In the Court of Appeal of Alberta

Citation: R. v. Dell, 2005 ABCA 246

Date: 20050715
Docket: 0401-0241-A
Registry: Calgary

Between:

Her Majesty the Queen

Respondent

- and -

Bryan Matthew Dell

Appellant

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Madam Justice Constance Hunt
The Honourable Madam Justice Adelle Fruman

Reasons for Judgment Reserved of The Honourable Madam Justice Fruman
Concurred in by The Honourable Madam Justice Hunt
Concurring Reasons for Judgment of the Honourable Mr. Justice Côté

Appeal from the Conviction by
The Honourable Mr. Justice Clark
Dated the 19th day of March, 2004
(Docket: 020556924Q1)

Reasons for Judgment Reserved of
The Honourable Madam Justice Fruman

[1] Bryan Matthew Dell appeals his conviction for possession of cocaine. The cocaine was found when he was briefly detained and searched by bar staff in a private bar. Dell claims the actions breached s. 9 of the *Canadian Charter of Rights and Freedoms* (the right not to be arbitrarily detained) and, as a consequence, the cocaine should be excluded from his criminal trial. The central issue in this appeal is whether the *Charter* applies to an investigative detention conducted by a private person.

Background

[2] Dell paid an admission fee to gain entry to a privately-owned Calgary bar. The bar employed security personnel, known as bouncers, who were charged with controlling admission, verifying ages of patrons, performing crowd control, ensuring the safety of patrons and handling problems. One of the bouncers' duties was to check the washrooms every 15 minutes for cleanliness, inappropriate or illegal activities or other problems. On the night in question, a bouncer entered the men's washroom, peered through the crack next to the door of a cubicle and observed Dell fiddling with a black film canister. He waited until Dell came out and then called the manager, communicating his suspicion that Dell was in possession of illegal drugs. The manager arrived within two to five minutes. He patted Dell down for weapons, found the canister, looked inside and observed rocks wrapped in cellophane. He gave the canister back to Dell and called the police. Dell was escorted to the kitchen where he was detained until the police arrived. He was then taken to a police cruiser, Chartered and cautioned. The rocks in the canister were later determined to be cocaine.

[3] At trial, Dell sought to have the cocaine evidence excluded, alleging a *Charter* breach. The trial judge held that the *Charter* did not apply to the manager's search of Dell in the washroom because the search was between private individuals: A.B. II 108/47-109/2. He observed that after the search, Dell was taken by bar staff to the kitchen and "detained in accordance with a citizen's arrest pursuant to the provisions of s. 494 of the *Criminal Code*": A.B. II 109/2-6. The judge admitted the cocaine evidence and convicted Dell of possession.

[4] The issue at the forefront of this appeal is whether the bouncer's detention of Dell in the washroom for two to five minutes prior to the search is caught by the *Charter*. Dell alleges a breach of s. 9 only. He does not argue that the later arrest in the kitchen contravened the *Charter*. In any event, no further evidence was elicited while Dell was in the kitchen. Nor is there any suggestion that the short detention in the washroom constituted a citizen's arrest. Indeed, the legal distinction in *Charter* cases between mere detention for investigative purposes and actual arrest is well established. An investigative detention is brief, based on a reasonable suspicion that an individual is connected to a particular crime: ***R. v. Mann,*** [2004] 3 S.C.R. 59, 2004 SCC 52 at para. 45. An arrest is a continuing act, based on reasonable and probable grounds a crime has been committed.

It involves a detention and a measure of ongoing restraint until the arrested person is delivered to the police: ***R. v. Asante-Mensah***, [2003] 2 S.C.R. 3, 2003 SCC 38 at para. 34.

[5] Dell contends that the *Charter* applies to investigative detentions carried out by private citizens. He submits that his detention in the washroom contravened the *Charter* and the fruits of the resulting search, the cocaine, should not have been admitted at trial.

Application of the *Charter* to Interactions Between Private Citizens

[6] Although s. 32 of the *Charter* limits its application to Parliament, legislatures and provincial and federal governments, when the *Charter* was first introduced there was some debate about its application. Since that time, the law has been settled that, as a general rule, the *Charter* only applies to government actions, not interactions between private citizens or institutions: ***Schreiber v. Canada (Attorney General),*** [1998] 1 S.C.R. 841 at para. 27; ***McKinney v. University of Guelph***, [1990] 3 S.C.R. 229 at para. 182. Recently in ***R. v. Buhay***, [2003] 1 S.C.R. 631, 2003 SCC 30 at para. 31, the Supreme Court confirmed that for *Charter* purposes, private security officers are no different than other private citizens, noting that "while private security officers arrest, detain and search individuals on a regular basis, the exclusion of private activity from the *Charter* was not a result of happenstance. It was a deliberate choice which must be respected."

[7] ***Buhay***, *supra*, recognized two exceptions to the general rule that the *Charter* does not apply to interactions between private citizens. The first is when a private citizen acts as an agent of the state: ***Buhay*** at para. 25 citing ***R. v. Broyles***, [1991] 3 S.C.R. 595. The agent of the state analysis requires an examination of the relationship between the state and the private individual alleged to have acted as an agent of the state. To decide whether the bouncer in this case was an agent of the state, the relevant question is: Would the exchange between Dell and the bouncer have taken place, in the form and manner in which it did take place, had the police not intervened? See ***Buhay*** at para. 25. This question must be answered in the affirmative because the detention and search of Dell were independent from any police activity or instruction. The police did not become involved until they responded to a call following Dell's detention and search in the washroom. Accordingly, the bouncer was not acting as an agent of the state and the *Charter* does not apply on this basis.

[8] The second exception to the general rule that the *Charter* does not apply between private individuals occurs when a private person can be categorized as "part of government" because he or she is performing a specific government function: ***Buhay*** at para. 25, citing ***Eldridge v. British Columbia (Attorney General)***, [1997] 3 S.C.R. 624. In ***Eldridge***, at para. 43, the Court noted that the *Charter* will only apply to a private entity if it is found to be implementing a specific governmental policy or program. The Court in ***Buhay***, at para. 31, observed that this exception would apply if there were an express delegation of a public function to a private person or if the state were to abandon, in whole or in part, an essential public function to the private sector.

[9] ***Buhay*** involved the search of a bus-depot locker by private security guards, but no arrest or detention. A breach of s. 8 of the *Charter* (the right to be free from unreasonable search and seizure) was alleged. In denying *Charter* protection, the Court noted at para. 28:

> Private security guards are neither government agents nor employees, and apart from a loose framework of statutory regulation, they are not subject to government control. Their work may overlap with the government's interest in preventing and investigating crime, but it cannot be said that the security guards were acting as delegates of the government carrying out its policies or programs.

The Court also stated that the mere fact a private person or entity performs what may loosely be termed a "public function" or an activity "public" in nature will not suffice to bring it within the purview of government for the purposes of s. 32 of the *Charter,* citing ***Eldridge***, *supra,* at para. 43: *ibid.*

An Analysis of *R.* v. *Lerke*

[10] In support of his argument that the *Charter* applies, Dell relies on a specific example of the government function exception enunciated by this Court in ***R. v. Lerke*** (1986), 67 A.R. 390 (C.A.). In that case, it was determined that the actions of employees of a tavern were subject to the *Charter* when they undertook a citizen's arrest. As a result, the evidence derived from the search following the citizen's arrest was excluded, pursuant to s. 24(2) of the *Charter*. Dell contends that ***Lerke*** applies not only to a citizen's arrest, but also to an investigative detention. In order to evaluate this argument, it is necessary to understand the basis for the decision in ***Lerke*.**

[11] In ***Lerke***, *supra,* this Court discussed the long legal history of citizen's arrest and its current statutory expression, noting that the foundation of the whole system of criminal procedure was the King's prerogative of keeping the peace. At that point in history, each citizen had a part to play in the criminal justice system, with not only the right to make arrests, but the duty to do so in appropriate cases. The right and duty were derived directly from the sovereign himself. The Court in ***Lerke*** held that because the power of citizen's arrest is derived from the sovereign, it is the exercise of a state function: at paras. 17 and 21. English historians conclude, the Court noted, that the citizen's right of arrest should not be analyzed as being derived from, or as consisting of some portion of, the rights and powers of a peace officer. Rather, a peace officer possesses the rights of a citizen with some additions: at para. 18.

[12] ***Lerke*** has not been uniformly applied. Many lower courts have followed it, including: ***R. v. Parsons*** (2001), 284 A.R. 345**,** 2001 ABQB 42; ***R. v. Jones***, [2004] N.B.J. No. 510, aff'd 2005 NBQB 14; ***R. v. Voege*** (1997), 31 M.V.R. (3d) 293 (Ont. C. J. Gen. Div.); ***R. v. Dean*** (1991), 5 C.R. (4th) 176 (Ont. C. J. Gen. Div.); and ***R. v. Wilson*** (1994), 29 C.R. (4th) 302 (B.C.S.C.). However, three appellate courts have held that the actions of private persons performing citizen's arrests are

not subject to the *Charter*: ***R. v. N.S.***, [2004] O.J. No. 290 (Ont. C.A.); ***R. v. J.(A.M.)*** (1999), 137 C.C.C. (3d) 213, 1999 BCCA 366; and ***R. v. Skeir***, 2005 NSCA 86. In the first two decisions, the courts arrived at this conclusion on the basis that private persons (in ***N.S.*** a security guard and in ***J.(A.M.)*** victims of a burglary) do not become agents of the state when effecting a citizen's arrest. Notably, the specific government function exception relied on in ***Lerke***, and recognized in ***Buhay***, was not canvassed.

[13] In the third decision, ***Skeir***, *supra*, the argument centred around whether a private security guard, in effecting a citizen's arrest, was exercising a specific government function. The Court referred to ***Buhay*** and concluded that because the citizen's arrest power in s. 494 of the *Criminal Code* is not an express delegation or abandonment of the police arrest function to private citizens, the *Charter* does not apply. The Court also indicated that the suggestion that s. 494 subjects private security officers' arrests to the *Charter* is "inconsistent with the message in Buhay, at para. 31": at para. 18.

[14] In ***Skeir***, the Nova Scotia Court of Appeal declined to follow ***Lerke***. That is its prerogative, as decisions of appellate courts in others provinces are persuasive, but not binding. This Court is not in the same position. ***Lerke*** is an Alberta Court of Appeal decision and it has precedential value in this province. While this Court has jurisdiction to reconsider its earlier decisions, it is our policy not to do so unless an application has previously been made and granted for leave to reconsider an earlier judgment. See A.3, *Consolidated Practice Directions of the Court of Appeal of Alberta*, June 30, 2004. No such application has been made in this case.

[15] A formal application for reconsideration is necessary unless it is clear that the Supreme Court of Canada has overruled a decision of this Court in whole or in part. See ***R. v. Dean*** (1992), 127 A.R. 376 (C.A.). The rule is fairly narrow. It must be clear that the principles of the Alberta decision have been overruled by the Supreme Court; being inconsistent with the tenor or spirit of a subsequent Supreme Court decision is not sufficient.

[16] Dell contends that the citizen's arrest exception in ***Lerke*** is good law and applies to investigative detentions. The Crown argues that ***Lerke*** has been overruled by the Supreme Court in ***Buhay***. The threshold issue is whether ***Lerke*** is still good law.

[17] As I read ***Buhay***, it does not determine that the *Charter* has no application to a citizen's arrest by a private person. ***Buhay*** involved a search and seizure, not a citizen's arrest, and ***Lerke*** was neither considered nor mentioned. There is but a passing reference to arrest in paragraph 31. The Supreme Court confirmed the existence of the government function exception in ***Buhay***, noting that it may derive from an express delegation or an abandonment of state powers to a citizen. Moreover, the Supreme Court recently confirmed that the power of citizen's arrest, having its roots in a power derived from the sovereign or state, survives in s. 494 of the *Criminal Code: **Asante-Mensah***, *supra*, at paras. 36-40. It follows that the power of citizen's arrest is a delegation by the sovereign or state to the ordinary citizen. The fact that the delegation is concurrent (to peace officers as well as to

private citizens) and direct (from the sovereign to the citizen rather than from the police to the citizen) does not necessarily defeat the essence of the delegation.

[18] Further support for the proposition that ***Buhay*** did not expressly overrule ***Lerke*** is found in ***Asante-Mensah***, a case heard and decided by the Supreme Court shortly after ***Buhay***. The Court declined "to address the question whether a citizen's arrest could be construed as state action for purposes of the *Charter*, as held by the Alberta Court of Appeal in ***Lerke,*** *supra*, at p. 134 and, if so, what consequences might flow from that ruling": at para. 77.

[19] There is therefore no basis on which to conclude that the Supreme Court has clearly overruled the principles in ***Lerke***. As no application has been made to reconsider ***Lerke***, I must proceed on the assumption that it is still good law in Alberta. The question remains whether its principles provide the foundation for extending *Charter* protection to an investigative detention by a private person.

Does *Lerke* Extend *Charter* Protection to Investigative Detentions

[20] ***Lerke*** is factually similar to the present case, in that both events took place in a bar and involved searches by bar personnel. However, there is a clear (albeit somewhat metaphysical) distinction in the sequence of events. In ***Lerke***, the offender had been asked to leave the bar. He returned and was arrested by bar staff. They later searched his jacket, which he had hung on the back of a chair, and found marijuana. In the present case, Dell was briefly detained for investigative purposes because the bouncer suspected he had drugs. He was searched as part of that detention and cocaine was found. Thereafter, he was arrested by bar staff. As Dell's search preceded and was not the consequence of a citizen's arrest, ***Lerke*** does not automatically apply.

[21] Dell does not offer any Supreme Court or appellate authority that extends the principles in ***Lerke*** to investigative detentions. He relies on *obiter dicta* in ***R. v. Chang*** (2003), 180 C.C.C. (3d) 330 (Alta. C.A.), a case involving a seizure by a private security guard, but no arrest or detention. In that case the Court observed at para. 10, citing ***Lerke***, that the *Charter* "may apply" to a citizen's arrest, but noted that Chang did not argue that he had been arrested or detained. The *obiter* reference to detention is, at best, equivocal and does not support the extension Dell seeks.

[22] The Ontario Court of Appeal considered whether the citizen's arrest exception in ***Lerke*** should be extended to detention by a private person in ***R. v. Shafie*** (1989), 47 C.C.C. (3d) 27. In that case, the accused worked as a parking attendant. In the course of an investigation into discrepancies in receipts, he was interviewed by a superior who believed that it would have been an act of insubordination on the accused's part if he refused to be interviewed. He was not advised of his right to counsel and made incriminating statements. The Court considered the application of ***Lerke*** at p. 32 and confined it to arrest, as opposed to detention. It declined to apply the *Charter* to a detention by a private person, recognizing that "actions that, in the hands of the police or other state or governmental agents, would be a detention, do not amount to a detention within the meaning of s. 10(b) of the *Charter* when done by private or non-governmental persons": at 34. The Court found

no detention, and thus, no violation of s. 10(b), stressing that society cannot tolerate the judicialization of private relationships such as employer to employee, school teacher to pupil and the like: at 34.

[23] Similar policy reasons militate against judicializing the bouncer's relationship with Dell in respect of the investigative detention. The bouncer was not patrolling the bathroom because he was fighting crime or looking for criminals to hand over to the police. His employer had instructed him to check the washrooms regularly for a number of legitimate safety reasons. The all too frequent presence of weapons or drugs in bars is a major safety concern that can also affect the economic viability of those businesses. Trafficking and consumption of drugs can lead to violence, harming innocent patrons. Momentary detentions and searches of patrons for such illicit substances has a valid purpose that is unrelated to prosecution or government action. Dell advances no compelling policy reason for applying the *Charter* in a manner that disentitles a property owner from taking reasonable steps to ensure the safety of patrons, employees and premises.

[24] But the fact the bouncer's actions were based on legitimate, private motives does not end the inquiry. Indeed, if motivation were the only test for *Charter* application, the *Charter* would not likely apply to citizen's arrests any more than to investigative detention by private citizens, because citizen's arrests also are frequently motivated by private concerns. Nor, according to ***Buhay*** is a public purpose alone adequate to invoke *Charter* protection. "In order for the *Charter* to apply to a private entity, it must be found to be implementing a specific governmental policy or program": ***Buhay*** at para. 28, citing ***Eldridge*** at para. 43. Arguably, citizen's arrest involves not only a broad public purpose of maintaining the peace, but the delegation of a specific government function to private persons. The latter characteristic is absent from investigative detention, and, as such, detention by private persons cannot be considered a specific government function attracting *Charter* protection.

[25] The *Charter* was instituted, in part, to address situations in which the administration of justice is called into disrepute. For this reason, remedies such as exclusion of evidence were crafted. There is no "administration of justice" involved in the momentary detention of Dell in the washroom. Dell argues that because the consequences of the detention and resulting search are grave (admission of the cocaine evidence), the *Charter* should apply. But *Charter* application depends on government action, not the severity of the consequences. Incriminating evidence collected by private persons is routinely admitted at trial without *Charter* scrutiny. In ***Shafie***, *supra*, it was argued that although private action may not trigger the application of the *Charter,* when the state later proposes to use the evidence as part of a prosecution, the earlier *Charter* breach should engage s. 24(2) of the *Charter*. The Court rejected this argument, noting at p. 34 that the question whether a person's *Charter* rights were infringed must be tested at the time the alleged detention occurred.

Conclusion

[26] In summary, unlike citizen's arrest, investigative detention cannot be reasonably construed to be a specific government function that has been delegated to private citizens. Therefore, the

principles on which ***Lerke*** is based, and the government function exception recognized in ***Buhay***, do not apply to extend *Charter* protection to investigative detention. Moreover, sound policy reasons dictate that no such extension should be made.

[27] Borrowing from the language of ***Buhay*** at para. 28, the bouncer's work may overlap with the government's interest in preventing and investigating crime. However, it cannot be said that in conducting a brief investigative detention, the bouncer was acting as a delegate of the government, carrying out its policies and programs. Accordingly, the *Charter* does not apply to the actions of the bouncer in detaining Dell, or the search and seizure flowing from the detention. The cocaine evidence was properly admitted. I would therefore dismiss the appeal of the conviction for possession of cocaine.

[28] Counsel agreed that the certificate of conviction wrongly states that the conviction was for possession for the purposes of trafficking. The certificate should be amended to substitute a conviction for simple possession. To that extent, I would allow the appeal.

Appeal heard on May 19, 2005

Reasons filed at Calgary, Alberta
this 15th day of July, 2005

Fruman J.A.

I concur:

Hunt J.A.

**Reasons for Judgment Reserved of
The Honourable Mr. Justice Côté**

A. Introduction

[29] I concur in the reasons for judgment of Fruman J.A. and also her conclusion. I wish to add some further comments of my own.

B. The Common Law

[30] ***R. v. Lerke*** is reported as (1986) 67 A.R. 390, 24 C.C.C. (3d) 129 (C.A.). That case held that a citizen's arrest is carried out under authority historically derived from the sovereign as a citizen's duty to help keep the King's Peace, and later merely codified in the *Petty Trespass Act* (or s. 494(1) of the *Criminal Code*). So such arrest is a state function and subject to the *Charter*. Does the ***Lerke*** case help one to decide that a temporary detention by a private citizen is subject to the *Charter*?

[31] I suggest that it does not, because the bouncer's right here may not exist and is regulated only by private law, and has no trace in public law rights or duties.

[32] No one suggests that the King's Peace, or common-law obligations to arrest felons, extended to mere temporary detention to investigate. The common-law citizen's right to arrest certainly did not, because it only extended to actual felonies, not suspected ones, nor even a reasonable appearance of a felony, which in fact had not occurred: ***Walters v. W.H. Smith & Son*** (1913) 110 L.T. 345.

[33] No legislation cited to us enables bar bouncers to detain patrons or visitors temporarily for investigation. I know of none.

[34] It is far from clear that the common law gave any citizen the right temporarily to detain another in order to investigate. Counsel before us declined to make submissions about torts law. There clearly are torts of trespass to chattels, and false imprisonment. The latter is broadly defined, and can cover a very short interval. The description of the tort of false imprisonment in some authorities is any deliberate restraining within defined bounds by any means. See *Clerk and Lindsell on Torts*, paras. 13-19 to 13-23 (18th ed. 2000); Klar, *Tort Law*, 54-59 (3d ed. 2003). Trespass to chattels is also apparently widely defined, though there is still some debate about whether touching a chattel without harming it is actionable. See *Clerk and Lindsell*, *op. cit. supra*, at paras. 14-02 and 14-134 to 14-137; Klar, *op. cit. supra*, at 80-83.

[35] I do not (of course) decide whether the bouncer committed any tort here when he asked the appellant to remain in the washroom during the initial 2-5 minutes. This appeal is from a criminal conviction, not a civil suit, and torts were not argued. The evidence led and not led in this trial presumably was chosen by counsel without any thought to the law of torts. And there are defences to the torts of false imprisonment and trespass to chattels which might possibly apply here. Those may include consent, lack of intent by the defendant, defence of property, preventing crimes, removing a danger, and self-defence. See *Clerk and Lindsell*, *op. cit. supra*, at paras. 3-57, 3-58, 13-23, 13-24, 13-37 to 13-39, and 14-137.

[36] My point in speaking of torts is more specific. Temporary detention by private employees, whether legal or not, is private and depends upon the private rights of the detainee and the business owner. If (as here) there is no question of a public breach of the peace, the topic has nothing to do with the King's command, the King's Peace, or any duty owed to the sovereign. That is precisely the distinction made in ***R. v. Lerke***, *supra*. When a citizen arrests another for a crime, he acts under duty to the sovereign, and the person arrested must be brought to a justice or a constable, so that a court proceeding in the name of the sovereign may be started. Any penalty is exacted by or for the government. Neither the complainant nor the victim nor the citizen arresting is a party to that criminal proceeding: ***R. v. Lerke***, *supra*, at para. 22. What the bouncer did here in the washroom, and the resulting wait of 2-5 minutes, involved no such duty. Temporary detention does not require court proceedings, nor lead to any right or duty to have a prosecution.

[37] It also follows that debates about whether the bouncer had the right to and did detain the appellant in the washroom for 2-5 minutes, whether he exceeded reasonable protection of property, and whether the appellant consented, all take place in the context of torts law (and maybe the other side of that coin, property law). They have nothing to do with constitutional law.

[38] Indeed, it is arguable that the very concept of detention exists in our law only when a police officer or a government official detains, not a private citizen. See the discussion in ***R. v. M.R.M.*** [1998] 3 S.C.R. 393, 233 N.R. 1 (paras. 66-68); cf. ***R. v. Thomsen*** [1988] 1 S.C.R. 640, 84 N.R. 347, 355-6 (para. 12), 40 C.C.C. (3d) 411, 417-18.

[39] Therefore no governmental function was involved when the bouncer temporarily detained the appellant in the washroom, and the *Charter* did not apply.

C. If the *Charter* Applied, Was it Broken?

[40] In case I am wrong, and s. 9 of the *Charter* did apply to the 2-5 minute wait in the washroom, I will also consider whether any legal consequences flow.

[41] Such *Charter* rights are not absolute; they all have limits and exceptions. It would be astonishing if temporary detention was always a *Charter* breach, regardless of its duration or

purpose. It is not: only an arbitrary or unreasonable detention is a breach, even where the *Charter* applies.

[42] In any event, the bouncer was not snooping because he was bored or curious. His employer had instructed him to check the washrooms regularly for a number of types of people and things, most revolving around safety. That was plainly not altruism: it was sound and necessary preservation of business and property. Disgruntled patrons sometimes try to burn down bars, and sometimes succeed spectacularly. Shootings and stabbings are more common in bars than in (say) bookstores. Drug dealers often try to peddle their wares in bars. People bring date rape drugs to bars and slip them into other patrons' drinks (as Crown counsel reminded us here).

[43] None of that is good for business. Very few patrons will knowingly enter a bar dangerous to their health. Not many more will go to what looks like a lawless dive. And activity which will wreck the physical premises is commercially dangerous too.

[44] If the *Charter* had any application to this bouncer, it is unthinkable that it would remove the bar owner's right to take reasonable steps to protect the safety of his patrons, employees, and premises. If the bouncer found someone in the washroom with a can of gasoline, or five clips for a machine gun, surely he could detain that person and not let him go out to get the accompanying blowtorch or machine gun.

[45] The trial judge found as follows:

> "I'm of the opinion that there was an element of urgency involved. Had Mr. Dell not been detained he could quickly have disappeared into the crowd of, I believe, several hundred who were in the dance hall at the time. He could have disposed of the drugs and there is in fact evidence before the Court, during the course of the voir dire, that he attempted to do so." (A.B. II 109/18-25)

[46] In my respectful view, the bouncer reasonably thought that the film container contained hard drugs, not film. (Most cameras are now digital, and photography is not common or suitable in bars or their washrooms). That was a danger to the bar's business and patrons. The bouncer took reasonable steps to contain the danger, and have a responsible person (his boss) investigate. The delay to the appellant was 2-5 minutes, which the appellant did not protest. Nor does his counsel today argue that that time was undue.

[47] Reasonable safety and defence of property and others has been made out on this evidence as the quotation from the trial judge confirms. Even if s. 9 of the *Charter* could apply, either it was not breached, or the breach was justifiable.

D. Exclusion of Evidence

[48] The appellant does not want a declaration of *Charter* rights or their violation any more than he wants $50 damages in tort. He asks the court to exclude from evidence the drugs found, and so to leave the Crown without the key element in its criminal case.

[49] But the drugs here seem to have come into the hands of bar employees two ways, according to the transcript. First, the manager patted the appellant's clothes, then he either reached in his pocket and took out the film container, or the appellant handed it to him. All that was without protest, and may well have been consensual. In any event, that search was made because the bouncer had seen the appellant holding the film container in the washroom. That sight occurred before any detention, and so could not be a product of the detention.

[50] Then the manager gave the container and contents back to the appellant. He did not confiscate it.

[51] Second, the appellant discarded the film container later, and bar staff found it on the floor where the appellant threw it. That jettison was voluntary.

[52] And s. 8 of the *Charter* is not argued. Only s. 9 on detention is argued. Nor is later detention in the kitchen argued. So I cannot see any real connection between the detention in the washroom postulated and the discovery or the acquisition of the film container and drugs by any bar staff.

[53] Finally, *Charter* breaches do not lead to automatic exclusion of evidence. Section 24(2) of the *Charter* asks whether admission of the evidence would bring the administration of justice into disrepute. Views of the informed public are relevant here. In my respectful opinion, the public would not link the bouncer or his boss to "the justice system". In any event, the basic distinctions in the reasons of Fruman J.A. and in my judgment would also be acceptable to the public, and seem to them justified, measured, and not intrusive at all.

[54] Therefore, the trial judge was right to admit the evidence, in my view.

Appeal heard on May 19, 2005

Reasons filed at Calgary, Alberta
this 15th day of July, 2005

Côté J.A.

Appearances:

R.A. Sigurdson
for the Respondent

J.M. Lutz
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