

In the Provincial Court of British Columbia

REGINA

v.

HUGH BLAIR McGARVIE

**RULING ON VOIR DIRE
OF
THE HONOURABLE JUDGE McGEE**

COPY

Crown Counsel:

P. Bhatti

Defence Counsel:

M. Mines

Place of Hearing:

Vancouver, B.C.

Date of Judgment:

May 23, 2007

[1] THE COURT: The accused is charged with possessing a prohibited weapon contrary to s. 91(2) and with unlawful possession of a controlled substance, to wit cocaine, contrary to s. 4(1) of the *Controlled Drugs and Substances Act*. The evidence of one officer, namely Police Constable Sideroff, was heard in a voir dire. The issue is whether evidence should be excluded on the basis the accused's rights under ss. 8,9 and 10 of the *Charter* have been infringed.

[2] The facts briefly are these. At approximately 6:30/7:00 a.m., Constable Sideroff received information from a police dispatcher that a 911 hang-up call had been made from apartment 7, 2405 Kamloops Street. The information was screams could be heard and an ambulance requested. It was not known who made that call.

[3] En route, a second call was made by the dispatcher to say it was a domestic situation and the information was a male had left, but a male could be heard in

the background. It was a female who had answered the dispatcher's call back to the apartment.

[4] At 6:50, Constable Sideroff arrived at the apartment. A person who identified herself as Courtenay O'Neill met him. She said her boyfriend had been inside and the boyfriend had called 911. Ms. O'Neill went outside the apartment and was dealt with by Constable Stokes. Constable Sideroff went into the apartment to see if there was anyone in the suite and met the accused. He had never had any involvement with the accused in the past. The accused was cooperative with the constable. The constable asked him to hold out his hands which were then handcuffed behind his back.

[5] A pat-down search led to the finding of a pair of pliers in the accused's back pocket and a push dagger referred to in Count 1 in his front pocket. A round of ammunition was also found. The accused was arrested for possession of a prohibited weapon and advised of his rights and was later searched by the wagon driver who found a small baggie of cocaine with reference to Count 2 and the accused was then rechartered.

[6] The primary reason the accused was handcuffed and searched was for officer safety. Based on his experience, Constable Sideroff said domestic situations can be volatile. Each case must be assessed on its own facts. To Constable Sideroff's knowledge, Ms. O'Neill made no mention of any assault or crime being committed by the accused. She did not complain of any injuries nor were any observed. The constable cannot recall asking if the accused made a 911 call and, if so, why. The constable had no previous dealings with the accused or any knowledge of past involvement between the accused and Ms. O'Neill. There was no complaint from anyone that a crime had been committed and I note the accused was completely cooperative.

[7] I have considered the case of *The Queen v. Mann*, a judgment of the Supreme Court of Canada dated July 23, 2004. I am satisfied in the case before me there were no reasonable grounds to suspect or any articulable cause to detain the accused. I am satisfied the accused's rights under s. 9 of the *Charter*, that is not to be arbitrarily detained, were infringed.

[8] I note in paragraph 30 of the *Mann* judgment the following which I believe

applies:

In *Simpson*, supra, at p. 202, the Court of Appeal for Ontario held that articulable cause was not sustained merely by the officer's hunch based on intuition gained by experience. Indeed, in *R. v. Jacques* [citation given] the majority endorsed the *Simpson* approach to the assessment of evidence, at para. 24, and Major J. in dissent, albeit on another point, acknowledged, at para. 52, that "reasonable grounds" to suspect was equivalent to the articulable cause standard.

[9] I attribute no bad faith on the part of the officer, but I am satisfied, given the particular circumstances of this case, the officer simply acted on a hunch that safety was jeopardized without any real basis for that, and under the circumstances, I am satisfied the evidence should be excluded under s. 24(2) of the *Charter*, and it is.

[RULING ON VOIR DIRE CONCLUDED]