen at that address. The reliable source that was referred to, source A, describes what took place outside a particular civic address and there was nothing in what source A said that connected the allegation of trafficking to the residence at 751 King Street.

[19] The reviewing judge did not consider whether there was evidence in the Information from which the issuing judge could reasonably have inferred that

probative evidence of an element of the offence could be found at Mr. Shiers' apartment at 751 King Street.

[20] The Information does contain evidence from which the issuing judge could reasonably have drawn this inference.

[21] Corporal MacGillivray's Information stated that on January 14, 2002 he received a telephone call from the informant, whom he identified as "Source A". The Information stated:

> Source "A" on this date stated to this informant that within the last hour Source "A" purchased a quantity of marihuana from Johnny Shiers. Source "A" stated that the transaction occurred outside his present residence, 'the blue place on King Street where Tia Macumber lives'. Source "A" at this time observed Johnny Shiers remove the quantity of marihuana from a large plastic baggie with what Source "A" estimated contained approximately 150 to 200 grams of 'grammed up' marihuana.

Other paragraphs in the information stated that Mr. Shiers and Ms. Macumber lived at 751 King Street, Ms. Macumber in apartment "B" and Mr. Shiers in apartment 3 at the rear of the building.

[22] Corporal MacGillivray's Information stated:

> This informant has fifteen years of police experience and I have extensive experience in drug enforcement including attending specific drug training and keeping current on material and articles relating to the illicit drug trade. Based on my drug enforcement experience I can say that 150 to 200 grams of marihuana is a significant amount of marihuana and this quantity in itself would suggest that the person in possession of it has it for the purpose of trafficking. Other indicia of a person who is trafficking marihuana is a set of weight scales either electronic or triple beam scales. It is necessary to divide up the marihuana usually in one gram amounts for easy resale. One who traffics marihuana usually has some form of packaging material usually small ziplock baggies, plastic wrap or tin foil. One who traffics usually has documentation of transactions referred to as score sheets. The sale of marihuana is a cash business and it is common to record who owes money or who has paid for an amount of marihuana. Electronic Storage Devices may be used to record those who owe money or from whom they receive their resupply of marihuana. It is my experience that some or all of the offence related property listed above may be located in the residence of one who traffics in marihuana.

[23] The issuing judge, by drawing reasonable inferences from the quantity of drugs said to be in Shiers possession at the time of the transaction and the way in which they were packaged, the evidence that Shiers was known to be involved in the drug trade, the fact that the transaction took place on the street in front of his residence and other facts and opinions disclosed in the Information to Obtain, could conclude that there were reasonable grounds to believe that the items targeted by the search were in his residence.

[24] The reviewing judge did not consider whether the issuing judge could have drawn such reasonable inferences.

[25] Rather, the reviewing judge noted that there was nothing on the face of the Information "to suggest that Mr. Shiers had been seen entering or leaving that residence let alone seen entering or leaving approximate in time to when Source "A" had contact with Mr. Shiers."

[26] It is correct that the Information does not state whether or not Mr. Shiers re-entered his residence after the transaction. But the issuing judge was entitled to draw a reasonable inference that (1) at some point, Mr. Shiers would return to his residence along with the remaining marihuana in the plastic bag; and (2) items such as scales and score sheets would remain at Mr. Shiers residence even if Mr. Shiers was temporarily absent.

[27] By overturning the warrant without considering whether there was evidence in the Information from which the issuing judge could reasonably draw the connecting inferences, the reviewing judge substituted her discretion for that of the issuing judge, which was an error of law.

[28] As the Supreme Court of Canada stated in *Dr. Q,. supra,* ¶ 43 - 44, if the lower court has not applied the correct standard of review, this Court must apply that standard.

[29] Applying the correct standard of review, as discussed above, it is clear that there was material in the information from which the authorizing judge could reasonably infer that the drugs, scales and score sheets were in the residence of Mr. Shiers at 751 King Street. In my view the Information satisfied s. 8 of the *Charter*, the warrant was valid, as was the search and the seizure.

[30] Because of my conclusion on the first issue, it is unnecessary to consider the second issue, ie. whether the evidence should have been excluded under s. 24(2).

[31] On the hearing of this appeal, counsel for Mr. Shiers acknowledged that, if the seizure was valid, then the admission of the evidence from the seizure would suffice for a conviction.

[32] I would allow the appeal, substitute a conviction and remit the matter to the Provincial Court for sentence.

Fichaud, J.A.

Concurred in:

Cromwell, J.A.

Hamilton, J.A.