S.C.C. No. 02729

NOVA SCOTIA COURT OF APPEAL

Hallett, Chipman and Freeman, JJ.A.
Cite as: R. v. Johnson, 1993 NSCA 47

B E T W E E N:

SCOTT DOUGLAS JOHNSON	**Stanley W. MacDonald for appellant**
appellant	
- and -	
HER MAJESTY THE QUEEN	**Robert E. Lutes for respondent**
respondent	
	Appeal Heard: February 3, l993
	Judgment Delivered: February 5, l993

THE COURT: Appeal from conviction on charge of break, enter and theft dismissed per reasons of Freeman, J.A.; Hallett and Chipman, JJ.A., concurring.

FREEMAN, J.A.:

This is an appeal against a conviction on a charge of break, enter

and theft contrary to s. 348(1)(b) of the **Criminal Code** on grounds that the appellant's inculpatory statement should not have been admitted into evidence because it followed an infringement of his right to counsel.

The appellant, Scott Douglas Johnson, and two co-accused were arrested in an apartment working on a bike after a break at a bicycle shop. Mr. Johnson was given the police caution and advised of his right to retain and instruct counsel. At that time he does not appear to have been told of his right to counsel "without delay."

He was not given an opportunity to telephone counsel until he arrived at the police station. He was driven there in the back of an unmarked police car; the driver and Constable Mark Hartlen were in the front seat. The vehicle stopped at the scene of the break-in and Constable Hartlen, who was not carrying his notebook, asked him several questions about where he had been that evening. His answers appear to have been intended to be exculpatory, but they placed him at the scene.

At the police station he was again told of his right to counsel and given police warning. He was offered a telephone book and a list of Legal Aid lawyers. He specifically declined the right to counsel and made an inculpatory statement which was taken down in writing and signed. It was admitted into evidence after a voir dire. The trial judge, His Honour Judge Michael Sherar of the Provincial Court, relied on the statement in convicting Mr. Johnson.

The following is the sole ground of appeal:

> "The learned trial judge erred by admitting into evidence a written statement given by the appellant after the appellant's right to counsel pursuant to Section 10(b) of the **Canadian Charter of Rights and Freedoms** had been infringed on two occasions."

The "two occasions" were stated by Judge Sherar as follows:

> "Counsel for Mr. Johnson points out at least two violations of his Section 10(b) rights. One, Mr. Johnson should not have been questioned prior to his being able to contact counsel or waiving his right to counsel. Two, Mr. Johnson was not advised at any time that he could contact counsel without delay."

In a lengthy and well considered decision on the voir dire Judge Sherar appears to have been scrupulously sensitive to the **Charter** rights of the appellant. He accepts both grounds referred to above as having been established.

While the police officers did not specifically state that Mr. Johnson was told he could contact counsel without delay upon his arrest, any deficiency was remedied in advance of his incriminating statement when he was provided at the police station with the telephone and list of legal aid lawyers. At that point Mr.Johnson, as the result of the words and actions of the police officers, must be considered to have been well aware that he could contact counsel without delay. It was only after he was fully informed as to his rights that he waived his right to counsel and made his incriminating statement.

The delay occasioned by the drive to the police station was a necessary one, but it was unnecessarily lengthened by the stop at the cycle shop. The questioning that took place during that period, before police had provided him with an opportunity to contact counsel, was an infringement of his right to counsel.

The subsequent incriminating statement must be considered in the light of strong statements by the Supreme Court of Canada that "the use of self-incriminating evidence obtained following a denial of the right to

counsel will generally go to the very fairness of the trial and should generally be excluded"--McLachlin, J. in **R. v. Evans** (1990), 63 C.C.C. (3d) 289 quoting Lamer, J. (as he then was) in **R. v. Collins** (1987), 33 C.C.C. (3d) 1.

In **R. v. Strachan** (1991), 67 C.R. (3d) 87 Chief Justice Dickson (as he then was) rejected the need for a causal connection when self-incriminating evidence was gathered following a violation of a **Charter** right, including a right to counsel:

> "In my view, all of the pitfalls of causation may be avoided by adopting an approach that focuses on the entire chain of events during which the Charter violation occurred and the evidence was obtained. Accordingly, the first inquiry under s. 24 (2) would be to determine whether a Charter violation occurred in the course of obtaining the evidence."

In examining the entire chain of events in the present case it may be noted, nevertheless, that no causal connection appears to exist between the **Charter** infringement and the subsequent statement.

In his often quoted statement in **Collins,** Lamer, J. cited the judgment of LeDain, J. in **Therens** (1985), 18 C.C.C. (3d) 481, 18 D.L.R. (4th) 493, [1986] 1 S.C.R. 383 at p 512 C.C.C., p. 686 D.L.R., p. 652 S.C.R.:

> "The relative seriousness of the constitutional violation has been assessed in the light of whether it was committed in good faith, or was inadvertent of or a merely technical nature, or whether it was deliberate, wilful or flagrant."

The present infringement can hardly be considered serious, in the sense of causing Mr. Johnson prejudice or disadvantage. The police had informed Mr. Johnson of his right to counsel, albeit defectively, and he had not asserted his right to counsel. It would appear inadvertent or

thoughtless rather than deliberate, wilful or flagrant: the officer did not even have a notebook. It was technical in nature, with a minimal impact on subsequent events. It must be considered in light of the fact that Mr. Johnson never attempted to assert his right to counsel and, presented with a telephone and list of names, specifically waived it.

It cannot be said with any semblance of reality that the infringement was of a nature or consequence that could operate unfairly against the appellant or affect the fairness of his trial.

Judge Sherar thoroughly considered the case law. He excluded the statement made by one of the co-accused after a more serious **Charter** violation. He found that the appellant had not met the onus under s. 24(2) of proving that the evidence should be excluded because it would bring the administration of justice into disrepute--see **Collins**, **supra**. In our opinion he committed no reversible error. The appeal is dismissed.

Freeman, J.A.

Concurred in: Hallett, J.A.

Chipman, J.A.

NOVA SCOTIA COURT OF APPEAL

B E T W E E N:

SCOTT DOUGLAS JOHNSON	)	**REASONS FOR**
	)	
appellant	)	**JUDGMENT BY:**
	)	
- and -	)	**FREEMAN, J.A.**
	)	
HER MAJESTY THE QUEEN		