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R. v. Munn (Nfld. S.C.)

Between
Her Majesty the Queen, Appellant, and
Douglas M. Munn, Respondent

Newfoundland Judgments: [1990] N.J. No. 31
1988 St. J. No. 2768

Newfoundland Supreme Court - Trial Division
Cameron J.

Heard: November 15, 1989
Judgment: February 15, 1990

Thomas Eagan, for the Appellant.

Stephen May, for the Respondent.

CAMERON J.:— This appeal was argued solely on the issue of whether s. 198A(3) of The Highway Traffic Act, R.S.N. 1970, c. 152, as amended, is contrary to s. 8 and s. 11(d) of the Canadian Charter of Rights and Freedoms.

On instructions from his client the solicitor for the respondent took no part in this appeal.

BACKGROUND:

The respondent was charged with a violation of s. 198A(1) of The Highway Traffic Act (now s. 175 of S.N. 1988, c. 33), operating a motor vehicle containing a radar detector. He was convicted and fined $10.00. The respondent then applied to the provincial court judge for the return of the device which had been seized by the police. The provincial court judge held s. 198A(3) infringed s. 8 of the Canadian Charter of Rights and Freedoms and ordered the radar detection device returned to the respondent. The Crown appeals.

LEGISLATION:

Section 8 of the Charter states:

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

Section 198A of The Highway Traffic Act states:

> 198A. (1) No person shall drive upon a highway a motor vehicle that is equipped with or that carries or contains a device capable of detecting or interfering with radar or any other electronic equipment as may be used from time to time for measuring the speed of motor vehicles.
>
> (2) Subsection (1) does not apply to

(a) a motor vehicle used by a constable in the course of his duties; or
(b) a motor vehicle used by a person in conducting a traffic survey authorized by the Minister.

(3) Where a constable apprehends a person operating a motor vehicle contrary to subsection (1), the constable may seize the device or equipment and it is forfeited to the Crown.
(4) No person shall, without the approval of the Minister, sell or offer for sale any device capable of detecting or interfering with radar or such other electronic equipment as may be used from time to time for measuring the speed of vehicles.
(5) Every person who violates this section is guilty of an offence.

APPLICATION OF S. 8 TO THIS CASE:

A review of the decision of the learned provincial court judge reveals it was the "automatic forfeiture without any judicial intervention" to which the argument of the respondent was directed not the taking of the item. It is for that reason that I conclude s. 8 has no application to this case. The weight of authority respecting the application of s. 8 is that seizure is defined by its plain meaning. The retention or use of things seized cannot be challenged under s. 8. On that same reasoning forfeiture of things seized cannot be challenged under s. 8.

In Jim Pattison Industries Ltd. v. The Queen (1985), 3 C.P.R.(3d) 9 at pp. 15-6; [1984] 2 F.C. 954 at 963 Dube J. held:

> There are no words in s. 8 of the Charter that would protect the right of a Canadian citizen to be secure against unreasonable "retention" or "use". The plain meaning of the word "seizure" is the forcible taking possession: see Pacific Finance Co. v. Ireland, [1931] 4 D.L.R. 186, [1931] 2 W.W.R. 593, 25 Alta L.R. 369 (Alta.S.C.A.D.); Re A.G.N.S. and Pye (1983), 150 D.L.R.(3d) 609, 7 C.C.C.(3d) 116, 57 N.S.R.(2d) 387 (N.S.C.A.). "Retention" is something else. "Use" is something else again. The distinction is quite clear in the Criminal Code of Canada: for instance, something may be "seized" under s. 445 and "detained" under s. 446.

The decision of Dube J. was followed in Re Barnable P.C.J. and The Queen (1986), 27 C.C.C.(3d) 565 (Sup. Ct. of Nfld. Trial Division) and R. V. Church of Scientology (1987), 31 C.C.C.(3d) 449 (Ont.C.A.) leave to appeal to S.C.C. refused 23 O.A.C. 321.

SECTION 11(d):

Counsel for the appellant has also argued the issue on the basis of s. 11(d) of the Charter which states:

> Any person charged with an offence has the right
>
> ...
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

The forfeiture of the device does not shift the burden of proof. The Crown must still prove every element of the offence including the nature of the device seized to obtain a conviction. I agree with the submission by the Crown that s. 198A of The Highway Traffic Act does not contravene s. 11(d) of the Charter.

The appeal is allowed. The order of Scott P.C.J. declaring that s. 198A(3) of The Highway Traffic Act infringes the respondent's "charter right under s. 8 of the Charter" and ordering the radar detection device be restored to the respondent shall be set aside.