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R. v. Sensenstein

Between
Her Majesty the Queen, and
Karl Sensenstein

[1982] O.J. No. 657
Also reported at:
(1983) 2 C.R.R. 296

Ontario Provincial Court - Criminal Division
York Judicial District - Toronto, Ontario
Cadsby Prov. Ct. J.

July 12, 1983.
(7 pp.)

Possession of burglar tools.

Counsel:

P. Derry, for the Crown.
D. Gorrell, for the accused.

¶ 1 **CADSBY PROV. CT. J.**:— The accused is charged on the 22nd day of April 1982, did without lawful excuse did have in his possession instruments for house-breaking, to wit: five screw-drivers, one steak knife and one pry-bar, under circumstances that gave rise to a reasonable inference that the said instruments were intended to be used for house-breaking.

¶ 2 Prior to electing the method of trial - this being an indictable offence in which the accused has an election - Mr. Gorrell, counsel on behalf of the accused, made an application pursuant to Section 24 of the Constitution Act in respect to Section 309 of the Criminal Code, the Section under which this charge has been laid. He submitted that the Section which under certain circumstances puts an onus upon the accused to provide a lawful excuse for the possession of instruments suitable for house-breaking, vault-breaking or safe-breaking, it is not, in accord with Section 11(b), the Charter or Rights, which states that,

> "... any person charged with any offence has a right to be presumed innocent until proven guilty according to law to a fair and public hearing by an impartial tribunal ..."

¶ 3 Before exercising any jurisdiction under Section 24 the court must determine whether it is the court of competent jurisdiction. This court reserved judgment on the application and the Clerk of the Court read an election to the accused who through his counsel elected trial by judge and jury.

¶ 4 That being so this court's jurisdiction is governed by the Provisions in Part XV of the Criminal Code. The procedure contemplated in Part XV provides in Section 463 dealing with jurisdiction or a justice to inquire into the charge and any other charge against that person.

> It then goes on in Section 464 to provide that: "Where an accused is before a justice other than a magistrate as defined in Part XVI charged with an offence over which a magistrate, under

> that Part, has absolute jurisdiction, the justice shall remand the accused to appear before a magistrate having absolute jurisdiction over that offence in the territorial division in which the offence is alleged to have been committed."

¶ 5 So that where there is absolute jurisdiction and, therefore, there is not going to be a preliminary hearing the justice has no power other than to remand the accused to a person who has the power of a magistrate under the Code.

¶ 6 Sub-section (2) deals with a case,

> "... where an accused is before a justice other than a magistrate as defined in Part XVI charged with an offence other than an offence that is mentioned in Section 427, and the offence is not one over which a magistrate has absolute jurisdiction under Section 483, the justice shall, after the information has been read to the accused, put him to his election in the following words ..."

Which are set out in the Section.

¶ 7 Now where the accused elects to be tried by a magistrate the justice must endorse that - under Sub-section (3) - on the information and remand the accused to appear and plead to the charge before the magistrate having jurisdiction over than offence.

¶ 8 Sub-section (4) provides that:

> "Where an accused does not elect to be tried by a magistrate, the justice shall held a preliminary inquiry into the charge ..."

¶ 9 And the powers of the justice are set out in Section 465.

¶ 10 In the Municipality of Metropolitan Toronto persons do not ordinary appear before a justice as set out in these Sections, but are brought before a provincial judge exercising both the jurisdictions of a justice and a magistrate. Once the accused has elected trial by judge and jury - as in this case - the provincial judge has only the powers of a justice, those powers are set out in Section 465. Supreme Court of Canada in the case of Regina vs. Doyle (1976), 35 C.R.N.S. 1 (S.C.C.), make it clear that the powers of the court and jurisdiction are confined to those set out in the Criminal Code.

¶ 11 I, therefore, am of the opinion that unless a provincial judge is sitting as a judge in a trial - conducting a trial - he is not sitting as a court of competent jurisdiction within the meaning of Section 24. Therefore, I do not propose to deal with the motion of the defence on its merit. It is a very interesting point.

¶ 12 For the reasons that I have stated the application is dismissed because of lack of jurisdiction of this court.

¶ 13 On the question of statement: The accused is a young man who was riding a bicycle at 3:30 a.m. in the morning in question along Queen Street, one of the main thoroughfares in the city of Toronto, Police Constables Krynitzki and Wright were patrolling the street and they observed the accused ride the bicycle through a red traffic signal and for this reason they stopped him. The accused was asked to identify himself and he did so, giving his name and his address. He could have been issued with an offence notice pursuant to the Provincial Offences Act, but he was not, Constable Wright noticed attached to his bicycle a small leather case with a piece of metal sticking out. Without asking permission of the accused - I think I might say without as much as even thinking of asking permission of the accused - he opened it and he found inside a twelve-inch pry-bar, a four-and-a-half-inch-blade steak knife, four screwdrivers of the ordinary variety and one Phillips screwdriver.

¶ 14 As a result of this he asked the accused - he or his partner asked the accused to enter the police vehicle to discuss the tools. He was asked nothing - that I can recall from the evidence - on the street about the tools, but he was asked to enter the police vehicle. At the time that request was me I find that the officers suspected the tools were burglar's tools. They were not investigating whatever law had been breached by the accused by riding his bicycle through a red traffic signal, but were investigating the tools.

¶ 15 When he was seated in the back seat of the police car and the two police officers were seated in the front the doors of the police car are so mechanically arranged as far as locking is concerned and the accused could not open the doors. I find that when the doors were closed on the cruiser that he had been detained by the officers. Therefore, Section 10 of the Charter of Rights apply.

¶ 16 He should have been informed pursuant to Section 10(a) properly of the reason he was being detained in the police car and of his right to retain and instruct counsel without delay and of his right to have the validity of his detention determined. None of these rights were read to him at the time.

¶ 17 The officers proceeded to question him about the tools, he gave an explanation which they did not believe, they persisted until they had him crying, at which point they got an incriminating statement from him. Then he was given the caution that he should have been given as soon as he was detained in the police car as to his rights under the Charter of Rights and he was cautioned with the ordinary police caution with respect to making statements. By this time, of course, he had made an incriminating statement and the caution given by the police officer was a mere mouthing of empty words and had no effect whatsoever.

¶ 18 According to the evidence of - I think it was Constable Wright, he said that this boy was frightened.

¶ 19 This court cannot find a statement made under these circumstances where all of the rights - there are so many rights of the accused given to the accused by the Charter of Rights - had been ignored. I am satisfied the test of a voluntary statement has not been met, that being so the statement will not be admitted.

¶ 20 There is little more to say because without the statement there is no evidence whatsoever that a reasonable jury properly instructed would find the accused guilty of any offence under Section 309 of the Criminal Code and, therefore, I discharge the accused.

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