

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Ryan, 2011 NSSC 102

Date: 20110118

Docket: CRAM-317760

Registry: Amherst

Between:

Her Majesty the Queen

v.

Anthony Joseph Ryan

Judge: The Honourable Justice Douglas L. MacLellan

Heard: January 18, 2011 in Amherst, Nova Scotia

Oral Decision: January 18, 2011

**Written release
of oral decision:** March 11, 2011

Charge: THAT HE on or about the 3rd day of February, 2009 at, or near Springhill, Nova Scotia, did unlawfully have in his possession for the purpose of trafficking, Cannabis (marihuana), in excess of three (3) kilograms, a substance included in Schedule II of the Controlled Drugs and Substances Act, S.C. 1996, c.19, and did thereby commit an indictable offence contrary to Section 5(2) of the said Act.

Counsel: Mr. Douglas Shatford, QC, for the crown
Mr. Gary Miller, for the defence

By the Court (orally):

[1] This is a decision on a voir dire to deal with the accused's *Charter* application by which he alleges that the illegal drugs found in his vehicle on February 3rd, 2009 should not be introduced into evidence at this trial because the search of his vehicle conducted by the R.C.M.P. was illegal and contrary to his *Charter of Rights*.

[2] Mr. Ryan is charged that

on or about the 3rd day of February, 2009 at, or near Springhill, Nova Scotia, he did unlawfully have in his possession for the purpose of trafficking, Cannabis (marihuana), in excess of three (3) kilograms, a substance included in Schedule II of the *Controlled Drugs and Substances Act*...and did thereby commit an indictable offence contrary to Section 5(2) of the said *Act*.

[3] Mr. Ryan had a preliminary hearing on the charge and was committed to stand trial in Supreme Court before a judge sitting alone.

[4] Both counsel have agreed that the application here should be based on the evidence presented at the preliminary and some other evidence agreed to by counsel, that is transcripts of telephone conversations and audio and video tapes

from the police car. I would indicate that there is really no dispute here between counsel about the facts involved in the accused's interaction with the R.C.M.P.

[5] The accused here alleges that when his vehicle was searched that was done illegally and contrary to his *Charter of Rights*.

Background Facts:

[6] Corporal Tessier of the R.C.M.P. in New Brunswick first observed the accused's vehicle on the Trans Canada highway in the Havelock Corridor area of New Brunswick. The vehicle was proceeding east towards Moncton and Nova Scotia. It was around 9:50 a.m. on that day and the Corporal noticed that the vehicle, a half ton truck had no front, and an obscured back license plate. Because of the obscured back license plate he followed the truck and pulled it over. He approached it and wiped off the back license plate. It was a Newfoundland plate.

[7] He spoke to the driver, the accused, who said he was coming from Ontario and was heading for Newfoundland. He took Mr. Ryan's vehicle documents and went back to the police car. Prior to that he asked Mr. Ryan if he had ever been in trouble with the law. Mr. Ryan said no but the officer felt that he changed his

demeanour when he was asked that question. Back in the police car the officer, the officer's computer system would not generate some, what you might call normal information about the accused, except to confirm that he was the owner of the truck.

[8] Corporal Tessier then went back to the accused's vehicle and told him he was free to go. He did ask him if he could, if he would answer a few questions but Mr. Ryan refused and drove off. During the police stop Corporal Tessier was joined at the scene by another R.C.M.P., Constable Raymond, in a police car. They spoke together about some suspicions that Corporal Tessier had about the accused and his vehicle. They both decided that they would follow the truck while they contacted the, their office to try to get some more background information on Mr. Ryan.

[9] During the time that they were following the vehicle some checks were made but resulted in no new information. They continued to follow him for some time and as they were approaching the Nova Scotia border, at that point Corporal Tessier spoke by telephone with a Acting Sergeant Tim Hogan of the Newfoundland police who told him that he would do some checks on the accused.

Acting Sergeant Hogan called back a short time later and told Corporal Tessier that he had checked with a confidential source in Newfoundland and that this source was of proven reliability who had told him that if Mr. Ryan was on the main island now, that he was probably in possession of between 50 and 100 pounds of marijuana.

[10] Based on that Corporal Tessier told Constable Raymond to proceed ahead of him to stop the accused vehicle. Constable Raymond did that and when Corporal Tessier caught up to the vehicle, the vehicle was stopped. Corporal Tessier had Constable Raymond, who had his sniffer dog with him in the vehicle, go around the truck. The dog did this and Constable Raymond reported that it indicated the presence of narcotics in the truck. Corporal Tessier then arrested the accused and the truck was searched. 103 pounds of marijuana were found in the truck box, along with about \$3,000.00 in cash.

[11] Constable Raymond testified that when he stopped the accused's truck he told him that he was being detained and to get out of the truck. He said he patted him down and told him that he could call a lawyer and that he didn't have to say anything. Corporal Tessier arrived shortly after that and took control of the

accused. Constable Raymond searched the vehicle and found the marijuana in the box. The truck was then turned over to Nova Scotia R.C.M.P.

[12] The accused here alleges breaches of sections 8, 9 and 10(a) and (b) of the *Charter*.

Section 9:

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

[13] Defence counsel suggests that when the accused was stopped by Constable Raymond that it was an arbitrary detention and violated his rights under section 9 of the *Charter*. Counsel suggests that when Corporal Tessier received the information from Acting Sergeant Hogan in Newfoundland, he still did not have proper grounds for detention because he didn't have enough information about the source of the information provided to the Sergeant in Newfoundland and therefore he should have made some more inquiries before proceeding with the detention. He suggests that while Corporal Tessier might have had a subjective belief that he had grounds to detain, there were no objective grounds to justify the detention.

[14] Crown counsel submits that when Corporal Tessier got the information from Acting Sergeant Hogan that gave him grounds to detain the accused because that along with his earlier concerns about the accused gave him a reasonable suspicion of criminal activity and permits detention to further investigate the accused.

[15] Both counsel here have made reference to a number of cases on the issue of when a police officer can detain a person in a vehicle. Many of these cases involve a minor traffic stop which then turns into a more serious situation for the driver or occupants of the vehicle. Here the first stop by Corporal Tessier was, what might be called a normal traffic stop about an obscured license plate. Corporal Tessier felt that something else was going on when the accused didn't lower his window down to talk to him and his reaction when he was asked about being involved with the law. There was also an issue about the glass on the truck box being tinted. Based on these concerns the Corporal followed the accused while he did some more checking. When he received the information from Acting Sergeant Hogan he said he felt he had enough to investigate further, which he did by having Constable Raymond stop the accused a second time.

[16] The issue before me is whether Corporal Tessier was justified in having the sniffer dog engaged after having the accused's vehicle stopped. Defence counsel submitted the case of *R. v. LeBlanc* [2009] N.S.J. No. 132, 2009 NSSC 99, a decision of Beveridge J. (as he then was) in which he extensively reviewed the law on the issue of unlawful detention and arrest.

[17] Crown counsel submitted a number of cases including *R. v. Campbell* [2003] M.J. No. 207, 2003 MBCA 76, a case from the Manitoba Court of Appeal which held that a police detention based on an anonymous tip was appropriate, but that did not give the police the power to arrest. I have reviewed a number of the other cases submitted by both counsel in their extensive briefs before me.

[18] I conclude in this case that Corporal Tessier did have the right to stop and detain the accused once he received the information he got from Acting Sergeant Hogan in Newfoundland. That information combined with the subjective suspicions earlier did establish a reasonable suspicion that the accused was in possession of marijuana. The fact that Corporal Tessier didn't get more detail about Acting Sergeant Hogan's source of information is explained by the time

element involved here. The accused's vehicle was heading out of Corporal Tessier's home province and a decision had to be made at that point.

[19] Defence counsel submits that we should have heard from Acting Sergeant Hogan at this hearing to test his information about the informant. I reject that necessity here and conclude that a reasonable person in possession of the information held by Corporal Tessier would conclude that there was a reasonable suspicion that the accused was involved in transporting drugs in his truck.

Section 8:

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

[20] Crown counsel agrees that when Constable Raymond searched the accused's vehicle he did not have a warrant to do so and therefore the search is presumed to be unreasonable and the crown must show that it was reasonable in the circumstances.

[21] This issue is really connected to the first issue of unlawful detention. Because the crown rely on the results of the dog sniffer test, along with the

information from Acting Sergeant Hogan in Newfoundland to justify the arrest of Mr. Ryan and the subsequent search incidental to that arrest. I have found that the police were justified in stopping and detaining the accused based mainly on the information received from the Newfoundland police. The crown rely on that same evidence to justify the dog sniffer procedure. Crown counsel points to the case of *R. v. Yeh*, [2009] S.J. No. 582 from the Saskatchewan Court of Appeal which held that the same grounds can be used for both the detention and the dog sniff search. That is the situation here because after the detention of the accused no new evidence was detected prior to the dog sniffer procedure.

[22] In this case I conclude that Corporal Tessier had valid grounds to engage the dog sniff procedure based on the information received from Acting Sergeant Hogan. The procedure to have the dog, the sniffer dog go around the accused's vehicle was reasonable here considering it was done very quickly after the detention and did not prolong that detention. It also did not involve any direct contact with the accused person. That procedure would be similar I submit to a police officer smelling drugs from the inside of an accused's vehicle while talking to the driver.

[23] Once the dog indicated the presence of drugs, I conclude that Corporal Tessier had reasonable and probable grounds to arrest the accused, and based on that arrest to search the vehicle. Support for my finding can be found in the case *R. v. Loewen* [2010] A.J. No. 980 from the Alberta Court of Appeal. In that case the court confirmed the admission of drugs found after a warrantless search of the accused's vehicle. There the police officer involved, stopped the accused for speeding. He smelled freshly burnt marijuana from the vehicle. The accused, when taken back to the police car, gave a false name to the officer and when searched by the police to protect against possible weapons, the police officer found that the accused had \$5,410.00 cash on him.

[24] Based on the smell and the cash the police arrested the accused and searched the vehicle and found 100 grams of cocaine. The drugs were admitted into evidence at trial and the decision was upheld on appeal.

[25] The court in that case concluded that the trial judge had found that the police officer had concluded that the accused was in possession of drugs based on the smell of marijuana and the money found on him and to establish objectively

reasonable grounds the crown need only to show that it was objectively reasonable to believe that an offence was being committed not that it was probable or certain.

Section 10(a) and (b)

The accused here has alleged that his *Charter Rights* of being informed of the reason for his arrest and to instruct counsel without delay was violated.

[26] Defence counsel has I believe conceded in this hearing that this ground for complaint is not terribly strong and he was mainly relying on the other arguments advanced under the *Charter*.

[27] I agree with defence counsel, the accused here was informed by the police officer of his right to call a lawyer as soon as he was stopped on the highway. He did not exercise that right. I would dismiss the argument in regard to a violation to his right to counsel.

[28] I conclude that the accused here has not established a *Charter* violation and therefore I would admit into evidence the drugs found in his vehicle. I would note that from reviewing the evidence in this case, had I found that there was a *Charter* violation in the circumstances here I would still have admitted the evidence based

on the section 24(2) analysis that is set out in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353.

[29] Thank you very much gentlemen. That's my decision on the voir dire.

Justice D.L. MacLellan