SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Mattison, 2013 NSSC 297

Date: 20130924
Docket: CR. AM. 415523
Registry: Amherst

Between:

Her Majesty the Queen

Appellant

v.

Dwayne Stewart Mattinson

Respondent

Judge:	The Honourable Justice Cindy A. Bourgeois
Heard:	August 22, 2013, in Amherst, Nova Scotia
Written Decision:	September 24, 2013
Counsel:	Bruce C. Baxter, for the Appellant Robert Hagell, for the Respondent

By the Court:

INTRODUCTION AND BACKGROUND

[1] This is an appeal against acquittal brought by the Crown.

[2] The Respondent, Dwayne Stewart Mattinson, was charged that he did, on or about the 11th day of September, 2012, at or near Riverview, Nova Scotia:

> While his ability to operate a motor vehicle was impaired by alcohol did operate a motor vehicle contrary to section 253(1)(a) of the Criminal Code;
>
> And furthermore, on the same date, did having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded eighty milligrams of alcohol in one hundred millilitres of blood did operate a motor vehicle contrary to section 253(1)(b) of the Criminal Code.

[3] The matter came for trial in the Provincial Court on March 27, 2013. At the outset, the Respondent's counsel made known his intention to bring a motion with respect to statements made to an officer, which were submitted as offending section 10(b) of the *Charter*. The Respondent was seeking exclusion of the offending statements. Both parties agreed that Crown evidence called in the *voir dire* would be used at trial.

[4] The *voir dire* commenced with the Crown calling three witnesses, one of whom was the investigating officer. The officer testified he had received a call from his dispatcher on September 11, 2012 regarding a possible impaired driver. A concerned citizen was able to provide not only a description of the vehicle, but the license plate number as well as the location where it was last seen. The officer utilized this information to attend at the Respondent's home, who was the registered owner of the vehicle. The officer was granted entry to the home by the Respondent's wife and then proceeded to pose several questions to the Respondent. The Respondent made certain statements to the officer, and was subsequently arrested and read his *Charter* rights.

[5] The Respondent did not call evidence at the *voir dire*. Both parties made submissions to the Court regarding whether the officer's conduct amounted to a breach of s. 10(b) of the *Charter*.

[6] The trial judge, at the conclusion of the *voir dire*, reserved his decision. On May 14, 2013 the trial judge rendered his oral decision in which he found a breach

of s. 10(b) of the *Charter*, ruled the statements of the Respondent inadmissible, and proceeded to acquit him of the two charges before the Court.

ISSUES ON APPEAL

[7] In its Amended Notice of Summary Conviction Appeal, the Crown puts forward the following grounds of appeal:

> 1. The trial Judge misapprehended certain of the facts at trial.
>
> 2. The trial Judge erred at law in finding a s. 10(b) *Charter* violation.
>
> 3. The trial Judge failed to engage in a proper subsection 24(2) analysis before excluding the statements of the respondent.
>
> 4. Such further grounds as the transcript might reveal and the Court permit.

[8] Although in its Notice, the Crown originally sought to have the acquittals set aside and a conviction entered, this position modified somewhat at the hearing. In oral submissions, the Crown remained adamant that the acquittals should be set aside, but acknowledged that a new trial was also an appropriate outcome given the somewhat unique procedural aspects of the decision under appeal.

POWERS OF A SUMMARY CONVICTION APPEAL COURT

[9] The appeal before the Court has been brought under s. 813(b)(i) of the **Criminal Code**. The powers of a summary conviction appeal court are outlined in section 686(4) of the **Criminal Code** as follows:

> 686(4) If an appeal is from an acquittal or verdict that the appellant or respondent was unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal may
>
> (a) dismiss the appeal; or
>
> (b) allow the appeal, set aside the verdict and
>
> (i) order a new trial, or
>
> (ii) except where the verdict is that of a court composed of a judge and jury, enter a verdict of guilty with respect to the office of which, in its opinion the accused should have been found guilty but for the error of law, and pass a sentence that is warranted in law, or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.

ANALYSIS

Failure to undertake a proper s. 24(2) analysis

[10] For reasons which will become apparent later in this decision, the Court will address only one ground of appeal, that alleging a failure to undertake a proper s. 24(2) analysis. Although the Crown submits the trial judge erred in finding a s.

10(b) breach, it is submitted that this error was followed by yet another, a failure to consider, notwithstanding the breach, whether the statements of the Respondent should be admitted into evidence.

[11] The Crown submits that although the trial judge was clearly aware of the decision of the Supreme Court of Canada in **R. v. Grant**, 2009 SCC 32, and followed same in relation to considering whether the Respondent had been detained, once that finding had been made, the necessary second step, the s. 24(2) analysis was completely missed.

[12] The Respondent submits two arguments in relation to this ground of appeal. Firstly, relying on recent authority from the Court of Appeal (**R. v. Hiscoe**, 2013 NSCA 48), it is submitted the Crown should be prohibited from raising this particular ground of appeal, as it was not raised at trial; and secondly, this Court can infer from the trial judge's decision that s. 24(2) was in fact considered by him.

[13] In **Grant, supra**, the Supreme Court undertook not only a consideration of the scope of detention, but more importantly for the purposes of this appeal, it articulated a re-vamped approach to determining whether evidence obtained

through *Charter* infringements should be excluded under s. 24(2). The Court writes at paragraph 71 of its decision:

> A review of the authorities suggests that whether the admission of evidence obtained in breach of the *Charter* would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public interests engaged by s. 24(2), viewed in a long-term, forward-looking, and societal perspective. When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute.

[14] The Crown submits that the trial judge, although relying upon **Grant, supra** in finding a psychological detention, and resulting breach of s. 10(b), simply failed to consider, at all, the above analysis. He simply went from finding a breach, to finding the statements of the Respondent inadmissible. The Respondent submits that the Crown should not even be permitted to raise an argument relating to the s. 24(2) analysis, as this argument was not raised at the *voir dire*. Given the Respondent's reliance on **Hiscoe, supra**, a very recent decision of the Court of Appeal, a review of that particular decision is prudent at this juncture.

[15] In **Hiscoe, supra**, the Court of Appeal was called upon to consider s. 8 of the *Charter*, in particular the proper scope of a police search incidental to arrest as applied to data retrieved from an accused's cell phone. There, the accused was charged with trafficking in cocaine contrary to s. 5(2) of *the Controlled Drugs and Substances Act*, S.C. 1996, c. 19. His cell phone was checked at the time of his arrest and the following day and recent text messages were retrieved. One month later, a "data dump" was undertaken, in which the entire contents of the device were retrieved and downloaded.

[16] The accused alleged that the search of his cell phone constituted a breach of his s. 8 *Charter* rights and that the evidence obtained therefrom should be excluded. Following the *voir dire*, the trial judge determined that the full content download was beyond the scope of search incidental to arrest and thus a breach of s. 8. The trial judge then proceeded to hear the accused's application to have the evidence excluded under s. 24(2). After undertaking a "**Grant**" analysis, the trial judge excluded all of the downloaded data, except for the text messages retrieved on the day of arrest. At the conclusion of the trial, the accused was found not guilty of trafficking, but guilty of the included offence of possession.

[17] The Crown appealed, alleging the trial judge erred both in finding a breach of s. 8, and in the alternative, submitted that the trial judge erred in law in his application of s. 24(2). In prohibiting the Crown from advancing the second ground, the Court writes:

> 15 I would strike the Crown's alternative ground of appeal.
>
> 16 At trial, the Crown told the judge that if any portion of the search related to the cell phone was found to violate s. 8, it was "prepared to let that evidence be ruled inadmissible." The Crown made no submissions on the s. 24(2) application. On appeal, however, its alternative ground argues that the judge erred with regard to s. 24(2). Crown counsel candidly admitted to this court that at the *voir dire*, the Crown had decided not to argue for the admission of the evidence on the s. 24(2) application. It deliberately limited its arguments to s. 8 of the *Charter*.
>
> 17 The Crown cannot raise arguments on appeal that it chose not to advance at trial: *R. v. Varga*, [1994] O.J. No. 1111 (C.A.) at para. 25, 26, 38 and 40. As Justice Doherty stated in that case, the Crown must live with its strategic decisions both at trial and on appeal. The liberty of an accused should not be jeopardized by permitting the Crown to advance an issue for the first time on appeal.

[18] The Respondent submits this Court should take the same approach, and decline to consider the Crown's s. 24(2) argument. With respect, the circumstances in the present case are, in a very material respect, distinguishable from that in **Hiscoe, supra**.

[19] I have carefully reviewed the transcript of the *voir dire*. At no point does the Crown in its submissions, address s. 24(2). Crown counsel focusses solely on

its argument that there was, based on the evidence at the *voir dire*, no breach of s. 10(b). This is much different in my view, than the approach of the Crown in **Hiscoe**, where it was acknowledged on the record that if a s. 8 *Charter* breach was found by the court, it was "prepared to let that evidence be ruled inadmissible".

[20] In the present case, the Crown gave no indication to the trial judge or Respondent at the *voir dire*, that it in any way, was prepared to forego a s. 24(2) analysis, nor concede that any evidence would be inadmissible if a breach of s. 10(b) was found. I am not prepared to prohibit the Crown from advancing this ground of appeal.

[21] At this point, a closer consideration of the trial judge's *voir dire* decision is warranted. The decision is not lengthy - 11 paragraphs in length. In the first five paragraphs the evidence given at the *voir dire* is reviewed. In paragraphs six through nine, the trial judge explains why based upon the evidence and the factors enunciated in **Grant, supra**, relating to psychological detention, why he found the Respondent to be detained at the time when questions were posed by the officer and answered by him. He concludes in paragraph [10]:

> [10] As a result, I find the accused was in fact detained, and therefore should have been provided his section 10(b) *Charter* rights. As a consequence, any part of the conversation that occurred prior to his being arrested are excluded from my consideration.

[22] In the final paragraph of the *voir dire* decision, the trial judge turns to a consideration of whether the Crown had "made out the essential elements of 253". The trial judge then proceeds, for a number of stated reasons, to find reasonable doubt "in relation to the intricacies of an investigation and a trial under section 253(1)(a) and (b)". The accused was acquitted of both charges.

[23] As noted earlier herein, the Crown submits the trial judge did not undertake a s. 24(2) analysis, and as such committed an error of law. In his oral submission, counsel for the Respondent argued that it should be inferred that the trial judge considered the three lines of inquiry contained in a s. 24(2) analysis and balanced same appropriately.

[24] Upon review of the *voir dire* decision, I agree with the position advanced by the Crown. Given the reasons of the trial judge, this Court simply cannot conclude that he considered, at all, s. 24(2). There is no reference to the section, nor more importantly, any reference to the factors to be balanced in considering whether the

impugned evidence should be admitted or excluded. The trial judge's automatic exclusion of the Respondent's statements without undertaking a s. 24(2) analysis constituted an error of law.

[25] It would appear that an acquittal on both counts were entered at the conclusion of the *voir dire*, without either party being afforded the opportunity to call further trial evidence. In the circumstances, the appeal is allowed, the acquittals set aside, and I direct a new trial to be scheduled in front of a different judge.

J.