IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. MELVIN, 2004 NSPC 48

Date: 20040621
Docket: Case Number 1361148
to
1361152
Registry: Halifax

Between:

Her Majesty the Queen

v.

Cory Patrick Melvin

(Decision on Voir Dire)

Judge:	The Honourable Judge Michael B. Sherar
Oral Decision:	June 21, 2004, in Halifax, Nova Scotia
Typed Decision:	September 30, 2004
Counsel:	Ms. Susan Bour, for the prosecution Mr. Warren Zimmer, for the defence

By the Court:

[1] Cory Patrick Melvin stands charged with three offences allegedly occurring on October 3, 2003 in Halifax, Nova Scotia.

(1) public mischief, by giving a false name to direct suspicion from himself, contrary to section 140(1)(b) of the Criminal Code;

(2) & (3) breaches of two conditions of a Recognizance, contrary to section 145(3)(a) of the Criminal Code.

[2] Trial was held on April 8, 2004 and, at the outset, the defendant gave notice that he was seeking exclusion of certain evidence pursuant to section 24(2) of the Charter of Rights and Freedoms - alleging violation of his section 10 Charter Rights.

[3] A *voir dire* was held to determine the foregoing Defence Application. It was agreed that the evidence on the *voir dire* would form a portion of the trial proper if the evidence was admitted.

[4] The relevant facts to be considered can be briefly stated as follows.

[5] Constable MacMullin and Constable Conrad, a police officer cadet at the time, were on routine patrol in the West Division in the Halifax Regional Municipality, Nova Scotia.

[6] They received word that a black vehicle was proceeding at a high rate of speed from Highway 102 inbound to Halifax in their direction. The police did not know the number or the identity of the occupants.

[7] Constable MacMullin and his partner attempted to assist other officers in tracking the speeding vehicle. They received reports that the vehicle was in the vicinity of Cowie Hill, and within a minute were in that location. They did not see the vehicle, but when they stopped they noted a smell - what to them appeared to be burning motor vehicle brakes. The police officers believed that the suspect vehicle was in the area. However, no vehicle or pedestrian traffic was observed except for a lone male.

[8] In the officer's words:

> Q. So when you first arrived there you noticed the strong smell. Did you notice anything else?
>
> A. Yes. Observed a male, a young while male, wearing a white t-shirt. He was in the area of 69A Mountain Road. He had crossed the road and he was coming up the side of the road sort of on the grassy area. He was in off the road some and he just crossed over. And he wasn't on like a sidewalk or the side of the road. He just looked like he was – crossed the road and he was going to take a short cut through a property there. We approached the male. He appeared to be out of breath and he just was acting kind of suspicious like he didn't really want to have any contact with us. We got out of the vehicle. We approached the male and he was, you know, somewhat – he was cooperative, I guess, but it appeared that he just wanted to continue on his way and didn't want to take any time out to talk to us. I cautioned this male. I told him that – what we were investigating. I read basically a standard police warning to him and advised him that we were looking for a suspicious vehicle that may have been involved in a chase with police. And after I cautioned him, I began to ask him questions in regards to it.

[9] At approximately 2156 hours to prevent the person - later identified as the defendant - from leaving the scene, the officers asked him to get into the back of the police vehicle.

[10] The officers acknowledge a person in the back of a police vehicle can only exit with the assistance of the police since there are no door handles in the backseat accessible to the person seated therein.

[11] The police were suspicious that the defendant was involved with the speeding vehicle and advised him of such. The police read the defendant the standard police caution.

> You need not say anything. You have nothing to hope from any promise of favour; nothing to fear from any threat. Whether or not you do say anything, anything you do say may be used as evidence.

The officer also said that he advised the defendant that at the time he was not under arrest.

[12] The officer's intention was twofold. He wanted establish the identity of the defendant so that he could record and follow up the person should further investigation be required. And also, he wanted the defendant to remain in the police vehicle until a police canine unit could conduct a tracking.

[13] In the latter case, if a suspect vehicle was located a dog would then be lead from the vehicle and hopefully trace his way back to the defendant - if the defendant had at one time been in the speeding car.

[14] While the defendant was advised that the officers were investigating a vehicle which had been proceeding through the area at a high rate of speed, they did not advise the defendant that he was under arrest for the same, or they did not apparently have or possess reasonable and probable grounds that the defendant was involved. They were, however, suspicious because of his presence and his actions.

[15] After having placed the defendant in the police vehicle and giving him the police caution - previously mentioned, the defendant was asked to identify himself. He provided a name. The officer stated:

> He was giving a name I was quite certain from my past experience and just from my gut feeling that he was giving a false name.

[16] While the defendant remained in the police vehicle, one of the officers attempted to confirm the defendant's identification - without success. The defendant provided a home address and the officers decided to take him to that address. By this time, the canine unit was called off since the original suspect vehicle could not be located. The officers became more suspicious of the defendant's true identity and their investigation increasing shifted to determining the identity of the person in the backseat of their police vehicle.

[17] At first the defendant appeared to agree to having his address checked out, then he requested to be let out of the police vehicle since he did not want to have the police vehicle in front of his residence.

[18] Finally the defendant blurted out that he was Cory Patrick Melvin and not the other name he had given, and also that he was on a Probation Order with certain conditions.

[19] At 2222 hours, the officers then placed the defendant under arrest for "obstruction" as he had previously tried to mislead the police as a result of the earlier false identification. He was a given the police caution again and advised of his rights under the Charter of Rights and Freedoms to avail himself of legal counsel.

[20] While initially in the police vehicle the defendant rejected the offer of legal counsel. Upon being taken to the police booking station, he did appear to consult counsel.

[21] Subsequently, a telephone pager was seized from the defendant as allegedly a term of his court ordered release proscribed the possession of such a pager.

[22] The issues to consider, based upon the foregoing facts, is whether the defendant's constitutionally protected rights, particularly under section 9 and 10 of the Charter of Rights and Freedoms, have been violated, and if so, should any evidence obtained in light of such a violation be excluded under s.24(2) of the Charter.

LAW

[23] There are no longer any Common Law offences or arrest powers in Canada. Arrest is only authorized under Statute. The Criminal Code outlines in section 494 the authority that a citizen has to arrest another citizen. Section 495 authorizes police officers to arrest citizens under certain circumstances.

> It allows an officer to arrest based upon reasonable and probable grounds and the standard has a subjective and objective component. Not only must the arresting officer personally believe he or she possesses the required grounds to arrest, those grounds must be objectively established in the sense that a reasonable person standing in the shoes of the officer would believe that they are reasonable and probable ground to make an arrest.

[24] Lastly, there is the police power under subsection 31(1) of the Criminal Code to arrest any person found committing a breach of the peace or whom on reasonable grounds the officer believes is about to join or renew a breach of the peace, reference James Stribopoulos' article in Article (2003) 48McGill L.J. 225 @ pp. 238 and 239.

[25] In the present case the officers did not believe on a subjective basis that they had reasonable and probable grounds to arrest the defendant until 26 minutes after he was detained.

> **THE COURT**: My question was with respect, when do you believe he was detained? When was the first time you believed he [the defendant] was detained?
>
> **CONSTABLE MACMULLIN**: Just a few minutes after we started speaking to him he had a seat in the police car with us and he was detained....

[26] The officer believed he was entitled to detain the accused for investigative purposes prior to effecting an arrest.

[27] In the seminal work by The Honourable R.E. Salhani, "Canadian Criminal Procedures, 6th Edition, at paragraph 3.95, the author talks about "Detention For Investigation."

> (2a) Detention for Investigation
>
> 3.95 Until recently, the law seemed to be clear that a police officer did not have the right to detain a suspect without proof on the basis of reasonable probability. In *Dedman,* [10a], Mr. Justice Martin stated what was understood to be the law:[10b]
>
> ARREST AND SEIZURE OF PROPERTY
>
> ...a police officer has no right to detain a person for questioning or for further investigation. No one is entitled to impose any physical restraint upon the citizen except as authorized by law, and this principle applies as much to police officers as to anyone else.
>
> However, in Simpson [10c] Mr. Justice Doherty felt that the *Dedman* case in the Supreme Court of Canada did not preclude detention imposed in the execution of a police officer's duty, *i.e.*, for the purpose of investigation, even though it did not meet the standards for the arrest of a detainee. He found that the power to detain for investigative purpose existed at common law and still does, [as I would compare it to the statutory requirements for arrest]. In reaching that conclusion, he adopted the comments of Professor Young, [10d] that "the courts must recognize the reality of the investigatory detention and begin the process of regulating the practice."[10e] He held that the standard imposed for detention for investigative purpose is one of reasonable suspicion as opposed to reasonable cause for arrest. The officer who claims

> reasonable suspicion must establish it by articulable cause. This means that the officer must establish "a constellation of objectively discernable facts which give the detaining officer reasonable cause to suspect that the detainee is criminally in the activity under investigation".[10f]

[28] The officer in this case was investigating a crime, the location of a speeding motor vehicle. Neither he nor any other member of the police force ever ultimately located the vehicle. The officer was in the vicinity of where the vehicle had last been seen. The officer detected the smell of vehicle brakes in the area. He had no objective grounds to conclude that the smell necessarily was related to the vehicle sought. He had no description of the vehicle or any of its occupants, other than the vehicle was black. The Defendant was not located near any vehicle. He was a suspect merely because he was walking in the vicinity of where the fleeing vehicle might, and I emphasize might, have passed by. The officer had a hunch that the Defendant may have been involved. One can assume that the officer would have questioned and detained anyone in the vicinity at the time.

[29] Crown Counsel asked during the *voir dire*:

> Q. If we could assume for a moment that Mr. Melvin [the defendant] was not a suspect but was just on scene, what would your approach have been?
>
> A. You mean would I have approached him at all or ...
>
> Q. Um-hmm.
>
> A. Yes, I mean, if I was just on a routine patrol and I saw somebody who was acting suspiciously and they caught my attention, you know I most likely would have still approached him, you know, depending on the circumstance.

[30] The suspicious activity was apparently the fact that while the Defendant was cooperative, he was out of breath and not walking on a sidewalk. When the officer yelled out at the Defendant, the latter kept on going and did not approach the police vehicle. With respect, that is hardly a "constellation of objectively discernable facts" leading to a reasonable suspicion.

[31] In fact, every citizen is free to walk away from a police officer unless he is detained or placed under arrest. A citizen need not identify himself.

[32] Mr. Justice McClung of the Alberta Court of Appeal in R. v. Guthrie [1982] A.J. 29 applied the reasoning of Chief Justice The Lord Parker in Rice v. Connolly [1966] 2 All ER 649.

> ...It seems to me quite clear that though every citizen has a moral duty or, if you like, a social duty to assist the police, there is no legal duty to that effect and indeed the whole basis of the common law is that right of the individual to refuse to answer questions put to him by persons in authority, and a refusal to accompany those in authority to any particular place short, of course, to arrest.

[33] The Defendant had every legal right to walk away from the officer and to refrain from answering any questions unless and until he was detained or arrested. How can such action on the part of a citizen in the absence of any other "evidence" cause a citizen to become a suspect on an objective basis?

[34] Section 9 of the Charter of Rights and Freedoms states:

> Everyone has the right not to be arbitrarily detained or imprisoned.

[35] With respect, it is the conclusion of this Court that on the date in question the actions of the officer, however well meaning, amounted to an arbitrary detention.

[36] It is clear the officer, at the time he had placed the Defendant in the back of his police vehicle, believed that he was detaining the Defendant and that the Defendant could not physically extricate himself from that physical detention without the consent of the officer.

[37] Salhani, which I referred to earlier, continues at paragraph 3.130 of his text:

> In England, a suspect is entitled to be cautioned before being questioned by a police officer as soon as the officer has reasonable grounds to suspect that an offence has been committed even though the suspect has not been arrested or detained.[16] In Canada, no such protection is recognized.[17] However, as soon as an accused is arrested or detained, he must be informed of his right to retain and instruct counsel and may not be questioned further until he has had a reasonable opportunity to exercise that right or has expressly waived it.

Section 10 of The Charter states:

Everyone has the right on arrest or detention

(2) (a) to be informed promptly of the reasons therefor

(b) to retain and instruct counsel without delay and to be informed of that right.

(c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful

[38] In this case, the evidence on the *voir dire* indicates that the Defendant was informed that there was an investigation going on about a speeding vehicle. When he was placed in the back of the police vehicle, the Defendant was given a police caution that he need not say anything but anything he did say could be used as evidence.

[39] He was questioned further as to his identity and provided answers for some 26 minutes prior to being advised of his right to retain and instruct counsel. With respect, the passage of 26 minutes in a situation whereby the accused is not attempting to abscond or attack the police is not "without delay"as contemplated by s.10(b) of The Charter of Rights and Freedoms.

[40] In R. v. Bartle [1994] 3 S.C.R. 173, The Supreme Court of Canada reviewed the state's obligation under s.10(b).

1. inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel;

2. if the detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and

3. to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger).

[41] Also in R. v. Prosper [1994] 3 S.C.R. 236 the obligation on police to hold off eliciting information until a detainee has been given a reasonable opportunity to contact counsel.

[42] The officer did not advise the Defendant of his constitutional rights under s.10(b) upon detention, and accordingly, the Defendant has shown on a balance of probabilities that the Defendant's s.10(b) rights were violated.

[43] Section 24(2):

> Where...a court concludes that evidence was obtained in a manner that infringed or denied any rights and freedoms guaranteed by this Charter, the evidence shall be excluded if it establishes that, having regard to all the circumstances, the admission of it in the proceedings would being the administration of justice into disrepute.

[44] In R. v. Collins [1987] 1 S.C.R. 265:

> The Supreme Court of Canada has declared that the test should read the evidence should be excluded if its admission could bring the administration of justice into disrepute and the onus is once again on the applicant on a balance of probabilities to prove such test.

[45] In this case it was the alleged statements of the Defendant alone, that were made prior to his being informed of his s.10(b) rights, that lead to his further detention and ultimate arrest for obstruction and breach of recognizance.

[46] In R. v. Stillman [1997] 113 C.C.C. (3d) 321, The Supreme Court of Canada differentiated between conscriptive and non-conscriptive evidence.

[47] Mr. Justice Cory at p.323 defined conscriptive evidence as evidence which is obtained when:

> ...an accused, in violation of his Charter Rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples.

[48] Since the evidence in this case emanated solely from the Defendant's statements in identifying himself - first allegedly falsely and then accurately after being detained without advice as to counsel - the evidence was conscriptive.

[49] In Stillman *supra* the Court was of the opinion:

> If the evidence is conscriptive and the Crown fails to demonstrate on a balance of probabilities that the evidence would have been discovered by alternative, non-scriptive means, then its admission will render the trial unfair.

[50] The Crown has not attempted to demonstrate that the evidence would have been ascertained alternatively to the conscriptive statements of the Defendant.

[51] In R. v. Simons [1994] M.J No.181 para 38 The Manitoba Court of Appeal applied the reasoning of The Supreme Court of Canada in R. v. Evans [1991] 1 S.C.R. 869:

> Generally, the obtaining of incriminating statements from an accused in violation of his rights results in unfairness because the accused's privileges against self incrimination is infringed and is infringed in a prejudicial manner by supplying evidence which would not be otherwise available. Few things could be more calculated to bring the administration of justice into disrepute than to the imprisonment of a man without a fair trial.

It should be noted that the accused in that case was being tried for murder.

[52] Furthermore in Elshaw v. The Queen (1989) 67 C.C.C. (3d) 97 Mr. Justice Iacobucci for The Supreme Court of Canada when considering whether a trial would be rendered unfair by the admission of evidence elicited in violation of a Charter Right stated:

> The measure of seriousness, then, is a function of the deliberate or non-deliberate nature of the violation by the authorities, circumstances of urgency and necessity and other aggravating or mitigating factors.
>
> ...it is the fact that the police obtained evidence from a detained person prior to fulfilling their responsibilities under s.10(b) which is important, not the relatively short period of time during which the appellant was detained.
>
> later on,
>
> ...where the impugned evidence falls afoul of the 1st set of factors set out by Lamer in Collins (trial fairness) the admissibility of such evidence cannot be saved by resort to the second set of factors (the seriousness of the violation). These 2 sets of factors are alternative grounds for exclusion of evidence and not alternative grounds for admission of evidence.

and further,

> ...a violation of rights which jeopardizes the fairness of the trial cannot be "saved" by mitigating factors (such as the good faith of the police). It can, however, be worsened by aggravating factors (such as a lack of urgency or necessity).
>
> ...it is clear that the exclusion of inculpatory statements obtained in violation of s.10(b) should be the rule rather than the exception.

[53] While the admission of this conscripted evidence may be vital to prove any conviction, the admission would lead to an unfair trail.

[54] The conscripted statements of identity, both alleged false and true, arose prior to the Defendant being provided with his s.10(b) right. That evidence lead to a discovery of the existence of the alleged outstanding court orders involving the Defendant and charges of breach of the same. If it were not for the inculpatory statement of the Defendant the police would not have had any grounds to charge him. The circumstances of the case were not so urgent that he could not have been advised as to his right to counsel. In addition to the violation of the Defendant's s.10(b) rights, it is the determination of this Court that he had been arbitrarily detained in the first place resulting in a violation of his s.9 Charter Rights.

[55] In these circumstances to allow the police authorities to profit from the spoils of an arbitrarily detention, would bring the administration of justice into disrepute.

[56] Accordingly, the statements of the Defendant are excluded from the evidence of the trial proper.

Order accordingly,

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Michael B. Sherar
Provincial Court Judge