ONTARIO COURT OF JUSTICE

CITATION: *R. v. Calabretta*, 2020 ONCJ 435
DATE: 2020 09 21
COURT FILE No.: Central Newmarket 4911 998 19 06274

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

MARIA CALABRETTA

Before Justice A. A. Ghosh
Heard on March 3, 2020
Reasons for Judgment released on September 21, 2020

A. Ghosh..... counsel for the Crown
A. Stastny and S. Randev..... counsel for the defendant Maria Calabretta

GHOSH J.:

Overview

[1] Maria Calabretta attended her high school prom at a Banquet Hall in Vaughan. Upon security-screening subjected to all entrants, a baggie of approximately 2 grams of cocaine was located in her purse. It was conceded that she possessed cocaine and was tried pursuant to s.4(1) of the *Controlled Drugs and Substances Act* (CDSA).

[2] The core issue to be resolved was whether her freedom from unreasonable search and seizure was violated, pursuant to s.8 of the *Charter*. This submission focused on the fact that the drug was located during a mandatory search of all attendees by a school official and not a police officer, and without reasonable grounds. The public health crisis and related administrative directives necessarily delayed the delivery of this ruling.

Summary of the Evidence

[3] On June 27, 2019, Maria Calabretta stood in an obvious security line at a banquet hall, waiting to enter her high school prom. School administrators were checking bags and purses for controlled substances, alcohol or weapons. Only property was searched. Male administrators searched the belongings of the male students. Women administrators searched the belongings of the female students. The entry ticket itself indicated that drugs and alcohol were prohibited at the event but did not mention a mandatory search would be conducted.

[4] The Vice-Principal (VP) testified that she "asked" the defendant to search her bag. Ms. Calabretta opened her bag. Curiosity was sparked when a small straw was found, and a brief further search produced a small bag of cocaine. The nervous defendant admitted that it was cocaine.

[5] When the Crown asked about any procedure in place involving a student's refusal to have the belongings searched, the VP indicated that this has never happened to her knowledge. She might have inquired about the refusal, and if the student continued to resist the search of a bag or purse, he or she would likely be asked to leave.

[6] Approximately 300 students attended the prom event and approximately 50 percent were under 18 years of age. The stated purpose of the searches was to ensure the safety and security of the students at an organized school event, and explicitly not to investigate criminal activity. The searches generally lasted 5-10 seconds.

[7] While pay duty officers were present, the VP testified the searches were not at the behest of the police. Again, the school independently employed this procedure to ensure the safety and security of all attendees. The police were primarily present to ensure students from other schools were turned away and to keep the peace.

[8] The VP turned the cocaine over to one of the pay duty officers. Ms. Calabretta was arrested for possession.

Analysis

Charter Issues to be Resolved

1. Was the defendant's s.8 freedom from unreasonable search and seizure violated?

2. If so, should the cocaine be excluded pursuant to s.24(2)?

The *Charter* as it Applies to School Authorities and the Ability to Search and Seize

[9] The principles associated with any duties and rights of school officials to search students or their property and any related rights of the students to privacy under s.8 of the *Charter* were outlined in the seminal Supreme Court decision in *R. v. M. (M.R.),* [1998] 2 S.C.R. 393.

[10] The supportive facts in that case are important, as they involve arguably more intrusive school and police intervention than in the present case. The VP in that matter had heard the young person had marihuana on school grounds. As soon as the school official observed the young person arrive at the school dance, he called for the police and then escorted the young person into the office.

[11] A plainclothes officer soon arrived, introduced himself to the young person, and stood silently while the VP searched the young person. The school official checked the pockets, and later felt a bulge in the student's sock and located a bag of marihuana. The officer confirmed the nature of the drug and arrested the young person.

[12] The Supreme Court conceded that the *Charter* applied to school officials, albeit in a more flexible manner than is applicable to the police. This was due to any school's imperative to protect the safety and security of the educational and school-sanctioned social environments of all students.

Diminished Expectation of Privacy in the School Setting

[13] The s.8 *Charter* freedom from unreasonable search and seizure is only engaged when there is a "reasonable expectation of privacy". The flexible s.8 search and seizure standard in the school setting extends to a student's diminished reasonable expectation of privacy for the same reasons earlier referenced: the focus on the overall safety of all students and their school-engaged environments.

[14] It does not appear to be disputed that these moderated *Charter* standards extend to school supervised "functions", even off-site: *M.(M.R.)*, para 35; *Gillies v. Toronto District School Board*, [2015] O.J. No. 833, para. 40. The seizure of illegal items by school officials in this context can be used in a criminal trial: *M.(M.R.)*, para 37. An obvious corollary of this principle is that the police must usually become involved at some point.

[15] Ms. Calabretta had a reasonable expectation of privacy in the contents of her purse. There were no reasonable grounds to search it and every entrant to the event was subject to a search. I will expand on this shortly. The Supreme Court in *M.(M.R.)* articulated a somewhat helpful analogy that when people cross the border or board a plane, everyone accepts that they will be searched or subjected to intrusive inquiries about property where a far lesser expectation of

privacy is engaged. Any related seizures are generally *Charter*-protected. Perhaps this is an inelegant analogy, but like a voluntarily attended prom party, you cannot even enter some amusement parks in Canada without having your bags searched.

[16] The Supreme Court in *M.(M.R.)* specifically observed at paragraph 33: "Similarly, the reasonable expectation of privacy of a student in attendance at a school is certainly less than it would be in other circumstances. Students know that their teachers and other school authorities are responsible for providing a safe environment and maintaining order and discipline in the school. They must know that this may sometimes require searches of students and their personal effects and the seizure of prohibited items. It would not be reasonable for a student to expect to be free from such searches. A student's reasonable expectation of privacy in the school environment is therefore significantly diminished."

The "Reasonable Grounds" Standard as it Applies to School Officials

[17] Defence counsel's primary objection was that the searches at the prom party were mandatory and thus without reasonable grounds. He primarily relied upon the Superior Court decision of *Gillies*. Those facts, however, involved a dramatically more intrusive mandatory search and seizure scenario than the present case.

[18] In Gillies, at the off-site school prom, the principal demanded that every attendee be subjected, without grounds, to a breathalyzer test. It is a trite point that the extraction of bodily samples is substantially more invasive than the mandated search of a bag or a purse. Bodily samples attract heightened protection under s.8 of the *Charter*.

[19] I accept the direction in *M.(M.R.)* that generally school authorities will require "reasonable grounds" to search and seize items from a student or her property. However, the court also acknowledged in discussing the reasonable grounds standard applicable to school authorities at para. 48 that "Searches undertaken in situations where the health and safety of students is involved may well require *different considerations* (emphasis added). All the circumstances surrounding a search must be taken into account in determining if the search is reasonable." Despite the absence of reasonable grounds, the mandatory security search of bags at a prom is reasonable in all the circumstances.

Absence of a Waiver

[20] Ms. Calabretta did not waive her s.8 *Charter* right to be free from unreasonable search and seizure. The VP did not inform her of what was potentially at risk from a search of her bag. This is not a viable issue in this case.

[21] The concern of a waiver of a *Charter* right is generally central when an individual is forced to participate in some state-sanctioned intervention and then asked to set aside a constitutional right. This was a voluntarily attended prom party. The issue of a waiver of the s.8 right here is inapplicable or less central. The defendant could have simply refused the request and left, cleared her purse, and returned to the prom.

[22] This was not, for example, Ms. Calabretta being forced by the police to stop her vehicle for impaired driving. *Charter* rights are more central then. In such scenarios, screening device demands and searches are expected and often mandatory. The waiver of any rights is potentially, if not obviously, more comparatively significant in such a situation.

[23] The off-duty officers in this case had no interest or involvement in the search process at all. In compliance with the Supreme Court's direction that search and seizure flexibility must be accorded school authorities to ensure a safe environment for students, even at off-site events, the VP and her colleagues appropriately searched every purse and bag, including the defendant's, before a student was permitted to enter. The seizure and its related conveyance to an oblivious off-duty officer was *Charter*-compliant. I do not find an informed waiver was necessary or applicable in this case.

[24] I find no violation of Ms. Calabretta's s.8 *Charter* freedom from unreasonable search and seizure.

Section 24(2) – *Charter* Remedy

[25] Given I have denied the application, I will only briefly discuss the prospect of s.24(2) evidentiary exclusion considering the analysis and factors outlined by the Supreme Court in *R. v. Grant*, 2009 SCC 32 (CanLII), [2009] S.C.J. No. 32 (S.C.C.). Any breach was not serious, given how I have characterized the absence of a breach. The impact on Ms. Calabretta's *Charter* protected interests was negligible at best. Cocaine is one of the most serious Schedule 1 substances in the CDSA and there is a societal interest in adjudication on the merits. In balancing the application of the factors, I would not have excluded the evidence.

Conclusion

[26] The application is denied. Given that the merits of the case itself were properly conceded, a finding of guilt will be entered.

Released: September 21, 2020