Cite as: R. v. Duffy, 1991 NSCO 9

C A N A D A
PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX

C.R. 11378

IN THE COUNTY COURT JUDGE'S CRIMINAL
COURT OF DISTRICT NUMBER ONE

HER MAJESTY THE QUEEN

versus

RONALD DAVID DUFFY
FRANK GEORGE DUFFY
AND
MICHAEL JEFFREY McMASTER

James C. Martin, Esq., Solicitor for the Crown
Craig M. Garson, Esq., Solicitor for Ronald Duffy
R.J. MacDonald, Esq., Solicitor for Frank Duffy

1991, January 23, Cacchione, J.C.C.:- (Orally) The accused in this matter, Ronald Duffy, Frank Duffy and Michael McMaster, are charged

> that they did at or near Lower Sackville in the County of Halifax, Nova Scotia on or about the 8th day of September, 1989 unlawfully have in their possession a narcotic to wit, Cannabis resin, for the purpose of trafficking, contrary to s.4(2) of the **Narcotic Control Act.**
>
> AND FURTHER, at the same time and place aforesaid, they did unlawfully have in their possession a narcotic to wit, Cannabis Marihuana for the purpose of trafficking, contrary to s.4(2) of the **Narcotic Control Act**
>
> AND FURTHER at the same time and place aforesaid they did unlawfully have in their possession a restricted drug, to wit, L.S.D., for the purpose of trafficking, contrary to s.48(2) of the **Food and Drugs Act.**

The matter proceeded to trial on October 1, 1990 and it was indicated at the commencement of the trial that the defence would be contesting the admissibility of exhibits seized pursuant to a search warrant issued on September 8, 1989. The defence argument is that the search warrant was defective and therefore the search conducted was warrantless and unreasonable and thereby violating the accused's rights under s.8 of the **Canadian Charter of Rights and Freedoms**. The remedy being sought is the exclusion of the evidence seized by the police on September 8, 1989.

Before addressing this issue it should be noted for the record that on November 2, 1990 the accused Michael Jeffrey McMaster chose to change his plea to Guilty on all counts contained in the present indictment. The sentencing for Mr. McMaster on this indictment was adjourned to April 25, 1991.

It was agreed to among counsel for the accused and the Crown that the s.8 **Charter** argument need not be conducted in a voir dire but instead that the evidence on the trial proper be used in support of this argument.

The matter of argument respecting the admissibility of the exhibits was adjourned to December 7, 1990. On December 7, 1990 the defendants not only argued that there had been a breach of s.8 of the **Charter** but also argued that the defendants' rights under ss. 7, 9, 10A and 10B had been breached, and it was submitted that the breaches of those **Charter** sections bolstered their argument under s.8. It was submitted that the cumulative effect of these multiple **Charter** breaches necessarily demands the exclusion of the evidence.

I should also point out that s.7 is a general section that only applies if a breach under a specific section cannot be found. As there are specific breaches here - covered by ss.8,9,10(a) & (b) I will not deal with 7.

I propose to deal with the breaches as they were argued, that is s.8 then s.9 and finally s.10A & B, but before doing so a brief summary of the facts is in order.

On September 8, 1989 Constable John Anderson of the R.C.M.P. attended before a J.P. at 11:00 a.m. and swore out an information to obtain a search warrant. As a result of that information a search warrant was granted. In the early afternoon of the same day a meeting was held with all the officers listed on the warrant in attendance. A plan was devised in order to get Ronald Duffy out of the residence before the search party arrived. The reason that this was done was because it was felt that Ronald Duffy controlled the other people in the residence and because of the security measures the police knew were in place at that residence.

Constable Shiers and Heon, driving a marked R.C.M.P. cruiser, arrived at the residence with the search warrant in hand. Ronald Duffy came out and was asked to sit in the police cruiser. He was told that the police were there to execute a search warrant and that he was under arrest for possession of a narcotic for the purpose of trafficking. He was then given his right to counsel under s.10B and also the standard police caution was given to him. The contents of the warrant were explained to him and he was asked to cooperate. Constable Shiers testified that Ronald Duffy was put in the police cruiser in order to isolate him from the other residents according to the plan that had been previously devised by the police.

Once Ronald Duffy was in the police cruiser other

members of the search party entered the residence by breaking open the lower door with a maul. The upper door was pushed opened and the officers were met by a Rottweiler dog. The dog was controlled by one of the occupants of the residence and the police then arrested those found inside the premises. The reason for the arrest of these people was given to them as being suspicion of the possession of a narcotic. The residents were then given their rights to counsel and removed to the R.C.M.P. detachment. The search then proceeded in an orderly and reasonable manner with specific officers being assigned to search specific areas of the house and surrounding property. All the exhibits were turned over to one officer who had been designated as the exhibit person.

During the examination of Constable Anderson, the informant on the information to obtain a search warrant, I permitted counsel for the defence to cross-examine him on the information he gave to obtain the warrant. Crown counsel argued that the warrant was valid on its face and that the affiant could not be cross-examined as a basis for an attack on the facially valid warrant. The Crown's position was that the validity of the warrant could only be attacked by evidence tending to show that the affiant committed a deliberate falsehood or omission or a reckless disregard for the truth with respect to the material used to obtain the warrant.

In allowing the cross-examination of the affiant on the information he gave to the Justice of the Peace I accepted the argument that this was necessary in order to allow the defendants their right to full answer and defence. This view seems to have been accepted by the Supreme Court of Canada in **R. v. Dersch, Payne, Waller, Waller, and Harris** - November 22, 1990, No.20580. Although

the **Dersch** case involved an application for wiretap it is analogous to the present case in that in both situations there is an invasion of privacy. The majority of the Supreme Court in **Dersch** ruled that **prima facie** misconduct is not required to be shown by an accused who seeks access to documents relating to the application for a wiretap. Simply asserting that the admission of the evidence is challenged and that access to the documents is required for full answer and defence is sufficient.

The Supreme Court of Canada in **R. v. Garofoli**, released on the same day as the **Dersch** decision, held that the trial judge has a discretion to allow the cross-examination of the affiant on a wiretap application in order to allow the defendant's right to make full answer and defence. The Court held that since wiretaps constitute a search and seizure, the statutory provisions authorizing them must conform to the minimum constitutional requirements demanded by s.8 of the **Canadian Charter of Rights and Freedoms**.

In the case at Bar the information to obtain search warrant states as follows

> Constable W. Fogarty has advised the informant personally that he has two separate confidential sources of proven reliability that state there are always drugs in Duffy's residence for sale. One of these confidential sources states that Ronald Duffy is purchasing a large quantity of Hashish sometime early this date. Recent surveillance on Ronald Duffy's residence on two separate occasions has shown that there is a large volume of traffic coming and going to the residence for short periods of time. Known drug users and drug dealers have been seen at Ronald Duffy's residence. There have been several N.C.A. searches at Ronald Duffy's residence and these searches have all been positive. Ronald Duffy has a criminal record

> dating back to 1979 including one conviction for s.3(1) N.C.A. and two convictions for s.4(1) N.C.A. Other persons residing at the residence also have convictions under the N.C.A. They include Michael McMaster, Eric Duffy, Frank Duffy, James Chisholm and Doug Briffett.

The evidence adduced on the cross-examination of Constable Anderson discloses that surveillance in the area of the Duffy residence was difficult because the area is fairly open and without cover. Because of the nature of the structure it is difficult to see if people are actually entering Ronald Duffy's residence or the residence below his. As well, the 'recent surveillance' referred to in the affidavit occurred in mid to late July, 1989 and not in September, 1989. The large volume of traffic coming and going from that residence also was based on observations made in July, 1989.

The portion of the affidavit dealing with who lived in the residence was shown on cross-examination to be based on one sighting of McMaster in the residence at some undisclosed date together with intelligence received from other officers who had dealt with him. With respect to Frank Duffy, it was shown that he had been seen around the property some two to four times over a five year period and that he had not been seen there in the eight months prior to the search. The affidavit states as a fact that Frank Duffy lived at the residence, even though this was simply the affiant's belief at the time the affidavit was sworn.

No where in the affidavit sworn to by Constable Anderson does he indicate that Ronald Duffy is to possess the drugs in his residence. It simply states that he

is purchasing drugs on this date.

The positive **Narcotics Control Act** searches referred to in the affidavit was accurate, as well as the information concerning Ronald Duffy's prior narcotics convictions.

The purpose of the requirement for prior authorization is to provide an opportunity, before the event, for the conflicting interests of the state and the individual to be assessed, so that the individual's right to privacy will be breached only where the appropriate standard has been met and the interests of the state are demonstrably superior. For such authorization procedure to be meaningful the person making the prior assessment must be able to do so in an entirely neutral and impartial manner. That person must, at a minimum, be able to act judicially.

The test which the Justice of the Peace is required to apply is set out in s.12 of the **Narcotic Control Act.** In summary, the Justice of the Peace must be satisfied (1) by information under oath, (2) that there are reasonable grounds for believing that there is a narcotic, (3) by means of or in respect of which an offence under the **Narcotic Control Act** has been committed, and (4) in any dwelling house.

The question therefore is, Did the Justice of the Peace have sufficient facts upon which she, acting judicially, could be satisfied that there were reasonable grounds for believing that at the time she issued the warrant, the accused had in his dwelling house a narcotic for the purpose of trafficking.

There is a great deal of law on this subject and in summary, it would appear to be well established that

the requirement of showing that there are reasonable grounds, is not a requirement of proof beyond a reasonable doubt, nor is it even proof of **prima facie** case. The standard to be met is as quoted in **Regina v. Debot**, 30 C.C.C. (3d) 207, a decision of the Ontario Court of Appeal. This case discusses the issue of reasonable grounds and the facts which the informant must set out in the information. Martin J.A., at p.218, states as follows:

> On an application for a search warrant, the information must set out in the information the grounds for his or her belief in order that the justice may satisfy himself, or herself that there are reasonable grounds for believing what is alleged: see **R. v. Noble, supra** at p.161. Consequently, a mere statement by the informant that he or she was told by a reliable informer that a certain person is carrying on a criminal activity or that drugs would be found at a certain place would be an insufficient basis for the granting of the warrant. The underlying circumstances disclosed by the informer for his or her conclusion must be set out, thus enabling the justice to satisfy himself or herself that there are reasonable grounds for believing what is alleged. I am of the view that such a mere conclusary statement made by an informer to a police officer would not constitute reasonable grounds for conducting a warrantless search or for making an arrest without warrant. Highly relevant to whether information supplied by an informer constitute reasonable grounds to justify a warrantless search or an arrest without warrant or whether the informer's tip contained sufficient detail to ensure it is based on more than mere rumor or gossip, whether the informer discloses his or her source or means of knowledge and whether there are any indicia of his or her reliability such as the supplying of reliable information in the past or confirmation of part of his or her story by police surveillance. I do not intend to imply that each of these relevant criteria must be present in every case, provided that the totality of the circumstances meets the standard of the necessary reasonable grounds for relief.

Analyzing the information given under oath by Constable Anderson one finds that no where does he attest to the credibility or reliability of Constable Fogarty. There was nothing before the Justice of the Peace showing that Constable Fogarty was attached to the drug section or that Constable Fogarty believed his sources.

In **R v. Borowski**, 61 Man.R. (2nd) 262, Oliphant J. of the Manitoba Court of Queen's Bench, in dealing with a certiorari application to quash a search warrant, stated at p.266

> Where information is provided by an informer, confidential or not, the informant must in my opinion, substantiate the credibility, voracity or reliability of such informer. If the information upon which the informant relies is hearsay information, then in my view, the informant must state his belief in that information.

In the present case Constable Anderson does not state that he believes the information he received. As well, the information provided to the Justice of the Peace does not disclose that the drugs which were to be purchased would be found at Ronald Duffy's residence. The statement regarding a large amount of traffic being seen during recent surveillance fails to disclose that the surveillance was done on two occasions in mid to late July, 1989. A period well before the application.

In my view a Justice of the Peace cannot simply take someone's word that there are grounds for believing in the presence of drugs. As was stated by Mitchell J. in **Re Kirwin and the Queen** (1982) 3 C.C.C. (3d) 264

> Warrants to search homes should only be granted where the applicant can bring himself strictly

within the terms of the statute authorizing the issuance of the warrant.

In **R. v. Pastro** (1988), 42 C.C.C. (3d) 485, Vancise J.A. states at p.520

> In the case of secondhand information the J.P. must be satisfied that the information communicated was true and accurate. He must therefore examine the information provided to the informant by the source to determine the means by which he came into the knowledge, the reliability and voracity of the informant. There must be sufficient evidence to enable the Justice to test the reliability of the information to be satisfied that the requisite grounds exist for the granting of the warrant.

As previously stated, the standard of reasonable grounds to believe is not to be equated with proof beyond a reasonable doubt or a **prima facie** case. The standard to be met is one of reasonable probability. One of the difficulties in this case is that the warrant was sought to search for a prohibited drug, Cannabis resin, the trafficking of which represents a serious problem in our society. It may have appeared to both the informant and to the Justice of the Peace that something less would be needed in a drug information than in others but such is not the case. This information sets forth hearsay. It does not set forth any grounds to support the belief. The bald statement of an informant that he has been proven reliable in the past is not a statement of fact, which would permit the Justice of the Peace to be satisfied upon reasonable grounds. In my view the information should have stated sufficient facts as to the reliability of the informant to allow the Justice of the Peace to determine for herself the reliability of the information and to give her reasonable grounds upon which to make her determination to make the warrant. There should have

been more information regarding Constable Fogarty's involvement and the basis for his sources of belief.

In reviewing the evidence and the information provided to the Justice of the Peace I have come to the conclusion that parts of the information provided were less than candid. For example, the statements regarding recent surveillance, the comings and goings of users and traffickers, and the residency of certain parties at that address. After severing those parts of the information the question remains, Would the Justice have reasonable grounds on which to grant a warrant? There was nothing before the Justice of the Peace to show that Constable Anderson believed the information he received from Constable Fogarty, nor was there a basis for believing that the purchased drugs would be found in Ronald Duffy's residence. I am satisfied that there was insufficient information before the Justice of the Peace to allow her to believe on reasonable grounds that there would be drugs found in Duffy's residence on September 8, 1989. In coming to this determination I have not substituted my opinion for that of the Justice of the Peace. The reasonable grounds must be proven by facts, which must be alleged, and while one does not wish to impose an impossible burden on the police, I think that it is not sufficient to indicate that an informant who has proven reliable in the past states that some person will be purchasing drugs on this date. To allow this warrant to stand would in effect mean that the police could go before a Justice of the Peace and state that they have been informed by a informer who has proven reliable in the past that an offence is to be committed and that the persons under suspicion have a neferious past and have been seen in the presence of known drug dealers or users. Surely that is not enough to warrant an intrusion into the home under a warrant to search.

On the basis of the foregoing I find that the search of the Duffy residence on September 8, 1989 was done without the benefit of valid warrant and therefore the search was warrantless. The authorities note that a warrantless search is **prima facie** unreasonable and I propose to approach this one as such.

The next issue argued was that the defendants' rights under s.9 of the **Charter** were breached. Section 9 of the **Canadian Charter of Rights and Freedoms** reads 'Everyone has the right not to be arbitrarily detained or imprisoned'.

In order to address this issue it is important to examine not only the police powers of arrest but also the powers of arrest associated with the search warrant which at the time it was executed the police believed to be valid.

There is no question that Ronald Duffy was detained when he was put in the police car by Constable Shiers. His detention was certainly within the meaning of detention as set out in **R. v. Therens** (1985), 18 C.C.C. (3rd) 481, S.C.C.

Since the officers had no warrant to arrest Ronald Duffy their power to arrest stemmed from s.495 of the **Criminal Code**. Section 495(1) reads as follows: '(1) A peace officer may arrest without warrant (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence'. The other portions of s.495 are not applicable.

Under s.495(1)(a) the key issue is whether or not the police had reasonable grounds for their belief. This

is to be determined by looking at the totality of the circumstances in order to see whether reasonable grounds existed or if it was merely a suspicion. **R. v. Debot** 52 C.C.C. (3rd) 193, S.C.C. When affecting a warrantless arrest there must be a subjective belief in the reasonable grounds and that belief must be justifiable from an objective standard as well. **R. v. Storrey** (1990), 53 C.C.C. (3rd) 316, S.C.C. In an earlier decision our Court of Appeal applied an objective standard to the subjective belief of the arresting officer that an indictable offence had been committed. See **R. v. Brown** (1987), 33 C.C.C. (3rd) 54.

The difficulty inherent in this case is the lack of evidence on some crucial issues. What knowledge did Constable Shiers have of the operation? Was he aware of all the information given to the J.P.? Was he aware of more or less or none of this information? Was he just told to arrest Ronald Duffy in order to isolate him or was he told that Ronald Duffy would be in constructive possession of a large quantity of drugs? This and other evidence was not led and a situation is similar to that facing the trial judge in **The Queen v. Collins** where because of an unfounded objection crucial evidence was never led.

The lack of evidence before me does not establish a subjective belief in the information let alone a justification of it on an objective standard. I find therefore that Constable Shiers had no reasonable grounds to arrest Ronald Duffy outside 972 Fall River Road and that his arrest was unlawful. The question then becomes whether this unlawful arrest was an arbitrary detention undr s.9 of the **Charter**.

In **R. v. Duguay** (1985) 18 C.C.C. (3rd) 289, Ont.

Court of Appeal, affirmed in 1989 46 C.C.C. (3rd) p.1. It was held that not every unlawful arrest amounts to an arbitary detention. Do the grounds for Ronald Duffy's arrest fall "just short" (of constituting reasonable grounds) or is there an entire absence of reasonable grounds such that no reasonable person could believe that the grounds existed. If it is the latter then the arrest or detention would be arbitrary.

To determine if this unlawful arrest is arbitrary one must examine the definition of arbitrary. Black's Law Dictionary, Fifth Edition, 1979 defines arbitrary as follows;

> **Arbitrary.** Means in an "arbitrary" manner, as fixed or done capriciously or at pleasure. Without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment; depending on the will alone; absolutely in power; capriciously; tyrannical; despotic; Without fair, solid, and substantial cause; that is, without cause based upon the law, not governed by any fixed rules or standard. Ordinarily, "arbitrary" is synonymous with bad faith or failure to exercise honest judgment.

In **R. v. Lee** (1987), 37 C.C.C. (3rd) 407, Justice Southin of the British Columbia Supreme Court indicated that there must be more for an arbitrary detention than an arrest not within the strict requirements of s.450 (now s.495).

The problem in this case as previously stated is the lack of facts. Since the evidence before me does not appear to establish a reasonable belief that an indictable offence had been committed or was about to be committed I conclude that the detention pursuant to the arrest was arbitrary. While the detention was not

capricious or tyrannical it was without cause based upon law as a result of a failure to exercise honest judgment. I am not finding that the detention was capricious, tyrannical or despotic or without solid and substantial cause because the police were in my view acting in good faith based on what they believed at the time to be a valid search warrant. In this respect although I find that the arrest was arbitrary and therefore a violation of the accused's rights under s.9 I am not satisfied that this violation was committed in bad faith or a flagrant violation.

There has also been an argument raised that Ronald Duffy was not informed promptly of the reasons for his arrest or detention. I have found as a fact that Ronald Duffy was told that his arrest was for the offence of possession of narcotics for the purpose of trafficking. This in my view is sufficient detail of the reasons for his arrest and detention and I find no merit in this argument as it applies to Ronald Duffy.

With respect to Frank Duffy, he was one of the persons inside the residence who were told that they were under arrest for suspicion of possession of a narcotic and then given their rights under s.10B. The evidence discloses that he was allowed to use the phone either at the residence or at the detachment and was present for at least part of the search. There is no evidence that he was misled as to the type of offence he was arrested for. Although the reasons for arrest were somewhat vague they were not however misleading. If there was an infringement of Frank Duffy's s.10A rights it surely would have to be classified as minimal. In any event there is no evidence that this infringement prevented him from consulting with counsel and obtaining advice respecting a narcotics charge.

In other words, Frank Duffy knew the substance of the reasons for his arrest, that is for a narcotics charge and that the police were searching the premises under warrant. I am therefore satisfied that Frank Duffy's rights under s.10A were not breached.

Having found that Ronald Duffy's rights under s.8 and s.9 were breached the issue now is whether the evidence obtained as a result of this warrantless search and the violation of Ronald Duffy's s.9 rights should be admitted into evidence. Section 24(2) of the **Canadian Charter of Rights and Freedoms** states

> Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

The purpose of Section 24(2) of the **Charter** is to prevent the administration of justice from being brought into further disrepute by the admission of the evidence in the proceedings. Further disrepute results from the admission of evidence that would deprive the accused of a fair trial or from the judicial condonation of unacceptable conduct by the police or the Crown. It is the long term consequences of the regular admission or exclusion of evidence on the reputation of the administration of justice which must be considered.

The question of whether to exclude or not to exclude evidence under s.24(2) of the **Charter** is a question of law. In order to exclude the evidence, the burden is on the accused to show that the admission of the evidence

in question would bring the administration of justice into disrepute. This burden on the accused is on the balance of probabilities, **Collins v. the Queen** (1987), 33 C.C.C. (3d) 1 (S.C.C.).

In **Collins** the Supreme Court of Canada discussed the application of s.24(2) in the following manner

> It is whether the admission of evidence would bring the administration of justice into disrepute that is the applicable test. Misconduct by the police in the investigatory process often has some effect on the repute on the administration of justice, but Section 24(2) is not a remedy for police misconduct, requiring the exclusion of evidence if because of this misconduct, the administration of justice was brought into disrepute. Section 24(2) could well have been drafted in that way, but it was not, Rather, the drafters of the Charter decided to focus on the admission of the evidence in the proceedings, and purpose of s.24(2) is to prevent having the administration of justice brought into further disrepute by the admission of the evidence in the proceedings. This further disrepute will result from the admission of the evidence that would deprive the accused of a fair hearing, or from judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies. It is also necessary to consider any disrepute that may result from the exclusion of the evidence.

In this case we are dealing with real evidence, the admission of which would not generally speaking render the trial unfair. This is not a case of an accused being conscripted against himself to provide evidence. The evidence existed prior to the **Charter** violations and irrespective of those violations.

The rights infringed here were those under ss.8 & 9 of the **Charter**, that is the right to be free from

unreasonable search and seizure and freedom from arbitary detention.

The violation which occurred was not in my opinion flagrant in that the police did seek out a warrant before proceeding to conduct a search. It was more a matter of the drafting of the information to obtain the warrant which caused me to reach my conclusion on the warrant's validity. I am satisfied that the police acted in good faith in seeking the warrant and their actions did not establish a blatant disregard for the rights of the accused.

The evidence also disclosed that there was a certain degree of urgency in the preparation of the information to obtain a warrant, in that the police wanted to seize as much of the drugs as possible. The evidence did disclose that the purchase of these drugs was happening that day.

The use of other investigatory techniques had been tried in the past and proven unavailable. Surveillance was difficult due to the location of the house and the presence of dogs. The use of undercover agents was not an option available to the police that day.

The offence is a serious one as shown by the maximum penalty of life imprisonment and it is also one where evidence can be easily destroyed or secreted. There is no doubt that the evidence sought to be excluded is essential to substantiate the charge.

Unlike the case of **Greffe v. R.**, [1990] 3 W.W.R. 577, S.C.C., the breaches that I have found in this case were not part of a larger pattern of disregard for the accused's rights. In **Greffe** the seriousness of the cumulative effect militated in favour of exclusion, however

the conduct of the police in the **Greffe** case led to an inference of bad faith in that they wilfully circumvented the **Charter** in a deliberate failure to provide the accused with a proper reason for his arrest and they failed to advise him of his rights under s.10B and then proceeded to conduct a rectal examination based on an arrest for traffic warrants. In **Greffe** the evidence was excluded because of multiple violations which resulted in a gross intrusion into the privacy of the person and also because the breaches showed a pattern of disregard whereby the breach of one right led to flagrant breach of another. In the present case I have come to the conclusion that the breach of Mr. Duffy's s.9 rights was technical in nature as it flowed from the police's mistaken belief in the validity of the warrant which they held. I have also taken into consideration that the detention of the individuals involved was motivated by the necessity to prevent the destruction of evidence. In summary, I find that there was no bad faith on the part of the police and that the evidence obtained was real and not obtained in a manner that was physically intrusive. Nor do I find that the breach of one right led to the flagrant breach of another.

The question is, Whether the administration of justice would be brought into disrepute by admitting or excluding the evidence? The proper test in my opinion is whether the admission of the evidence would bring the administration of justice into disrepute in the eyes of a reasonable person, dispassionate and fully appraised of the circumstances of the case.

I am mindful of the words of Mcdonald J.A. in **R. v. Brown** (1987), 76 N.S.R. (2d) 64, where he stated:

We do not have nor do we need in this country

> a rule that evidence obtained as a result of a breach of the Charter right must in all cases be excluded. The test under Section 24(2) of the Charter is clear and admits of no judicial discretion. Evidence obtained as a result of a breach of Charter rights is **prima facie** admissible. It shall not be excluded unless and only unless it is established on a balance of probabilities or by a preponderance of evidence that under all the circumstances to allow such evidence in the proceedings would bring the administration of justice into disrepute. When Section 24(2) of the Charter is utilized, it has the effect, in practically all cases, of interfering with the criminal justice systems truth finding function. It follows therefore in my view that the indiscriminate application of such exclusionary power is bound the generate disrespect for our legal system and the administration of justice. See **Stone v. Powell, supra**. Section 24(2) should not in my view be applied to nullify objectively reasonable law enforcement activities of the kind and nature that existed in this case.

In the present case I have no doubt that a reasonable person fully appraised of the circumstances of the case would consider the administration of justice to be brought into disrepute if the evidence were excluded. The police acted as best they could in keeping the accused's rights in mind, they obtained search warrant, which subsequently was ruled to be defective or invalid. They seized a large quantity of drugs and drug related paraphenalia pursuant to what they believed to be a valid search warrant. To exclude such evidence would no doubt bring the administration of justice into disrepute.

I would therefore allow into evidence the exhibits seized pursuant to the search on the Duffy property.