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R. v. Wasylyshen

Between
Her Majesty The Queen, (Informant), Appellant, and
Ernie Wasylyshen and Sylvia Wasylyshen, (Accused), Respondents

Manitoba Judgments: [1987] M.J. No. 254
Suit No. 470/85 (Brandon)

Manitoba Court of Queen's Bench
Smith J.

May 14, 1987

A.G. Bowering, Counsel for the Appellant.

Murray F. Kernaghan, Counsel for the Respondents.

SMITH J.:— This is a summary conviction appeal by the Crown on the record under Part XXIV of The Criminal Code of Canada from a decision of His Honour Judge H. W. Forrest on the 13th day of September, 1985. He acquitted the Respondents of a charge under The Highway Traffic Act, S.M., 1966, Cap. H60 and amendments thereto (which was in effect at the time the offence occurred) under section 185(3)(b) (now section 203(1)(b)) that:

> "On or about the 23rd day of March, A.D., 1984, at the Rural Municipality of Lansdowne in the Province of Manitoba, DID UNLAWFULLY possess a device for detecting radar speed determination equipment, in a motor vehicle CONTRARY TO SECTION 185(3)(b) OF THE HIGHWAY TRAFFIC ACT."

The facts of the case briefly are that on March 23, 1984 the R.C.M.P. stopped a vehicle being driven by the accused, Ernie Wasylyshen, in the Rural Municipality of Lansdowne, in Manitoba, at approximately 2:00 p.m. Constable Sutton noticed a cord leading from the cigarette lighter of the accused's vehicle up to and underneath a baseball cap on the dashboard on the vehicle. When asked what was under the cap, the co-accused, Sylvia Wasylyshen, grabbed the object and hid it from the officer's view. At this time Constable Sutton recognized the object removed from the dash as a "Bell Micro-eye" radar detector. For a period of approximately five minutes, according to the evidence of Constables Sutton and Olson, the two accused refused to surrender the object. It was finally seized by Constable Olson, who also indicated in his evidence that he recognized the object to be a Bell Micro-eye radar detector. Once seized, Constable Sutton tested the object and indicated he connected the object in the cigarette lighter in his police car and activated the unit. The object emitted a beeping noise and produced a red light signal in the presence of activated radar. The parties were charged, given Appearance Notices and allowed to proceed.

The Learned Trial Judge felt that he was bound by the case of R. v. Henuset, [1983] 4 W.W.R. 267, a judgment of the late Justice Lorne P. Ferg (then of the County Court of Manitoba) and dismissed the charges. The judge's reasons were:

> "The wording of Regina vs Hunset (sic) is just as strong as the evidence in this case or vice versa. They appear to be on all fours. It's a case that, with which I don't agree, personally, I don't think it makes sense, but however, that is not, this is a judgment of a superior court. A Court who's decisions are binding upon me. I must therefore dismiss the charges under The Highway Traffic Act."

The Crown's grounds of appeal were as follows:

1. That the Learned Trial Judge erred in considering himself bound by the decision in R. v. Henuset.
2. That the Learned Trial Judge erred in finding that, as a matter of law, he could not consider the Crown evidence as to the nature of Exhibit 1, which evidence alleged that it was a "radar detector."

In the factum on appeal the counsel for the accused argues that in addition to the fact that the Learned Trial Judge did not err, the search and seizure in the case and the detention offended section 8 and/or 9 of the Canadian Charter of Riqhts and Freedoms.

There are two questions to be decided on this appeal:

1. Was the Trial Judge correct in his analysis of the law relating to the evidence provided by the Crown in regard to the instrument presented and filed as Exhibit 1, and was he bound by the Henuset decision?
2. Can the accused, by his counsel on this appeal, raise a question which was not raised at the time of the trial and obviously was not considered by the Trial Judge? If the answer is yes, then I must consider:

   (a) whether there was a violation of sections 8 and/or 9 of the Charter;
   (b) should the evidence be excluded as a result?

Evidence of Radar Detector

It seems clear from the reasons of the Learned Trial judge that he was satisfied Exhibit 1 was a radar detector, but he felt bound by the decision in R. v. Henuset.

The Learned Trial judge may have felt bound by the decision, but with all respect, I am not so encumbered.

With all respect to the late Justice Lorne Ferg (County Court Judge as he was then), in considering the evidence it is clear to me that on the evidence before him -- Henuset was, in my opinion, wrongly decided. There was, in my opinion, no necessity for expert evidence to prove the device was a radar detector.

A verdict for dismissal in this case was unreasonable and could not be supported by the evidence. It is my opinion the Learned Trial Judge could have distinguished the present case from Henuset on the facts.

We have the clear evidence of Constable Sutton, a police officer of some experience, who not only recognized what the unit was, but named the type. The unit was tested by him and it was in working order. The police officer had experience with these devices, and in my opinion, his test was sufficient, his evidence clear and supported by another officer.

It should be pointed out that according to the evidence the accused's major concern was the officer's right to seize the radar detector. There could be, in my opinion, no reasonable doubt that Exhibit 1 was a radar detector, that it worked and that it was in the possession of the accused as charged.

In my opinion, a verdict of dismissal was unreasonable and could not be supported by the evidence.

As a result of this finding I must consider the second question.

Should Argument Relating to Alleged Charter Violations be Received on This Appeal

I requested written argument from counsel on the question of whether I could consider the argument put forward by counsel for the Respondents concerning alleged violations of sections 8 and 9 of the Charter of Rights and Freedoms and the exclusion of evidence obtained after such alleged violations.

It should be noted that this is an appeal on the record by the Crown from a dismissal. There is no evidence before me that any Charter argument was raised in the case and certainly no evidence the Trial Judge considered any such arguments.

There is no cross appeal for obvious reasons and the Charter argument was, to say the least, a last minute argument in the Respondents' factum. I therefore requested additional written argument.

The Crown submits that such arguments should not be considered due to the nature of the appeal and the fact that no such argument was considered at the original trial, nor were any objections taken as to either a detention or wrongful search and seizure. The Crown submits I should follow R. v. Aimonetti (1981), 8 Man.R. (2d) 271 (C.A.). This case was pre-charter and the facts are quite different from those before me. In that case it was stated that the provincial judge, when the issue of unlawful search and seizure was not raised before him, was entitled to assume the validity of the steps taken by police.

In this case it is clear from the record no objections were taken, and therefore, there was no need for evidence from the Crown at the trial.

The Crown submits the accused have no right of appeal from a dismissal and so could not in effect launch a cross appeal on Charter arguments.

The Respondents' counsel submits the case of Perka et al. v. The Queen 14 C.C.C. (3d) 385 (S.C.C.) to support the contention that the Charter breaches should be considered under the circumstances of this case. Dickson J. (as he then was) said at page 391:

> "In both civil and criminal matters it is open to a respondent to advance any argument to sustain the judgment below, and he is not limited to appellant's points of law. A party cannot, however, raise an entirely new argument which has not been raised below and in relation to which it might have been necessary to adduce evidence at trial...."
> (the underlining is mine)

In reading sections 24(1) and 24(2) of the Charter it is abundantly clear that the accused must make an application to the Court for exclusion of evidence, which may or may not be granted.

There was clearly no application at the trial. I do not believe the raising in argument of Charter violations on this appeal on the record is reasonable or appropriate, considering all the circumstances of this case as disclosed in the record.

In Regina v. Roach 23 C.C.C. (3d) 262 the Alberta Court of Appeal considered a crown appeal from a Queen's Bench decision on a summary conviction appeal. Only in the Court of Appeal was an eleventh hour argument raised of a violation of section 10(b) of the Charter.

I concur with the comments of McClung J.A. in Regina v. Roach supra at pp. 264-5:

> "There are no abstract Charter breaches. Its function is to protect the subject from unwarranted but real executive intrusion. Remedies are provided. By s. 24 of the Charter, the citizen whose rights or freedoms have been traduced may seek from the court its appropriate and just remedy. That may include the exclusion of evidence if its admission, because of the Charter violation involved, would throw the administration of justice into disrepute. Without a measure

> of the extent, or even the existence, of the Charter violation that is urged, how can just and appropriate s. 24 remedies be tailored? Exclusion, an extreme remedy, can be ordered only if the reputation of the criminal justice system is at risk otherwise. It is a step that cannot be taken by a judge weighing phantom Charter encroachments.
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> . . . . .
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> The burden of adducing evidence, while not a burden of proof, is one which I would think on principle must devolve upon the accused. It is the burden of "going forward", a concept expressed in some American writings. It is simply a practical obligation to adduce sufficient evidence to put the complaint into issue; enough to invest it with an air of reality. The Crown's traditional onus of proof on the issue would then engage. The accused is not driven to call defence evidence to put the complaint into issue; this may be achieved by cross-examination of prosecution witnesses or by way of admission of fact.
> .... For the purpose of this case it is sufficient to say that a silent record will not commission an inquiry into Charter legal rights compliance."

I concur with the reasoning in this case and I am of the opinion I should not consider this argument.

If I am wrong and should consider the argument of Charter violations, I would hold as follows:

Search or Seizure - Section 8, Charter of Rights

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

Detention or Imprisonment - Section 9, Charter of Rights

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

According to the evidence of Constable Sutton he stated as follows:

> "I was working with several other members at a stationary traffic check in the Rural Municipality of Landsdowne, in the Province of Manitoba on Provincial Trunk Highway No. 16. We were checking the vehicle for violations of The Highway Traffic Act, Provincial Liquor Control Act, and Criminal Code traffic matters."

On cross-examination Constable Sutton indicated that they were on traffic detail and were stopping as many cars as they could. Constable Sutton also indicated that there was nothing wrong in the way the car was being driven.

In my opinion, there was no unlawful search or seizure. There is statutory authority under The Highway Traffic Act of Manitoba then in effect for such action.

"Seizure of radar detecting device.

185(4) Where a peace officer finds

(a) a vehicle that is equipped with a device for detecting radar speed determination equipment; or
(b) a person in possession of a device for detecting radar speed determination equipment, in a motor vehicle;

he may seize the device."

The type of spot check in this case was standard police procedure and it is authorized by the provisions under The Highway Traffic Act.

"Compliance with orders of peace officer.

71(2) Every driver of a vehicle that is on a highway, and every pedestrian or other person on a highway
(a) shall immediately comply with an order of a peace officer as to stopping or moving, or approaching or departing from any place, or as to the manner of taking up or setting down passengers or loading or unloading goods; and
(b) in particular, and without restricting the generality of clause (a), shall, on a signal from a peace officer requiring him to do so, immediately bring to a stop any vehicle that he is driving or animal that he is riding, and shall not proceed until so directed by the peace officer.

Inspection by peace officer.

60(1) A peace officer may at any time stop and inspect or cause to be inspected any equipment on a vehicle or bicycle on a highway, and may, if the equipment or any part thereof does not comply with this Act or with the regulations, require that the driver or operator thereof have, and the driver or operator shall proceed forthwith to have, the equipment made to comply therewith.

Arrest without warrant.

215(1) A peace officer who, on reasonable and proper grounds, believes that a violation of any of the following provisions, that is to say,

. . . . .

(j) clause (a) or (b) of subsection (1) of section 184;
(k) clause (a) or (b) of section 185;

. . . . .

of this Act, or any provision of section 233, 234, 235, 238, 239 or 295 of the Criminal Code, has been committed, whether it has becn committed or not, and who, on reasonable and probable grounds, believes that any person has committed such a violation, may arrest that person without warrant whether he is guilty or not."

Whether the above sections are appropriate is not the question before me. Rather, do the police have the right to stop this vehicle for a traffic spot check when, as it is alleged, there is no reasonable ground for doing so?

I am of the opinion, based on the facts on the record before me, there was not an arbitrary detention. Even if by stopping the Respondents there was a detention, it was only of short duration. It was not arbitrary, but developed as a result of the observation of the device by the constable and then the actions of the accused. The seizure then was statutorily authorized.

Even if there was an arbitrary stopping, the seizure was authorized by statute. In my opinion, such a road block and the obtaining of evidence from such a reasonable statutorily authorized stopping is not violation of sections 8 and 9 of the Charter

Even if it was held that there was a violation of sections 8 and 9, in my opinion, the evidence obtained clearly should not be excluded. The public as whole certainly would not find such a search and seizure improper or unreasonable under the circumstances of this case.

The public must be protected from the failure of persons to obey clear and unambiguous laws in regard to the use of highways and equiping motor vehicles.

I concur with the opening comments of Twaddle, J.A. in R. v. Nelson 45 Man. R. (2d) 68 which are as follows:

> "The arbitrary detention of a citizen by the police is an exercise of power which the Canadian Charter of Rights and Frcedoms is intended to suppress. There is a danger, however, that in our eagerness to protect individual freedom we will curb the legitimate use of power by the police to enforce the laws by which society is protected from unlawful conduct. The judiciary walks a tightrope in its effort to balance the protection of individual freedom with the protection of society."

The police must have reasonable methods of enforcing the law. If the police could not check vehicle registration and driver's licence they would be unable to enforce traffic regulations for the benefit of all.

The manner in which the police obtained the evidence in this case showed no flagrant violation of the accuseds' rights. In my opinion, the admission of the evidence in this case as set out in the record would not bring the administration of justice into disrepute.

The concept of disrepute when considering the circumstances of any particular case were recently considered in Collins v. The Queen, an unreported case of the Supreme Court of Canada dated April 9, 1987:

> "Since the concept of disrepute involves some element of community views, the test should be put figuratively in terms of the reasonable person: would the admission of the evidence bring the administration of justice into disrepute in the eyes of the reasonable person, dispassionate and fully apprised of the circumstances of the case. A judge's discretion under this test is thus not untrammelled, for he should not render a decision that would be unacceptable to the community, provided the community is not being wrought with passion or otherwise under passing stress due to current events."

In any event, I would allow the appeal and enter a conviction against both Respondents.

A nominal fine is a reasonable penalty considering all the circumstances of this case. Each Respondent shall pay a fine of $10.00; in default, incarceration for one day.

SMITH J.