Docket No.: CAC 164712
Date: 20010118

NOVA SCOTIA COURT OF APPEAL

[Cite as: R. v. Hewlin, 2001 NSCA 16]

Roscoe, Chipman and Oland, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

SHAWN RAYMOND HEWLIN

Respondent

REASONS FOR JUDGMENT

Counsel:	Marion V.R. Fortune-Stone, for the appellant Philip J. Star, Q.C., for the respondent
Appeal Heard:	January 18, 2001
Judgment Delivered:	January 18, 2001
THE COURT:	Appeal allowed as per oral reasons of Roscoe, J.A.; Chipman and Oland, JJ.A. concurring.

The reasons for judgment of the Court were delivered orally by:

ROSCOE, J.A.:

[1] The issue raised by this appeal is whether the respondent's rights to be secure against unreasonable search or seizure guaranteed by s.8 of the **Charter** were infringed when he was the subject of a pat down search. The background facts are set out in this court's decision reported as **R. v. Hewlin** (1999), 174 N.S.R. (2d) 93. As a result of that decision the matter was remitted to the Provincial Court for a new trial. At the new trial, the respondent alleged that his rights pursuant to sections 7, 8, 9 and 10(b) of the **Charter** were breached. By agreement of the parties the new trial judge, Chief Judge J.L. Batiot, based his decision on the **Charter** motions upon the evidence called on the original trial.

[2] Batiot, C.J. succinctly stated the facts commencing at paragraph 2 of his decision as:

> [2] July 19th, 1996 was a dark and rainy night. At about 21:00 hrs, Mr. Shawn Hewlin, the accused, drove away from his home situate on Sissiboo Road, Digby County, Province of Nova Scotia. Unbeknownst to him, Constable Mary Jo Gates, of the Digby R.C.M.P., acting on confidential information, was watching from a ditch. She radioed Corporal Mahoney her observations.

[3] Corporal Karl John Mahoney, of the Yarmouth Detachment of the RCMP, Drug section, was stationed in an unmarked police car some distance away, ready to intercept the vehicle described by Const. Gates. In fact there were two vehicles; he passed and stopped both of them at 21:40 hrs. From the evidence, the two officers do not appear to have been very far apart, and the 40 minutes are likely due to an error of time keeping, or of faulty recall.

[4] Stopped first and immediately behind the Corporal's car was a Ford half ton truck. A larger car was behind the truck; Auxiliary Constable Miller checked it. Corporal Mahoney looked and identified immediately the driver and sole occupant of the truck as the accused, whom he knew from a past encounter.

[5] His original intention was to further the purpose of the surveillance: gather any observations with respect to the use (or transportation) of drugs. But the Corporal also knew the accused to be a suspended or prohibited driver and thus went about to ascertain that status. He looked in the cabin, with a flashlight, asked for a driver's license, and may have observed at that time, beside the driver, a radar detector. I say "may" as there is also evidence that it may have been discovered later, when the accused went back to his truck to look further for the requested documents.

[6] Mr. Hewlin did not have any papers with him. He was invited to go to the police car. Upon reaching the rear passenger door, Corp. Mahoney advised the accused there would be a pat-down search before he entered the car: there was no protective shield and it was the officer's standard practice to do so, in order to secure his own safety.

[7] The accused then reached in his right pocket and "*showed*" the officer its content, some paper money and something which appeared light-coloured and the size of a quarter; this, the accused threw over the guardrail, in an underhand toss, in line with the bumper of the police car, toward the ditch, about 15 or 20 feet away, and down an embankment, describing it as *litter, a piece of foil*. The officer did not touch the money but asked whether it was some drug. "*No*" was the response.

[8] The officer did a visual and a very quick pat-down check of the accused and invited him in the back of the police car. After some 5 minutes, the accused suggested to go back to his truck for his papers. At that time the radar detector was seized and soon after the officer released the accused, satisfied he was licensed but advising him there may be consequences if he finds anything suspicious in the ditch.

> [9] By 22:15 hrs, Corporal Mahoney had Constable Mitchell, the "*dog man*", at the scene. He explained to him where to direct Hunter, a German Shepherd police service dog, trained to detect drugs and human scented material. He showed the area, in line with the bumper of the car, over the guard rail, and down the ditch. Within 5 minutes, after settling in, Hunter discovered the exhibit on the first sweep. A second sweep proved fruitless. There was much garbage in the grass, paper, pop bottles, even an old typewriter. It was later analysed as containing 16 "hits" of LSD.

[3] The trial judge found that the detention was lawful, but under the circumstances the search was unreasonable and excluded the evidence pursuant to s. 24(2) of the **Charter**. His conclusion in respect of the s. 8 motion is as follows:

> [28] We can conclude that police officers have a common law power to stop and frisk suspects detained for investigation, upon articulable cause, as necessary ancillary to their general duties to protect the State, and themselves, during and immediately after a stop.
>
> [29] In the case at bar, Corporal Mahoney wished to check the accused for weapons, before entering the police car, after detaining him specifically for a suspected Motor Vehicle offence, having set aside his earlier suspicions of a possible drug offence. Were there articulable causes to search based on objective evidence? The officer mentions that there was no security divider in the car and the accused had loose clothing, and that it was his practice to do so. There was no indication of suspected violent behaviour. The stop very quickly turned into a motor vehicle check, albeit in adverse weather conditions, in a dark evening. There is, however, nothing in the evidence to indicate any grounds, on the part of the officer, or any observations, of suspicious, or possible violent behaviour, on the part of the accused. Indeed the conversation was very civil. In my opinion, there was insufficient grounds to search the accused. Accordingly there is a breach of s. 8 of the **Charter**.

[4] As to the issue of possession, the trial judge concluded:

> [38] . . . I do come to the conclusion, that the accused was in

> possession of the drug as charged, as it *is the only reasonable inference to be drawn from the proven facts* (see **R. v. Cooper** (1977), 74 D.L.R. (3rd) 731 (S.C.C.), at p. 732.
>
> [39] In light of my findings however with respect to the breach of the **Charter** and the case made out by the defence for exclusion of the evidence, I do exclude this evidence together with that of the toss by the accused. Without that evidence, there is no LSD before The Court and I must therefore find the accused not guilty.

[5] We agree with the Crown's submission that the trial judge erred in law in concluding that the search of the respondent was unreasonable. Based on the decisions in **R. v. Boyd** (1989), 89 N.S.R. (2d) 173 (A.D.), **Cloutier v. Langlois et al.** (1990), 53 C.C.C. (3d) 257 (S.C.C.), **R. v. Stillman** (1997), 113 C.C.C. (3d) 321 (S.C.C.) and **R. v. Lake** (1996), 113 C.C.C. (3d) 208 (Sask.C.A.), cited in the appellant's factum, we find that the search of the respondent was reasonable. It was authorized by a common law power of search incident to a lawful detention or arrest. This law has been found to be reasonable, and the search was reasonable in the manner in which it was carried out. In the circumstances of this case, the trial judge erred by finding that the police officer needed independent grounds to perform a search incident to detention.

[6] We grant leave to appeal, allow the appeal and, in view of the conclusions of the trial judge, remit the matter to the Provincial Court for the entering of a conviction and the imposition of sentence.

Roscoe, J.A.

Concurred in:

Chipman, J.A.

Oland, J.A.