C.A.C. No. 105615

NOVA SCOTIA COURT OF APPEAL

Freeman, Roscoe and Pugsley, JJ.A.

Cite as: R. v. G.M.R., 1994 NSCA 247

BETWEEN:

G.M.R. Appellant - and - HER MAJESTY THE QUEEN Respondent	)	Roger A. Burrill for the Appellant Robert E. Lutes, Q.C. for the Respondent Appeal Heard: November 10, 1994 Judgment Delivered: December 19, 1994

THE COURT: Appeal allowed, conviction set aside and acquittal entered, per reasons for judgment of Freeman, J.A.; Roscoe and Pugsley, JJ.A. concurring.

FREEMAN, J.A.:

The appellant, seeking to overturn a conviction for break, enter and theft with respect to a private dwelling, alleges errors of law by the Youth Court judge under the **Young Offenders Act**, R.S.C. 1985 c. Y-1 and the **Canadian Charter of Rights and Freedoms** in the admission of a statement and fingerprint evidence.

The judge found the statement had been taken after a violation of s. 10(b) of the **Charter** but that it should not be excluded from evidence under s. 24(2). The appellant argues the fingerprint evidence was also tainted by the **Charter** breach should not have been admitted. The Crown argues by notice of contention that s. 10(b) was not breached.

THE FACTS

The home of John McNaughton was burglarized some time after 8:00 a.m., on December 9, 1993. A neighbour testified he saw a youth aged fourteen or fifteen at the McNaughton's back door about 10:20 a.m., and subsequently heard banging sounds. He could not identify the appellant in court. Corporal Joseph Gillis of the R.C.M.P., identification section, attended at the McNaughton home and lifted latent fingerprints from the point of entry at the back door.

Constable Robert Thorne of the R.C.M.P. testified that G.M.R became a suspect in the course of his investigation on December 9th, which included interviewing the neighbour. At that time he learned that G.M.R. was also involved in a pointing firearm offence at the McNaughton address prior to December 9th. On December 10th, G.M.R. was arrested for pointing a firearm. He was not, however, charged with that offence.

He gave a written statement followed by oral statements which were ruled inadmissible. Fingerprints taken on a "non-criminal" fingerprint form at that time were also ruled inadmissible.

Constables Thorne and Dempsey returned to G.M.R.'s home on January 16, 1994, and arrested him on the present break and enter charge in light of the fingerprints evidence. A new statement was taken at the Cole Harbour R.C.M.P. detachment and fingerprints were again taken, this time on a "criminal" fingerprint form pursuant to the **Identification of Criminals Act** R.S.C. 1985 c. I-1. That statement and set of fingerprints were admitted into evidence and they are at issue in this appeal.

THE STATEMENTS

The January 16th statement was taken on a form, since replaced, purporting to follow the requirements of s. 56 of the **Young Offenders Act**. It contains a number of cautionary statements explaining the young person's rights to silence and to counsel which were read to G.M.R. by Constable Thorne. G.M.R. stated that he understood each one. For purposes of this appeal the key provision of the form in use at that time is the following:

> B) IT IS ALSO MY DUTY TO INFORM YOU THAT YOU HAVE THE RIGHT TO CONSULT WITH COUNSEL (A LAWYER). A PARENT, AN ADULT RELATIVE OR ANOTHER APPROPRIATE ADULT. DO YOU UNDERSTAND?

The form reflects the language of s. 56(2)(c) which provides that no oral or written statement is admissible against a young person unless

> (c) The young person has, before the statement was made, been given a reasonable opportunity to consult with counsel or a parent, or in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person.

Read by itself, this section could be seen to provide the right to consult with a parent or other adult as an alternative to the right to consult with a lawyer. However the right to consult with a lawyer is guaranteed by s. 10(b) of the **Charter** and restated with some elaboration in s. 11 of the **Young Offenders Act**. Section 56 cannot diminish the guaranteed right to counsel; it can only add to it by introducing an

additional right to consult with a parent or other adult. In **E.T. v. R**. (1993), 86 C.C.C. (3d) 289 (S.C.C.), on which the appellant relies, Sopinka J. makes it clear at p. 301 that "a young person is given the right to consult with a parent or other adult as well as the right to counsel on arrest or detention, and is entitled to have a lawyer or other adult present when making a statement."

Sopinka J. stated at p. 298:

> . . . The only interpretation of s. 56 which is consistent with both s. 10(b) of the **Charter** and s. 11 **YOA** is that a parent is not an alternative to counsel unless the right to counsel is waived.

Since **E.T**. a new statement form has been introduced in which the explanatory provisions attempt to reflect this interpretation, and which explains that an application can be made for the transfer into adult court of a young person fourteen years of age or over charged with committing an indictable offence for which an adult would be liable to imprisonment for five years or more.

G.M.R. orally purported to waive the right to counsel before making his statement of January 16, 1994. It was not considered necessary that the waiver be in writing because G.M.R. had called his mother from the interview room and consulted with her, thus exercising one of the rights provided by s. 56(2)(c). However it had not been explained to him that he was subject to transfer to adult court. Therefore, on the authority of **E.T**., the waiver of the right to counsel was not valid.

Sopinka J. stated at p. 299:

> The right of the accused to know the extent of his or her jeopardy in the context of the s. 10(b) right to counsel was discussed by this court in **R. v. Smith** (1991), 63 C.C.C. (3d) 313, [1991] 1 S.C.R. 714, 4 C.R. (4th) 125, a case in which the police had failed to advise the accused that his shooting victim had died. McLachlin J. for the court, summarized the law in this area as follows, at p. 322:
>
> > In Canada, we have adopted a different approach [than that in the United States]. We

> take the view that the accused's understanding of his situation is relevant to whether he has made a valid and informed waiver. This approach is mandated by s. 10(a) of the **Charter**, which gives the detainee the right to be promptly advised of the reasons for his or her detention. It is exemplified by three related concepts: (1) the "tainting" of a warning as to the right to counsel by lack of information; (2) the idea that one is entitled to know "the extent of one's jeopardy", and (3) the concept of "awareness of the consequences" developed in the context of waiver. . . .
>
> Applying these principles to the young offender context, it seems to me that the phenomenal difference in potential consequences faced by the young person in youth court as opposed to adult court mandates that a young person be aware of the possibility (where it exists) that he or she will be elevated to adult court, and the potential result of this in terms of stigma and penalty. In the present case, this means that E.T. should have been advised that the Crown might apply to have him tried in adult court and that the maximum penalty which he might face, given that a death was involved, is life imprisonment without parole for 25 years.

In the present case the Youth Court judge found that, while the statement form indicated the right to consult with a parent or other adult as an alternative to speaking with counsel, G.M.R. had been advised of his right to counsel under s. 10(b) orally by the police officer. The Youth Court judge found it was not a requirement of s. 11 of the **Young Offenders Act** or s. 10(b) of the **Charter** that G.M.R's waiver of his right to counsel be in writing. She stated:

> . . . With all due respect, s. 56 speaks of waivers in writing with respect to the rights, which, or the obligations upon the police with respect to that section. But, s. 11 certainly, and certainly, s. 10(b) do not carry with them the obligation that any waiver of right to counsel be made in writing and, in these circumstances, I am satisfied that G.M.R was given his rights to counsel pursuant to s. 10(b).

I do not disagree that s. 11 of the **Young Offenders Act** and s. 10(b) of the **Charter** can be satisfied by the oral reading of rights by a police officer in a context

separate from the taking of a statement. However s. 56(2) and (4) of the **Young Offenders Act** provide:

> (2) No oral or written statement given by a young person to a peace officer or other person who is, in law, a person in authority is admissible against the young person unless
>
> . . .
>
> (3) . . .
>
> (4) A young person may waive his rights under paragraph (2)(c) or (d) [the right to consult with counsel or a parent or other adult, and the right to make any statement in the presence of counsel, a parent or another adult] but any such waiver shall be made in writing and shall contain a statement signed by the young person that he has been apprised of the right that he is waiving.

A waiver in writing is therefore a prerequisite to the admission of a statement by a young person unless he or she has exercised the right to consult with counsel and a parent or other adult.

There is no such requirement respecting statements by adults, on whom there is a considerably heavier onus with respect to the right to counsel. The judgment of the Supreme Court of Canada in **R. v. Baig** (1988), 37 C.C.C. (3d) 181 stated:

> We agree with Tarnopolsky J.A. in **R. v. Anderson** (1984), 10 C.C.C. (3d) 417 (Ont. C.A.), wherein he said, at 431:
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> > . . . I am of the view that, absent proof of circumstances indicating that the accused did not understand his right to retain counsel when he was informed of it, the onus has to be on him to prove that he asked for the right but it was denied or he was denied any opportunity to even ask for it. No such evidence was put forth in this case.
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> In the present case, the accused did not put forward, nor does the record reveal, any evidence suggesting that he was denied an opportunity to ask for counsel. Absent such circumstances, as that referred to by Tarnopolsky J.A., once the police have complied with s. 10(b), by advising the

> accused without delay of his right to counsel without delay, there are no correlative duties triggered and cast upon them until the accused, if he so chooses, has indicated his desire to exercise his right to counsel.

The right to counsel referred to, and elaborated upon in the context of young people, in s. 56 and 11 of the **Young Offenders Act** is the same right to counsel referred to in s. 10(b) of the **Charter**. There is no independent right to counsel which can be waived separately. If the right to counsel is exercised, the same consultation with counsel would satisfy all three provisions. As Sopinka J. said in **E.T.**, the right to speak with a parent or other adult is not an alternative to the right to counsel but rather an additional right granted to young people. It follows therefore that the s. 56(4) requirement of a written waiver, another additional right granted to young people, cannot be read in the alternative. Section 56(4) refers to the waiver of two rights, and it is not sufficient compliance with s. 56(2) and (4) to waive just one of them unless the other has been exercised. That is to say, both the right to counsel and the right to speak with a parent or another adult, and have them present, if not exercised, must be waived in writing if the statement of a young person is to be admissible. A statement made by a young person who has not exercised his or her right to counsel is not admissible under s. 56(2) and (4) unless there is a waiver of that right in writing, regardless of whether the young person has spoken with another adult. With respect, it was an error of law for the Youth Court judge to hold otherwise. While there would seem to be no need to consider the exclusion of the statement under s. 24(2) of the **Charter** because it is not admissible under s. 56, counsel sought a ruling on the **Charter** considerations.

With regard to the need to warn of the risk of transfer to adult court identified by Sopinka J. in **E.T**., the Youth Court judge considered that there was never

an attempt to raise the present case to adult court and found the facts and circumstances were "distinctly different" from those in **E.T.** She therefore concluded:

> I am not satisfied in these circumstances that to admit the evidence, admit the statement into evidence would bring the administration of justice into disrepute and I am satisfied that, if one concludes that the comments of Mr. Justice Sopinka make it mandatory that a warning be given of possible transfer and that failure to do so results in a breach of a **Charter** right, pursuant to s. 10(b) that, even in that event, upon a consideration of s. 24(2), the statement, Exhibit VD-II ought to be admitted under the circumstances.

The language used by Sopinka J. was very clear.

> . . . [T] he phenomenal difference in potential consequences faced by the young person in youth court as opposed to adult court mandates that a young person be aware of the possibility (where it exists) that he or she will be elevated to adult court . . .

Transfer to adult court is possible only for young persons over fourteen when the maximum sentence for the offence under the **Criminal Code** is five years imprisonment or greater. The maximum disposition under the **Young Offenders Act** for an offence punishable by five years imprisonment in adult court would be two years, a three year differential. The Crown argues on the appeal that in **E.T**. the difference between a Youth Court disposition (then for a maximum of three years on a murder charge) and a possible sentence of life imprisonment with no prospect of parole for twenty-five years is truly "phenomenal", but that G.M.R. was facing a much smaller contrast in dispositions. Although the theoretical maximum for burglary in a dwelling house is life imprisonment, in practice sentences do not approach the maximum. The Crown argued that recent amendments to the **Young Offenders Act** have increased the maximum disposition for murder to five years, and that there is a continuum from Youth Court to adult court dispositions, not a phenomenal difference. In some instances

adults may serve less time in prison than young offenders do in youth centres for similar offences.

In my view, however, the difference remains so great both as to kind and degree, as to sentencing philosophy as well as stigma and penalty, that a young person cannot be said to understand his or her jeopardy unless the possibility of transfer to adult court, where applicable, has been explained. Failure to warn of such a phenomenal difference in consequences rings in the concerns raised by McLachlin J. in **Smith**:

> (1) the "tainting" of a warning as to the right to counsel by lack of information; (2) the idea that one is entitled to know "the extent of one's jeopardy", and (3) the concept of "awareness of the consequences" developed in the context of waiver.

In the absence of the warning, and it is acknowledged that G.M.R. was not warned, there could be no valid waiver of his right to counsel, even if one had been made in writing. Therefore, following **E.T.**, there has been an infringement of G.M.R.'s right to counsel. This requires an analysis, in the context of **Collins** (1987), 33 C.C.C. (3d) 1 (S.C.C.), of whether the admission of the evidence would affect the fairness of the trial:

> At p. 19 of **Collins** Lamer J., as he then was, stated:
>
> . . . It is clear to me, that the factors relevant to this determination will include the nature of the evidence obtained as a result of the violation and the nature of the right violated and not so much the manner in which the right was violated. Real evidence that was obtained in a manner that violated the **Charter** will rarely operate unfairly for that reason alone. The real evidence existed irrespective of the violation of the **Charter** and its use does not render the trial unfair. However the situation is very different with respect to cases where, after a violation of the **Charter**, the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination. Such evidence

> will generally arise in the context of an infringement of the right to counsel.

The Crown cites **R. v. Duguay** (1989), 67 C.R. (3d) 252 (S.C.C.), which was mentioned with approval by Iaccobucci J., in **R. v. Borden** (Unreported - September 30, 1994 - S.C.C.):

> It was not the proper function of the Supreme Court, though it had jurisdiction to do so, absent some apparent error as to the applicable principles or rules of law, or absent a finding that is unreasonable, to review findings of the courts below under s. 24(2) of the **Charter** and substitute its opinion of the matter for that arrived at by the Court of Appeal.

I would agree with the Crown argument that the same principle applies to this court in considering the conclusions of the Youth Court judge. However a statement was taken from G.M.R. when he had neither consulted with counsel nor waived his right to do so. His non-waiver was in the context of a failure to explain to him his jeopardy. While there was to be no attempt to transfer his case to adult court, that was not known or knowable at the time of his arrest or detention, a time identified by the **Charter** as a crucial one with respect to the right to counsel and the right to silence. Had he been given the information to which he was entitled under **E.T.**, it could have changed his decision with respect to exercising his right to counsel, which in turn could have changed his decision with respect to the statement. There is nothing in the present circumstances to distinguish the present case from the language of **Collins**: G.M.R. was "conscripted against himself through a confession emanating from him . . . . The use of such evidence would render the trial unfair." I would find that the Youth Court judge was in error as to an applicable principle, and that the statement must be excluded under s. 24(2). I would allow the appeal on this ground and dismiss the notice of contention.

THE FINGERPRINTS

The fingerprint evidence involves more complex considerations. Latent prints were lifted from the crime scene by Corporal Gillis on December 9, 1993, a day before the first police contact with G.M.R. in connection with this offence. They were real evidence as opposed to a confession, and they were not evidence derived from inadmissible statements nor an unlawful arrest. There was neither a temporal nor a causal nexus with the s. 10(b) breach which affected the admissibility of the statements. The issues turn on the fingerprints taken from G.M.R. for comparison purposes. Statutory authority for taking such fingerprints is found in s. 2(1) of the **Identification of Criminals Act**, which provides:

> 2(1) Any person who is in lawful custody, charged with or under conviction of, an indictable offence, or who has been apprehended under the **Extradition Act** or the **Fugitive Offenders Act** may be subjected, by or under the direction of those in whose custody the person is, to
>
> (a) the measurements, processes and operations practiced under the system for the identification of criminals commonly known as the Bertillon Signaletic System; or
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> (b) any measurements, processes or operations sanctioned by the Governor in Council that have the same object as the measurements, processes and operations practiced under the Bertillon Signaletic System.

The **Identification of Criminals Act** applies to young persons pursuant to s. 44(1) of the **Young Offenders Act**. Section 51 of the **Young Offenders Act** incorporates all provisions of the **Criminal Code** which are not inconsistent with it or excluded by it, including provisions for taking fingerprints when the accused person is not in actual custody. Section 509(5) provides that a person alleged to have committed an indictable offence may be required to appear for fingerprinting by summons. Section 501(3) provides that a person alleged to have committed an indictable offence may be required to appear for fingerprinting by an appearance notice in which event such

person is deemed for purposes of the **Identification of Criminals Act** "to be in lawful custody charged with an indictable offence."

The first set of fingerprints taken from G.M.R. on December 10th was on a "non-criminal form" - that is, they were taken by consent and not under the authority of the **Identification of Criminals Act**. He had been apprehended on December 10th, 1993, with respect to the offence of pointing a firearm contrary to s. 86(1) of the **Criminal Code** and made a first statement that was non-incriminating with respect to the present offence. The Youth Court judge held there had been a shift in the direction of the investigation to focus on the present case and G.M.R. should have been given the right to counsel again at that time. She found the first statement inadmissible and rejected the consensual fingerprints on the same basis. In my view she was correct in doing so; there was an infringement of G.M.R.'s rights under s. 10(b) of the **Charter,** distinct from the infringement considered above, which invalidated G.M.R.'s consent to giving his fingerprints - see **Borden**.

The Crown has argued that fingerprints could have been taken on December 10, 1993, under the authority of s. 2 (1) of the **Identification of Criminals Act** and that proceeding by consent created no substantial unfairness. Assuming that the police had reasonable grounds for believing the appellant had committed an offence contrary to s. 86(1) of the **Criminal Code**, he was in lawful custody at the material time and had not been arbitrarily detained. However he was not charged under s. 86(1), then or subsequently. Thus the police had no right to demand his fingerprints.

G.M.R. was arrested on January 16, 1994, and charged with the break and enter offence. It is clear from the evidence that the police relied on a comparison of the set of fingerprints taken December 10, 1993, with those found at the crime scene as reasonable grounds for belief he had committed the offence, thus justifying his arrest pursuant to s. 495(1)(a) of the **Criminal Code**. At that time they required that he

provide another set of fingerprints under the authority of s. 2(1) of the **Identification of Criminals Act** on the basis that he was in lawful custody and charged with an indictable offence. The first set of fingerprints which the police relied on to provide reasonable grounds for the belief that G.M.R. had committed the offence with which he was charged was later found to be inadmissible as evidence, as discussed above. This raises several issues with respect to the January 16 fingerprints:

1. Were they lawfully obtained pursuant to s. 2(1) of the **Identification of Criminals Act**?

2. Were they derivative evidence tainted by the **Charter** breach on December 10, 1993?

3. If they were tainted, should they be excluded pursuant to s. 24(2) of the **Charter**?

The Youth Court judge found the second set of fingerprints would have been derived from the first set had it not been for the intervening statement of G.M.R. which gave the police fresh grounds for the arrest. That statement was made after the arrest, for which I have found the police had reasonable grounds. It was therefore irrelevant to the taking of the second set of fingerprints, which depends not on belief that the accused is involved in the offence, but on whether the criteria of s. 2(1) of the **Identification of Criminals Act** have been met.

That section is satisfied when a person is in lawful custody and charged with an indictable offence or under conviction of an indictable offence. Then fingerprints can be demanded, and even taken by force. In **R. v. Beare**, [1988] 2 S.C.R. 387 at p. 403, LaForest, J. stated:

> In brief, the main purposes of the **Identification of Criminals Act** and the allied provisions of the **Code**, as they apply to a person charged with but not convicted of an offence, are to establish the identity and criminal record of the accused, to discover whether there are warrants outstanding for his arrest or if he has escaped from lawful

> custody, and, in some cases, to gather evidence which may be relevant to the question of whether or not he committed the crime with which he has been charged.

The appellant argues that G.M.R. was not in lawful custody, the first criterion under s. 2(1) of the **Identification of Criminals Act**: the arrest was improper because the evidence in support of it was inadmissible and the police had no admissible evidence on which to find a reasonable and probable belief in his involvement. The appellant cites **R. v. Duguay, Murphy and Sevigny** (1985), 18 C.C.C. (3d) 289 (Ont. C.A.) in which statements and fingerprints taken from the accused were found inadmissible because the police had no basis for honestly believing there was reasonable cause for the arrest of the accused. It was found that "the arrest or detention was arbitrary, being for quite an improper purpose - namely, to assist in the investigation."

In the present case the arrest was not arbitrary and there can be no question as to the good faith of the police officers, as there was in **R. v. Duguay, Murphy and Sevigny,** which was upheld by the Supreme Court of Canada in (1989), 67 C.R. (3d) 252.

In a dissenting opinion in **R. v. Duguay, Murphy and Sevigny**, Zuber J.A., of the Ontario Court of Appeal, identified the nub of the present issue when he stated at p. 302:

> To believe on reasonable and probable grounds that a person has committed an indictable offence does not require that the grounds be made up of evidence that can later be adduced in a court-room.

In **R. v. Allen** (1985), 18 C.C.C. (3d) 155 (Ont. C.A.) a police officer with a warrant arrested and charged the accused with threatening. He escaped and was recaptured but the warrant was never served on him as required by the **Code**. He was charged with escaping lawful custody. At trial, because of the failure to comply with the

Code, the charge of threatening was dismissed. The trial judge therefore acquitted him on the escaping charge. The Court of Appeal held that the accused was in lawful custody at the time he escaped. Goodman J.A. held at p. 158:

> In our view, the custody was lawful at the time of the escape and did not become retroactively unlawful by reason of failure to serve a copy of the warrant as soon as practicable after the respondent was taken to the police station. In that regard, see **Wiltshire v. Barrett,** [1966] 1 Q.B. 312 at p. 323, where Denning M.R. said " . . . the general rule that an act which is lawful at the time is not to be rendered unlawful afterwards by the doctrine of relation back . . . "

Wiltshire was also cited by the Supreme Court of Canada in **R. v. Biron,** [1976] 2 S.C.R. 56. The court analyzed the validity of a charge for resisting arrest when the original charge for disturbing the peace had been dismissed. The arrest was without a warrant, and the issue was whether the officer saw the accused committing a crime. The court held that "apparently committing a crime" is sufficient, and that even though the initial charge was unfounded the resisting arrest charge could stick. Martland, J., held at p.72:

> My view is that the validity of an arrest under this paragraph [s. 450(1)(b), now s. 495(1)(b)] must be determined in relation to the circumstances which were apparent to the peace officer at the time the arrest was made.

For present purposes the test for the validity of an unlawful arrest pursuant to s. 495 (1)(a) of the **Criminal Code** must be whether a reasonable person in the position of the police officer would consider that reasonable grounds existed, at the time of making the arrest, for believing that the accused had committed an indictable offence. What is critical is the belief that the accused committed the act comprising the offence, not whether there is admissible evidence by which his or her guilt can be proven beyond a reasonable doubt. Dismissal of a charge for want of sufficient

evidence is generally immaterial to the validity of the arrest. In my view therefore the comparison of the fingerprint evidence taken on December 10, 1993, with the fingerprints lifted at the scene of the offence was sufficient to provide the police with reasonable grounds for arresting and charging G.M.R. This satisfied s. 2(1) of the **Identification of Criminals Act**, giving the police the necessary statutory authority to demand fingerprints on the "criminal form" on January 16, 1994.

There is a sharp distinction however between the reasonable grounds of belief by the police officers leading to the creation of the second set of fingerprints, and the admissibility of those fingerprints as evidence at trial. On December 10, 1993, G.M.R. was not advised of his right to counsel under s. 10(b) of the **Charter** when the investigation with respect to the s. 86(1) offence shifted to the present burglary offence. Indeed, the evidence makes it clear that the burglary investigation was the main reason G.M.R. was arrested on December 10 for the s. 86(1) offence. That **Charter** breach clearly preceded the taking of both sets of fingerprints from G.M.R. In addition to this temporal nexus, there was a clear causal nexus as well. Without the first set of fingerprints the police would have had no grounds for taking G.M.R. into custody or for charging him with the offence; that is, for satisfying s. 2(1) of the **Identification of Criminals Act**. Without the first set of fingerprints, the second set could not have been brought into existence. The first set resulted from a **Charter** breach, the second set derived from it.

Fingerprint evidence is of a higher degree of reliability, and therefore of probative value, than confession evidence. It is real evidence in that a person's fingerprints are an objective, unchanging part of one's person. An unfairly taken statement may not be true; unfairly taken fingerprints cannot be false. However, these considerations would appear to have been taken into account by Parliament in enacting the **Identification of Criminals Act**, under which fingerprints can be demanded in a

constitutionally valid way - see **Beare**. This merely brings fingerprint evidence into existence; once it is produced it must be subjected to the same **Charter** scrutiny as any other evidence.

G.M.R. was not given his right to counsel with respect to the burglary charge on December 10, 1993, and therefore was denied the opportunity of being advised by counsel that, because he was not charged with any offence he was under no legal duty to provide fingerprints. That vitiated his consent to the fingerprints which were taken on that date, and without them there would have been no basis on January 10, 1994, for taking the fingerprints now in issue.

This goes to the fairness of the trial. Applying the principles set out in **R. v. Collins**, I would exclude the fingerprints taken January 10, 1994 pursuant to s. 24(2) of the **Charter**. I do not consider it contradictory that the police were justified in taking the fingerprints but that they must be excluded from evidence. I am not persuaded of the existence of evidence other than the excluded statements and fingerprints which would justify a new trial.

I would therefore allow the appeal, set aside the conviction and enter an acquittal.

J.A.

Concurred in:

Roscoe, J.A.

Pugsley, J.A.

C.A.C. No. 105615

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

G.M.R. Appellant - and - HER MAJESTY THE QUEEN Respondent	)	REASONS FOR JUDGMENT BY: FREEMAN, J.A.