

R. v. Roberts, [2004] O.J. No. 6307

Ontario Judgments

Ontario Court of Justice

Oshawa, Ontario

K.N. Barnes J.

Heard: November 29, 2004.

Oral judgment: November 29, 2004.

Information No. 04-07299

[2004] O.J. No. 6307

Between Her Majesty the Queen, and Andrew Roberts

(61 paras.)

Case Summary

Charges: s. 145(3), Criminal Code of Canada — Fail Compl. Bail Cond.(x2)

Counsel

E. Sealy, Counsel for the Crown.

S. Reid, Counsel for Andrew Roberts.

REASONS FOR JUDGMENT

K.N. BARNES J. (orally)

1 Mr. Roberts is charged that on the 9th day of September in the year 2004 in the Municipality of Clarington he was in possession of a knife outside a residence in violation of his recognizance by which he was required to always be in the company of his sureties. The allegation is that he had no lawful excuse for doing so.

2 He is also charged on the 9th day of September in the year 2004 in the Municipality of Clarington in the said Region that while he was bound by a recognizance that was entered into before a justice, one of the conditions being that he was not to leave his house unless in the company of his sureties, to go to school or to attend education facility or place of employment, that he on that occasion failed to abide by that condition since he was not in the company of his sureties.

3 The facts that give rise to the application that is before this Court can be summarized briefly as follows: On the 9th day of September in the year 2004 around 7:45 p.m., Constables Romano and Richardson of the Durham Regional Police were in plain clothes capacity. They were driving in an unmarked police car. The vehicle was driven by Constable Richardson. They were on patrol on Ninth Street in the City of Bowmanville in the vicinity of some business establishments and a plaza. The officers observed a group of white males with one black male in the

group. That black male was Andrew Roberts who is before the court. He was standing in an area in front of the plaza.

4 Constable Romano and Constable Richardson indicated that they recognized all the males that were in that group except Mr. Andrew Roberts, and therefore called him over, had a discussion with him, determined that he was on a recognizance that required him to be in the company of his sureties, and as a result of that, they decided to arrest Mr. Andrew Roberts. They searched him incident to that arrest and found a knife in his possession.

5 Mr. Roberts submits that his *Charter* rights under sections 8, 9 and 10(b) of the *Charter* have been breached and he seeks an exclusion of all the statements that he made to the officers, as well as any observations the officers may have made and the physical evidence that was obtained as a result of the search. He seeks exclusion of these items pursuant to section 24(2) of the *Charter*.

6 The issues that this Court must address:

- a) Whether or not Mr. Andrew Roberts was detained;
- b) If he was detained, whether or not there was articulable cause for the said detention;
- c) Whether or not the statements made by Mr. Roberts to the police were made in breach of his right to counsel under section 10(b) of the *Charter*;
- d) Whether the search of Mr. Roberts was lawful;
- e) If the Court finds a breach, whether all the statements, the items that were located, pursuant to the search, should be excluded pursuant to the *Charter*.

7 Section 8 states everyone has a right to be secure against unreasonable search and seizure.

8 Section 9 states that everyone has the right not to be arbitrarily detained or imprisoned.

9 Section 10 (b) of the *Charter* indicates that everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right.

10 Section 24(2) indicates that where, in proceedings under subsection (1), a court concludes that evidence has been obtained in a manner that infringed or denied any rights or freedoms guaranteed by the *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.

11 The applicant, Mr. Andrew Roberts, submits that he was arbitrarily detained, that the officers had no reason to suspect that any criminal activity was occurring. In fact, that there were no objectively discernible facts to support such detention, and as a result there was no articulable cause for the detention. The applicant further submits the presence in a high crime area does not amount to articulable cause for detention.

12 Mr. Roberts submits that he felt he was not free to leave because the officer was persistent and ran his name on the police CPIC system. The Court is urged to make a finding that Mr. Roberts felt a psychological compulsion to remain and therefore Mr. Roberts was detained.

13 With respect to the search issue, the applicant indicates this was a warrantless search. The grounds of the search were gleaned from an arbitrary detention and because the detention was unlawful, the arrest was unlawful, and the police were not acting within the scope of their duty, therefore the search was unlawful and the knife and items located should be excluded.

14 With respect to section 10(b), the applicant submits that Mr. Roberts was detained. He indicated that he wished to speak to counsel, however, the police officer continued to ask him a question with respect to where his parents

were. Because Mr. Roberts was detained and was not given his rights of counsel, his initial statement with respect to his name and also his subsequent statement after he was given his rights to counsel with respect to where his parents were, were all obtained in breach of his section 10(b) rights, and therefore they should be excluded.

15 On trial fairness, the applicant submits that the statement is conscriptive. It goes to trial fairness and must be excluded. The items seized were a result of a flagrant disregard for the duties and misapprehension of the scope of police powers and therefore would affect trial fairness.

16 The applicant further submits that the alleged violation is a serious one. The officers are trained on court proceedings and also the way to handle persons in accordance with the *Charter of Rights and Freedoms*. The applicant urges the Court to make a finding of bad faith on the part of the officers and also submits that on the evidence that was called in this case, the Court can make a finding that there was racial profiling in this case, that Mr. Roberts was picked out simply because he was black.

17 With respect to the impact on the administration of justice, the applicant submits that this is not a serious offence, but the breach is a serious one and shows a total disregard for the applicant's rights and the admission of the evidence obtained as a result will have a deleterious impact on the administration of justice.

18 The Crown submits there was no detention in this case. The officer was entitled to approach Mr. Roberts on the street to ask him for his name, it was a public place; that Mr. Roberts was free to leave. There was no legal consequence for his leaving, and therefore, since Mr. Roberts was not detained, the statement obtained was not in violation of his section 10(b) rights. The Crown goes on to indicate that with respect to the statement as to "where your parents were," the question and answer occurred before Mr. Roberts was detained. Therefore, even if this Court were to find that there was a section 10(b) violation, that evidence was obtained prior to the violation.

19 The Crown submits that the officers are entitled to ask questions of Mr. Roberts while Mr. Roberts is in a high-crime area, and in fact, it was proper for the officers to ask only Mr. Roberts the question. The officers have testified that they recognized the others in the group and did not feel the need to ask them any questions.

20 The Crown submits that the officers were entitled to run Mr. Roberts' name on CPIC and therefore it cannot be said it was a detention. There was no evidence whatsoever before the Court that will cause the Court to conclude that there was racial profiling in this case. There not being any breaches of section 9, 10(b), and 8 of the *Charter*, the evidence should not be excluded.

21 Constable Romano and Constable Richardson, as well as Mr. Andrew Roberts testified in this case. I have thoroughly reviewed their testimony and do not propose to repeat everything that they said. I simply intend to highlight portions of their evidence that are necessary to give my reasons, my findings some context.

22 Constable Romano testified that the primary purpose for speaking to Mr. Roberts was to find out who he was. Constable Romano indicated that he knew the other four to six males in the company of Mr. Roberts. Police Constable Richardson testified that there were about two to four males. Constable Richardson testified that his intention was simply find out who Mr. Roberts was. He testified that he was suspicious of Mr. Roberts because he did not recognize him. According to Constable Richardson, the purpose of calling Mr. Roberts over was to determine if there was some criminal activity occurring.

23 Police Constable Romano testified that immediately upon finding out Mr. Roberts' name, he ran a CPIC check. This is consistent with Police Constable Richardson's assertion that the purpose of calling Mr. Roberts over was to investigate him for possible criminal activity. He was unknown to them, therefore suspicious and possibly involved in criminal activity.

24 I find on the evidence that the primary reason for calling Mr. Roberts over was to investigate him for possible criminal activity and not simply to find out his name.

25 I also make the following findings:

- 1) Prior to calling Mr. Andrew Roberts over, Police Constables Richardson and Romano had no information of any possible criminal activity on the part of Mr. Roberts, or any other persons he was with on that location.
- 1) Neither Mr. Roberts or the persons he was with had engaged in any suspicious activity.
- 1) The only distinguishing feature that resulted in Mr. Roberts being called over was that he was unknown to the police officers.
- 1) Mr. Roberts was the only black person amongst a group of white males.

26 Constable Romano testified that there were about four to six males. Constable Richardson indicates there were two to four males. Mr. Andrew Roberts testified that there were about ten males. Even though Constable Romano and Constable Richardson indicated that they knew who the persons were, they are not able to give an exact number of the persons present. This is significant because these are persons the officers testified they knew and therefore they should be able to indicate with some precision how many people were in the group. I note that the officers differ with respect to the number of persons in the group.

27 I find on the evidence that irrespective of the number of persons with Mr. Andrew Roberts, none of these persons were engaged in any type of suspicious activity and none of them had criminal records.

28 Constable Romano testified that he called Mr. Roberts over from across the street and Mr. Roberts came over and voluntarily and willingly provided his name to Constable Romano. This was in response to a question from Constable Romano with regards to Mr. Roberts' identity. Constable Richardson had no recollection of this exchange.

29 Constable Richardson testified that Constable Romano was asking Mr. Andrew Roberts about his charges. Constable Richardson did not actually hear the entirety of the exchange between Mr. Andrew Roberts and Constable Romano.

30 Constable Romano testified that one of the males, Shane Cavello (ph), indicated to Mr. Roberts words to the effect, "Do not worry, Tony. He's a cop." Mr. Andrew Roberts does not recall this statement being made, however, Constable Richardson recalls it. Neither officer has this notation in their notebook.

31 Mr. Roberts testified that Constable Romano and Constable Richardson were not in uniform, but in an unmarked police vehicle. He indicated that he could tell that it was a police vehicle because it had a number of antenna on it. He testified that Constable Romano asked him his name four or five times, and that Constable Romano did not give him a reason for asking, even though he asked Constable Romano why he wanted to know.

32 Mr. Roberts testified that he felt he had to go over and speak to Constable Romano because the officer persisted in asking him questions. This conversation occurred across the street. Constable Romano was on one side of the street and Mr. Andrew Roberts was on the other. They were communicating to each other across the street. Traffic was moving back and forth on the street, dividing them. Constable Romano denies asking Mr. Roberts his name more than once.

33 I find Constable Romano's own version on this point to be inconsistent with a single request to Mr. Roberts for his identification. On Constable Romano's version, Shane Cavello had to reassure Mr. Roberts that it was okay to go over because Tony, referring to Constable Romano, was a police officer. This clearly signified that there was some hesitation on the part of Mr. Andrew Roberts to go over and speak with Constable Romano. It is, in fact, consistent with Mr. Andrew Roberts' version that Constable Romano had to ask him three, four, or five times before he went over.

34 For all these reasons I find that Constable Romano had to call out to Mr. Roberts some four or five times before Mr. Roberts crossed the street and went over to meet Constable Romano. I accept Mr. Andrew Roberts' version that he responded to Constable Romano's initial inquiry only by providing his first name, and he tried to find out why the request was being made. I also find on the evidence that Mr. Andrew Roberts went over to speak to Constable Romano because he felt he had no choice.

35 Although Constable Romano did not expressly tell Mr. Roberts that he could not walk away, Constable Romano persisted in asking Mr. Andrew Roberts for his name, and refused to provide Mr. Roberts with an explanation for why he was seeking to find out his name. Under those circumstances it was reasonable for Mr. Andrew Roberts to conclude that he had no choice but to go over to speak to Constable Romano.

36 I accept Mr. Andrew Roberts' testimony that immediately upon obtaining his name, date of birth, Constable Romano ran his name on CPIC. I also accept Mr. Andrew Roberts' testimony that he was surrounded by Constable Romano and Constable Richardson when he crossed the street to speak to Constable Romano. The police cruiser on one side, Constable Romano on one side, and Constable Richardson on another and the street with traffic was behind Mr. Roberts at that time.

37 For all the foregoing reasons, the Court concludes that Mr. Roberts' assertion that he felt that he had no choice but to answer the officer's questions, and that he was not free to leave is reasonable. In effect, Constables Richardson and Romano detained Mr. Roberts for investigative purposes.

38 The Ontario Court of Appeal has held that it is permissible for the police to stop persons in a public place to speak to them, even if they do not observe any suspicious activity with respect to the persons who are stopped. However, there are a number of caveats. One, that there should be no legal consequences for the persons who are stopped if they refuse to speak to the police. And also, the police should take no steps to impede the person's ability to leave. As long as these two preconditions are satisfied, it is permissible for police to act in that fashion. See *R. v. Hall*, 22 O.R. (3d) 289; and *R. v. Lawrence*, 59 C.C.C. (3d) 55; and *R. v. Calder* [2004] O.J. No. 451.

39 However, if a person is detained, then the police are expected to engage in a number of activities to address the fact that they are detained and to ensure that the person's *Charter* rights are not breached.

40 In this case, the main assertion by Mr. Roberts is that he was in a position in which he felt he could not leave. Trial judges are to examine the circumstances surrounding the detention to determine whether or not the applicant's assertion that he felt psychologically compelled to stay is reasonable in the circumstances. This should include the applicant's personal circumstances which includes a consideration of facts such as age and mental capacity. See *R. v. Lawrence*, 59 C.C.C. (3d) 55, 46 O.A.C. 345

41 The whole concept of a citizen or a person feeling psychologically compelled to remain in the presence of police, and therefore, being detained in law, is set out by the Supreme Court of Canada in the case of *R. v. Therens*, 18 C.C.C. (3d) 481. And that court indicates and I quote:

"Detention may be effected with either application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that a choice to do otherwise does not exist."

42 Applying the law to the findings of fact I have made, I have indicated I have found that Andrew Roberts under the circumstances reasonably felt he could not leave, and therefore he was detained for investigative purposes.

43 The next issue is whether or not there was articulable cause for such detention.

44 I make the following findings of fact:

- 1) Constable Romano and Richardson were not investigating any alleged criminal offence.
- 1) They had no information about any ongoing or future criminal activity on the part of Mr. Roberts or of any other persons he was with. Neither did they observe any suspicious activity or criminal activity. In fact, Mr. Roberts and members of his group were engaging in a lawful activity, just standing in front of a building. They just happened to be engaging in that lawful activity in an area that is known for high criminal activity.
- 1) Mr. Roberts was called over on the barest and most basic of hunches. He was unknown to the police; therefore he had to be investigated for possible criminal activity.

45 On the evidence I find that the hunch that unknown persons would most likely be involved in criminal behaviour simply because they are unknown, or because they happen to be in an area known for high criminal activity does not constitute objective, discernible facts required to constitute the requisite articulable cause to detain Mr. Andrew Roberts. See *R. v. Simpson*, 79 C.C.C. (3d) 482.

46 For the reasons, I find that Mr. Andrew Roberts was arbitrarily detained and his rights under section 9 of the *Charter* were breached.

47 With respect to the issue of racial profiling, Mr. Roberts submits that he was called over and detained by Constable Romano and Constable Richardson simply because he was a black person in the company of white males and he was singled out because of his race.

48 The Ontario Court of Appeal in *R. v. D. Brown*, 64 O.R. (3d) 161 provides some very helpful principles with respect to racial profiling.

- 1) The Court refers to racial profiling as a phenomenon that targets individual members of a particular racial group on the basis of the supposed criminal propensity of that entire group, and;
- 1) The underlying attitude for racial profiling may not necessarily be racist. It may be based on subconscious racial stereotyping, and;
- 1) The trial judge must examine the evidence to determine if the circumstances relating to the detention correspond to racial profiling and provide a basis for the Court to infer that the officers singled out the accused person intentionally because of his or her race.

49 If a trial judge comes to this determination on the evidence called, then a finding that there was racial profiling can be made by the trial judge.

50 In this case, the evidence called before Court indicates as follows:

- 1) Mr. Andrew Roberts was the only black person in a group of white, young men.
- 1) Constable Romano singled out Mr. Andrew Roberts because he knew the other men and did not know Mr. Andrew Roberts. He did this in accordance with his belief that unknown persons in that area should be investigated for possible criminal activity.

51 The reasons why Constable Romano said he knew the other men, how he knew them, how familiar he was with them, their names as well as other relevant matters were not explored, either in examination in-chief or cross-examination. Therefore, based on the evidence called before me, there is nothing to dispute the logical conclusion that Constable Romano called Mr. Andrew Roberts over because he did not know him and because he knew other members of the group.

52 Certainly, the fact that a police officer picks out a young black man out of a group made up of other white persons is cause for the Court to examine the circumstances to determine if there was racial profiling. On the

evidence that was called before this Court, I cannot reasonably conclude that the only reason why Mr. Andrew Roberts was picked out was because he was black. It may simply be a coincidence, taking into account Constable Romano's policy of picking out persons he doesn't know to investigate. In the absence of other evidence, that's the only conclusion this Court can draw. Therefore, I find that on the totality of the evidence, there is no support of a finding of racial profiling in this case.

53 With respect to whether or not Mr. Roberts' Section 10(b) rights were breached, having made a finding that Mr. Roberts was detained when he began speaking to Constable Romano, Constable Romano was required to provide Mr. Roberts the opportunity to retain counsel of his choice, and also to provide him with a reasonable opportunity to do so, *R. v. Bartle*, (1994), 92 C.C.C. (3d) 289. I make the following findings:

- 1) Constable Romano asked Mr. Roberts his name and date of birth. Upon getting that information, he checked the CPIC system and found that Mr. Roberts was subject to a recognizance which required him to be in the company of his surety.
- 1) Constable Romano then arrested Mr. Roberts for failing to comply with the terms of the recognizance.
- 1) Mr. Roberts was provided with his rights to counsel. He indicated that he wished to speak to his counsel, Mr. Reid Rusonik.
- 1) Before Mr. Roberts had opportunity to speak to Mr. Reid Rusonik, Constable Romano continued to interrogate him and ask him where his parents were. This is a breach of Mr. Andrew Roberts' section 10(b) rights.

54 The next issue is whether or not the search of Mr. Andrew Roberts was lawful. Section 491 of the *Criminal Code* indicates that in the event of a search without a warrant, the police officer must have reasonable, probable grounds for making the arrest. These reasonable and probable grounds are to be reviewed on subjective and objective basis. See *R. v. Storrey*, (1990), 53 C.C.C. (3d) 316.

55 In this case, Mr. Andrew Roberts was searched incident to arrest. I find that after it was evident Mr. Roberts was in the company of the group of men that were known to him, Constable Romano obtained his name, ran his name on CPIC and then made a determination that Mr. Roberts was required to be in the company of a surety. This formed the reasonable probable grounds for the arrest of Mr. Andrew Roberts. Those grounds were obtained as a result of a violation of Mr. Roberts' right not to be arbitrarily detained, and therefore the fruits of the unlawful detention cannot be used by the state to argue compliance under the *Charter of Rights*. For all these reasons, I find that Mr. Roberts' section 8 rights were breached.

56 With respect to the exclusions of evidence, the principles are set out in *R. v. Collins*, [1987] 1 S.C.R. 265. In summary, I must consider three factors: the trial fairness; the seriousness of the breach; and the effect of the admission of the evidence on the administration of justice.

57 On trial fairness, the statements made by Mr. Andrew Roberts to Constable Romano is conscriptive evidence. To admit conscriptive evidence will adversely affect trial evidence. See *R. v. Stillman*, (1997), 113 C.C.C. (3d) 321. Therefore, that should lead to exclusion. Therefore, all the statements made by Mr. Andrew Roberts and Constable Romano are excluded.

58 With respect to the seriousness of violation, Constable Romano continued to ask Mr. Roberts to provide him with his name and refused to provide him with a reason why this information was required. Constable Romano is a police officer of some four years experience. He's aware that although he could speak to Mr. Roberts, Mr. Roberts was not compelled to speak to him and yet he persisted in his efforts to speak to Mr. Roberts. Mr. Roberts clearly indicated that he did not want to speak to the officer and the officer created an atmosphere in which Mr. Roberts felt he had no choice but to comply. There was no urgency. In fact, the officer had absolutely no information of any present or future criminal activity occurring. The result was a breach of multiple *Charter* rights. I find that the breach was flagrant, it was a serious breach.

59 The charges in this case are not serious in the scheme of things; however, the breach is serious. To admit this evidence, obtained as a result of multiple *Charter* breaches, would bring the administration of justice into disrepute. All statements, all items that were seized as a result of his detention and search are excluded.

60 MS. SEALY: Thank you, Your Honour. I at this time ask that the charge be marked dismissed.

61 THE COURT: All right. The charge is dismissed at the request of the Crown.

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