PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Langille, 2013 NSPC 4

Date:20130109
Docket: 2372870/71
Registry: Amherst

Between:

Her Majesty the Queen

v.

Donald Ross Langille and Cory Palmer

Judge:	The Honourable Judge Paul B. Scovil
Heard:	September 18, 2012, in Amherst, Nova Scotia
Written decision:	January 16, 2013
Charge:	That they, on or about the 5th day of August, 2011, at or near Amherst, Nova Scotia, did without lawful excuse, have in their possession assorted instruments suitable for breaking into a place under circumstances that give rise to a reasonable interference that the said instruments were intended to be used for such a purpose contrary to Section 351 (1) of the Criminal Code.
Counsel:	Bruce Baxter, for the Crown Jim O'Neil, for the Defendant, Mr. Langille Robert Moores, for the Defendant, Mr. Palmer

By the Court:

[1] Amherst, Nova Scotia was a quiet and moderately dark town at 4:00 a.m. early Friday morning, August 5, 2011. Sergeant Robert MacPherson of the Amherst Police Department was doing what every town clamours for: conducting a foot patrol in the wee hours of the morning. At that time, there were concerns of buildings in the downtown core of Amherst having copper stolen from them. The Sergeant felt that these thefts (largely of unoccupied buildings) were occurring in the early hours of the morning. This night he saw three individuals in the semi-darkness scurrying about the streets and alleys of the downtown core. They were carrying knapsacks, which the officer thought was odd. Sergeant MacPherson followed and shortly found three individuals nestled up to small shed behind a Needs convenience store. The area blocked the individuals from general view. They were later identified as the two co-accuseds here along with a third co-accused, who has been dealt with separately.

[2] Sergeant MacPherson told the group to stay where they were and then advised them to drop what the officer now at that point noticed were kit bags. A metal clank was heard when one of the kit bags hit the ground. The officer asked what mischief they were up to. The officer then searched one of the individuals for officer safety. One of the three, who is not before this court, then pulled from his clothing a long pry bar, a short pry bar, a screwdriver and a hammer. He would have resembled an unfolding human Swiss Army knife. When Mr. Palmer dropped a kit bag that he had, it made an obvious clanking sound. Mr. Langille dropped a kit bag as well. The accuseds were then searched. Mr. Palmer's bag contained a bolt cutter, hacksaw, saw blades, pipe cutter, gloves and a flashlight, while the other kit bag contained more bags. The three were subsequently charged with possession of instruments suitable for breaking and entering.

[3] The issue in this voir dire on an application by the accused persons is whether the detention of the trio was in violation of their rights under the **Canadian Charter of Rights and Freedoms** and whether any searches conducted under that detention violated the right against arbitrary search and seizure. If this detention did infringe the accuseds' rights, should the evidence be excluded under Section 24(2) of the **Charter**?

Law

[4] The accuseds gave notice of **Charter** violations relating to Section 9 stating they were the subject of arbitrary detention, as well as their rights against unreasonable search or seizure under Section 8 being violated. Further, that the accuseds' rights under section 10(a) were violated in that the accuseds were not told promptly of the reasons for their arrest and detention. The accuseds asked that remedial action be taken by excluding any evidence obtained as a result of the detention pursuant to Section 24(2) of the **Charter**.

Arbitrary Detention

[5] The two accuseds in this matter assert that their right against arbitrary detention under Section 9 of the **Charter of Rights and Freedoms** were infringed by the officer on the night in question. Section 9 states:

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

[6] When and how a peace officer can detain an individual has garnered much attention in Canadian jurisprudence. In **R. v. Aucoin** [2012] S.C.C. 66, Justice Moldaver stated:

> 36 The existence of a general common law power to detain where it is reasonably necessary in the totality of the circumstances was settled in *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725. That case moved our jurisprudence from debating the existence of such a power to considering whether its exercise was reasonably necessary in the circumstances of a particular case. As Abella J., for the majority, observed:
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> > The determination will focus on the nature of the situation, including the seriousness of the offence, as well as on the information known to the police about the suspect or the crime, and the extent to which the detention was reasonably responsive or tailored to these circumstances, including its geographic and temporal scope. This means balancing the seriousness of the risk to public or individual safety with the liberty interests of members of the public to determine whether, given the extent of the risk, the nature of the stop is no more intrusive of liberty interests than is reasonably necessary to address the risk. [Emphasis added; para. 31.]

[7] Justice Moldaver was clear in **Aucoin** that the issues there did not deal with a matter of investigative detention. The power to conduct an investigative detention by policing authorities was canvassed in **R. v. Mann [2004] S.C.J. No. 49. Mann** recognized a limited power of police officers to engage in detention of an individual for investigative purposes. In recognizing such limited police powers at common law, Justice Moldaver was informed by the English Court of Criminal Appeal in **R. v. Waterfield [1963] 3 All E.R. 659.** The test set out in **Waterfield** for determining if an officer has acted within their common law powers to detain an individual is a two pronged one. First, was the detention derived from the nature and scope of the police duties, including: preservation of the peace, prevention of crime and the protection of life and property? The second stage of the test requires a court to consider if it is reasonably necessary or justified to detain an individual in light of the public purpose served by the control of criminal behaviour balanced against the rights of the public to liberty.

[8] The second stage was examined by the Court of Appeal for Ontario in **R. v. Simpson (1995) 14 O.R. (3d) 182** where Justice Doherty held that investigative detention is only justified if the police can provide an articulable cause for the detention of an individual. As Justice Doherty stated at page 202, it requires:

> "...a constellation of objectively discernable facts which gave the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation."

[9] It should be noted here as it was in **Simpson** (supra) that articulable cause cannot be clothed in hunches and intuition no matter how experienced the officer. A detaining officer must be able to casually link the individual detained to a specific crime or crimes in an objective manner that raises his decision above hunches, suspicions or informed intuition.

[10] In the present case, the officer's only cause of detention was a concern of general thefts in the area. Further, the individuals seen were carrying backpacks at four in the morning, which was deemed odd. Finally, the individuals were darting about buildings muttering something about cops. These days, backpacks seem to be a ubiquitous part of young peoples attire along with hoodies. It does not mean that they therefore can be stopped and interrogated by police.

[11] A very similar set of facts can be found in **R. v. Grant [2009] S.C.R. 353.** In **Grant**, a high school in the Toronto area had a history of student assaults, robberies and drug offences over the lunch hour. Three officers were patrolling the area to monitor and maintain student safety. Grant, a young black male, was observed walking on a street by two officers in a patrol car. Grant stared at the officers and fidgeted with his coat causing suspicion with the officers. The officers felt they should have a chat with the individual and asked a third officer on foot patrol to speak to Grant to see if there was any need for concern. The officer on foot patrol approached Grant and asked what was going on and requested his name and address. The accused gave the officer his health card. As Grant was still acting nervous, he was instructed to keep his hands in front of him. By this time the other officers had come up behind Grant. The officer had asked Grant if he had anything on him he shouldn't have, to which Grant replied that he had "a bag of weed". The officer asked what else he might have to which grant replied, "a firearm". The firearm was retrieved and Grant was arrested, searched and taken back to the police station.

[12] In **Grant**, the Supreme Court canvassed the concept of detention in cases such as the one at bar. At paragraph 30 the majority stated:

> 30 Moving on from the fundamental principle of the right to choose, we find that psychological constraint amounting to detention has been recognized in two situations. The first is where the subject is legally required to comply with a direction or demand, as in the case of a roadside breath sample. The second is where there is no legal obligation to comply with a restrictive or coercive demand, but a reasonable person in the subjects position would feel so obligated. The rationale for this second form of psychological detention was explained by Le Dain J. in *Therens* as follows:
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> In my opinion, it is not realistic, as a general rule, to regard compliance with a demand or direction by a police officer as truly voluntary, in the sense that the citizen feels that he or she has the choice to obey or not, even where there is in fact a lack of statutory or common law authority for the demand or direction and therefore an absence of criminal liability for failure to comply with it. Most citizens are not aware of the precise legal limits of police authority. Rather than risk the application of physical force or prosecution for wilful obstruction, the reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand. The element of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to

> make the restraint of liberty involuntary. Detention may be effected without the application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist. [Emphasis added; p. 644.]
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> 31 This second form of psychological detention — where no legal compulsion exists — has proven difficult to define consistently. The question is whether the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand. As held in *Therens*, this must be determined objectively, having regard to all the circumstances of the particular situation, including the conduct of the police. As discussed in more detail below and summarized at para. 44, the focus must be on the state conduct in the context of the surrounding legal and factual situation, and how that conduct would be perceived by a reasonable person in the situation as it develops.

[13] The court went on to state:

> 40 A more complex situation may arise in the context of neighbourhood policing where the police are not responding to any specific occurrence, but where the non-coercive police role of assisting in meeting needs or maintaining basic order can subtly merge with the potentially coercive police role of investigating crime and arresting suspects so that they may be brought to justice. This is the situation that arises in this case.
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> 41 As discussed earlier, general inquiries by a patrolling officer present no threat to freedom of choice. On the other hand, such inquiries can escalate into situations where the focus shifts from general community-oriented concern to suspicion of a particular individual. Focussed suspicion, in and of itself, does not turn the encounter in a detention. What matters is how the police, based on that suspicion, interacted with the subject. The language of the Charter does not confine detention to situations where a person is in potential jeopardy of arrest. However, this is a factor that may help to determine whether, in a particular circumstance, a reasonable person would conclude he or she had no choice but to comply with a police officer's request. The police must be mindful that, depending on how they act and what they say, the point may be reached where a reasonable person, in the position of that individual, would conclude he or she is not free to choose to walk away or decline to answer questions.

[14] Here, Sergeant MacPherson asked the individuals what mischief they were up to and then began a search. Clearly the accuseds were detained at that point. Applying the principals expressed in **Mann** (supra) and followed in Grant, the

detention in this case was arbitrary and infringed the rights of these accuseds under Section 9 of the **Charter**.

Unreasonable Search and Seizure

[15] Section 8 of the **Charter of Rights and Freedoms** states:

> 8. Everyone has the right to be secure against unreasonable search or seizure.

[16] For a search to be reasonable it must be one which is authorized by law to be reasonable. The authorising law as well must be reasonable and the search must be carried out in a reasonable manner. As the accuseds in this matter were detained in an arbitrary manner, they were likewise searched in an arbitrary manner. This analysis applied to the facts here results in a section 8 **Charter** breach.

10(b) Charter Rights

[17] In addition to other breaches the accuseds argue that their rights under Section 10(b) of the **Charter** were violated. Section 10(b) states:

> 10. Everyone has the right on arrest or detention
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> (b) to retain and instruct counsel without delay and to be informed of that right.

[18] Section 10(b) has been litigated in cases in every criminal court in Canada. What is clear is that the obligation of the police to advise an individual of his or her counsel rights arises upon the crystallization of the detention of that person. This is set out in **Grant** (supra) at paragraph 58:

> 58 In *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, we conclude that the s. 10(b) right to counsel arises immediately upon detention, whether or not the detention is solely for investigative purposes. That being the case, s. 10(b) of the Charter required the police to advise Mr. Grant that he had the right to speak to a lawyer, and to give him a reasonable opportunity to obtain legal advice if he so chose, before proceeding to elicit incriminating information from him. Because he now faced significant legal jeopardy and had passed into the effective control of the police, the appellant was "in immediate need of legal advice": *R. v.*

> *Brydges*, [1990] 1 S.C.R. 190, at p. 206. Because the officers did not believe they had detained the appellant, they did not comply with their obligations under s. 10(b). The breach of s. 10(b) is established.

[19] Here, there was no mention to the accuseds of their rights to counsel once they were detained and prior to the searches conducted. Given the arbitrary nature of the detention, a lawyer's advice just prior to the search would have been extraordinary useful to these accuseds. As a consequence, there is clear violation of Mr. Palmer and Mr. Langille's 10(b) **Charter** rights.

Exclusion of Evidence under Section 24(2) of the **Charter**

[20] Breaches of an individual's rights under the **Charter of Rights and Freedoms** are not hollow ones and the courts have been provided a remedial tool in such instances under section 24(2):

> 24(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[21] The Supreme Court of Canada in **Grant** (supra) set out the proper approach that courts must take in determining whether evidence obtained in a manner that infringed the Charter should be excluded under 24(2). In analysing whether a **Charter** breach would bring the administration of justice into disrepute, Grant set out a three component test to be utilized. These components are:

1. The seriousness of the **Charter** infringing state conduct,

2. The impact of the breach on the **Charter** protected interests of the accused, and

3. Societies interest in the adjudication of the case on it's merits.

[22] This court must balance the factors set out above to determine whether in all circumstances the admission of the evidence would bring the administration of justice into disrepute.

Seriousness of the **Charter** Infringing State Conduct

[23] If the evidence seized by Sergeant MacPherson is allowed into this trial, would the public perceive that this is a message that the court condones the breach? This is a primary concern and in assessing this I must consider if Sergeant MacPherson's actions were a flagrant and knowing violation of the rights of the accuseds. Was this a minor violation of **Charter** rights by a police officer acting in good faith or one where the officer flagrantly ran roughshod over the rights of the accuseds? Deliberate infringement would tend towards evidence being excluded. Here the officer followed the accuseds at four in the morning after his curiosity was piqued. The dark clothing worn by the accuseds and their surreptitious movements while wearing backpacks caused the officer to follow them. Only when Sergeant MacPherson found the accuseds sequestered by a shed behind a store out of view from the street, did he ask them what they were up to. The area appeared to be one which was not a public area. Had the officer stopped the accuseds on a sidewalk in an open and brightly lit area and demanded they open their backpacks, things would have been different. Here the officer's search was arbitrary, but not in circumstances that were a flagrant abuse of power or one where citizens would be alarmed at the police conduct employed. I find that Sergeant MacPherson was acting in good faith and that as a result coupled with all other circumstances, it renders the arbitrary detention, unlawful search and denial of counsel rights minimal and of little intrusion.

Impact on the **Charter** Protected Interests of the Accuseds

[24] An inquiry into the impact of breaches on the **Charter** protected interests of an accused calls for an examination of the extent to which the breach undermines the interest protected by the right infringed. Breaches may be minor and fleeting to ones that are highly intrusive. Here the detention and search was minimally intrusive. These breaches were on the lower end of the scale of potential breaches. An example would be an accused removed from a busy store on suspicion of shoplifting and strip searched. Such a breach would be highly intrusive and far more likely to bring the administration of justice into disrepute. Here the accuseds were out of public view in the early hours and searched originally only for officer safety. The accused not before this court dropped items out of his person unasked and the subsequent searches were of kit bags held by Mr. Palmer and Mr. Langille.

It would seem there would be a minimal expectation of privacy in these circumstances given the hour and location of the detention. There was in this matter a low impact on the **Charter** protected rights of the accuseds.

Societies Interest in the Adjudication of Matters on their Merits

[25] We as a society expect criminal allegations to be tried on their merits. As a result, the third line of inquiry asks whether the truth seeking function of the criminal trial process would be served by the admission of derivative evidence from breaches or better served by it's exclusion. Breaches that compel an accused to incriminate themself can undermine the reliability of the evidence. Examples include: torture to obtain confessions, illegal wiretaps and other such investigative tools. It is also important to consider in this analysis, the necessity of the evidence for the crown's case. In this instance, the entire crown case rises and falls with the availability of the evidence obtained through the breaches of the Charter rights of the accuseds. With no tools and accessories that were recovered from the accused, there is simply no case left for the crown on the matter of possession of implements for the purpose of conducting breaks.

[26] **Grant** (supra) discusses the handling of real evidence as was obtained here. In light of the three part test to determine if evidence should be excluded under 24(2), at paragraphs 112 to 115, Chief Justice McLachlin stated:

> 112 The three inquiries under s. 24(2) will proceed largely as explained above. Again, under the first inquiry, the seriousness of the *Charter*-infringing conduct will be a fact-specific determination. The degree to which this inquiry militates in favour of excluding the bodily evidence will depend on the extent to which the conduct can be characterized as deliberate or egregious.
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> 113 With respect to the second inquiry, the *Charter* breach most often associated with non-bodily physical evidence is the s. 8 protection against unreasonable search and seizure: see, e.g., Buhay. Privacy is the principal interest involved in such cases. The jurisprudence offers guidance in evaluating the extent to which the accused's reasonable expectation of privacy was infringed. For example, a dwelling house attracts a higher expectation of privacy than a place of business or an automobile. An illegal search of a house will therefore be seen as more serious at this stage of the analysis.

> 114 Other interests, such as human dignity, may also be affected by search and seizure of such evidence. The question is how seriously the Charter breach impacted on these interests. For instance, an unjustified strip search or body cavity search is demeaning to the suspect's human dignity and will be viewed as extremely serious on that account: *R. v. Simmons*, [1988] 2 S.C.R. 495, at pp. 516-17, *per* Dickson C.J.; *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679. The fact that the evidence thereby obtained is not itself a bodily sample cannot be seen to diminish the seriousness of the intrusion.
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> 115 The third inquiry, whether the admission of the evidence would serve society's interest in having a case adjudicated on its merits, like the others, engages the facts of the particular case. Reliability issues with physical evidence will not generally be related to the Charter breach. Therefore, this consideration tends to weigh in favour of admission.

Analysis

[27] As I have indicated above, I find that Sergeant MacPherson was acting in good faith and was not engaging in wilful and flagrant abuses of the accuseds' rights. His detention and search in this matter was minimal and lacked the intrusiveness which would bring the administration of justice into disrepute. The accuseds' lack of being informed on detention of their legal rights was significant, but that must be weighed against the reliability of the evidence which was real in nature. In considering and weighing all factors here, there are compelling reasons not to exclude the evidence and as a consequence, it will be admitted into the trial.

J.P.C.