IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. D.B.M. 2009 NSPC 38

Date: July 22, 2009
Docket: 1959888
Registry: Halifax

Between:

Her Majesty the Queen

v.

D.B.M.

Restriction on Publication:	Restriction on publication pursuant to s. 110(1) of the Youth Criminal Justice Act
Judge:	The Honorable Judge Jamie S. Campbell
Decision:	July 22, 2009
Charge:	CDSA 4(1)
Counsel:	Jeff Moors, counsel for the Crown Joe Cameron, counsel for the Defendant

Introduction

1) DBM is a student at a Halifax area high school. He was found with a plastic bag containing 10 grams of a substance alleged to be marihuana. That was as a result of a search undertaken at the school by two vice principals.

2) Mr. Cameron, for the defence, asserts that the search was unreasonable and that the evidence seized as a result should be excluded.

R. v. M (M.R.)

3) The law to be applied in this matter is as set out in the Supreme Court of Canada decision in *R.* v. *M (M.R.)*, [1998] 3 S.C.R. 393. In that case the court dealt with the seizure of drugs from a 13 year old junior high student in a Nova Scotia school. The case provides the legal framework within which this case must be decided.

4) A student attending a school has a reasonable expectation of privacy with respect to his person and with respect to items carried on his person. Section 8 of the Charter is engaged.

5) A search of a student by a school official will be justified when there are reasonable grounds to believe that a school rule has been or is being violated and that evidence of that violation will be found in either the location or on the person to be searched. (**R. v. M.(M.R.)** para 48 (supra)).

6) Reasonable grounds may be provided by information obtained from one student whom the school authority considers credible, by information received from a number of students, from observations of teachers or from a combination of those pieces of information. The credibility of the information and sources must be assessed by the authorities in the context of the circumstances at the particular school.

7) The search itself must be reasonable. A threat to student safety will justify immediate action, through swift and extensive searches. The same type of search would not be justifiable where the student is reasonably believed to have something like chewing gum which might be prohibited by school regulations.

8) A search should be conducted in a sensitive manner and be minimally intrusive.

9) In **R. v. M.(M.R.)** (supra) the vice principal had received information from several students that the young person had marijuana in his possession and was trafficking it on the school grounds. He thought the information was reliable because the students knew the young man well. One of the students had in fact provided accurate information on a previous occasion. On the evening of the search he had specific information that the young person would be carrying drugs at that time. That provided the vice principal with reasonable grounds to believe that he would find marijuana if a search were undertaken at that time.

Evidence

10) DBM and another student were observed by a vice principal, off the school grounds in an area known as the “pit”. The area is adjacent to the school property and is frequented by students who hang out or smoke cigarettes there before going to class. The vice principal approached the two young men and spoke to them about going to class. They appeared to head toward the school.

11) The vice principal went back inside the school and observed them both, on a surveillance camera, back in the pit. The vice principal and a colleague went out to the area again. Both students ran into the wooded area just beyond the pit and appeared to be trying to hide there. They called for both students to come into the office. DBM complied. The other student did not.

12) Once in the vice principal’s office, DBM was searched. The search revealed a bag containing ten grams of a substance alleged to be marijuana.

Expectation of Privacy

13) The expectation of privacy is diminished because the search took place in the school environment and in the context of school authorities acting on a concern.

14) Students know that school authorities are responsible for providing a safe environment and maintaining order and discipline in the school. This may require searches of students.

Teachers and school administrators need to be granted flexibility to deal with disciplinary problems in school, especially when they involve the possession of illicit drugs and dangerous weapons.

15) Courts must consider whether and to what extent a student has a reasonable expectation of privacy in the location of the search. For example, the expectation of privacy with respect to the person is greater than the expectation of privacy with respect to a school locker.

16) It has been argued that there was no evidence even that DBM had gone to school that day and was off the school property when observed by the vice principal.

17) While this is not analogous to a situation where a student is stopped in the hallway of the school, neither is it a situation where a teacher stops a student on the street. This incident got underway in an area that was contiguous to the school, the pit. It is an area frequented by students and is known as a regular gathering place. While not technically part of the school property, it was an area that was so closely connected to the school that a school surveillance camera was trained on it.

18) The incident happened while students were gathering for school. Even if DBM had not attended school that day, he was a student at that school, he was interacting with other students of that school, during school hours, responding to a demand by a vice principal, in an area that at least in some informal way was considered to be part of the school.

19) The expectation of privacy is significantly diminished in the school environment. Here, it might be somewhat, but only very slightly, less diminished by the fact that the pit was not formally the property of the school.

Reasonable Grounds

20) The two vice principals had a heightened level of suspicion with respect to DBM and his activities. They had received information from other students in the past about his involvement with drugs. They had smelled drugs on him in the past. Drugs are a problem at that school and the pit itself is reputed to be an area where drugs are bought and sold.

21) At this point, DBM was under what might be described as general suspicion. There was, in the view of the school authorities reason to watch him.

22) That general suspicion however would not, in itself, be sufficient to justify a search. Otherwise, this young man could be stopped and searched every day. Even in the environment with a diminished expectation of privacy it would be unreasonable to permit searches based on such general suspicion.

23) A search must be justified based on a reasonable suspicion that a breach of school rules or the law has been committed and that evidence of that breach will be found if the person is searched. Comments from other students that he had been involved with drugs are of a different quality than a piece of reliable or credible information from a student that he would have drugs

with him that day. Similarly, the smell of drugs in the past, is of a different quality than the smell of drugs on the day in question. Here, there was no smell and no credible information to suggest that DBM would have anything in his possession.

24) When the vice principals saw DBM return to the pit area after having been spoken to by one of them, their suspicions were further heightened. When he fled into the woods they began to develop more of a sense that something was amiss. They were not quite sure what exactly might be amiss, but their intuition told them there was something. Students don't run and hide for no apparent reason.

25) That sense that something was amiss prompted them to call the students into the office to be searched. DBM complied.

26) The issue at his point is whether, in the context of the general suspicion, the actions of DBM in returning to the pit, running away, then attempting to hide, would be sufficient to justify a search having been conducted. Neither of the vice principals were able to state that at that stage in the process they knew specifically what they were suspicious about. They indicated that there was a concern for student safety. In their view, they might have found a gun or they might have found drugs.

27) One of the vice principals, I think accurately described it as a situation in which he and his colleague were acting on their "instincts". As he said, "If he'd gone to class we wouldn't be having this conversation". He felt it more likely that drugs were involved rather than a weapon,

but his words were that there was no “guarantee”. In cross examination he said this was based on “an educated hunch”.

28) The other vice principal also made reference to “informed instinct” guiding their decision.

29) The phrases “educated hunch” and “informed instinct” are not really terms of art. It would hardly be fair to pounce on them because they are specifically noted in case law as being insufficient grounds on which to formulate a reasonable belief or reasonable suspicion. Intuition and instinct do however both convey a sense that inferences are being made for reasons that may not be able to be articulated or explained.

30) It does appear however as though what they had was a general suspicion about DBM which they felt that they could not act upon unless something happened to activate that suspicion or allow them to relate it to a specific situation. Returning into the pit and running away might not have been the cause of similar concern with respect to a student regarding whom there was no pre-existing general suspicion. With regard to this student however it was seen as being a cause for concern.

31) Neither of the vice principals were quite sure of what they suspected. It could have been a gun or it could have been drugs. They were suspicious that something was going on and that the something could be a risk to other students.

32) The test to be applied is whether the authorities had reasonable grounds to believe that the law or a school rule has been violated and that evidence of that breach would be found on the student. The vice principals had a suspicion. It was not with regard to a particular breach. It was a concern that something was just not right about these circumstances. This sense or intuition that something was amiss falls short of the standard of reasonable belief. The belief that something might be wrong, while an example of valuable and in this case perhaps even valid intuition, does not equate to the standard of reasonable belief or reasonable suspicion.

33) Here, there was no tip from a student that DBM would have drugs that day. There was no physical observation of him that would permit the reasonable inference that he was in the possession of drugs or anything else that was illegal. There was no smell of marijuana.

34) His actions in returning to the pit area and running when he saw the vice principals would cause a reasonable person to wonder why he might do that. The vice principals wondered. Why would an innocent person run and hide? They had reasonable grounds to wonder. Reasonable grounds to wonder are not the same as reasonable ground to believe or suspect.

35) I find that DBM's right to be free from unreasonable search and seizure under s. 8 of the Charter have been breached.

<u>Section 24 (2)</u>

36) Once a finding has been made that a Charter right has been breached, evidence is not

automatically excluded. The accused person bears the burden under s. 24(2) of the Charter to demonstrate that the admission of the evidence would bring the administration of justice into disrepute.

37) The Supreme Court of Canada in *R.* v. *Grant* [2009] S.C.J. No. 32 has revised out the manner in which the analysis under s. 24(2) should be undertaken. That case was released 5 days before the decision was scheduled to be delivered with respect to this case. I have given counsel the opportunity to adjourn the matter should they wish to comment on the implications of that case.

38) The phrase "bring the administration of justice into disrepute" is to be understood in the long term sense. The court noted that while the exclusion of evidence in an individual case may provoke immediate criticism, it is the overall repute of the justice system in the long term that should be the focus. The focus is also prospective in the sense that while the very fact of a Charter breach has already done some damage to the administration of justice, the system should ensure that the evidence obtained does not do further damage. Finally, the focus is also societal. The section is not aimed at punishing the police or other state authorities. It is instead aimed at systemic concerns.

39) The Supreme Court of Canada in **R. v. Grant** (supra) sets out a three step process.

40) The first consideration is the seriousness of the Charter-infringing state conduct. A court must assess whether the admission of the evidence would, in effect , send a message to the public

that state deviation from the rule of law was being condoned. That requires a consideration of the seriousness of the state conduct that led to the breach. Evidence is more likely to excluded if the breach is deliberate or egregious.

41) As noted by the Supreme Court of Canada in *R.* v. *Harrison* [2009] SCC No. 34 the issue of police conduct is important. It may range from blameless, to negligent to flagrant.

42) There is absolutely no sense here that the authorities acted with a flagrant disregard to the rights of the student. Both vice principals were operating on the basis of subjective belief that they had reasonable grounds. Both had previous knowledge of DBM that gave them cause to be suspicious. They had smelled marijuana on him some time before. They had what they believed to be reliable information that he had possessed drugs before. His actions in running would give one cause to question why he might do that. Their actions were not arbitrary or capricious. Their grounds fell short of reasonable grounds but not far short.

43) The situation was not one in which the school authorities executed a plan to search a particular student in the hope of finding something. His actions in running and hiding left them with the general sense that something was wrong and that it had to be addressed quickly. This is in a school environment where drugs had become a serious concern. There was at least a subjective sense of both urgency and necessity.

44) The situation was not one in which a student or students were searched arbitrarily as part of either a targeted group or a random group. There is no sense that inappropriate profiling of

any kind might have entered into the consideration of the two vice principals.

45) The second consideration is the impact on the Charter-protected interests of the accused person. This requires an evaluation of the extent to which the breach "undermined the interests protected by the right infringed". The more serious the impact the greater the risk that the admission of the evidence would send a signal to the public that Charter rights were of little value.

46) The court commented on the rights that may be impacted by an unreasonable search contrary to s. 8 of the Charter. Those interests could be described as interests in privacy and human dignity. An unreasonable search that intrudes on areas in which there is a higher expectation of privacy or that demeans the person's dignity is more serious than one that does not.

47) There is a significantly reduced expectation of privacy in the school environment. The search was undertaken by two vice principals who have the authority and obligation to take reasonable steps to safeguard the students who attend the school. Their job is by no means an easy one. They are not police officers.

48) The search itself was undertaken reasonably. The evidence is that DBM was brought into the vice principal's office and a pat down search was undertaken with both male vice principals present. He was asked to roll down the waistband of his pants and that was where the bag containing the substance alleged to be marijuana was found. There was nothing

extraordinary or particularly obtrusive or demeaning about the search itself.

49) The third consideration is society's interest in an adjudication of the merits. The issue is whether the truth-seeking function of the trial process would be better served by the admission of the evidence or by the exclusion of the evidence. The court has to consider both the negative impact of the admission of the evidence on the repute of the administration of justice and the impact of failing to admit the evidence.

50) The reliability of the evidence is an important factor in this consideration. The admission of unreliable evidence does not serve the public interest in uncovering the truth and does not serve the accused person's interest in a fair trial. The importance of the evidence to the prosecution's case is another factor. The admission of evidence of questionable reliability, such as an improperly obtained statement, that forms an important part of the Crown's case, is more likely to bring the administration of justice into disrepute. On the other hand, excluding highly reliable evidence may reflect negatively on the system of justice when the remedy "effectively guts the prosecution".

51) The seriousness of the offence is a valid consideration that the majority of the Supreme Court suggested could "cut both ways." Failure to prosecute serious offences due to excluded evidence may have an immediate impact on how people view the system. Yet, the long term is the focus. The Charter rights of those accused of the most serious crimes must be respected if those rights are to have any meaning.

52) As the court noted, “(r)eliability issues with physical evidence will not generally be related to the Charter breach. Therefore this consideration tends to weigh in favour of admission.” (para 115)

53) The breach here resulted in the seizure of a bag of a substance alleged to be marijuana. It is highly reliable evidence.

54) The charge is one of possession contrary to s. 4(1) of the Controlled Drugs and Substances Act. The charge is not trafficking. It is possession of a relatively small amount of marijuana. Many people would consider this to be a rather minor charge. The seriousness of the charge should be considered in the context however.

55) The Supreme Court of Canada has acknowledged in **R. v. M.(M.R.)** (supra), that schools are faced with extremely difficult problems that would have been unimaginable a generation ago. The presence of drugs and weapons in schools create problems that are “grave and urgent”. The possession of drugs in and around a school is a serious matter.

56) That does not mean that rights should not be respected. Students and their parents have reasonable expectations that schools should be safe places and provide environments that are conducive to learning. That is not consistent with the presence of illegal drugs whether in the hands of traffickers or their customers. Possession of marijuana in and around a school, whether technically on the property of the school or not, is a serious concern.

57) In this case, the evidence itself is highly reliable and vital to the prosecution's case. The offence, while not serious in and of itself, must be seen in its particular context as a reflection of a much more serious and dangerous problem.

58) Using the framework for analysis set out by the Supreme Court of Canada, the evidence obtained as a result of the search should not be excluded under s. 24(2) of the Charter. The breach itself was far from deliberate or egregious but was committed by school officials acting on the basis of subjective grounds formed in good faith and not without at least some objective foundation. The search was undertaken in the context of a school, where there is a significantly reduced expectation of privacy. The search itself was undertaken in a manner that was not a significant affront to the dignity of the student. The evidence obtained was reliable and essential to the Crown's case. The offence, while not serious in its own right, is alleged to have been committed in an environment where the prosecution of such offences is of great importance.

59) There are times when principles must be upheld. Rights should not be traded off easily for security. Sometimes the breach of a constitutional right must result in critical evidence being excluded. In the short term, public confidence in the justice system may be seen by some as being adversely effected. The long term concern for the integrity of the system that safeguards the rights of citizens must sometimes trump that short term concern.

60) Standing on principle and standing on a technicality are not the same thing. The reputation of the system of the administration of justice depends on its being able to tell the difference. The system can be brought into disrepute if it fails to protect the principles set out in

the Charter even in those hard cases where public outcry is almost certain to follow. Equally, the system can be brought into disrepute if it stubbornly refuses to acknowledge that every Charter breach is not the same.

61) Based on the analysis under s. 24(2) the evidence obtained as a result of the search will be admitted.