SC CR 95 016

CR 02812

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

RAYMOND SOLDAT

Application for exclusion of evidence pursuant to s.24(2) of *Charter of Rights and Freedoms*, following an unauthorized seizure of scalp hair samples from accused while in custody. Application denied.

Heard at Yellowknife on September 29, 1995

Judgment filed: October 5, 1995

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J.E. RICHARD

Counsel for the Applicant: Bernadette Schmaltz

Counsel for the Defendant: James D. Brydon

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REASONS FOR JUDGMENT

1 On September 25, 1994 the accused was arrested and charged with sexually assaulting the complainant earlier that day at the complainant's residence in Rae-Edzo. Several hours later the police obtained a search warrant from a justice of the peace in Rae-Edzo authorizing the police, *inter alia*, to seize scalp hair samples from the person of the accused while he was detained in custody at the RCMP detachment. The justice of the peace did not have jurisdiction to issue the search warrant. The accused says that the seizure of his scalp hairs was unlawful, unreasonable, and an infringement of his constitutional rights. He requests an order preventing the Crown from presenting to the jury any evidence concerning those scalp hairs, or concerning any forensic DNA analysis of those scalp hairs.

2 The *Charter of Rights & Freedoms* protects the privacy rights of individuals, including accused persons, in s.8:

> 8. Everyone has the right to be secure against unreasonable search or seizure.

3 The focus, then, in determining whether there has been an unconstitutional search or seizure is on the reasonableness or unreasonableness of the state's action against the individual. An individual's right to privacy must be balanced against other societal needs, including law enforcement. Parliament has prescribed a system of prior judicial authorization to justify searches and seizures executed by the police or anyone else. Thus, s.487 of the *Criminal Code* authorizes a justice of the peace to issue a conventional search warrant in clearly specified circumstances, and sets out the procedure that must be followed:

> 487. (1) A justice who is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in a building, receptacle or place
>
> (a) anything on or in respect of which any offence against this Act or any other Act of Parliament has been or is suspected to have been committed,
> (b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against this Act or any other Act of Parliament, or
> (c) anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant,
>
> may at any time issue a warrant under his hand authorizing a person named therein or a peace officer
>
> (d) to search the building, receptacle or place for any such thing and to seize it, and
> (e) subject to any other Act of Parliament, to, as soon as practicable, bring the thing seized before, or make a report in respect thereof to, the justice or some other justice for the same territorial division in accordance with section 489.1.

4 Two years ago Parliament enacted a new section of the *Criminal Code*, s.487.01, authorizing a Territorial Court judge or a Supreme Court judge to issue a special search warrant to the police in circumstances not covered by the existing s.487:

> s.487.01 (1) A provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined to section 552 may issue a warrant in writing authorizing a peace officer to, subject to this section, use any device or investigative technique or procedure to do any thing described in the warrant that would, if not authorized, constitute an unreasonable search or seizure in respect of a person or a person's property if
>
> (a) the judge is satisfied by information on oath in writing that there are reasonable grounds to believe that an offence against this or any other Act of Parliament has been or will be committed and that information concerning the offence will be obtained through the use of the technique, procedure or device or the doing of the thing;
> (b) the judge is satisfied that it is in the best interests of the administration of justice to issue the warrant; and
> (c) there is no other provision in this or any other Act of Parliament that would provide for a warrant, authorization or order permitting the technique, procedure or device to be used or the thing to be done.
>
> (2) Nothing in subsection (1) shall be construed as to permit interference with the bodily integrity of any person.
>
> 1993, c.40, s.15

5 There have been few reported cases which interpret the scope of this new section.

6 On April 10, 1995, Hermiston J of the Ontario Court General Division in *R. v. Hutchinson* (unreported) considered an application by the Crown for a warrant under s.487.01 authorizing the Crown to seize hair samples, buccal or saliva swabs, and blood samples from an accused man who was charged with sexual assault and who was detained in custody. It was held that the taking of the blood samples and the buccal swabs was an interference with the bodily integrity of the person and hence prohibited by ss.487.01(2). The learned judge was of the view that the taking of scalp hair samples did not, however, offend subsection (2):

> "... The taking of scalp hair is not so intrusive as the other two. A person's body is not invaded in the same sense.
>
> ...
>
> My review leads me to the opinion that subsection (2) prohibits procedures which would compel a person to actively participate in the investigation, such as giving blood, or a buccal smear. The taking of hair samples does not fall within this category.
>
> The probative value of this procedure needs to be weighed against its inherent intrusiveness. I am satisfied that the taking of hair for DNA testing is highly probative and is minimally intrusive. I cannot find that the taking of hair samples was intended to be prohibited by subsection (2). It would stretch the meaning of "interference with bodily integrity" unduly to include the taking of scalp hair samples within the definition of the same. ..."

A general warrant was issued in *Hutchinson* authorizing the obtaining of scalp hair samples from the accused.

7 To the contrary is the decision of Moore J in *R.* v. *McDowell* (Alta. Q.B. #9408-0045030, May 11, 1995, unreported). A general warrant had issued pursuant to s.487.01 authorizing the police to take a saliva sample and scalp hair samples from the accused. As trial judge, Moore J ruled that each of these actions constituted an interference with the bodily integrity of a person, and that the general warrant should not have been issued. On a *voir dire* he ruled inadmissible any evidence emanating from the seizures.

8 Coincidentally, Parliament has now taken yet another explicit step in prescribing the specific situations where law enforcement agencies may obtain a search warrant to seize a bodily substance for the purpose of forensic DNA analysis:

> s.487.04. In this section and sections 487.05 to 487.09,
> ...
> "designated offence" means
> (a) an offence under any of the following provisions of this Act, namely,
> ...
> (xxiii) section 271 (sexual assault),
> ...
>
> s.487.05 (1) A provincial court judge who on *ex parte* application is satisfied by information on oath that there are reasonable grounds to believe
>
> (a) that a designated offence has been committed,
> (b) that bodily substance has been found
> (i) at the place where the offence was committed,
> (ii) on or within the body of the victim of the offence,
> (iii) on anything worn or carried by the victim at the time when the offence was committed, or
> (iv) on or within the body of any person or thing or at any place associated with the commission of the offence,
> (c) that a person was a party to the offence, and
> (d) that forensic DNA analysis of a bodily substance from the person will provide evidence about whether the bodily substance referred to in paragraph (b) was from that person
>
> and who is satisfied that it is in the best interests of the administration of justice to do so may issue a warrant in writing authorizing a peace officer to obtain, or cause to be obtained under the direction of the peace officer, a bodily substance from that person, by means of an investigative procedure described in subsection 487.06(1), for the purpose of forensic DNA analysis.
> 1995, c.27, ss.1 and 3
> (in force July 13, 1995)

9 To return to the present case, it is clear from the evidence adduced on the *voir dire* that the police, in making application to the justice of the peace for a warrant, purported to act pursuant to the new s.487.01 of the *Criminal Code*. On the pre-printed "Form 5 - Warrant to Search, section 487 *Criminal Code*" the expression "Form 5" is deleted and the expression "section 487" is altered to read "section 487.01". It is equally clear that the justice of the peace had no jurisdiction to issue the s.487.01 general

warrant, Parliament having specified that the prior authorization must come from a "provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 [a judge of the Supreme Court]". The warrant issued on September 25, 1994 was invalid. Although there was no evidence directly on point, for the purposes of this *voir dire*, I infer that the police simply made a mistake, unknowingly.

10 Thus, the search and seizure upon the accused's person on September 25, 1994 was warrantless. The law is clear that a warrantless search and seizure is *prima facie* unreasonable and it is for the Crown to establish the reasonableness of the state action.

11 Crown counsel submits that the police had a right to seize the scalp hairs independent of the faulty warrant, and that in that respect the warrant is mere surplusage. It is submitted that a police officer has the right to search a person upon his lawful arrest, incidental to that arrest, and to take from his person anything which the officer reasonably believes is connected to the charge upon which he is arrested. Thus, a search and seizure incidental to arrest, it is argued, is lawful and reasonable, and does not constitute an infringement of an accused's s.8 Charter rights.

12 The Supreme Court of Canada in *Cloutier* v. *Langlois* (1990) 53 C.C.C. (3d) 257 confirmed the existence of a police power to search incidental to arrest:

> "... it seems beyond question that the common law as recognized and developed in Canada holds that the police have a power to search a lawfully arrested person and to seize anything in his or her possession or immediate surroundings to guarantee the safety of the police and the accused, prevent the prisoner's escape or provide evidence against him." at p.274.

13 Reported court decisions relating to the power of search incident to arrest reflect an uncertainty as to the scope of this power when it involves the body and body parts of the detainee. Much depends on the extent of the "intrusiveness". While frisk searches (*Cloutier* v. *Langlois, supra*) and the removal of a bloody bandage (*R.* v. *Miller* (1987) 38 C.C.C. (3d) 252 (Ont. C.A.)) have been held to be reasonable, a rectal search (*R. v. Greffe*, [1990] 1 S.C.R. 755) has been held to be unreasonable. The reasonableness or unreasonableness of the removal of "live" body parts, e.g. scalp hairs, has been more contentious.

14 In the 1985 decision of the Ontario Court of Appeal in R. v. Alderton 44 C.R. (3d) 254, the taking of hair samples from the accused upon his arrest on a charge of sexual assault was held to be reasonable:

> "In this case, Detective Ashton had reasonable grounds to believe that the analysis of hair samples from the appellant would connect him with the offence. The taking of the hair samples was not accomplished by violence or threats of violence and we are all of the view that the taking of the hair samples, in the circumstances of this case, and having regard to the serious nature of the offence, did not contravene s.8 of the Charter." p.259

15 A similar ruling was made in R. v. Hutchinson [1991] Y.J. No. 212, Y.T.S.C., a case in which the accused woman was charged with murder and in which the police had seized scalp hair samples at the time of her arrest. In making this ruling Maloney J. stated:

> "...It seems to me eminently reasonable for him [the police officer] to assume that hair samples might become a factor at a subsequent trial, might figure in evidence, might be a source of useful evidence. He had executed a lawful arrest. The lawfulness of that arrest has been conceded. Consequently, the Crown contends that the investigating officer had the right to take the hair sample pursuant to that valid arrest.

> In my view, that contention is correct. The officers did have the power to take the hair specimens as they did. ..."

16 Apart from Alderton and Hutchinson, most other reported decisions reflect the view that the police power of search/seizure incidental to arrest does not include the right to seize hair samples, and that to do so is an unreasonable state action which contravenes s.8 of the Charter.

17 In R. v. Legere (1988) 43 C.C.C. (3d) 502 (N.B.C.A.) the accused was charged with murder. Sometime after his arrest in 1986 the police went to his cell and forcibly removed head hairs from the accused, to be used as sample hairs in DNA analysis. The Legere decision was made prior to the enactment of either s.487.01 or s.487.04 of the Criminal Code. Angers, J.A., at p.513 stated:

> "By statutory authority or court order, the fingerprints of a person can be taken, samples of his breath and blood may be taken, his private conversations intercepted and his home searched. I might add that until a few years ago his life could also be taken with a proper court order. However, no statutory authority nor court order permitted what happened here. Moreover, it is not justifiable under the incidental power of arrest since at the time when the hair samples were taken, the arrest was a *fait accompli*. I note that for the purposes of this case, it is not necessary to decide whether such samples could be taken under the ancillary power of arrest.
>
> In my opinion, the forcible taking of parts of a person, in the absence of legislation authorizing such acts, is an infringement of the right to security of the person and constitutes an unreasonable seizure. ..."

18 The Alberta Queen's Bench in R. v. Babcock [1990] 3 W.W.R. 35 dealt with a fact situation wherein a police officer took a comb and made several passes through the arrested person's hair, misleading the accused as to the real reason for so doing by telling

the accused it was to make him look good for his photograph. Even though the trial judge found that the officer's conduct was not oppressive and consisted of a slight application of force only, and that the act was not necessarily an affront to the accused's dignity, he held that this was an intrusive force used on the accused, resulting in an unreasonable search and an infringement of the accused's s.8 Charter rights.

19 A decision in R. v. Paul (1994) 95 C.C.C. (3d) 266 (N.B.C.A.) concerned a police officer "requiring" the accused to provide hair samples upon his arrest for murder in 1990:

> There is no legislation authorizing the taking of hair samples. The absence of such legislation has been noted by many judges and commentators. There is legislation providing for fingerprinting, breath samples and, in limited circumstances, blood samples, but, as noted, none for obtaining hair samples.
>
> Thus, any authorization must be found in the common law where searches and seizure are permitted when they occur incidentally to an arrest. The Crown, as noted, submits that the hair samples were so obtained and relies on *Cloutier v. Langlois* (1990), 53 C.C.C. (3d) 257, [1990] 1 S.C.R. 158, 74 C.R. (3d) 316.
>
> Searches made incidentally to an arrest are justified so that the arresting officer can be assured that the person arrested is not armed or dangerous and seizures are justified to preserve evidence that may go out of existence or be otherwise lost. As neither circumstance existed here, the Crown cannot rely on a power that is incidental to an arrest to justify seizure of the hair samples from Mr. Paul. In my opinion, the power to search and seize does not extend beyond those purposes. ..." per Hoyt, C.J.N.B., at p.271

20 The Court ruled there had been a breach of Mr. Paul's s.8 rights.

21 Mr. Legere found himself before the New Brunswick Court of Appeal again in 1994 in connection with subsequent charges. Upon his re-arrest in 1989, the police again took hair samples from him without his consent. The Court of Appeal (95 C.C.C.

(3d) 168), followed its earlier decisions in *Legere* (1988) and in *Paul*, supra, and held that Legere's constitutional rights under s.8 of the Charter had again been infringed.

22 Other cases in which the taking of hair samples from an accused person, either surreptitiously or forcibly, was determined to constitute an unreasonable police action and a contravention of s.8 of the Charter are *R.* v. *Williams* (1992) 76 C.C.C. (3d) 385 (B.C.S.C.); *R.* v. *Hodge* (1993) 80 C.C.C. (3d) 189 (N.B.C.A.); *R.* v. *Foster* [1994] B.C.J. 470 (B.C.S.C.); and *R.* v. *Love* [1994] A.J. 847 (Alta. Q.B.).

23 Thus, the majority of the case law suggests that the police power of search incident to a lawful arrest does not include the power to seize live body parts such as hairs. I therefore conclude that the warrantless seizure of scalp hairs from Raymond Soldat at the RCMP detachment in Rae-Edzo on September 25, 1994 was unlawful. An unlawful seizure by the state does not meet the test of reasonableness, *R.* v. *Collins* (1987) 33 C.C.C. (3d) 1 (S.C.C.). The unlawful seizure was a breach of Mr. Soldat's constitutional rights pursuant to s.8 of the *Charter of Rights and Freedoms*, as alleged by him on this application.

24 I turn now to the second aspect of the accused's application, which is made pursuant to s.24(2) of the Charter, i.e. whether it has been established that the admission of this evidence obtained *via* a breach of Mr. Soldat's s.8 rights could bring the administration of justice into disrepute.

25 The test to be applied is whether the evidence could bring the administration of justice into disrepute in the eyes of a reasonable person, dispassionate and fully

apprised of the circumstances of the case, *R.* v. *Collins, supra*. The burden of persuasion, on a balance of probabilities, is on Mr. Soldat.

26 The Supreme Court of Canada in *Collins* and subsequent cases has indicated the factors to be considered in determining whether or not the admission of evidence could bring the administration of justice into disrepute. In a case cited by counsel in the present case, *R.* v. *Turcotte* (1987) 39 C.C.C. (3d) 193 (Sask. C.A.), Vancise J.A. conveniently summarized the three broad categories of factors as follows:

> "1. The fairness of the trial. If the admission of the evidence in some way affects the fairness of the trial it should be excluded. Some factors to be taken into account to determine whether the admission of the evidence could result in unfairness are, the nature of the evidence, the nature of the right violated, and the manner in which the right was violated. The use of self-incriminating evidence obtained as a denial of the right to counsel is an obvious example of something going to the very heart of fairness of the trial and will ordinarily be excluded.
>
> 2. Nature and circumstances of the Charter violation, having particular reference to whether the infringement was committed in good faith, was inadvertent or technical as opposed to deliberate and flagrant. The circumstances surrounding the violation are important. If because of the urgency or necessity to prevent the destruction of evidence, the police are unable to, for example, obtain a warrant that will obviously impact upon whether the evidence should be excluded. Equally important is whether the evidence could have been obtained without the violation of the Charter.
>
> 3. The effect of the exclusion of the evidence on the repute of the system of justice. One must determine whether the administration of justice will be better served by the admission or exclusion of the evidence." at p.209-210.

27 Having regard to the foregoing factors, and to all of the circumstances of this case, I am not satisfied that the accused has established that the admission of the

impugned evidence at trial could bring the administration of justice into disrepute. The hair samples are real evidence that existed irrespective of the Charter breach. As indicated in *Collins*, real evidence will rarely operate unfairly against an accused at his trial if it exists independently of any Charter breach. Allowing the Crown to adduce this evidence will not affect the fairness of the trial any more than would fingerprints taken from an accused. This evidence was not conscripted from, did not emanate from, the accused as in the case of a statement or confession. This evidence existed prior to and independent of the Charter breach. Indeed, it still exists (i.e. the accused's scalp hairs) and in all likelihood is available to the police and the Crown pursuant to the statutory provisions of s.487.01 and/or s.487.05 of the *Criminal Code*.

28 This Charter violation, though unlawful, was not a significant intrusion upon the accused's person or dignity. Although the accused may today consider the Charter violation as serious, it is not apparent that he did so at the time.

29 The accused has not established on this application any lack of good faith by the police. They were dealing with relatively new statutory provisions. This is not a case where the police acted arbitrarily, or conducted themselves in flagrant disregard for the law and/or well-known procedures. I am of the view that the conduct of the police in this case would not shock the conscience of the community.

30 The accused is charged with a serious offence. I find that the admissibility of his hair samples for identification purposes, notwithstanding the technical breach of his constitutional right to be secure from unreasonable seizures, could not bring the administration of justice into disrepute.

On any s.24(2) application, the Court must take into consideration the factors enumerated in *Collins* in the context of the particular facts and circumstances of the individual case. I note, however, that in the "hair sample" cases discussed earlier in these reasons, including those many decisions determining the existence of a Charter breach, the Court invariably declined to exclude the evidence of the hair samples pursuant to s.24(2) of the Charter. In yet another reported decision, in the course of dismissing an accused person's appeal on grounds similar to the submissions of Mr. Soldat in the present application, Côté J.A. succinctly wrote "pulling a few hairs is no great affront to human dignity", *R.* v. *Bowen* (1990) 59 C.C.C. (3d) (Alta. C.A.).

31

32 For the foregoing reasons, the accused's s.24(2) application is denied.

J.E. Richard
J.S.C.

Yellowknife, Northwest Territories
5 October 1995

Counsel for the Applicant: Bernadette Schmaltz

Counsel for the Defendant: James D. Brydon

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