S.C.C. No. 02611

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. M.S., 1993 NSCA 148

Hallett, Freeman and Roscoe, JJ.A.

BETWEEN:

M. S. and J. T. Appellants - and - HER MAJESTY THE QUEEN Respondent	)	Davies B.N. Bagambiire for the Appellants Robert C. Hagell for the Respondent Appeal Heard: June 9, 1993 Judgment Delivered: July 19, 1993

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

THE COURT: Leave to appeal refused, per reasons for judgment of Roscoe, J.A.; Hallett and Freeman, JJ.A. concurring.

ROSCOE, J.A.:

The appellants were charged with unlawful assembly and causing a disturbance by fighting contrary to sections 66 and 175(1)(a)(i) of the **Criminal Code**. The charges arose from incidents that took place at Cole Harbour District High School on January 10, 1989. They were tried in Provincial Court before Judge Potts. The unlawful assembly charges were dismissed after a motion for directed verdict. After completion of the evidence, the appellants were convicted of causing a disturbance and sentenced. Mr. S. received a suspended sentence and Mr. T. a conditional discharge.

At the trial the appellants, through their counsel, made a motion that the charges be dismissed on the basis that their constitutional rights guaranteed by ss. 15 and 7 of the **Charter** were infringed. The appellants, who are black, argued that the R.C.M.P. officers who investigated the matter that led to the charges administered or applied the law in a manner that discriminated against them on the basis of race, contrary to s. 15 of the **Charter**. The motion was dismissed by the trial judge. An appeal to Justice Cacchione, then of the County Court, was dismissed.

The appellants raise the following issues before this Court:

> "(1) Whether or not the prosecutions of the appellants violated s. 15(1) of the **Charter** and whether the learned County Court judge was wrong in holding that it did not because 'both groups were treated exactly the same';
>
> (2) Whether or not the prosecutions of the appellants violated s. 7 of the **Charter**; and
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> (3) If the prosecutions violated ss. 15(1) or 7 of the **Charter**, what the appropriate remedy is, in the circumstances."

The events giving rise to the charges against the appellants took place on January 10, 1989 over the noon break at Cole Harbour District High School. That was the second of three days of racially motivated fighting between black and white students and non-students on the school grounds. The trial

judge noted that the fighting was a result of the ignorance and intolerance of a few white students. The events were widely publicized by the media.

On January 9, the fighting erupted after some snowballs were thrown. At least two black students and two white students were involved in the fighting. The next day several carloads of white and black non-students came to the school yard at lunch time and widespread fighting ensued which involved numerous students and non-students. On January 11, although approximately 400-500 people assembled in the school yard, only two people engaged in fighting.

The appellants submit that as a result of racial discrimination in the investigation of the incidents more black individuals were charged with and convicted of criminal offences. It is submitted that the investigation "had the effect of impacting upon the blacks more adversely" and therefore the equality rights of the appellants were violated. They seek a permanent stay or dismissal as a remedy. Essentially the appellants maintain that a racially neutral investigation and prosecution would have resulted in more charges and convictions entered against whites involved in the disturbances. They say that "if the appellants had been treated like the whites who benefited from the breaches of ss. 15 and 7 of the **Charter** the appellants would not have been tried". The appellants admit that on the facts, the offences were proved. The appeal relates only to the preliminary **Charter** motion.

As a result of the events over the three days, 18 people were charged with 27 offences. Of those charged, 8 were white and 10 were black. The charges included unlawful assembly, causing a disturbance and possession of a weapon for a purpose dangerous to the public peace. No assault charges were laid.

Eleven people, 7 blacks and 4 whites, were tried. Nine of those were acquitted. Only the appellants were ultimately convicted. Seven of the people charged, 3 blacks and 4 whites, had all charges "dropped", that is the Crown offered no evidence.

The trial judge agreed with the appellants' submission that the protection afforded by s. 15 includes equality in the administration or application of the law and the question of intention is not relevant in determining whether discrimination exists. She placed the burden on the appellants and concluded that they must establish that the blacks were treated differently from the whites by the R.C.M.P. in their investigation or by the Crown in the prosecution and that such differential treatment resulted in the blacks being unfairly and adversely affected.

The learned trial judge carefully reviewed the evidence led on the **Charter** motion and examined the details of the investigation to see if they revealed a discriminatory pattern. With respect to the January 9 incident, she noted (p. 807, Appeal Book):

> " Obviously, an exhaustive investigation of the incident would have involved locating and interviewing every potential witness known to the R.C.M.P. The police in retrospect and with the benefit of hindsight and after having had their investigation probed under a microscope, probably wish they had done so, but their failure to do so did not result in an investigation which can be described as racially discriminatory."

Regarding the investigation of the January 11 fighting, she stated (p. 808, Appeal Book):

> ""Examination of the Crown files indicates that the police relied with respect to the P. matter, heavily on the evidence afforded by the M.I.T.V. tape, which they seized. There were no doubts, as evidenced by the affidavits filed on behalf of the applicants, as well as the tape itself, many witnesses to the event, none of whom the police interviewed or attempted to interview. Given the evidence that the police had, they were entitled to rely on that evidence and conclude their investigation, although ideally every criminal investigation would be exhaustive. The reality of financial resources and manpower make that ideal an impossibility. It must be remembered that, for the most part, the police were investigating Summary Offences, the least serious in the **Criminal Code**, and could not be expected to investigate with the same thoroughness as one might expect were the charges more serious. The fact that the R.C.M.P. did not pursue the investigation beyond seizure of the M.I.T.V. tape does not lead me to the conclusion that the investigation was probably discriminatory. Similarly, in the case involving J.D. and D.S., the police relied essentially on the

> evidence afforded by a C.B.C. news tape. J.D. was not included as a witness against Mr. S. and vice versa and charges against both were dismissed for want of prosecution. The only distinction with respect to the two was that Mr. S. was interviewed by the R.C.M.P. and Mr. D. was not. That fact standing alone does not establish that the R.C.M.P. conducted a thorough investigation of the white side of things, and further, does not establish that the investigation was racially discriminatory."

Of the police work involving the January 10 events, she said (p. 810, Appeal Book):

> "It is true that the police could have made efforts to obtain names and addresses of the witnesses at the scene on January 10th and failed to do so. In this respect, however, the blacks were dealt with in exactly the same way as the white students. There was no real effort by the R.C.M.P. to obtain names and addresses of white students at the scene any more than there was an effort made by the R.C.M.P. to obtain names and addresses of blacks.
>
> The police also asked the assistance of Mrs. Tupper, Vice Principal of the school, to have witnesses come forward which resulted in them obtaining only one (1) statement. Many of the black students who filed affidavits and gave sworn evidence in this proceeding complained of having had criminal acts committed against them. Obviously there is no obligation on those individuals to come forward and make complaints to the police. The police, however, do not conduct investigations in a vacuum. They respond, for the most part, to complaints and do not go out looking to find offences to investigate. No doubt, if more witnesses had come forward, or been discovered and located, more charges would have been laid against both whites and blacks."

She concluded her decision on the **Charter** motion as follows:

> "It is blatantly obvious that the prosecution of both blacks and whites might have been more successful had more investigation been done and no doubt, many of the blacks who testified before this Court and others, would willingly have given statements to the police if they had been approached. In this respect I am not satisfied despite their evidence that all of them would have been cooperative in giving statements, in the same way that not all of the whites were cooperative in so doing. It is, however, in my view, overstating the case to say that the investigation was one-sided and it is not appropriate to suggest that a racially unbiased investigation would have required that the same number of blacks as whites be interviewed. In my view, virtually the same opportunities were afforded to both groups and the rights of the

> defendants under s. 15 and, of necessity, under s. 7 have not been infringed and the application must fail."

The learned summary conviction appeal judge after reviewing the arguments, the applicable law and the trial judge's decision concluded by saying:

> " A review of the transcript of evidence shows that the findings of fact made by the trial judge are supported by the evidence. Findings of fact are not reversible by an appellate court unless they are clearly erroneous. In the present case the transcript shows that these findings are supportable.
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> A review of the learned trial judge's decision also shows that she correctly applied the law to the facts as she found them. As such, no reversible error was committed and the appeal must be dismissed."

The appellants argue that both the trial judge and summary conviction appeal judge erred by focusing on the procedure used by the police rather than on the effect or results of the procedure. They state that had the R.C.M.P. used proper, thorough investigative techniques more evidence from blacks implicating whites would have been uncovered; that is that the effect would have been different.

The trial judge stated that the accused must establish that they were treated differently from the whites involved in fighting and thus in her examination of the evidence searched for unequal treatment and found none. Although differential treatment could be discriminatory, it is also possible to prove a breach of s. 15 by showing that racially neutral treatment had an adverse effect based on race, that is that the administration of the law had the effect of imposing burdens on the appellants, not imposed on others.

The trial judge did consider the effect of the administration of the law when she stated:

> " The applicants argue that the way in which the investigation was conducted resulted in a disadvantage or adverse effect to the blacks, which did not result in the same way to the whites. But let us examine for a moment, the effect of the investigation on the white students. Of the seven (7) whites who agreed to give

> statements concerning the January the 10th incident, five (5) were charged, two (2) of which went to trial and were acquitted, and the charges against the others were dismissed for want of prosecution. Of the six (6) blacks charged, two (2) were dismissed for want of prosecution, one (1) was acquitted, leaving the remaining three (3) applicants for trial. With the exception of M. S. who, in his statement, made allegations against M.F., not one black student complained at the time of any offence having been committed by others against them. M. S. alleged that Miss F. had assaulted him and she was not charged with that offence. On the other hand, Miss F. made the same allegation against Mr. [M.] S. and he was not charged with the offence of assault either. M.F. was acquitted after trial and the charge against M. S. was dismissed for want of prosecution. The whites, in large measure, were charged essentially because they incriminated themselves in their own statements." [emphasis added]

While I agree, as did the trial judge, that much more could have been done by the investigators, it does not necessarily follow that more whites would have been charged and convicted as a result. The trial judge made a finding of fact, based on credibility of witnesses called by the defence, that not all of them would have cooperated in giving statements to implicate whites. In spite of that finding of fact, the appellants ask this Court to assume that had a more thorough investigation been undertaken, more charges would have been laid against whites. Although the evidence does establish an incomplete investigation, and the fact that more people, of both races, were involved in the fighting than were charged, it does not establish conclusively who those other people were or that more convictions against white people would have ultimately resulted. Nor does the evidence establish, as contended by the appellants, that far more whites than blacks were involved in the fighting and that the whites started the fights. In summary, the evidence does not support a finding of adverse effect based on race.

The issues raised on this appeal relate solely to fact findings by the trial judge and the summary conviction appeal judge. Therefore the appellants have not raised a question of law. Leave to appeal ought to be refused.

Concurred in:

Hallett, J.A.

Freeman, J.A.