Charter s. 8

Cite as: R. v. Comeau, 1991 NSCO 15

1990 C.D. No. 2956

IN THE COUNTY COURT OF DISTRICT NUMBER THREE

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

- and -

MARTIN DENNIS COMEAU

RESPONDENT

HEARD: At Digby, Nova Scotia, on the 23rd day of January, A.D. 1991

BEFORE: The Honourable Judge Charles E. Haliburton, J.C.C.

CHARGE: Section 253(b) of the Criminal Code

DECISION: The 13th day of February, A.D. 1991

COUNSEL: V. Blaine Allaby, Esq., Q.C., for the Appellant

R. Alain Deveau, Esq., Q.C., for the Respondent

D E C I S I O N O N A P P E A L

HALIBURTON, J.C.C.

This is a Crown appeal from the acquittal of the Accused on the charge

> That he on or about the 17th day of February, 1990, at or near Meteghan in the County of Digby, Province of Nova Scotia, did operate a motor vehicle having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded eighty milligrams of alcohol in one hundred millilitres of blood, contrary to Section 253(b) of the Criminal Code.

The Accused was acquitted when the Trial Judge accepted the arguments of Counsel as put forward in a Post-Trial Brief in which it was argued that a Charter breach (s. 8) had occurred, that the results of a breathalyzer test as reported in a Certificate of Analysis were tainted by the breach, and that the evidence ought to be excluded under the provisions of s. 24(2) of the Charter.

FACTS

The facts as disclosed by the transcript are as follows:

While two police constables were involved in a routine highway patrol, they observed that a motor vehicle passing in the opposite direction was emitting a loud sound from its muffler. The police turned to follow this vehicle, observed it overtake and pass a second vehicle in a fifty kilometre zone, activated the emergency equipment on the police vehicle and stopped it. The driver of the vehicle brought it to a stop on its lefthand shoulder of the highway; the police constables approached on either side of the vehicle at which time they were

able to recognize the driver. The driver, however, then drove off and, inspite of the fact that the police constables hurried back to their own vehicle, they were unable to overtake and apprehend the vehicle and its driver. They did, however, keep it in view until it turned off the highway and drove approximately one kilometre on a snow-covered track behind some houses. The police vehicle was unable to follow. One police constable did follow on foot while the other drove the police car to a side road on which the residence of the Accused was located. Constable Bidal, who was the officer on foot following the tracks, arrived first at the residence where he observed the vehicle parked by the rear door. He estimated that he arrived at the back door approximately eight minutes after the vehicle had done. Depending upon whose evidence is accepted, the constable knocked loudly or banged on the door. It was not locked. He apparently hesitated for some seconds and then entered without permission.

The father of the Accused, the owner of the house, testified that at around quarter to two, he was awakened by a loud banging at the back door. Startled, he got up, pulled on his pants, proceeded toward the door through the den anticipating that it was his son who had banged on the door. From the den to the rear door is a fifteen-foot hallway. Mr. Comeau, Sr., testified that when he got into the den, he saw the police constable in the hallway shining his flashlight. Mr. Comeau then turned on the light. He testified that he had not invited the constable to come inside the house; that nobody did.

He did not, however, protest the constable's presence in the house and was present over the next few minutes when his son, the Accused, entered the same room and had some conversation with the police constable. Ultimately, an ALERT demand was given to the son with a failed result and a subsequent breathalyzer test resulted in the Certificate which the Trial Judge excluded from evidence.

THE GROUNDS OF APPEAL

The grounds of appeal are:

1. **THAT** the learned Trial Judge erred in law in finding the entry into the dwelling of Hector Comeau was "not proper" in that Constable Bidal was in "hot pursuit" of an unknown individual at the time he entered the dwelling of Hector Comeau;

2. **THAT** the learned Trial Judge erred in law in not admitting evidence obtained after Constable Bidal entered the dwelling of Hector Comeau on the ground that even if such entry did violate the rights of Hector Comeau and/or Martin Comeau such violation was committed in good faith and there was urgency or necessity at the time;

3. **THAT** the learned Trial Judge erred in law by not finding that the violation of the Charter of Rights was such as would not bring the administration of justice into disrepute in these particular circumstances and should therefore have allowed the evidence obtained thereafter;

GROUND NO. 1

The Trial Judge found that the entry into the dwelling was "not proper". The Appellant takes the position that it was proper because it was effected in the course of "hot pursuit". "Hot pursuit", I presume, is that which is described in Black's Law Dictionary as "fresh pursuit" in the following terms:

> A pursuit instituted immediately and with intent to reclaim or recapture, after an animal escaped, a thief flying with stolen goods, etc.

Both the concept and the authority are discussed in Halsbury's Laws of England, Third Edition, at Volume 10, page 351 and following. The quotations below appear to be relevant in considering the issues raised on this appeal (page 354, paragraph 647):

> If a felony has been committed and the felon is followed to a house and there is no other means of entering, any person may, it seems, break open the door of the house, to arrest the offender. This may also be done if a felony will probably be committed unless some person interferes to prevent it.
>
> If an affray occurs in the presence of a constable, and the offenders run away and are immediately pursued by the constable and they enter a house, then the doors may be broken open by the constable to apprehend them in the course of the immediate pursuit.
>
> Before doors are broken open to effect an arrest, **due notice must be given and admission be demanded and refused.**

Counsel have debated whether in view of the time lapse of eight minutes there was, in this case, fresh pursuit or not. Even if it were fresh pursuit, that concept does not authorize entry without "demand" and a refusal. The evidence of both the constable, himself, and the evidence of the owner of the house, the father of the Accused, seems to establish clearly that while it might be said that the police constable demanded admission, he did not wait for a response before entering. While it is true that he did not break down the door or force an entry into the household, the door was closed to him and his entry was not

authorized. The constable, himself, in explaining his actions, said:

> At that time, I was what I considered in pursuit, in fresh pursuit of an individual who had committed an indictable offence and had entered the residence...I believed the driver of that vehicle was in that house. Had Mr. Comeau turned on the light or not regardless I would have proceeded through the house.

The reference to the indictable offence made by the constable in this passage was never explained. It is clear that no indictment was ever laid. The obvious conclusion is that in the constable's own mind, except if he was in fresh pursuit of an individual who had just committed an indictable offence, his action in entering the house and proceeding to conduct a search of it was unlawful.

I would conclude that his entry into the house was unlawful under the traditional law or the common law of our Province.

CHARTER SECTION 8

The Defence has relied on s. 8 of the Charter which provides:

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

Drawing only upon materials contained in the Canadian Charter of Rights, Annotated, and the Post-Trial Memorandum submitted by Counsel for the Accused, I find myself in agreement with that position. In the draft resolution proposed in 1980, s. 8 read:

> Everyone has the right not to be subjected to search or seizure except on grounds and in accordance with procedures established by law.

The same right is established under the **European Convention,** Section 1:Article 8, in the following terms:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by the public authority with the exercise of his right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In Hunter v. Southam, Inc. (1984) 14 C.C.C. (3d) 97, as reported in the Canadian Charter of Rights,

> This section guarantees a broad and general right to be secure from unreasonable search and seizure beyond mere protection of property. Its protections go **at least as far as protecting an individual's reasonable expectations of privacy...**The purpose in this section of protecting individuals from unjustified state intrusions upon their privacy requires a means of preventing unjustified searches before they happen, not simply of determining after the fact whether they ought to have occurred in the first place. This can only be accomplished by a system of prior authorization, not one of subsequent validation. **Accordingly, where it is feasible to obtain prior authorization, such authorization is a pre-condition for a valid search and seizure.**

Defence Counsel has cited to the Court the decision of Mr. Justice Dickson in Hunter v. Southam, supra, who in turn quoted from Entick v. Carrington (1765), 19 State Tr. 1029, wherein Lord Camden observed:

> The great end, for which men entered into society, was to preserve their property. That right is preserved sacred and incommunicable (incommutable) in all instances where it has not been taken away or abridged by some public law for the good of the whole.
>
> Our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law.

The Defence relies upon the decision in Eccles v. Bourque (1975) 2 S.C.R. 739 to negative the Crown's claim of "fresh pursuit" as a justification for a warrantless search. In that case, the Court observed that the police constable had a right **"after proper demand"** to enter the home forceably. The ancient and oft quoted Semayne's Case is quoted in Eccles:

> In all cases when the King is party, the Sheriff (if the doors be not open) may break the party's house, either to arrest him or to do other execution of the King's process, if otherwise he cannot enter. **But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors.**

I have reviewed the provisions of the Criminal Code with respect to whether the police constable before entering this home had any objective grounds upon which to obtain either a warrant to search the home or a warrant for the arrest of the Accused. The police constable, in his testimony, indicated that he was pursuing someone who had committed an indictable offence. There is, however, no evidence of an indictable offence having been committed. There is nothing other than a well founded suspicion on the part of the police constable that there must

have been some very good reason for the Accused to avoid an interview with the two police constables and to leave the highway location in such a hurray.

The entry by Constable Bidal into the Comeau residence in the early morning hours when the house was in darkness without the permission of the occupants constituted a breach not only of the Charter rights of the occupants to have their reasonable privacy protected under s. 8, but it was similarly a breach of the common law right to the security of their own home and place of residence.

THE REMEDY

In the circumstances of this Charter breach, was the Trial Judge correct in excluding the breathalyzer certificate as being the appropriate remedy? A number of relevant questions have been raised by Counsel in arguing the appeal. The Accused, himself, precipitated a chase by his failure to comply with the directions of the police officers on the highway. The evidence of the police constable is that he believed he had the authority in the case of fresh pursuit to enter the residence as he did. When challenged, however, he did not identify the indictable offence which he believed had occurred. The Accused was one of several "occupants" of the residence the policeman entered at the sufference of his father who might be termed the legal occupant. This, then, raised the issue of whether the rights of the Accused had been abridged or infringed by the entry of the policeman or whether it was the rights of the father only who was affected.

The sanctity of the home and the protection it affords must extend to all those persons who are within its walls with the knowledge and consent of the regular occupants. To conclude otherwise would be to entirely erode the principle. The entry by the police constable was a flagrant infringement of the privacy of that household. The Trial Judge made no finding and it is not certain whether the officer genuinely believed circumstances were such as to entitle him to make the entry he did but, in any event, the evidence before the Court clearly indicates that had he waited a minute or two longer before entering, he would have been able to do so with permission.

The Accused was eventually charged with failing the breathalyzer. The evidence indicates that there were no real indications of impairment observable by the police constable. By his own evidence, it was only after the administration of an ALERT test that he believed he had reasonable and probable grounds to make a breathalyzer demand.

Defence Counsel has referred to the analysis in R. v. Collins (1987) 33 C.C.C. (3d) 1 where Mr. Justice Lamer considered the nature of the factors which might bring the administration of justice into disrepute. A similar analysis was made by the Court in R. v. Genest (1989) 45 C.C.C. (3d) 385. These factors have been divided by the Court into three groups, the first group being those factors affecting the fairness of the trial, particularly, where evidence is obtained as a result of a Charter violation. The second group relates to the seriousness of the violation and considers whether it was

triggered by urgency or necessity; whether the impuned action was necessary to effectively carry out the investigation or whether other "investigatory techniques" were available. The third set of factors "requires the Court to balance the effect of excluding the evidence against the effect of admitting it".

Defence Counsel has argued in his Post-Trial Submission very cogently:

> To condone the actions of the police in relation to Hector Comeau's residence is to ignore that:
>
> (1) "The Sanctity of the home is deeply rooted in our traditions". It serves to protect the security of the person and as stated by Mr. Justice LaForest in R. v. Landry (S.C.C.) (1986) 25 C.C.C. (3d) 1 at Page 16;
> (2) ignores Semayne's Case;
> (3) ignores Entick v. Carrington;
> (4) ignores Section 8 of the Charter;
> (5) ignores the trend of the Supreme Court of Canada in cases such as Hunter, Dyment, Collins and R. v. Therens (1985) 18 C.C.C. (3d) 481.

As in Genest, supra, the evidence in this case fails to justify the manner in which the search was carried out. There is a reasonable basis in the evidence to conclude that if a request to enter had been made, the occupants of the house would have acceded to that request. The police constable was simply a little over zealous in the circumstances. His judgment at the time was, no doubt, affected by the fact that the Accused had deliberately avoided direct contact with the constables on the highway and followed the constable's high speed tracking exercise on foot. In the final analysis, the Court is faced with balancing the interests of society in having the police investigate what must have been a suspicion of impaired driving

in the absence of any certain knowledge that any offence had been committed, with society's interests in protecting the sanctity of a citizen's home. There is no contest. The sanctity of the home must be protected; otherwise, the administration of justice would be brought into disrepute. Finally, it is clear that the creation of the breathalyzer certificate flowed directly from the Charter breach. That being the case, I conclude that the Trial Judge was correct in his decision to exclude the Certificate pursuant to s. 24(2). Even if the creation of the Certificate had not flowed directly from the breach, having found that there was a breach, there appears to be no alternative remedy available other than excluding the evidence.

DATED at Digby, Nova Scotia, this 13th day of February, A.D. 1991.

CHARLES E. HALIBURTON
JUDGE OF THE COUNTY COURT
OF DISTRICT NUMBER THREE

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CASES AND STATUTES CITED:

Canadian Charter of Rights, Annotated, s. 8 and s. 24(2)

Halsbury's Laws of England, Third Edition, at Volume 10, page 351

European Convention, Section 1:Article 8

Hunter v. Southam, Inc. (1984) 14 C.C.C. (3d) 97

Entick v. Carrington (1765), 10 State Tr. 1029

Eccles v. Bourque (1975) 2 S.C.R. 739

R. v. Collins (1987) 33 C.C.C. (3d) 1

R. v. Genest (1989) 45 C.C.C. (3d) 385

CANADA
PROVINCE OF NOVA SCOTIA

1990 CASE NUMBER 139848

IN THE COUNTY COURT JUDGE'S CRIMINAL COURT OF DISTRICT NUMBER THREE

ON APPEAL FROM

THE PROVINCIAL COURT

HER MAJESTY THE QUEEN

-versus-

MARTIN DENNIS COMEAU

HEARD BEFORE: His Honour Judge John R. Nichols,J.P.C.

PLACE HEARD: Little Brook, Nova Scotia

DATES HEARD: May 30th and July 24th, 1990

CHARGE: That he on or about the 17th day of February, 1990, at or near Meteghan in the County of Digby, Province of Nova Scotia, did operate a motor vehicle having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded eighty milligrams of alcohol in one hundred millilitres of blood, contrary to Section 253(b) of the Criminal Code.

V. Blaine Allaby, Esq., Q.C., for the Prosecution

R. Alain Deveau, Esq., Q.C., for the Defence

C A S E O N A P P E A L