C.K. No. 10,367

IN THE COUNTY COURT FOR DISTRICT NUMBER FOUR

BETWEEN:

RALPH OLDEN LYNCH

APPELLANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

HEARD: At Kentville, Nova Scotia, on the 20th day of February, 1990.

BEFORE: The Honourable Judge Donald M. Hall, C.C.J.

DECISION: March 9, 1990

COUNSEL: Robert C. Stewart, Esq., Counsel for the Appellant

Jack buntain, Q.C. Counsel for the Respondent.

HALL, DONALD M., J.C.C.

This is an appeal of a conviction entered against the appellant on a charge of operating a motor vehicle while impaired contrary to section 253(a) of the Criminal Code.

The only issue raised on the appeal is whether a stay of the proceeding against the appellant ought to have been ordered since, as he contended, his rights under sections 7 and 9 of the Canadian Charter of Rights and Freedoms were violated.

The facts are not in dispute. On February 19, 1989, at approximately 4 o'clock in the afternoon the appellant was observed trying to get his half ton pick-up truck out of a ditch. At the time he was obviously impaired by alcohol. Shortly thereafter the appellant went to the nearby residence of his employer where he remained until the investigating officer, Corporal John Ashton, arrived at approximately 5 p.m. Upon his arrival, Corporal Ashton informed the appellant that he was under arrest for impaired driving and asked him to get into the police car. The appellant got into the police car as requested, where he made a number of attempts to provide samples of his breath for the so called "Alert" device but without success. Corporal Ashton then advised the appellant again that he "was under arrest for impaired driving and he had the right to consult with counsel and we'd be going to the cells". Corporal Ashton then took the appellant to the lock-up in Kentville and delivered him into the custody of the keeper

at approximately 5:30 p.m. with instructions that he not be released until Corporal Ashton returned. Corporal Ashton did not return until between 9 and 10 o'clock the next morning when the appellant was released. The only reason the police officer gave for requiring the appellant to remain incarcerated was for his "investigational convenience", that he wanted to talk to the appellant again the next morning.

In support of his argument that the appellant's rights had been violated and that the proper remedy under section 24(1) of the Charter was a stay, Mr. Stewart cited several cases including: R. v. Ware; R. v. Kopec; R. v. Byers (1987), 49 M.V.R.(2d) 97 (B.C. Co. Ct.); R. v. McIntosh (1984) 29 M.V.R. 50 (B.C.C.A.); R. v. Christienson (1987), 3 M.V.R.(2d) 116 (B.C. Co. Ct.); R. v. Farncombe (1984) 34 Sask. R. 161 (Sask. Q.B.); R. v. Pithart (1987), 34 C.C.C.(3d) 150 (B.C. Co. Ct.); R. v. McCarthy, unreported 1988 (N.S. Prov. Ct.); R. v. Cayer et al (1988) 28 O.A.C. 105 (Ont. C.A.).

Mr. Stewart also argued that a stay was the only remedy available to the appellant since under s. 240(3) of the Code the police officer is "deemed to have been acting lawfully". He contended that a stay ought to be imposed in order to bring it home to the police that they must not abuse a person's rights and expect to do so with impunity.

Mr. Buntain, on behalf of the respondent, relied on the decision of the Appeal Division of the Nova Scotia Supreme Court in R. v. Davidson, (1989) 88 N.S.R.(2d) 271.

He contended that there was no reasonable connection between the charge and the alleged breach of the appellant's Charter rights, thus, a stay of the charge or the proceeding would not be an appropriate remedy under section 24(1).

In his decision the learned trial judge made no finding as to whether there had in fact been a violation of the appellant's Charter rights. Instead his decision was based on his conclusion that all of the evidence to support the charge against the appellant was obtained prior to his incarceration and that he was not thereby prejudiced in his defence. He concluded as a result that a stay of proceedings was not justified.

The relevant provisions of the Charter are:

s. 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

s. 9. Everyone has the right not to be arbitrarily detained or imprisoned.

s. 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The provisions of the Criminal Code respecting arrest without warrant are as follows:

495(2) A peace officer shall not arrest a person without warrant for

(a) an indictable offence mentioned in section 553,

(b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, or

(c) an offence punishable on summary conviction, in any case where

(d) he believes on reasonable grounds that the public interest, having regard to all the circumstances including the need to

(i) establish the identity of the person,

(ii) secure or preserve evidence of or relating to the offence, or

(iii) prevent the continuation or repetition of the offence or the commission of another offence, may be satisfied without so arresting the person, and

(e) he has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend court in order to be dealt with according to law.

(3) Notwithstanding subsection (2), a peace officer acting under subsection (1) is deemed to be acting lawfully and in the execution of his duty for the purposes of

(a) any proceedings under this or any other Act of Parliament; and

(b) any other proceedings, unless in any such proceedings, it is alleged and established by the person making the allegation that the peace officer did not comply with the requirements of subsection (2).

In order to resolve this appeal three questions must be answered; first, did the arrest and imprisonment of the appellant constitute a breach of his rights under sections 7 and 9 of the Charter; second, if so, was the trial court the appropriate forum to provide a remedy under section

24(1) and, third, was a stay the proper remedy?

According to the evidence of Corporal Ashton, immediately upon encountering the appellant seated in the kitchen at the Crosby residence, he informed the appellant that he was under arrest for impaired driving and asked the appellant to come out to the police car which he did. Although he had placed the appellant under arrest it appears that the officer did not at that time inform him of his right to counsel pursuant to section 10 of the Charter. It was only after a number of unsuccessful attempts by the appellant to blow into the ALERT device and again being informed that he was under arrest for impaired driving that the officer informed him that he had the right to "consult with counsel." It seems as well that by this time the appellant's vehicle had been taken away by a tow truck. The only reasons given by the officer for the appellant's arrest and subsequent sixteen hour imprisonment were that he seldom takes arrested impaired drivers home "to prevent any possible problems that could come as a result", that he wanted to obtain a statement from the appellant or talk to him at the "earliest opportunity", and for "investigational convenience".

The officer knew the identity of the appellant and that he resided not far from the place where he was arrested. There was no question of securing or preserving evidence nor of continuation or repetition of the offence. There also was no question as to the appellant's attendance in court.

It appears to me that if it can be said that the initial arrest of the appellant was permitted under section 495(2) for the purpose of securing evidence in the circumstances it clearly was not necessary. It appears that the appellant co-operated with the police officer and did as he requested. In arresting the appellant as he did, in my opinion, the officer acted precipitously and without justification.

In any event the continuation of the detention and the subsequent imprisonment of the appellant were entirely without lawful justification. The reasons for the imprisonment given by the officer clearly did not come within section 495. Therefore it cannot be said that the arrest was lawful by virtue of that section. Indeed, the subsection declares that a person shall not be arrested without warrant in such circumstances.

Section 9 of the Charter speaks of "arbitrary" detention and imprisonment. Arbitrary is defined in part in the Shorter Oxford English Dictionary, 3rd Edition, as follows:

> **Arbitrary** - 1. Dependent upon will or pleasure. 2. Law - Relating to, or dependent on, the discretion of an arbiter; discretionary, not fixed. 3. Based on mere opinion or preference; hence, capricious. 4. unrestrained in the exercise of will, absolute; hence, despotic.

and in Black's Law Dictionary, Fifth Edition:

> **Arbitrary** - Means in an "arbitrary" manner, as fixed or done capriciously or at pleasure. Without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment; depending

> on the will alone; absolutely in power; capriciously; tyrannical; despotic; . . . . Without fair, solid, and substantial cause; that is, without cause based upon the law, . . . not governed by any fixed rules or standard. Ordinarily, "arbitrary" is synonymous with bad faith or failure to exercise honest judgment and an arbitrary act would be one performed without adequate determination of principle and one not founded in nature of things.

The arrest and detention of the appellant in these circumstances in my opinion amounted to a violation of his rights under Sections 7 and 9 of the Charter. Assuming that for every breach of one's Charter rights there must be a remedy, and the words of section 24(1) seem to be mandatory, was the trial court an appropriate forum to provide the remedy.

There is no doubt that the trial court is the proper forum to provide a remedy for a Charter breach in many if not most circumstances, R. v. Mills, [1986] 1 S.C.R. 863. This is especially so where there has been an infringement or a denial of rights to which section 24(2) applies. It appears as well that if a stay or dismissal of the charge or proceeding is the appropriate remedy then the trial court is the appropriate forum, R. v. Rahey, [1987] 1 S.C.R. 588. That begs the question of whether in the circumstances of this case a stay is the appropriate remedy.

In my opinion it is not. The Appeal Division of the Nova Scotia Supreme Court in R. v. Davidson, (1989) 88 N.S.R.(2d) 271 in circumstances somewhat similar to those in the present case upheld the trial court's ruling that a stay was not the appropriate remedy.

Jones, J.A. in delivering the judgment of the Court at page 277 quoted with apparent approval from the decision of the Alberta Court of Appeal in R. v. Cutforth, (1988) 40 C.C.C.(3d) 253 as follows:

> In this case the length, features or quality of his detention neither provided, altered nor destroyed evidence touching the solitary issue of Mr. Cutforth's driving capacity. It shed no light on the behaviour which brought about his arrest. Credibility was not affected. As the trial judge found, it could not trigger s. 24(2) of the Charter to suppress the evidence contained in the certificates of analysis. It provided no potential guidance to the court on what might be a fit sentence following a conviction. Detention, as an issue, stood alone and irrelevant. While the Canadian Charter of Rights and Freedoms has and will continue to affect much of Canadian societal and legal life, it did not recast the rules of relevancy.

The Alberta Court of Appeal rejected a stay as an appropriate remedy in that case.

Jones, J.A., went on to say at page 278:

> The remedy must be "appropriate and just in the circumstances". Where there is no reasonable connection between the Charter violation and the offence charged then a stay or dismissal of the charge may not be the appropriate remedy.
>
> That does not rule out a separate civil action as contemplated in Cutforth. Indeed if the perpetrator of the violation is to have an opportunity to make full answer and defence that may be the most appropriate forum.

He went on to quote from a judgment of Esson, J.A., of the British Columbia Court of Appeal in R. v. Erickson, 13 C.C.C.(3d) 269 in part as follows:

> . . .The need to impress upon all parties the requirement that the law be obeyed is not enough to justify granting a remedy which is not otherwise just and appropriate. I say that with full recognition of the fundamental nature of the right

> created by s. 454 and the importance of it being complied with by thos who are obligated to do so; but a breach does not in itself justify turning the system on its head.
>
> . . . I will assume that for every breach of a Charter right there is some remedy. It simply does not follow that every breach must lead to some remedy being granted at trial. The purpose of the trial is, as it was before the Charter, to decide whether the accused is guilty. Breaches of Charter rights do not become a proper subject of inquiry at trial simply because they occurred in relation to the charge being tried.

Jones, J.A., concluded:

> The incident with Corporal O'Handley took place an hour and a half after the original detention and had no bearing on the charge. Judge Crowell made that finding on the evidence and he was justified in doing so. The incident had no bearing on the defence to the charge and the defence never made any suggestion that it impaired the defence in any way. There was no reason to conclude that a stay was the only appropriate or just remedy in the circumstances.

Although the Court does not seem to entirely rule out a stay in the circumstances of that case it concluded that it should not disturb the ruling of the trial judge in that respect.

Mr. Justice Jones, however, said at page 278, that he had "difficulty in accepting that a Charter breach must 'equate to a recognized defence in law' or not be foreign to the issues raised in the indictment'". He went on to say that that does not mean "that there does not have to be some connection between the Charter violation and the particular charge."

With respect to the exclusion of evidence under section 24(2) of the Charter the Supreme Court of Canada

said in Brydges v. The Queen, (unreported, February 1, 1990) per Lamer, J.,:

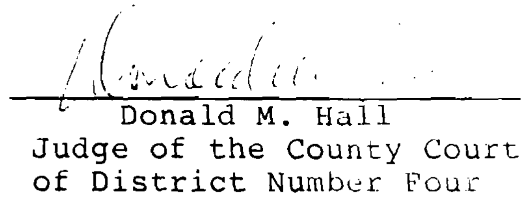
> . . . This court has clearly established in R. v. Strachan, [1988] 2 S.C.R. 980, that a requirement of strict causation is not appropriate under s. 24(2). Rather, s. 24(2) is implicated as long as a Charter violation occurred in the course of obtaining the evidence.

Thus it appears that there must be some causal connection, although not a strict one, between the Charter violation and the obtaining of the evidence in order to trigger the exclusion of the evidence under section 24(2)

Similarly it seems to me that there must be some causal connection between the Charter violation, the particular charge and the remedy sought. If the Charter violation affected the overall fairness of the trial or it affected the accused person's ability to make full answer and defence or if it impaired him in developing and presenting his defence a stay would likely be the proper remedy. Failing such or similar impediments to the defence I fail to see that a stay is an appropriate and just remedy.

In the present case the only connection between the breach and the charge is that the appellant was arrested and imprisoned in connection with the charge of impaired driving. All of the evidence supporting the charge was in existence prior to the breach and it is not contended that the appellant was impaired in any way by the Charter violation in presenting his defence. Accordingly, I must conclude that in these circumstances a stay was not an appropriate

and just remedy. The appeal is therefore dismissed, but without costs.



Donald M. Hall
Judge of the County Court
of District Number Four