
CANADA / JUDGMENT

R. v. Johnson

2000 BCCA 204

COURT

British Columbia Court of Appeal

DECIDED

21 March 2000

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COURT OF APPEAL FOR BRITISH COLUMBIA

ORAL REASONS FOR JUDGMENT

Before:

The Honourable Mr. Justice Esson

March 21, 2000

The Honourable Madam Justice Rowles

The Honourable Madam Justice Ryan

Vancouver, B.C.

BETWEEN:

REGINA

RESPONDENT

AND:

ERROLL JOHNSON

APPELLANT

S. Goldberg

appearing for the Appellant

B. MacLean

appearing for the (Crown) Respondent

[1]

RYAN, J.A.: The appellant, Erroll Johnson, was convicted in Provincial Court on February 2, 1999 of one count of possession of stolen property.

- [2] He appeals his conviction on several grounds. It will be necessary only to refer to the Charter issues he has raised with respect to his search and arrest.
- [3] The appellant was stopped by two police officers at about 6:00 o'clock at night on April 1, 1998 as the appellant walked down the median of the street in the 1100 block Main. He carried two pillowcases over his shoulder. The police saw the outline of what they believed to be VCRs in the pillowcases. Suspicious, they stopped to speak with him.
- [4] One of the police officers testified that she knew from experience that pillowcases are often used to carry stolen property from breaking and enterings. The appellant was within a block of the Ivanhoe Hotel which has a reputation as a popular place to sell stolen property.
- [5] The appellant was asked for his name. He said that it was "Johnny Singh". The police officers checked his name on CPIC and received nothing. They then looked into his bag and examined the VCRs. They found a telephone handset in the bag as well. The officers ran the serial numbers of the VCRs through CPIC and received a negative response.
- [6] As the officers had looked into the pillowcases the appellant was asked what was inside. He answered "two VCRs". He was asked to name the brands. He got one of them right.
- [7] The appellant was arrested and taken to the police station for "investigation of stolen property".
- [8] In this court the Crown justified the search of the pillowcases on the basis of *R. v. Simpson* (1993), 79 C.C.C. (3d) 482 (Ont. C.A.), *R. v. Ferris* (1998), 126 C.C.C. (3d) 298 (B.C.C.A.) and *R. v. Murray* (1999), 136 C.C.C. (3d) 197 (Que. C.A.).
- [9] I agree with the Crown that the police were entitled to briefly detain the appellant in these circumstances. Although the police did not possess reasonable and probable grounds to arrest or to search the appellant, there existed a constellation of objectively discernable facts giving rise to an articulable cause to briefly detain the appellant to investigate whether a crime had taken place or not.

- [10] The Crown goes further to say that the grounds entitled the police to search the appellant as well. In my view they did not. A search incident to an investigative detention may be made for weapons when there is a basis for the belief that the detainee is armed and dangerous. But without reasonable and probable grounds, the police cannot undertake a search for contraband. In *R. v. Ferris* the majority said this at para. 27:
- [27] ...The difference between the case at bar and the traditional search cases is that the detention in this case was intended to be brief, for the purpose of investigating a crime that the police believed had just occurred or was in progress, and the search was undertaken for purposes other than the discovery of contraband. There is an element of necessity connected with the detention and search, which I will deal with in more detail presently. and later at para. 54:
- [54] If the police have the duty to determine whether a person is engaged in crime or is about to be engaged in crime they should not be obliged to risk bodily harm to do so. It is my view that the police are entitled, if they are justified in believing that the person stopped is carrying a weapon, to search for weapons as an incident to detention. The question for the court must be whether the search was reasonably related in scope to the circumstances which justified the interference in the first place.
- [11] The Crown relied on the case of *R. v. Murray*, supra, which is a recent decision of the Quebec Court of Appeal. In that case the court held that a search incident to a brief detention could be conducted to secure non-convictive evidence of a crime. The *Murray* case dealt with the lawfulness of a search of a vehicle stopped in a roadblock set up to capture fleeing bank robbers. In searching for the bank robbers, the police discovered stolen cigarettes in the back of a truck. The court concluded that the roadblock was a lawful exercise of police powers and the search of the vehicle a reasonable incident. The statement made by the majority with respect to "non-convictive evidence" is obiter dicta. The *Murray* case is therefore distinguishable from the type of investigative detention we are dealing with in this case.
- [12] In the case at bar, the investigative stop did not produce reasonable and probable grounds to search for contraband. Neither police officer testified that the search was for anything other than contraband. They did not give evidence that the search was necessary for their safety. The search, in my view, was therefore unreasonable.
- [13] After the appellant could not identify one of the brand names of the VCRs, the officers arrested him for "investigation of stolen property". They did not testify that they had reasonable and probable grounds for his arrest, nor were there sufficient objective grounds to make the arrest.
- [14] In the end, in my view, the search was unreasonable and the arrest arbitrary.

- [15] About one week later the arresting officers learned that their suspicions were correct. The property in the possession of the appellant had been stolen the day of his arrest from a home on east 12th Avenue.
- [16] The question remains - ought the evidence to be excluded under s. 24(2) of the Charter? In my view it must. Although the police search was of the pillowcases and not of the appellant's person, the search can be described as a serious breach of the appellant's right to privacy. There were neither objective nor subjective grounds to search. More importantly, there were no grounds for the appellant's arrest.
- [17] The cumulative effect of the breaches is serious. This is not a case of good faith. The police did not testify that they believed that they had reasonable and probable grounds. They ought to know that they are not entitled to search for contraband or arrest on anything less than reasonable and probable grounds. Applying the Stillman test, in my view, the evidence ought to be excluded.
- [18] There is no other evidence upon which to base a conviction. I would therefore allow the appeal, set aside the conviction and enter an acquittal.
- [19] ESSON, J.A. I agree.
- [20] ROWLES, J.A. I agree.
- [21] ESSON, J.A. The appeal is allowed as proposed by Madam Justice Ryan.
- "The Honourable Madam Justice Ryan"

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