CANADA
PROVINCE OF NOVA SCOTIA

Case #988305, 988310-12

June 14, 2001

IN THE PROVINCIAL COURT

HER MAJESTY THE QUEEN

versus

MAURICE ALLISON
[Cite as: R v. Allison, 2001 NSPC 14]

DECISION

HEARD BEFORE: **The Honourable Judge C. H. F. Williams , JPC**

PLACE HEARD: **Halifax Provincial Court**

IN THE MATTER OF: **Criminal Code**

COUNSEL: **Ms. M. MacQueen, Crown Attorney**
Mr. B. Sarson, Defence Attorney

Cite as R v. Maurice Allison, 2001 NSPC 14

R v. MAURICE ALLISON

Delivered orally June 14, 2001
The Honourable Judge C. H. F. Williams, JPC

Counsel: Ms. M. MacQueen, Crown Attorney
Mr. B. Sarson, Defence Attorney

Introduction

The police have charged the defendant, Maurice Allison, with unlawfully producing marihuana, unlawfully possessing more than thirty grams of marihuana and the careless storage of a firearm. All these allegations occurred in Halifax County on July 16, 2000.

The defendant contends that the police violated his right protected under the ***Canadian Charter of Rights and Freedoms,*** s.8 and, as a result, seeks a remedy pursuant to the ***Charter***, s.24.

Assessment of the Voire Dire Evidence and Findings

The evidence on the *voire dire* discloses, and I find and accept, that on July 16, 2000, at 1315 hours, Constable Phil MacLellan of the R.C.M.P. Tantallon Detachment went to 1210 Pockwock Road, a private home, in response to a 911 hang up call. On the scene, he met the defendant who advised him that the call was made inadvertently by some children playing with the telephone. The defendant would not permit the officer to enter the home to ascertain that all was well. As they were in discussion, Susan Paris, who was at the time the girlfriend of the defendant, appeared at the doorway and informed the officer that it was she who had made the call because the defendant had assaulted her.

I accept that she had her belongings packed and was ready to leave the house and that the officer assisted her in ensuring that she did remove her possessions without any interference from the defendant. Further, I accept that she told the officer that she wanted to be taken to the Bryony House shelter and that she had no intention of returning to the house. I also accept that she told the officer that she knew the defendant for four years and had lived with him but had moved to Calgary in November 1999. On the evidence I find that she was never asked by Constable MacLellan, or any other officer with whom she had contact, when she returned to Nova Scotia and how long she was residing at the house before the alleged assault.

I do not doubt that she had conversation with Constable MacLellan when they were in the police vehicle on the way to the Detachment or when they were at the Tim Horton's in the nearby Kingswood Shopping Mall. However, both parties are at odds concerning what was said.

Constable MacLellan's recollection was that Paris told him that the defendant had marihuana products drying in his basement. Also, present in the basement was a firearm. She also told him that the defendant was cultivating marihuana plants at a location near to his home. Consequently, he advised her that he wanted to conduct a search of the premises, to confirm her information, and required her consent to do so. Further, he told her that, "as she had volunteered the information", she would not be charged with any drug related offence in the event that any controlled drugs were found. He gave her a "Charter Consent/Waiver Search" form, tendered as Exhibit VD1, to sign. She signed the form which he subsequently gave to Constables Steve Parker and Jeffery Sanford. However, Constable MacLellan is not clear on at what point in their contact Paris did sign the form. I find that he commenced taking a statement concerning the assault at 1548 hours and he completed it at 1625 hours. Additionally, he could not say, with certainty, when they arrived at the Detachment but he could say that he transported her to Bryony House at 1730 hours.

Paris, on the other hand, recalled that she told the police that the accused was "stoned" and that in her opinion it was a contributing factor in his assault on her. She recalled that she mentioned that the defendant was involved with "weed and weed plant" but that she did not know where he obtained his "weed" but felt that he purchased it. Further, she had no knowledge of marihuana inside the house and accordingly did not inform the police of this detail. With respect to Exhibit VD1, she recognizes her signature but does not recognize the Form or the surrounding circumstances when she signed it. She assumed that the police wanted to search the home as she had informed them that the defendant was "stoned". Further, she made it clear to the officer that she was not the owner of the house although she, at the point in time prior to her leaving, was residing there with the defendant. She admitted, in testimony, that it was not her property; she was a guest of the defendant and therefore she could not give a consent to search it. Finally, she told the police that she had no intention of returning to the house.

When I weigh and assess the testimonies of these two witnesses, with the total evidence and my observation of them as they testified, I find and accept that Paris gave information to Constable MacLellan that caused him to suspect that the defendant had controlled drugs and a weapon within the house. After all, she was his guest and girlfriend and was staying at the house and it is reasonable to conclude that she had some information pertinent to the defendant that she could relay and which could be of some interest to the police. In addition, I find that she was sufficiently upset with him, after his assault upon her, to give information implicating him, to the police. Finally, I accept and find that she did inform the police that she was not the owner of the home and had no intention of returning. Nonetheless, I find that she did sign the form upon the request of Constable MacLellan.

I accept and find that after consultation with Constable MacLellan, at the Kingswood Shopping Mall, Constables Sanford and Parker, with the Consent Form in their possession, went to the defendant's home. Sanford arrested him for the assault on Paris and escorted him away from the house to a police vehicle. Parker stood on guard at the door of the home to secure the home against entry by anyone as he understood that a search of the house was to be conducted. He remained at the door until Constable Daniel Ryan arrived on the scene.

Nonetheless, I find and accept that none of the police officers that went to the defendant's house had ever spoken to Paris before they arrived despite the fact that they did see her with Constable MacLellan. In the circumstances however, it was MacLellan who instructed them to arrest the defendant for assault and subsequently to conduct the search of the house on the basis of the document that he gave to them. I accept that. However, when the defendant was arrested for the assault, Constable Sanford told him that, with the consent of Paris, he was going to search the home. The defendant informed him that Paris did not live there. Further, members of the public that were present also told the police that Paris did not live at the house nor did she have any proprietary rights in the house.

Further, I accept and find that Constables Sanford and Ryan, the two officers that entered the house to conduct the search, did not have in their possession a valid search warrant and neither did they request permission to enter from the defendant whom they had taken from the house and who was present and in their custody prior to the search. They had information that he was living at the house. Additionally, I accept and find that despite information available to them on the scene affecting their understanding concerning who owned and occupied the house, they made no enquiries to verify or to confirm their initial view of who had ownership or peaceable possession of the home. Likewise, I accept and find that both officers who conducted the search considered obtaining a search warrant, as it was possible to do so, but they did not do so as they were satisfied that the document signed by Paris was sufficient authorization.

Analysis

The defendant is asserting that the police conducted a warrantless search of his private dwelling in which he was in lawful and peaceable possession. The search was conducted without his consent although he was present, but under arrest for another offence, prior to the search. Further, he is asserting that the police knew or ought to have known, in the circumstances that presented themselves, that Paris did not have authority to give them permission to enter and search his private dwelling. Additionally, there were no exigent circumstances present and the police, if they believed the information given to them by Paris, and had reasonable and probable grounds, they could have obtained a search warrant. In short, a warrantless search cannot be legally conducted for the purpose of obtaining grounds that would make the obtaining of a search warrant possible. ***R. v. Kokesch*** (1990), 61 C.C.C. (3d) 207, [1990] 3 S.C.R.3.

The ***Canadian Charter of Rights and Freedoms*** s.8 states that:

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

There is no doubt that the police did not have prior judicial authority when they entered the defendant's home to conduct a search and seizure therein. Therefore, here, in my view, without statutory authority to enter the private dwelling, they must rely upon the permission of the person who is in lawful and peaceable possession. ***R. v. Feeney*** (1997), 115 C.C.C. (3d) 129 (S.C.C.); ***R.***

v. Mercer and Kenny (1992), 70 .C.C.C. (3d) 180 (Ont. C.A.), leave to appeal to the S.C.C. refused 74 C.C.C. (3d) vi.

Further, as a warrantless search is presumed unreasonable, here, the Crown must rebut that presumption. ***Hunter et al. v. Southam Inc***. (1984), 14 C.C.C. (3d) 97, [1984] 2 S.C.R. 145; ***R. v. Evans*** (1996), 104 C.C.C. (3d) 23, [1996] 1 S.C.R. 8; ***R. v. Caslake*** (1998), 121 C.C.C. (3d) 97 (S.C.C.). Additionally, in order for the warrantless search to be constitutionally permissible it must be authorized by law. ***Kokesch***, *supra*.

On the evidence, Paris was the alleged victim of an assault committed by the defendant. She was in the safety of the police and it can be reasonably inferred that, because she did not request to return escorted to obtain more items and as she had indicated that she had no intention to return to the house, she had taken all her belongings from the residence. It can therefore be reasonably inferred and I do so infer and conclude that she had terminated her association with the defendant and his dwelling house. There was no further investigation to be done with respect to the assault complaint. The police had reasonable and probable grounds to arrest the defendant for the assault. They did.

However, when interviewing Paris concerning the assault, Constable MacLellan received information from her that led him to suspect that there were illegal drugs and a weapon inside the premises. In any event, there was no ongoing investigation of the defendant concerning any illegal drugs or weapons. Nonetheless, because Paris told him about the possibility of finding the items within the house that she had jointly occupied with the defendant, and, without conducting any investigation, Constable MacLellan exempted her from any criminal liability. I can therefore reasonably infer from the total evidence, and I do infer and conclude, that she was ruled out as a possible suspect in order to obtain her further cooperation and as an appreciation for her tip. Constable MacLellan then prevailed upon her to sign a consent to search authorization and it can be reasonably inferred, on the evidence adduced and which I accept, to be in consideration of her not being a suspect or to be charged for any criminal offence.

Paris then is neither a suspect nor an accused of any criminality. She is not being detained as such but is presented as merely a home owner who voluntarily gives her consent for the police to search her home to obtain evidence to be used, not against her but against the other joint occupant of the house. In effect, she has given to the officer a written waiver to enter a dwelling house in which she has terminated, if she ever did have, any privacy interest. In addition, it was essentially an authorization to seize something over which she has claimed no control or ownership and over which the police has excluded her from being the owner. ***See: R. v. Wills*** (1992), 70 C.C.C. (3d) 529 (Ont. C.A.). Her ***Charter*** rights, with respect to the consent form, are therefore not in issue. What is in issue is the validity of her consent and its effectiveness, if at all, on the defendant's right to his reasonable expectation of privacy.

In any event, there are particulars of the document signed by Paris that causes me some concerns. First, was it a real consent in the sense that she yielded a constitutional right in the course of the police investigation? In ***Wills***, *supra.*, followed in ***R. v. Borden*** (1994), 92 C.C.C. (3d) 404 (S.C.C.), Doherty J.A., at p.546, formulated the test to be applied in determining whether there was

a genuine consent, as follows:

> (i) there was a consent, express or implied;
>
> (ii) the giver of the consent had the authority to give the consent in question;
>
> (iii) the consent was voluntary in the sense that that word is used in Goldman, supra, and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;
>
> (iv) the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;
>
> (v) the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested, and
>
> (vi) the giver of the consent was aware of the potential consequences of giving the consent.

I am satisfied that all the criteria formulated in ***Wills***, *supra.*, except (ii) and (iii) have been established on a balance of probabilities. Before she signed the document, the police assured Paris that she would not be charged with any offences as she had volunteered the information. This assurance against criminal charges, by Constable MacLellan who was the lead investigator, in my view, could have affected her "freedom to choose whether or not to allow the police to pursue the course of conduct requested." She was guaranteed that she was not in jeopardy and thus had nothing to lose should she sign the form. Paris, however, does not recall the circumstances surrounding the signing of the document. But, she testified that as it was not her property and she was not the owner she could not give her consent as such. Further, she told the police that she had no intention of returning to the house. Under these circumstances, in my opinion, the police, from an objective perspective, were in possession of a dubious and disputable document. This is a factor which they reasonably ought to have known.

Second, as the language of the document is framed in the first person, it proposes that only the person requesting the permission, and no other person, is allowed to enter the house of the owner. However, it does not identify who is that person. Consequently, here, questions do arise. For example: to whom, in fact, did Paris give her permission? Did Constable MacLellan sign the document merely as a witness to Paris' signature, or did he sign it as the person who in fact

personally received the permission and was the only person authorized to enter? On the evidence that I accept, it was Constable MacLellan, when alone with Paris, who requested her permission to enter the premises for the purposes of conducting a search, as a result of her tip. Further, it was to Constable MacLellan that she gave the written document. If so, can he transfer the personal approval that he received from Paris to other persons who are not named in the purported consent to search document without her knowledge and authority? This is not the case as in ***R. v. Borden,*** *supra.*, where any member of the named Police Department could act within the scope of the written consent. These issues were not canvassed or addressed by counsels but answering these questions, in my view, will go toward assessing the reasonableness and the propriety of the police conduct.

It must also be remembered that the police knew that the defendant lived at the premises. They knew that Paris had left with her belongings and had no intention to return to the house to live with the defendant. Even if they believed that Paris, in the circumstances, could give consent, in my opinion that did not relieve them of the responsibility to inform the defendant of their information concerning the narcotics and to seek his permission to enter to conduct a search. See, for example: ***R. v. Lewis*** (1998), 122 C.C.C. (3d) 481 (Ont. C.A.). The defendant was in actual possession when they arrived on scene. They had arrested him at the house for the assault on Paris. He was in their custody and could not re-enter the house to destroy any evidence, if at all it existed. However, the focus of the police had shifted from his arrest for assault to him being a target of an investigation that he might be in possession of controlled substances in his dwelling house. They did not inform him of this fact.

I find that the defendant was a lawful possessor of the premises with a right to occupy it without interference from the police, except as authorized by law. Thus, if the police believed and accepted that Paris had a right to give them permission to enter because of her prior occupancy, however tenuous, they were also aware that the defendant occupied the house as his dwelling. As a result, they must also accept that there were two persons jointly occupying the premises enjoying equally the same rights to privacy and exclusion. The defendant did not give up his right to his expectation of privacy. Paris' permission, such as it was, in my opinion, did not override or extinguish the privacy interest of the defendant. Consequently, in my opinion, the defendant's right to privacy was superior to the right of the police to enter. Thus, again in my opinion, the police cannot simply ignore the defendant who was present and proceed to act on the permission of Paris who is purported to be an owner of the premises.

I must also recall that on the scene, the police were told not only by the defendant but by others who were present and observing events, that Paris did not live at the premises. Therefore, the police ought to have sought permission from the certain and known occupier who was present and in their custody, the defendant, to enter the premises for the purposes to search for controlled substances and a weapon. They needed his permission to enter but they did not seek it. See, for example: ***R. v. Edwards*** [1996] 1 S.C.R. 128. In the event that he had refused, the alternative would have been for them to withdraw and re-attend with Paris or to obtain a search warrant. See for example: ***R. v. Cardinal,*** [2001] A.J. No.672 (Prov. Ct.)). They did neither. Thus, it is pertinent that I underscore the words of Ritchie J., in ***R. v. Colet,*** [1981] 1 S.C.R. 2, 57 C.C.C. (2d) 105 at p.8 S.C.R., p. 110 C.C.C.:

> ...what is involved here is the longstanding right of a citizen of this country to the control and enjoyment of his own property, including the right to determine who shall and who shall not be permitted to invade it. The common law principle has been firmly engrafted in our law since Semayne's case [77 E.R. 194,5 Co. Rep. 91 a] in 1604 where it was said "That the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose ...". This famous dictum was cited by my brother Dickson in the case of Eccles v. Bourque [1975] 2 S.C.R. 739] in which he made an extensive review of many of the relevant authorities.

Here, there is no argument that there was an urgency that compelled a warrantless search. The purpose of the police was to verify what was told to them by Paris. However, it does not appear, from the evidence, that they seriously considered whether they had sufficient grounds to obtain a search warrant as the search was directed against the defendant and not against Paris. There is also no evidence that it was impracticable to obtain a search warrant. Further, from the evidence, it did not appear that they even considered an investigation by methods less intrusive than through a search. They insist that their authorization to search and seize rests solely upon the document signed by Paris. Thus, on the test respecting police conduct infringing upon ones reasonable expectation of privacy as expressed by La Forest J., in ***R. v. Wong*** (1990), 60 C.C.C. (3d) 460, [1990] 3 S.C.R. 36, at p. 478 C.C.C, I find and conclude, in the circumstances of this case and on the above analysis, "it was not open to the police to act as they did without prior judicial authorization." As a result, I find and conclude that they ignored the defendant's lawful right to a reasonable expectation of privacy and therefore violated his s.8 ***Charter*** rights .

I now turn to the question of whether I should admit or exclude, as evidence against the defendant, the items seized from the dwelling house at 1210 Pockwock Road.

In ***R. v. Collins*** , [1987] 1 S.C.R. 265, reaffirmed and clarified in ***R. v. Stillman*** (1997), 113 C.C.C. (3d) 321, [1997] 1 S.C.R. 607, the Supreme Court articulated the approach to be taken in determining whether or not impugned evidence ought to be admitted at trial. Thus, applying the ***Collins*** test, on the first branch, I find that the police violated the defendant's right to be secure against unreasonable search and seizure. Here, the items seized, the rifle and the drying marihuana, existed independent of the Charter violation and are therefore non-conscriptive evidence. Consequently, their admission would not render the trial unfair.

On the second branch of the test, was the search reasonable? Here, I must consider among others, whether the police acted in good faith; the seriousness of the breach; any exigent circumstances and the availability of other investigative techniques. In my view, by relying on an administrative form of their own creation the police applied themselves studiously to circumvent established limitations on their investigative powers. In my view, had they considered objectively Paris' present status vis-a-vis the home and the presence of the defendant at the home they would have known that they were trespassing and could not have had any reasonable misapprehension as to what the law authorized them to do in such a circumstance.

Additionally, if they believed what Paris told them was reliable and they felt that they had the requisite grounds to obtain a search warrant, it was practicable and open for them to do so. They had some information that they wished to confirm and it was not the case where the defendant is under arrest as a result of a narcotic investigation. The defendant was in their custody and could not have returned to the dwelling. Further, they had secured the house against any entry by others. Also, they thought about obtaining a search warrant as there was time to do so but they were relying upon their own administrative document. Whatever was in the dwelling, under the circumstances, could not have been disturbed or destroyed. Thus, there was no urgency that would have compelled them to enter, without a warrant, in order to preserve evidence of a crime. Here, in my opinion, on the totality of the evidence, it is difficult to conclude that the police, in these circumstances, acted in good faith. Consequently, on the evidence that I accept and the analysis that I have made, in the circumstances of this case, I conclude that the police conduct was an extremely serious ***Charter*** violation from many perspectives.

On the third branch of the test, the effect of exclusion on the reputation of the administration of justice, I must balance the fairness of admission against the seriousness of the violation. First, in my opinion, the essential value protected by s.8 ***Charter*** should not be trivialized nor be minimized. See, ***R. v. Dyment*** (1988), 45 C.C.C. (3d) 244, [1988] 2 S.C.R.417. Second, as was expressed by Sopinka J., in ***Kokesch***, *supra*., at p.226, "The court must refuse to condone, and must dissociate itself from egregious police conduct."

The weapon and narcotic offences are serious and the impugned evidence, the drying marihuana leaves and the rifle, is required for a conviction. Their exclusion could affect, to some degree, without any counterbalance, the repute of the administration of justice. However, in my opinion, the unlawful conduct of the police was neither minor nor trivial, it was a deliberate and flagrant assertion of their own creation and criteria that was originated to subvert both the legal and constitutional limits of their power to intrude on an individual's privacy. This, in my view, counterbalances any speculations about the disrepute of the administration of justice should the evidence be excluded.

As a result, in this case, I adopt the view, as expressed by MacKinnon, A.C.J.O, in ***R. v. Duguay, Murphy and Sevigny*** (1985), 18 C.C.C. (3d), affirmed 46 C.C.C.(3d) 1 (Ont. C.A.) at p.300.

> If the court should turn a blind eye to this kind of conduct, then the police may assume that they have the court's tacit approval of it. I do not view the exclusion of the evidence as a punishment of the police for their conduct, although it is hoped that it will act as a future deterrent. It is rather an affirmation of fundamental values of our society, and the only means in this case of ensuring that the individual's Charter rights are not illusory.

Conclusion

In the result, I have concluded, that here, on the evidence presented and on the analysis that I have made, the administration of justice would suffer far greater disrepute from the admission of this evidence than from its exclusion. I will therefore exclude, as evidence, all the items seized from the dwelling house at 1210 Pockwock Road.