

R v. Silveira
[1995] 2 SCR 297

[126] CORY J: At issue on this appeal is whether the evidence, secured as a result of a search that was conceded to be unreasonable, should be excluded pursuant to the provisions of s. 24(2) of the Canadian Charter of Rights and Freedoms. As is so often the case, the factual background and the findings of the courts below will have a profound effect upon the result.

Factual Background

[127] On August 28, 1990, the members of a drug squad of the Metropolitan Toronto Police commenced an investigation into the sale of cocaine. On that same date, an officer, working undercover, purchased a gram of cocaine from Antonio Scinocco for \$600. On September 10, 14 and 18, an undercover officer made further purchases of cocaine from Scinocco at a community centre in Trinity Park, Toronto. On each occasion, the amount purchased was an ounce and the sum paid in advance was \$2,000. On each of these occasions, the police officers observed the following pattern of events. Scinocco would meet with the appellant, Antonio Silveira. Silveira would then be driven by another co-accused to his residence at 486 Dufferin Street. The appellant would then go inside and leave after a short time to meet, once again, with Scinocco. Scinocco would then return to the undercover officer and give him the approximately 1 ounce or 25 grams of cocaine in rock form. At about 7:10 p.m. on the 18th, shortly after the third sale was made, the appellant was arrested, as were two co-accused. All the arrests took place in the vicinity of the community centre which was close to the appellant's residence.

[128] The police were concerned that the public nature of those arrests would lead to instructions being given to the residents of 486 Dufferin Street to destroy or remove any evidence that might be on the premises. The police believed that they had sufficient evidence from the purchases of cocaine and the observations of Silveira made on the 10th and 14th to obtain a search warrant for 486 Dufferin Street. Yet, they did not want to be accused of failing to present up-to-date information to the Justice of the Peace. It was therefore determined that further information relating to the purchase of cocaine made on the 18th would be added to the affidavit to be presented on the application for the search warrant. The police were satisfied that they had such an abundance of evidence establishing the reasonable and probable grounds for searching the premises that they would have no difficulty obtaining a search warrant. To prevent the destruction or the removal of the evidence between the time of the arrest and the arrival of the search warrant, officers attended at 486 Dufferin Street. They knocked on the door, identified themselves, and entered the premises without an invitation. Upon entering, they checked the premises for weapons and for the location of residents within the house. They then holstered their weapons and advised the occupants of the house to continue preparing dinner and watching the Blue Jays baseball game on television. They did not search the premises, but waited for the search warrant which they believed would arrive shortly.

[129] The officers who secured the premises were convinced that 486 Dufferin Street was the supply base for the cocaine that was sold to the undercover officer. One of the officers had, on two previous dates, observed the appellant and others return to the address prior to the sales being made. Further, they were concerned that, in light of the public nature of the arrests made in three locations close to 486 Dufferin Street, word would get back to the residents with the result that the evidence would be destroyed or removed. This, in the opinion of the officers, was not uncommon in the case of hard drugs. It is not without

significance that a brother of the accused arrived at the premises while the police were waiting for the search warrant. Although there had been no apparent phone call to him, he was aware of the arrest of his brother before he arrived at the house.

[130] It was only when the search warrant arrived, a little over one hour later, that the actual search of the premises was undertaken. In the course of the search, the police found a locked duffle bag in the appellant's bedroom on the second floor of the house. When the officers opened it, they found some 285.56 grams (10 ounces) of cocaine and \$9,535 in cash. The cash included substantial amounts of the marked money used by the undercover police to buy cocaine on earlier occasions.

Decisions and Factual Findings of the Courts Below

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Issue

[139] The question for determination is whether the majority of the Court of Appeal erred in finding that the admission of the evidence seized from the appellant's residence could not bring the administration of justice into disrepute.

Relevant Statutory Provisions

Canadian Charter of Rights and Freedoms

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

24. ...

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Narcotic Control Act, RSC 1985, c. N-1

10. A peace officer may, at any time, without a warrant enter and search any place other than a dwelling-house, and under the authority of a warrant issued under section 12, enter and search any dwelling-house in which the peace officer believes on reasonable grounds there is a narcotic by means of or in respect of which an offence under this Act has been committed.

12. A justice who is satisfied by information on oath that there are reasonable grounds for believing that there is a narcotic, by means of or in respect of which an offence under this Act has been committed, in any dwelling-house may issue a warrant, under the hand of the justice, authorizing a peace officer named therein at any time to enter the dwelling-house and search for narcotics.

Did the Entry by the Police Constitute a Search?

[140] In my view, the respondent very properly conceded that the entry by the police, undertaken in order to secure the premises and prevent the destruction of evidence, was

indeed a form of search not authorized by law. There is no place on earth where persons can have a greater expectation of privacy than within their "dwelling-house." No matter how good the intentions of the police may have been, their entry into the dwelling-house without a warrant infringed the appellant's rights guaranteed by s. 8 of the Charter. Moreover, there can be no artificial division between the entry into the home by the police and the subsequent search of the premises made pursuant to the warrant. The two actions are so intertwined in time and in their nature that it would be unreasonable to draw an artificial line between them in order to claim that, although the initial entry was improper, the subsequent search was valid. It follows, then, that the question to be resolved is whether or not the admission of the cocaine and the money discovered during the search could bring the administration of justice into disrepute.

Section 24(2) of the Charter

[141] This case comes down to a consideration of the balance that must be struck between the right to privacy within the home and the necessity of the police to act in exigent circumstances. On the one hand, the police, in direct contravention of s. 10 of the *Narcotic Control Act*, entered into a dwelling-house without a search warrant or authorization. The *Narcotic Control Act* itself recognizes the age-old principle of the inviolability of the dwelling-house. It must be the final refuge and safe haven for all Canadians. It is there that the expectation of privacy is at its highest and where there should be freedom from external forces, particularly the actions of agents of the state, unless those actions are duly authorized. This principle is fundamental to a democratic society as Canadians understand that term. Thus, it can be argued that the unauthorized entry into a dwelling-house is so grave a breach of a Charter right that evidence secured as a result of such an unauthorized entry should always be excluded.

[142] Yet, on the other hand, the police were investigating a very serious crime, specifically the sale of a hard drug. It is a crime that has devastating individual and social consequences. It is, as well, often and tragically coupled with the use of firearms. This crime is a blight on society and every effort must be undertaken to eradicate it. It is so serious and the destruction or removal of evidence is so easy that it can be argued that the police, while awaiting a search warrant, should always have the right to enter a dwelling-house without authority to preserve the evidence. Perhaps the solution lies somewhere between these extreme positions. Before considering the proper balance to be achieved, it is necessary to deal with a preliminary issue, namely, does the decision in *R v. Kokesch*, [1990] 3 SCR 3, determine the outcome of this case?

Does the Kokesch Decision Dictate the Result in this Case?

[143] The appellant argued that the evidence obtained during the search should be ruled inadmissible because the illegal entry of the police into his dwelling-house was analogous to the perimeter search conducted in *Kokesch*, supra. I cannot accept that submission. It will be remembered that in *Kokesch*, the police made a perimeter search of the premises without having either an authorization or reasonable and probable grounds for believing evidence would be found on the premises. It was as a result of this improper perimeter search that the police were able to obtain the requisite evidence to apply for the search warrant. Sopinka J, writing for the Court, pointed out that it was the initial violation of s. 8 of the Charter which led to the discovery of the evidence obtained in the search. This case is very different. No evidence was obtained as a result of the illegal entry onto the premises. The only effect of the illegal police action upon the appellant was that steps could not be taken to destroy or remove the evidence. In these circumstances, the *Kokesch* case should not be blindly applied so as to exclude automatically the evidence obtained in the search. The outcome of this case will have

to be determined upon the weighing of the pertinent factors relating to the admission or exclusion of the evidence pursuant to s. 24(2) of the Charter.

Deferential Approach to Decisions of the Courts Below

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Factors to be Taken into Account in a Consideration of s. 24(2) of the Charter

[145] In *Collins*, [[1987] 1 SCR 265], at p. 284 and p. 288, Lamer J (as he then was) set out the three primary factors which should guide the consideration of a Court in determining whether evidence should be excluded under s. 24(2) of the Charter. These are: (a) does the admission of the evidence affect the fairness of the trial, (b) how serious was the Charter breach, and (c) what would be the effect on the system's repute of excluding the evidence.

(a) The Fairness of the Trial

[146] The real and tangible evidence in issue is, of course, the 285.56 grams (10 ounces) of cocaine and the money. It existed prior to the search and was located in the appellant's home. In the absence of removal or destruction, it would inevitably have been discovered upon a search of the premises. It is significant that the police did not take any steps to search the premises before the warrant arrived. Thus, the actions of the police in entering the premises without a warrant cannot be said to have jeopardized the appellant in any way unless it were to be argued that their presence prevented him from arranging for removal or destruction of the evidence. This is hardly a submission which is likely to succeed. The appellant very fairly conceded in oral argument that he was not seriously contending that the admission of the evidence would affect the fairness of the trial. He was right to make such a concession. It simply cannot be said that the admission of the evidence would affect the fairness of the trial and that aspect need no longer be considered.

(b) Seriousness of the Charter Violation

[147] This is the most difficult aspect of this case. It is on this issue that the minority differed from the majority in the Court of Appeal. It is on this issue that the appellant bases his strongest submissions. In order to assess the gravity of the breach, a number of factors must be considered. They may be summarized as follows:

was the violation inadvertent or committed in good faith or was it wilful, deliberate and flagrant;

was the violation serious or merely of a technical nature;

was the violation motivated by a situation of urgency or necessity;

were there other investigative means available to the police which would not infringe the Charter.

See *Collins*, *supra*, and *R v. Strachan*, [1988] 2 SCR 980.

(i) Nature of the breach

[148] The police, without warrant or authority, entered a dwelling-house. This was not a simple perimeter search as in *Kokesch*, but an entry into the dwelling itself. It is hard to

imagine a more serious infringement of an individual's right to privacy. The home is the one place where persons can expect to talk freely, to dress as they wish and, within the bounds of the law, to live as they wish. The unauthorized presence of agents of the state in a home is the ultimate invasion of privacy. It is the denial of one of the fundamental rights of individuals living in a free and democratic society. To condone it without reservation would be to conjure up visions of the midnight entry into homes by agents of the state to arrest the occupants on nothing but the vaguest suspicion that they may be enemies of the state. This is why for centuries it has been recognized that a man's home is his castle. It is for this reason that the *Narcotic Control Act* prohibits entry into a private dwelling-house without a warrant and it is for this reason that a search warrant must be obtained from a judicial officer on the basis of reasonable and proper grounds. Despite the historical importance attached to the privacy interest of an individual in his or her home, and the significance attached to a dwelling-house by s. 10 of the *Narcotic Control Act*, the police entered the appellant's home without a warrant.

[149] The entry onto the property by the police was thus a very serious breach of a Charter right. It remains to be seen if there are other factors which can mitigate the seriousness of the Charter violation.

(ii) Was the violation committed in good faith and was it motivated by circumstances of urgency or necessity?

[150] These critical factors can, I think, be considered together. It will be remembered that the trial judge found that there were exigent circumstances which required the police to enter the premises to protect the evidence. These included, particularly, the arrest of three co-accused all in public places which were close to the home of the appellant. The police believed that those arrests might trigger the removal of the evidence. The trial judge concluded that the police had a valid basis for their concern to preserve the evidence pending the arrival of the warrant. He observed that the search itself was conducted reasonably, as was the original entry of the police into the home. Lastly, he concluded that there was a sound basis for issuing the search warrant. These findings were all confirmed by the majority of the Court of Appeal. There are, therefore, concurrent findings in this regard. If there was no specific finding that the police had acted in good faith, there was certainly no indication that there was any evidence of bad faith on the part of the police. Further, the evidence reveals that the police considered that they had the right to enter the house to preserve the evidence and an able and experienced trial judge appeared to agree with that conclusion. The trial judge, like the police, may have been in error in reaching that conclusion for the police actions specifically breached the provisions of s. 10 of the *Narcotic Control Act*. Nonetheless, the circumstances of the public arrests and the need to preserve the evidence were found to constitute exigent circumstances. In those circumstances, it cannot be said that the breach of the Charter rights by the police was committed in bad faith.

[151] There was strong and persuasive evidence upon which the trial judge and majority of the Court of Appeal could properly find that there were exigent circumstances which justified the police entry into the home of the appellant. That is to say that there were other factors which mitigated the seriousness of the Charter violation. It is sufficient to dispose of this issue to state that the appellant has not demonstrated that the findings of the courts below were unreasonable or that there was some error made as to the applicable principles of law.

Police Dilemma

[152] Yet, the question remains, how should the police act in a situation where they have a serious and valid concern pertaining to the preservation of evidence while awaiting a search

warrant. As a result of this case, police officers will be aware that to enter a dwelling-house without a warrant, even in exigent circumstances, constitutes such a serious breach of Charter rights that it will likely lead to a ruling that the evidence seized is inadmissible.

[153] In the future, this problem may disappear as a result of legislation which might, for example, amend the provisions of s. 10 of the *Narcotic Control Act*. However, apart from legislation, let us consider the options that are open to the police and their consequences.

[154] In this case, evidence existed upon which a search warrant could have been obtained before the arrests were made. It may be that it would have been preferable for the police to have obtained a search warrant based on the earlier transactions completed prior to that made on the day of the arrests. The police could have advised the Justice of the Peace that they expected to make the arrests and that there might be further information that would be available from those arrests which could be supplied immediately after the arrest, perhaps by telephone and subsequently confirmed by a deposition. At the time of trial, if the search warrant was attacked on the grounds that it was outdated, evidence could be adduced of the difficulty of providing up-to-date material in circumstances like these and that, in light of the necessity of protecting the evidence, the police found it necessary to obtain a warrant based on the earlier transactions and observations. In the absence of an unreasonable delay between the observations and the application, it would be difficult to imagine that the warrant could be successfully attacked on the grounds that it was stale-dated. That is the way the police should have proceeded.

[155] Yet, that is not to say that the police forever should be prohibited from entering premises in order to secure and preserve the evidence. Situations may arise when it will be impossible for the police to proceed by means of a search warrant based on earlier observations. Undercover officers may have worked long and hard in situations of great personal danger to proceed with one very large purchase of drugs in circumstances where it is essential to preserve the evidence which the police believe on reasonable and probable grounds to be in a home. Yet, it will take time to obtain a search warrant. In those circumstances, courts will have to determine on a case-by-case basis whether or not there existed such a situation of emergency and importance that the evidence obtained may be admitted notwithstanding the warrantless search. However, I must emphasize again that after this case it will be rare that the existence of exigent circumstances alone will allow for the admission of evidence obtained in a clear violation of s. 10 of the *Narcotic Control Act* and s. 8 of the Charter. Otherwise, routinely permitting the evidence to be admitted under s. 24(2) of the Charter in cases where exigent circumstances exist would amount to a judicial amendment of s. 10 of the *Narcotic Control Act*. ...

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(c) *The Effect of the Exclusion of the Evidence*

[164] The last major factor to be considered in the s. 24(2) analysis is the effect the exclusion of the evidence would have on the administration of justice. The outcome of this issue was not seriously contested by the appellant. The appellant was charged with possession for the purpose of trafficking and trafficking in a hard drug in significant quantities. These are offences that can have a catastrophic effect on society and that carry with them a provision for imprisonment for life. The evidence at issue here was vitally important if not crucial to the prosecution of the case. Indeed, the respondent concedes that without this evidence there would be no possibility of obtaining a conviction on the charge of possession of cocaine for the purpose of trafficking. As well, exclusion of the impugned evidence would substantially diminish the strength of the Crown's case on the trafficking charges.

Summary with Regard to the Three Factors***(a) Fairness of the Trial***

[165] The evidence seized as a result of the search was real evidence that existed in the appellant's residence. It would inevitably have been discovered in a search of those premises. Its admission cannot conceivably be thought to affect the fairness of the trial adversely.

(b) Seriousness of the Breach

[166] There can be no doubt that for the police to enter a dwelling-house without a warrant flies in the face of the provisions of the *Narcotic Control Act* and is a denial of the historical and fundamental importance of a person's home. Yet, exigent circumstances did exist. They included the nature of the crime, the public arrests near the dwelling-house and the belief by the police that they needed to enter the house in order to preserve the evidence while they awaited the search warrant which they believed to be on the way. As the trial judge and the majority of the Court of Appeal found, the Charter violation was rendered less serious in light of the particular facts of this case.

[167] If the urgent emergency circumstances are such that the police are required to enter a dwelling without a warrant to preserve evidence, the question as to whether or not the serious nature of the breach would render the evidence obtained in a subsequent search inadmissible will have to be carefully considered on a case-by-case basis. I reiterate, however, that it would be only in rare cases that such evidence could be admitted in the future. It would be preferable for the police to obtain a search warrant prior to the arrest even if it was on the basis of more limited information than that which could be advanced after the arrest. An explanation to the trial court concerning the need for speed in searching the premises may often satisfactorily answer any allegations that the warrant is so stale-dated as to be ineffective. Now the police may be able to obtain a search warrant by telephone by making use of the provisions of s. 487.1 of the *Criminal Code*.

(c) Effect of the Exclusion of the Evidence

[168] Drug trafficking is a serious crime and the evidence seized was vital to the proof of the case against the appellant. The admission of the evidence would not have an adverse effect upon the reputation of the administration of justice.

[169] In weighing all the factors which must be taken into account when considering s. 24(2) of the Charter, it is apparent that in this case the evidence was properly found to be admissible.

Disposition

[170] The appeal is therefore dismissed.

Appeal dismissed, LA FOREST J dissenting.