

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Messervey, 2004 NSPC 58
R. v. Ryan, 2004 NSPC 58

Date: 20040531
Docket: 1262639-644
1262647-653
& 1262656-657
Registry: Kentville

Between:

Her Majesty the Queen

v.

Arnold Clifton Messervey

and between:

Her Majesty the Queen

v.

Claudine Veronica Ryan

Judge: The Honourable Judge Alan T. Tufts

Heard: March 8, 2004; April 6, 2004; April 19, 2004 (view);
May 18, 2004 in Windsor, on location and in Kentville,
Nova Scotia

(Oral) decision: May 31, 2004

Charge: v. Ryan: 5(2) CDSA
7(1) CDSA
355(b) CC
86(1) CC x 3

v. Messervey 5(2) CDSA
 7(1) CDSA
 355(b)(i) CC
 86(1) CC x 3
 355(a) CC x 3

Counsel:

R. Michael MacKenzie, for the Crown
Chris Manning, for the defendant Ryan
Peter Nathanson, for the defendant Messervey

By the Court:

- [1] This is the matter of *R. v. Messervey and Ryan*. The two accused, Claudine Ryan and Arnold Messervey are charged on separate information with charges under the **Controlled Drugs and Substances Act** and the **Criminal Code**. With respect to Mr. Messervey those charges are under s. 5(2) and 7(1) of the CDSA and under s. 355(b) of the **Criminal Code**, three charges under s. 86(1) of the **Criminal Code** and three charges under s. 355(a) of the **Criminal Code**.
- [2] With respect to Ms. Ryan, she is charged with an offence under s. 5(2) and 7(1) of the **CDSA**; three charges under s. 86(1) of the **Criminal Code** and 355(b) of the **Criminal Code**.
- [3] The allegations relate generally to items of stolen property and guns that were found at 1066 Highway 14 and with respect to certain drugs and evidence of, or allegations of a marihuana grow operation at the same residence. A joinder of the two Informations was granted with consent of all parties. The issue of the admissibility of seizures made during the search was the subject of a voir dire and this is a decision on the accuseds' motion for exclusion of the seized items.
- [4] The facts are outlined in the brief of the accused, Arnold Messervey, and for simplicity's sake I will simply incorporate those in this decision with some further comments and it is not necessary for me to repeat or read those facts today. The facts as outlined are reproduced as follows:

Ms. Ryan lives at 1066B, Highway 14, Lower Vaughan, Hants County, Nova Scotia. Mr. Messervey lives at 1066A, Highway 14, Lower Vaughan, Hants County, Nova Scotia.

The house located at 1066 Highway 14, Lower Vaughan, is a duplex. It is divided into two distinct halves. The two distinct halves are separated by doors, with locks. Each half has a main floor and an upper floor. Each main floor has a living room, kitchen, dining room, and a staircase that leads to the second floor. Each upper floor has bedrooms and a storage area. The bathroom on Mr. Messervey's side is on the upper floor. On Ms. Ryan's side the bathroom is on the main floor.

1066B and 1066 A Highway 14 share a common basement. In addition to an exterior entrance to the basement each of 1066B and 1066A access the basement through a common vestibule. The vestibule is internal to 1066. However, the vestibule may only be accessed by each of 1066A and 1066B through a locked door on each unit.

There are two driveways on the property. One is immediately adjacent to the entrance of 1066A. The other is located on the same side as 1066B.

Mr. Messervey's address is recorded as 1066A Highway 14 with the provincial Department of Health, the provincial Department of Community Services and **Service Nova Scotia and Municipal Relations**. Ms. Ryan's address is recorded as 1066B Highway 14 with Canada Customs and Revenue Agency and the provincial Department of Health. Ms. Ryan's address is shown as being 1066B on the Last Will and Testament of Mr. Messervey's father, Clifton Maxwell Messervey

A search warrant was granted to search the residence and appurtenances owned by Arnold Messervey located at 1066 Highway 14, Lower Vaughan, Nova Scotia.

The police indicated that prior to obtaining the search warrant Mr. Messervey's address was obtained or confirmed with the assistance of the Municipality of the County of Hants. The police officer, by stipulation, confirmed that the information was provided orally and the police officer did not know the name of the person who provided the information.

The search warrant was executed on November 1, 2002. Mr. Messervey was not present when the search warrant was executed. The police entered by the side door located on the south side of the house. That door leads to 1066A, Mr. Messervey's unit. Once inside, the police proceeded through the kitchen towards a door at the bottom of the staircase.

Ms. Ryan was in Mr. Messervey's unit at that time. She was there as the caretaker for Clifton Maxwell Messervey. Ms. Ryan was paid for this service. She had no independent right of access to Mr. Arnold Messervey's unit.

Ms. Ryan informed the police that the door opened to her home, 1066B Highway 14, and that this was not the home of Mr. Messervey, 1066A Highway 14. The police proceeded to Ms. Ryan's side of the house and searched both the main floor and upper floor.

[5] The Court however conducted a view of the subject residence in the presence of the accused, the accuseds' counsel and Crown counsel.

- [6] The accused Claudine Ryan also acted as a surety for the son of Arnold Messervey and signed the bail papers as “Claudine Ryan Messervey”. She explained in the *voir dire* she was simply going along with the obvious assumptions made by the son's counsel and the other officials that Ms. Ryan was the mother or step-mother of the son. She maintains she never held herself out in that capacity.
- [7] Although there are two driveways at the residence it appears that only one was used with any regularity, that being on the side closest to Mr. Messervey's entrance.
- [8] The Crown concedes that there are in fact two residences; that the search warrant under which the police were conducting the search applied to that of Arnold Messervey and not to Claudine Ryan. The Crown concedes that the search of Claudine Ryan's residence constitutes a breach of her s. 8 rights. The real issue is whether the evidence of the seizure should be excluded pursuant to s. 24(2) of the **Charter**.
- [9] The Crown argues that the accused, Arnold Messervey, cannot raise a s. 8 breach relative to the charges against him, particularly it is argued that the **Charter** right is a personal right and that he has no expectation of privacy in Ms. Ryan's residence. It would appear as if there is no dispute on that issue.
- [10] The Crown further suggests that the Court should not consider Mr. Messervey's submissions on this point. While I do not accept the Crown's position with respect to the last point I agree that the search of Ms. Ryan's residence is not a breach of Mr. Messervey's s. 8 **Charter** rights for the reasons advanced by the Crown. However, because Mr. Messervey is a co-accused in this joined proceeding his submissions will be considered, and again in argument, counsel agreed that little turned on this last point in any event.
- [11] Because there is no s. 8 breach however relative to Mr. Messervey the evidence of the seizures are not excluded relative to him.
- [12] I will now proceed to consider the application of s. 24(2) of the **Charter** and whether the evidence of the seizure should be excluded relative to Claudine Ryan. The law related to this issue has recently and extensively been

reviewed by the Supreme Court of Canada in **R. v. Buhay**, [2003] 1 S.C.R. 631. I have also reviewed a paper prepared by Chief Justice Gerald E. Mitchell of Prince Edward Island Supreme Court (Appeal Division) January 30, 2004 which gives a complete review of the law in this area to that point in time.

- [13] To determine if evidence obtained as a result of a Charter breach should be excluded the Court must consider the following:
1. Trial Fairness;
 2. The seriousness of the **Charter** breach;
 3. Whether the exclusion of the evidence would bring the administration of justice into disrepute.
- [14] It is conceded that the evidence here is real and does not engage the trial fairness issue. The issue of seriousness of the violation involves an examination of the following:
1. Whether the police conduct was committed in good faith;
 2. Whether the evidence could be obtained by other means;
 3. The obtrusiveness of the search;
 4. The individual's expectation of privacy in the area searched, and
 5. The existence of reasonable and probable grounds.
- [15] Much of the submissions of counsel centred around the conduct of the police and the accused Ryan's expectation of privacy and the obtrusiveness of the search. The Crown argues that while there may be in fact two residences, the police were not negligent in believing the opposite. The Crown points to the written recognizance where the accused was described as Ms. Messervey, and to the information the investigating officer received from the municipality about the address, which did not show either an "A" or a "B" attached to the address, although it is conceded the officer made no notes and did not know to whom he was speaking when he received this information.
- [16] Finally the Crown submits that the circumstances of the residence when the police arrived was not inconsistent with one residence. Ms. Ryan's side of the building had downstairs bedrooms with the kitchen area to the rear, which has since been altered. Ms. Ryan was in the Messervey residence

with Mr. Messervey Sr., which the Crown maintains makes it understandable that the police would believe that this was simply one residence. Further, there appears to be only one regularly used driveway.

- [17] On the other hand the defence argues that Ms. Ryan alerted the police to the fact that there were two residences when she announced, “This is my side” when the police entered into her area. It is also argued that the police could have done more to determine the nature of the residence, who lived there and the character of their relationship.
- [18] In my opinion it is not necessary for me to determine if the police conduct amounted to good faith strictly or not. I can certainly conclude that the police did not act *malafides* or in the bad faith, however that does not necessarily conclude a determination of good faith, nor can I conclude that the actions of the police were inadvertent or without negligence. However, these were unusual circumstances, although in my opinion not completely unique for this particular area of rural Nova Scotia. These people were very modest means and this may have contributed to the unusual arrangements which may not have been immediately apparent.
- [19] I do believe it is significant that Ms. Ryan announced to the police her “ownership” of her area. Other than the presence of her name as “Messervey” in the recognizance there is simply no other evidence which connects her to Mr. Messervey. They were not a couple. They do not share living arrangements other than what was necessary for Ms. Ryan to care for Mr. Messervey's father. The suggestion by the defence that Ms. Ryan's announcement ought to give the police pause is not without merit.
- [20] I do not accept that the police were acting in exigent circumstances because evidence would be destroyed. This argument is without merit given that the police were entering a private residence. I accept that the police believed that there was one residence and the circumstances of the house may have confirmed this. I would not, however, go as far as to say that their actions were inadvertent and do accept as the defence maintains, that they could have acted more cautiously, particularly after Ms. Ryan announced that they were entering “her side”.
- [21] The search warrant which was obtained targeted the accused Mr. Messervey and his son and not the accused Ryan. Accordingly there was no reasonable

and probable grounds to search her residence. Given the lack of evidence of an association between her and Mr. Messervey, the presence of her signature on the recognizance is not probative of any cause to search her residence.

- [22] The expectation of privacy in one's own residence is obvious and it is high. There are few areas which attract a higher expectation of privacy. Also, the search was obtrusive in that the police entered the accused's bedroom and other private areas of the home. The Crown argues that because Ms. Ryan signed the recognizance as "Messervey" that this lowered her expectation of privacy. With respect I cannot accept this argument. While this factor clearly goes to whether the police acted in good faith it cannot in my opinion affect Ms. Ryan's own privacy expectation. The fact that she may have, at best, held herself out as the son's stepmother and as the police believed, lived with the accused Mr. Messervey, does not change the real fact that she had her own residence, her own home, with the consequent privacy expectation.
- [23] Finally, it does not appear that the seized items would have been obtained in any event. Unless there could be established a further and better connection between Mr. Messervey, his son or others with Ms. Ryan, it is unlikely the items in her residence would have been discovered. It is possible Ms. Ryan's own family have been implicated, but there is no evidence of this and this is mere speculation at best.
- [24] On balance therefore I must conclude that the breach was serious, as I stated above, while the nature of the police conduct does not necessarily favour this conclusion, the high expectation of privacy, the obtrusiveness of the search, lack of other reasonable and probable grounds weighs heavily to this conclusion.
- [25] I now must consider whether the exclusion of the evidence would affect the reputation of the administration of justice. This requires an examination of the seriousness of the offence and the importance to the Crown's case of the seized evidence. These are serious charges and the volume of drugs found are significant, together with the other indicia of a grow operation. However, the substances were marijuana products as opposed to hard drugs, a factor pointed out by the Supreme Court of Canada in **Buhay**, *supra*, although the quantity suggests uses beyond a personal one. The stolen items and the guns do not necessarily add to the seriousness of drug offences, although they are somewhat serious on their own behalf.

- [26] I do not make any inferences that the guns supported the presence of drugs. Again, guns such as the ones found are quite common in rural areas of Nova Scotia such as this. Obviously the seizures made are critical evidence in the Crown's case relative to Ms. Ryan.
- [27] On the whole I am not satisfied that the seriousness of the offences charged and the critical nature of the evidence to the Crown's case outweighs the seriousness of the **Charter** violation as I described, notwithstanding the trial fairness is not affected.
- [28] This was a significant intrusion into this woman's home where privacy expectation is high and while there are certainly circumstances which explain the police conduct which mitigate the seriousness of their actions I believe that it would bring the administration of justice into disrepute if the evidence was admitted. This is especially so when there was nothing to connect Ms. Ryan to the reason for the search in the first place and no other reason or basis to search her home.
- [29] Accordingly, the evidence of the seizures are excluded relative to the accused, Ryan.

ALAN T. TUFTS, J.P.C.