PROVINCIAL COURT OF NOVA SCOTIA
Citation: R v. Mayo, 2012 NSPC 53

Date: 20120611
Docket: 2273051,
2273050
Registry: Bridgewater

Between:

R.

v.

Shamus Mayo

Judge:	The Honourable Judge James H. Burrill
Heard:	June 11, 2012, in Bridgewater, Nova Scotia
Written decision:	July 20 , 2012
Charge:	254(2)(b) CC, 253(1)(a) CC
Counsel:	C. Lloyd Tancock, for the Crown Thomas J. Feindel, for the Defence

By the Court:

[1] Mr. Mayo is before the Court charged with two offences that are alleged to have occurred on the 27th day of November, 2010, at or near Highway 10, North River, Lunenburg County, Nova Scotia. He's charged with impaired driving and with refusal of the approved screening device demand made to him by Constable Swinimer on that date.

[2] This has been a *voir dire* to determine the admissibility of statements allegedly made by Mr. Mayo while in the police car at an accident scene.

[3] The facts of the case are as follows: Constable Kelvin Swinimer was on patrol in the North River/New Germany area of Highway 10, Lunenburg County, on the 27th day of November, 2010, at approximately 3:00 in the morning. He had been in the area on a call. He had been assisting another officer, and he had just finished assisting that officer when he was advised of a roll-over motor vehicle accident by a passer-by. He travelled to the accident scene, which was not that far away from his location. On his way there he passed the accused who was walking on the side of the road approximately one half a kilometer from the accident scene.

He drove past the accused at that time and went to the car that was in the ditch and overturned. He went to the vehicle, checked quickly and saw that no one was inside. The engine was still warm, the lights of the vehicle were on, and the wheels of the vehicle were just turning. As Cst. Swinimer put it, they were just slowing down. He confirmed that the engine was not running. He then returned to the area where he had seen the accused, who was still walking on the side of the road and he spoke to him. He said that the accused was, " confused in name, he was just mumbling". He said in evidence on the voir dire that he noticed a smell of alcohol coming from him. The accused said that he was going to a friend's place up the road. Upon questioning he did not know who the friend was, or at least he wouldn't say who the friend was. The officer then said he got the impression there was "some sort of misleading coming toward me". He then made a decision to detain the accused and he said this. He said, "right now I'm going to detain you while I investigate this roll over". He said he didn't know if he was the driver of the motor vehicle or if the vehicle was stolen. In fact, at that time, he didn't know anything about the accident, other than what he had observed at the accident scene that I've already related and that the accused was, in this relatively rural or isolated area, walking on the road at three o'clock in the morning at a time when the officer saw no one else around.

[4] Once he told Mr. Mayo that he was going to detain him, Constable Swinimer said he searched him for his safety and the safety of the accused. He, during the search, took a wallet from the accused and found a broken, what the officer called a "Mohawk" card, but upon examination it was a broken Mosaic MasterCard that was obtained from him that had the accused's name on it. He had been placed in the police car at this time and returned to the area of the accident. No section 10(b) rights were given at this point in time. The officer ran the plate on the car. The results of the ownership were communicated to him via radio and it was at that time the accused made a statement that the crown seeks to have introduced in evidence. As soon as that statement was made, the Roadside Screening Test demand was given and that was given at 3:11 in the morning, which means that the accused was in custody of the authorities for some period of time between 3:00 and 3:11. Up to eleven minutes, although it is clear that for a very short period of time the officer would have driven past him to the accident scene, checked the vehicle and then returned to Mr. Mayo's location before taking him in custody.

[5] The Defence has raised charter issues, but has not raised the issue of voluntariness on this *voir dire*, specifically alleging a breach of Section 7, 10(a)

and (b). The Court raised with counsel the issue of Section 9 of the Charter, and as well the Court raised the issue of Section (8) although that particular section may not be determinative.

[6] The Crown argues that the detention of the accused was an authorized investigative detention and that the officer had a duty to investigate the accident as Section 98 of the Motor Vehicle Act of Nova Scotia requires that a peace officer who is investigating an accident obtain full particulars and provide those to the Registrar as to what happened. Sections 83 of the Motor Vehicle Act requires any person to comply with orders, signals and directions of peace officers, and Section 261 of the Motor Vehicle Act authorizes a peace officer to arrest a person who he believes has recently committed an offence. Section 301(2) of the Motor Vehicle Act requires persons to, or prohibits persons from furnishing false information to peace officers during an investigation. The Crown argues that those sections either individually or in combination, together with the investigatory obligations and powers of the officer, that he would have from federal legislation relating to motor vehicles and motor vehicle offences, would empower, and in fact obligate, Constable Swinimer to investigate the circumstances of an overturned motor vehicle. Interaction with Mayo, the sole person in the area, from the officer's

perspective would be logical and, the crown argues, justified and authorized by legislation.

[7] No one argues that the officer had a duty to investigate the motor vehicle accident that he had found. No one would argue that it wouldn't have been logical for Constable Swinimer to speak to the only person in the area to see what he knew or see whether or not he would cooperate with the officer and answer questions that the officer clearly had a duty under the Motor Vehicle legislation to ask. But the question is whether or not his subsequent detention was authorized by law.

[8] It's clear that Mr. Mayo was not arrested, formally. However, it is equally clear that Mr. Mayo was detained within the meaning of Section 10 of the Charter. In fact the Supreme Court of Canada authorizes investigative detentions where grounds for arrest do not exist. In the case of the R v.Mann, [2004] 3 SCR 59, the court specifically sets out when investigative detentions will be authorized, and at paragraphs 34 through 36 of that decision, they say as follows:

> "...The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an

> assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with the individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and the extent of that interference, in order to meet the second prong of the *Waterfield* test.
>
> Police powers and police duties are not necessarily correlative. While the police have a common law duty to investigate crime, they are not empowered to undertake any and all action in the exercise of that duty. Individual liberty interests are fundamental to the Canadian constitutional order. Consequently, any intrusion upon them must not be taken lightly and, as a result, police officers do not have *carte blanche* to detain. The power to detain cannot be exercised on the basis of a hunch, nor can it become a *de facto* arrest."

[9] Dealing with the issue of search, paragraph 36 says this:

> "Any search incidental to the limited police power of investigative detention described above is necessarily a warrantless search. Such searches are presumed to be unreasonable unless they can be justified, and hence found reasonable, pursuant to the test established in *R. V. Collins*..."

[10] With respect to the issue of search, paragraph 40 of the decision limits the power to search upon investigative detention and says that

> "The general duty of officers to protect life may, in some circumstances, give rise to the power to conduct a pat-down search incident to an investigative detention. Such a search power does not exist as a matter of course; the officer must believe on reasonable grounds that his or her own safety, or the safety of others, is at risk. I disagree with the suggestion that the power to detain for investigative searches endorses an incidental search in all circumstances....The officer's decision to search must also be reasonably necessary in light of the totality of the

> circumstances. It cannot be justified on the basis of a vague or non-existent concern for safety, nor can the search be premised upon hunches or mere intuition."

[11] It is noteworthy that in this particular case, the officer conducted more than a pat-down search. If he conducted a pat-down search, it is clear that he found nothing that would cause him a safety concern and he never testified as to why he had a safety concern before the search was conducted. As I say, nothing may ultimately turn on the Section 8 issue, but it is noteworthy that he went on to extract a wallet from the accused's pocket and seize that and use that MasterCard that he retrieved from that wallet to further his investigation and went beyond the pat-down search incident to an investigative detention.

[12] At paragraph 45, the court summarizes the principles in *Mann*, and says this:

> "To summarize as discussed above, police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual"

and I emphasize this

> "is connected to a particular crime and that such a detention is necessary. In addition, where a police officer has reasonable grounds to believe that his or her safety or that of others is at risk, the officer may engage in a protective pat-down

> search of the detained individual. Bot the detention and the pat-down search must be conducted in a reasonable manner. In this connection, I note that the investigative detention should be brief in duration and does not impose an obligation on the detained individual to answer questions posed by the police."

[13] In this case I find that there is no breach of Section 10(a) of the *Charter.* Section 10(a) of the *Charter* says that

> "Everyone has the right on arrest or detention (a) to be informed promptly of the reasons therefore;"

Well, the officer did promptly tell him why he was being detained. He told him that he was detaining him while he investigated the roll-over accident.

[14] The defence also argues 10(b) of the *Charter* which says:

> "Everyone has the right on arrest or detention (b) to retain and instruct counsel without delay and to be informed of that right;"

It is clear from the evidence on the *voir dire* that the officer at the time of the detention did not inform the accused of his Section 10(b) rights. Nor did he at any time, up until the time of the alleged statement, advise him of his right to retain and instruct counsel. The question then arises, what are the obligations of the police conducting what they consider to be an investigative detention to inform an

individual under section 10(b). The Supreme Court of Canada has answered that question, and answered it in the case of R vs. Suberu, 2009 SCC 33, [2009] 2 S.C.R. 460, and at paragraph two of that decision, the Court answers that question directly:

> "The specific issue raised in this case is whether the police duty to inform an individual of his or her s. 10(b) *Charter* right to retain and instruct counsel is triggered at the outset of an investigative detention – a question left open in *R v. Mann"*

They answer that question by saying:

> "It is our view that this question must be answered in the affirmative. The concerns regarding compelled self-incrimination and the interference with liberty that s. 10(b) seeks to address are present as soon as a detention is effected. Therefore, from the moment an individual is detained, s. 10(b) is engaged and, as the words of the provision dictate, the police have the obligation to inform the detainee of his or her right to counsel "without delay". The immediacy of this obligation is only subject to concerns for officer or public safety, or to reasonable limitations that are prescribed by law and justified under s. 1 of the *Charter*."

Now, with regards to roadside stops, and the giving of roadside screening tests, it is clear that in law the right to counsel is suspended and is a reasonable limitation prescribed by a law, because of the momentary interference with an individual's liberty and the legislative scheme for roadside screening tests. Although a screening test resulted it is the detention leading up to the ultimate giving of the

demand that is the concern of this case and in my view a subsequent roadside screening demand cannot negate the obligations of the authorities to act in accordance with the principles set out in *Mann* and *Suberu*.

[15] Dealing with the specifics of this case, it is my view that the rights of the accused under Section 9, 10(b) and Section 8 of the *Charter* were all violated by Constable Swinimer on this occasion. On the authority of the Queen versus *Mann*, while it was quite appropriate for Constable Swinimer to return to Mr. Mayo, who was walking on the side of the road and ask him questions about what he knew, he had no authority in the circumstances to detain him. The officer did not know that he was investigating any offence at the time he effected the detention. One must remember that *Mann* requires that there be reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime.

[16] In this case, the officer had no reason to believe that any crime had been committed, nor did he have any reason to believe that any other offence had been committed, or if he did, he did not articulate such in his testimony. He had been advised and saw a vehicle that was rolled over in the ditch. He saw the accused walking on a roadway a half a kilometre away from that vehicle. Yes, it was three

o’clock in the morning and he saw no one else around, and he may have had a hunch that Mr. Mayo was connected to the vehicle, but he had no reasonable grounds to suspect in all the circumstances that this individual was connected to a particular crime or offence.

[17] Additionally, even if I were wrong on that point, s. 8 of the *Charter* is also breached in that the officer went beyond the pat-down search authorized for safety reasons by *Mann* and went into a full search of the accused person and extracted a wallet of the accused, extracted a wallet from his pocket that he used to compare the identity of the accused on the credit card with the identity of the owner of the vehicle that he learned from his dispatch centre, by running the plate on the vehicle.

[18] Section 10(b) of the *Charter* was also breached by the officer because *Suberu* makes it clear that upon detention, even an investigative detention, the obligations of the officer to inform the accused of his right to retain and instruct counsel under 10(b) exist and Constable Swinimer did not at any time advise him of his s. 10(b) rights.

[19] Having found these *Charter* breaches it then falls to a consideration of s. 24(2) to determine whether or not the statement, whose admission is sought, should be admitted or excluded from testimony. It's clear from the decisions of the Supreme Court of Canada that I need to consider three factors in assessing whether or not the evidence should be excluded. One, the seriousness of the conduct, the offending conduct; Two, the impact of breach on the *Charter* interest, and society's interest in determining the case on it's merits.

[20] In this case, it is very clear that the right of the accused to not be arbitrarily detained and to be informed of his right to counsel were seriously breached by Constable Swinimer on this occasion. The officer clearly would have known, or should have known his powers of detention and his obligation upon effecting a detention and he simply ignored his duties. I'm not satisfied that his conduct was wilful, but at the very least it was a negligent disregard of the *Charter* by an experienced officer and the Court should take serious consideration of the need to disassociate itself from such conduct.

[21] As one considers the impact of the breach on the *Charter* interest, it's very clear that it cannot be described as an impact that was fleeting or technical. It was

detention of some probably 8 to 10 minutes maximum eleven. But the detention, or the impact was significantly intrusive. The officer took control of the accused's movements and held him in a police car more than briefly in order to further his investigation of the accident. One must be concerned that allowing the statement into evidence in such circumstance would serve to neutralize the rights protected by section 9 and 10 specifically, and contribute to the breeding of cynicism and ultimately bring the administration of justice into disrepute. Thirdly, as I weigh the breaches, I must ask whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence or by it's exclusion. The reliability of the evidence and it's importance to the Crown's case are factors to be considered and if a breach undermines the reliability of the evidence this points in the direction of exclusion. And of course, section 24(2) does operate independently of the seriousness of the offence. In this case, the evidence of the accused's statement is important. From the evidence on the *voir dire* it appears that it is the evidence of the accused's statement that would place the accused as the driver of the motor vehicle at the time of the accident. However, considering all the factors set forth in ***R v. Grant*** [2009] S.C.J. 32, I am satisfied that because of the seriousness of the offending conduct , and the significant impact of the breach on the *Charter* interest, and even considering that the evidence may be

crucial to the Crown's case, it is a case where I'm satisfied that to admit the evidence would bring the administration of justice in to disrepute. I am satisfied that on all the evidence, it's been established on the balance of probabilities by the defence that to admit the evidence in this case would not be proper, and as I've said, bring the administration of justice in to disrepute. The evidence of the statement will not be admitted.