IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R v. Skeir, 2004 NSPC 61

Date: 20041119
Docket: 1396967, 1396969, 1396971
Registry: Halifax

Between:

R.

v.

Carl Wendell Skeir

Defendant

Judge:	The Honourable Judge Crawford
Date Heard:	November 1, 2004 in Halifax, Nova Scotia
Decision Date:	November 19, 2004 in Halifax, Nova Scotia
Counsel:	Richard Miller, for the Crown Roger Burrill, for the Defence

By the Court:

[1] Mr. Skeir faces three charges under the *Criminal Code of Canada*: theft contrary to s. 334(b); possession of property obtained by crime contrary to s. 355(b); and breach of probation contrary to s. 733.1(1)(a). He brings this application for the exclusion of evidence under s. 24(2) of the *Charter of Rights* because of an alleged breach of his right to be informed of his right to counsel under s. 10(b) of the *Charter*.

Facts

[2] The facts as set out in the defence brief are:

> Information emerged on the *voir dire* (incorporating elements of the testimony at trial) that Mr. Novelli approached Mr. Skeir and Ms. Fong in the parking lot of the Sears Canada Inc. store in Halifax. He advised the parties that he was a Security Officer, showed his credentials, and then informed the parties that they were under arrest. He advises that he then provided the following specific form of combined Caution and *Charter* rights to counsel:
>
> > "You have the right to remain silent. If you give up the right to remain silent anything you say can be used against you in a Court of law. You have the right to an attorney. If you can't afford an attorney, an attorney can and will be provided for you via legal aid services. Do you understand?"
>
> Mr. Novelli further indicated that he advised the arrestees of the following:
>
> > "You are under arrest for theft under $5000."
>
> It was at this time that the defendant, Skeir, is alleged to have made a statement against his interest.

[3] The uncontradicted evidence of Mr. Novelli on the *voir-dire* was that Mr. Skeir's statement was made immediately upon being informed that he was under arrest and was made spontaneously and not in response to questioning by Mr. Novelli.

[4] The defence called no evidence on the *voir-dire*.

Issues

[5] The issues are as stated in the Crown brief:

> 1. Does the *Charter* apply to Mr. Novelli, the security officer for Sears Canada Inc.?
>
> 2. If the *Charter* does apply, were the s. 10(b) rights given by Mr. Novelli deficient?
>
> 3. If the s. 10(b) rights were deficient should the evidence obtained by Mr. Novelli be excluded under s. 24(2) of the *Charter*?

1. Does the *Charter* apply to security guards?

[6] As the Supreme Court of Canada stated in *R. v. Asante-Mensah* [2003] 2 S.C.R. 3, this issue has yet to be decided at that level.

[7] At the provincial Courts of Appeal level, there are two lines of cases, beginning with *R. v. Lerke* [1986] 24 C.C.C. (3d) 129 (Alta. C.A.) on one side and *R. v. Shafie* (1989), 47 C.C.C. (3d) 27 (Ont. C.A.) and *R. v. J.(A.M.)* (1999), 137 C.C.C. (3d) 213 (B.C.C.A.) on the other.

[8] In *Lerke,* after reviewing the long history of the common law and statutory right and duty of a citizen to arrest, Laycraft, C.J.A. concluded:

> In my opinion when one citizen arrests another, the arrest is the exercise of a governmental function to which the Canadian Charter of Rights and Freedoms applies. . .

[9] On the other hand, Krever, J.A. in *Shafie*, after conducting a similar review of authorities, came to the opposite conclusion:

> It is apparent from the cases to which I have referred that the weight of judicial opinion, although perhaps not authority in the strict sense, is that actions that, at the hands of the police or other state or governmental agents, would be a detention, do not amount to a detention within the meaning of s. 10(b) of the Charter when done by private or non-governmental persons. However weakly this conclusion may be based on authority, I believe that it is supported by principle.

> . . . Any other conclusion would result in the judicialization of private relationships beyond the point that society could tolerate. The requirement that advice about the right to counsel must be given by a school teacher to a pupil, by an employer to an employee or a parent to a child, to mention only a few relationships, is difficult to contemplate.

[10] Or, as Goldie, J.A. put it in *J.(A.M.)*:

> ¶ 39 . . . there is an air of unreality in requiring a person who apprehends a wrongdoer in one of the situations described in s. 494 to give the wrongdoer a Charter warning -- whether the person is a citizen of Canada or a visitor to this country.
>
> ¶ 40 Such a requirement would tend to reduce s. 494 to a dead letter by requiring the person on the street who responds to a criminal act to thereupon give a Charter warning. Section 494 contains sufficient safeguards against vigilante justice. The circumstances in which it may be used are tightly defined and the direction in s-s. (3) is imperative.

[11] My own review of the authorities mentioned, as well as other cases cited therein, leads me to the same conclusion as Krever, J.A. reached in *Shafie*, i.e. that the weight of authority, as well as principle, indicates that an arrest by a private citizen does not constitute a detention within the meaning of s. 10(b) to which the rights of that section would attach.

[12] If the defendant was not detained within the meaning of the section, then his right to counsel was not violated.

2. Were the "rights" given by Mr. Novelli deficient?

[13] If I am wrong in the foregoing conclusion, I note that the wording of the caution and rights given by Mr. Novelli clearly does not comply with the requirements in *Brydges* (1990) 53 C.C.C. (3d) 330 (S.C.C.) and *Bartle* (1994) 92 C.C.C. (3d) 289 that the detainee be informed of his right to free immediate preliminary legal advice and of the method by which it can be obtained.

[14] In my opinion the vague statement that a lawyer "can and will" be provided through legal aid both over- and under- states what is available in Nova Scotia. It overstates what is available because there is no guarantee that even the poorest person

"will" be eligible for a Legal Aid lawyer; it is my understanding that eligibility for Legal Aid depends on the nature of the case and the likelihood of incarceration, among other criteria. More importantly, it understates what is available because it makes no mention of the availability of immediate free advice, regardless of income. And it makes no mention of means of obtaining that immediate advice.

3. Should the evidence be excluded under s. 24(2)?

[15] What the defence seeks to exclude is the spontaneous statement of the defendant made immediately upon arrest.

[16] Cases such as *Broyles v. The Queen* (1991), 68 C.C.C. (3d) 368 (S.C.C.), *R. v. Harper* (1994), 92 C.C.C. (3d) 423 (S.C.C.), *U.S.A. v. Yousef* [2003] O.J. No. 3118 (Ont C.A.), *R. v. Russell* [1996] S.J. No. 59 (Sask. C.A.), *R. v. Hebert* (1990), 57 C.C.C. (3d) (S.C.C.) and *R. v. Whynder* [1996] N.S.J. No. 110 (N.S.C.A.) make it clear that in cases in which statements against interest are given spontaneously, without any eliciting behaviour by the arresting officer, and/or in which it can be shown that the defendant would not have acted differently had the rights been properly given, the statement will be admissible despite the *Charter* breach, because admitting such evidence will have little or no effect on trial fairness.

Conclusion

[17] I conclude that the statement made by the defendant to Mr. Novelli following his arrest is admissible, either because his arrest by a private security guard is not "arrest or detention" within the meaning of s. 10(b), or, despite the defective wording of the warning and rights, because admission of his spontaneous statement made without any eliciting behaviour by Mr. Novelli will not affect trial fairness and accordingly will have no deleterious effect on the repute of the administration of justice.