

Regina (respondent) v. Rajinder Singh Dhillon (appellant)
(CA038220; 2012 BCCA 254)

Indexed As: R. v. Dhillon (R.S.)

British Columbia Court of Appeal
Donald, D. Smith and Hinkson, JJ.A.
June 13, 2012.

Summary:

The British Columbia Provincial Court convicted Dhillon on four firearm offences. He appealed.

The British Columbia Court of Appeal allowed the appeal. The convictions were set aside and acquittals entered.

Civil Rights - Topic 1646

Property - Search and seizure - Unreasonable search and seizure defined - Weapons were found in Dhillon's vehicle - He was convicted of four firearm offences - On Dhillon's appeal, the Crown conceded that the officer failed to obtain a valid consent from Dhillon to search the vehicle - The British Columbia Court of Appeal allowed the appeal, setting aside the convictions and entering acquittals - The trial judge erred in principle and in fact when she found that Dhillon was subject to an investigative detention and, therefore, in finding that the search of the vehicle was reasonably necessary as incidental to that investigative detention - At trial, the officer stated that the only legal authority on which he conducted the search was Dhillon's consent, even though the officer acknowledged that the consent was not obtained in a manner that made it valid and enforceable - He had not purported to search the vehicle incidentally to an investigative detention as he acknowledged that his bare suspicion that he might find drugs and/or weapons did not rise to the level of reasonable grounds to detain Dhillon - The trial judge's apparent rejection of that evidence without explanation was an error in law - The law required both a subjective and an objective basis for an investigative detention - Even if the trial judge's finding that there was an objective basis for detention were accepted, the complete absence of a subjective basis was fatal to the finding that there was a lawful investigative detention - See paragraphs 41 to 48.

Civil Rights - Topic 1646

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doctrine would extend it far beyond its proper scope - While the Waterfield doctrine had developed a robust history in Canada, it had been limited by constitutional constraints and, in particular, by a requirement that police show an objectively reasonable basis for the exercise of any powers - This criterion was reflected in the second branch of the Waterfield doctrine - Canadian courts, to date, had held that the exercise of a common law police power was only justified where its use was objectively reasonable and necessary - The officer here admitted to having nothing more than a bare suspicion to support his concerns for officer and public safety - He further admitted that the vehicle could have been secured until more officers arrived - The search was neither objectively reasonable nor necessary - Thus, the search failed on the second branch of Waterfield - The circumstances here did not support an application of the Waterfield doctrine to justify police conduct that was otherwise in breach of the Charter - See paragraphs 49 to 71.

Civil Rights - Topic 1651

Property - Search and seizure - Warrantless search and seizure - Motor vehicles - [See both **Civil Rights - Topic 1646**].

Civil Rights - Topic 3604

Detention and imprisonment - Detention - What constitutes detention - Weapons were found in Dhillon's vehicle - He was convicted of four firearm offences - On Dhillon's appeal, the Crown conceded that the officer failed to obtain a valid consent from Dhillon to search the vehicle - The British Columbia Court of Appeal allowed the appeal, setting aside the convictions and entering acquittals - The trial judge erred in principle and in fact when she found that Dhillon was subject to an investigative detention and, therefore, in finding that the search of the vehicle was reasonably necessary as incidental to that investigative detention - Dhillon was not physically detained - The only evidence that might support a finding that Dhillon was psychologically detained was his compliance with the officer's requests to produce his driver's licence and to show the officer how to open the trunk - However, this was not an evidentiary basis for finding that Dhillon believed that he had "no choice but to comply" - Further, while a finding that there was a lawful investigative detention might have been implicit in the trial judge's reasons, her analysis focussed solely on whether there were reasonable ground to detain, not on whether there was, in fact, a detention - The question for the court was the lawfulness of the actual police conduct, not the potential basis for the exercise of police power - See paragraphs 37 to 40.

Civil Rights - Topic 8368

Canadian Charter of Rights and Freedoms - Denial of rights - Remedies - Exclusion of evidence - Weapons were found in Dhillon's vehicle - He was convicted of four firearm offences - On Dhillon's appeal, the Crown conceded that the officer failed to obtain a valid consent from Dhillon to search the vehicle - The British Columbia Court of Appeal allowed the appeal, setting aside the convictions and entering acquittals - Having found that the search of Dhillon's vehicle could not be justified as incidental to an investigative detention for officer and public safety reasons, the court held that admission of the evidence obtained in the search would bring the administration of justice into disrepute - The Charter-infringing conduct here was serious - Proceeding with a search in the

admitted absence of reasonable grounds and without a valid consent did not demonstrate good faith - Absent exceptional circumstances, deliberate, negligent or wilfully blind state conduct did not equate with good faith and the impugned conduct could not be justified - The effect of the state's non-compliance on Dhillon's Charter-protected interests was also significant - Even a search of a motor vehicle, where there was a reduced expectation of privacy, could not be justified where there were no reasonable grounds or valid consent for the use of that police power - Finally, in balancing society's interest in a trial on the merits with the interest in ensuring state compliance with Charter-protected rights, a court had to focus on the long-term effect that non-compliance would have on the "overall repute of the justice system", rather than the "immediate reaction" to the circumstances of an individual case (even if they were egregious) - See paragraphs 72 to 79.

Criminal Law - Topic 3147

Special powers - Power of search - Search incidental to arrest or detention - [See both **Civil Rights - Topic 1646**].

Police - Topic 3024

Powers - Common law - Scope of - [See second **Civil Rights - Topic 1646**].

Police - Topic 3086

Powers - Arrest and detention - Detention for investigative purposes - [See **Civil Rights - Topic 3604**].

Police - Topic 3185

Powers - Search - Following arrest or detention - [See both **Civil Rights - Topic 1646**].

Police - Topic 3188

Powers - Search - Weapons search of persons, vehicles, etc. - [See both **Civil Rights - Topic 1646**].

Cases Noticed:

R. v. Collins, [1987] 1 S.C.R. 265; 74 N.R. 276, refd to. [para. 2].

R. v. Borden (J.R.), [1994] 3 S.C.R. 145; 171 N.R. 1; 134 N.S.R.(2d) 321; 383 A.P.R. 321, refd to. [para. 3].

R. v. Mann (P.H.), [2004] 3 S.C.R. 59; 324 N.R. 215; 187 Man.R.(2d) 1; 330 W.A.C. 1; 2004 SCC 52, refd to. [para. 4].

R. v. Suberu (M.), [2009] 2 S.C.R. 460; 390 N.R. 303; 252 O.A.C. 340; 2009 SCC 33, refd to. [para. 5].

R. v. Debot, [1989] 2 S.C.R. 1140; 102 N.R. 161; 37 O.A.C. 1, refd to. [para. 5].

R. v. Dedman, [1985] 2 S.C.R. 2; 60 N.R. 34; 11 O.A.C. 241, refd to. [para. 27].

R. v. Waterfield, [1963] 3 All E.R. 659; [1964] 1 Q.B. 164, refd to. [para. 27].

R. v. Grant (D.), [2009] 2 S.C.R. 353; 391 N.R. 1; 253 O.A.C. 124; 2009 SCC 32, refd to. [para. 30].

R. v. Therens, [1985] 1 S.C.R. 613; 59 N.R. 122; 40 Sask.R. 122, refd to. [para. 30].

R. v. Kang-Brown (G.), [2008] 1 S.C.R. 456; 373 N.R. 67; 432 A.R. 1; 424 W.A.C. 1;

- 2008 SCC 18, refd to. [para. 32].
- R. v. Reddy (C.J.) (2010), 282 B.C.A.C. 51; 476 W.A.C. 51; 2010 BCCA 11, refd to. [para. 33].
- R. v. Whitaker (D.P.) (2008), 254 B.C.A.C. 234; 426 W.A.C. 234; 2008 BCCA 174, refd to. [para. 40].
- R. v. Feeney (M.), [1997] 2 S.C.R. 13; 212 N.R. 83; 91 B.C.A.C. 1; 148 W.A.C. 1, refd to. [para. 44].
- R. v. Stenning, [1970] S.C.R. 631, refd to. [para. 53].
- R. v. Knowlton, [1974] S.C.R. 443, refd to. [para. 53].
- R. v. Simpson (R.) (1993), 60 O.A.C. 327; 12 O.R.(3d) 182 (C.A.), refd to. [para. 55].
- R. v. Godoy (V.), [1999] 1 S.C.R. 311; 235 N.R. 134; 117 O.A.C. 127, refd to. [para. 56].
- R. v. Clayton (W.) et al., [2007] 2 S.C.R. 725; 364 N.R. 199; 227 O.A.C. 314; 2007 SCC 32, refd to. [para. 57].
- R. v. Chuhaniuk (B.D.) (2010), 292 B.C.A.C. 89; 493 W.A.C. 89; 2010 BCCA 403, refd to. [para. 67].
- R. v. Harrison (B.), [2009] 2 S.C.R. 494; 391 N.R. 147; 253 O.A.C. 358; 2009 SCC 34, refd to. [para. 77].

Authors and Works Noticed:

Stribopoulous, James, A Failed Experiment? Investigative Detention: Ten Years Later (2003), 41 Alta. L. Rev. 335, para. 27 [para. 52].

Counsel:

K. Beatch and R. Thirkell, for the appellant;
M. Levitz, Q.C., for the respondent.

This appeal was heard at Vancouver, B.C., on March 13, 2012, by Donald, D. Smith and Hinkson, J.J.A., of the British Columbia Court of Appeal. On June 13, 2012, D. Smith, J.A., delivered the following reasons for judgment for the court.

Appeal allowed.

Editor: Sharon McCartney

Civil Rights - Topic 1651

Property - Search and seizure - Warrantless search and seizure - Motor vehicles - Weapons were found in Dhillon's vehicle - He was convicted of four firearm offences - On Dhillon's appeal, the Crown conceded that the officer failed to obtain a valid consent from Dhillon to search the vehicle - The British Columbia Court of Appeal allowed the appeal, setting aside the convictions and entering acquittals - The trial judge erred in principle and in fact when she found that Dhillon was subject to an investigative detention and, therefore, in finding that the search of the vehicle was reasonably necessary as incidental to that investigative detention - At trial, the officer stated that the only legal authority on which he conducted the search was Dhillon's consent, even though the officer acknowledged that the consent was not obtained in a manner that made

it valid and enforceable - He had not purported to search the vehicle incidentally to an investigative detention as he acknowledged that his bare suspicion that he might find drugs and/or weapons did not rise to the level of reasonable grounds to detain Dhillon - The trial judge's apparent rejection of that evidence without explanation was an error in law - The law required both a subjective and an objective basis for an investigative detention - Even if the trial judge's finding that there was an objective basis for detention were accepted, the complete absence of a subjective basis was fatal to the finding that there was a lawful investigative detention - See paragraphs 41 to 48.

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Criminal Law - Topic 3147

Special powers - Power of search - Search incidental to arrest or detention - Weapons were found in Dhillon's vehicle - He was convicted of four firearm offences - On Dhillon's appeal, the Crown conceded that the officer failed to obtain a valid consent from Dhillon to search the vehicle - The British Columbia Court of Appeal allowed the appeal, setting aside the convictions and entering acquittals - The trial judge erred in principle and in fact when she found that Dhillon was subject to an investigative detention and, therefore, in finding that the search of the vehicle was reasonably necessary as incidental to that investigative detention - At trial, the officer stated that the only legal authority on which he conducted the search was Dhillon's consent, even though the officer acknowledged that the consent was not obtained in a manner that made it valid and enforceable - He had not purported to search the vehicle incidentally to an investigative detention as he acknowledged that his bare suspicion that he might find

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Police - Topic 3024

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Police - Topic 3086

Powers - Arrest and detention - Detention for investigative purposes - Weapons were found in Dhillon's vehicle - He was convicted of four firearm offences - On Dhillon's appeal, the Crown conceded that the officer failed to obtain a valid consent from Dhillon to search the vehicle - The British Columbia Court of Appeal allowed the appeal, setting aside the convictions and entering acquittals - The trial judge erred in principle and in fact when she found that Dhillon was subject to an investigative detention and, therefore, in finding that the search of the vehicle was reasonably necessary as incidental to that investigative detention - Dhillon was not physically detained - The only evidence that might support a finding that Dhillon was psychologically detained was his compliance with the officer's requests to produce his driver's licence and to show the officer how to open the trunk - However, this was not an evidentiary basis for finding that Dhillon believed that he had "no choice but to comply" - Further, while a finding that there was a lawful investigative detention might have been implicit in the trial judge's reasons, her analysis focussed solely on whether there were reasonable ground to detain, not on whether there was, in fact, a detention - The question for the court was the lawfulness of the actual police conduct, not the potential basis for the exercise of police power - See paragraphs 37 to 40.

Police - Topic 3185

Powers - Search - Following arrest or detention - Weapons were found in Dhillon's vehicle - He was convicted of four firearm offences - On Dhillon's appeal, the Crown conceded that the officer failed to obtain a valid consent from Dhillon to search the vehicle - The British Columbia Court of Appeal allowed the appeal, setting aside the convictions and entering acquittals - The trial judge erred in principle and in fact when she found that Dhillon was subject to an investigative detention and, therefore, in finding that the search of the vehicle was reasonably necessary as incidental to that investigative detention - At trial, the officer stated that the only legal authority on which he conducted the search was Dhillon's consent, even though the officer acknowledged that the consent was not obtained in a manner that made it valid and enforceable - He had not purported to search the vehicle incidentally to an investigative detention as he acknowledged that his bare suspicion that he might find drugs and/or weapons did not rise to the level of reasonable grounds to detain Dhillon - The trial judge's apparent rejection of that evidence without explanation was an error in law - The law required both a subjective and an objective basis for an investigative detention - Even if the trial judge's finding that there was an objective basis for detention were accepted, the complete absence of a subjective basis was fatal to the finding that there was a lawful investigative detention - See paragraphs 41 to 48.

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Police - Topic 3188

Powers - Search - Weapons search of persons, vehicles, etc. - Weapons were found in Dhillon's vehicle - He was convicted of four firearm offences - On Dhillon's appeal, the Crown conceded that the officer failed to obtain a valid consent from Dhillon to search the vehicle - The British Columbia Court of Appeal allowed the appeal, setting aside the convictions and entering acquittals - The trial judge erred in principle and in fact when she found that Dhillon was subject to an investigative detention and, therefore, in finding that the search of the vehicle was reasonably necessary as incidental to that investigative detention - At trial, the officer stated that the only legal authority on which he conducted the search was Dhillon's consent, even though the officer acknowledged that the consent was not obtained in a manner that made it valid and enforceable - He had not purported to search the vehicle incidentally to an investigative detention as he acknowledged that his bare suspicion that he might find drugs and/or weapons did not rise to the level of reasonable grounds to detain Dhillon - The trial judge's apparent rejection of that evidence without explanation was an error in law - The law required both a subjective and an objective basis for an investigative detention - Even if the trial judge's finding that there was an objective basis for detention were accepted, the complete absence of a subjective basis was fatal to the finding that there was a lawful investigative detention - See paragraphs 41 to 48.

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