Regina v. Kutynec
[Indexed as: R. v. Kutynec]

7 O.R. (3d) 277
[1992] O.J. No. 347
Action No. 663/90

Court of Appeal for Ontario,
Brooke, Finlayson and Doherty JJ.A.
February 24, 1992

Charter of Rights and Freedoms -- Remedies -- Procedure -- Where there was no evidence that accused was detained, trial judge not erring in refusing a *voir dire* at close of Crown's case to establish that accused had been arbitrarily detained contrary to s. 9 of Charter -- Procedure to be followed in applying for remedy under s. 24(2) of *Charter* discussed -- *Canadian Charter of Rights and Freedoms*, ss. 9, 24(2).

The accused was charged with refusing to provide a breath sample. At the conclusion of the Crown's case, counsel for the accused asked the trial judge to hold a *voir dire* to enable the accused to establish that he had been arbitrarily detained contrary to s. 9 of the *Canadian Charter of Rights and Freedoms*. The trial judge refused to grant the accused's request because he thought it was without merit or foundation. The accused called no evidence and was convicted.

The accused appealed, arguing that the trial judge's refusal to permit him to enter into a *voir dire* violated his rights under s. 7 of the *Charter*. The appeal was dismissed on the ground that the trial judge correctly concluded that, at the conclusion of the case for the Crown, the evidence of the Crown witnesses did not establish a prima facie case that the accused had been arbitrarily detained, or even detained. The judge on appeal went on to set out what he described as the desirable practice for seeking a remedy under s. 24 of the *Charter*. He stated that s. 24 issues should ordinarily be raised by pre-trial motion returnable before the trial judge and that the notice of motion should identify the *Charter* right infringed or denied and give particulars of the alleged infringement or denial and should be supported by affidavits of potential defence witnesses directed to the proof of the alleged *Charter* violation. The accused appealed.

Held, the appeal should be dismissed.

The trial judge did not err in dealing with the motion for a *voir dire*.

While the appeal judge correctly concluded that the trial judge was not obliged to permit a *voir dire*, his suggested procedure for the bringing of *Charter* motions was too rigid and restrictive.

Under the *Charter*, the burden of having the court reject evidence under s. 24(2) rests on the defence. The Crown does not have to anticipate that the defence will seek to exclude Crown evidence on the basis of an alleged *Charter* breach. Objection to the admissibility of evidence must be made before or when the evidence is proffered. The *Charter* application to exclude evidence must precede the admission of the evidence. In the interests of conducting an orderly trial, the trial judge is entitled to insist that defence counsel state his or her position in possible *Charter* issues either before or at the

outset of the trial. Failing timely notice, a trial judge, having taken into account all relevant circumstances, is entitled to refuse to entertain an application to assert a *Charter* remedy.

There were problems with the procedural requirements laid down by the appeal judge in this case. In straightforward cases, the only pre-trial source for an affidavit setting out the basis for a belief that the *Charter* has been infringed will be the accused, and forcing the accused to swear an affidavit would appear to infringe his right to remain silent. The requirements presupposed full disclosure of the Crown's case to the defence and, additionally, depended on the Crown having disclosed any facts relevant to potential *Charter* violations, even though those facts may not have been part of the Crown's case. Disclosure practices, however, are uneven in this province and are sometimes rudimentary for summary conviction offences. The requirements constituted an unnecessary interference with the inherent jurisdiction of the trial judge to control the conduct of the trial.

While written notice to the Crown particularizing the *Charter* breach complained of was a desirable practice, it should not be mandatory.

It was not helpful for the court to attempt to establish the extent or the form of the offer of proof to be made in all cases when giving notice of a *Charter* application. In some cases, when the defence indicates, prior to the calling of evidence, that it intends to advance a *Charter* application to exclude evidence, the trial judge may call upon the defence to summarize the evidence that it anticipates it would elicit on the application. If the defence is able to summarize the anticipated evidentiary basis for its claim, and if that evidence reveals no basis upon which the evidence could be excluded, then the trial judge need not enter into an evidentiary inquiry, and should dismiss the motion without hearing evidence.

Particularly in cases tried in the Provincial Division there will be instances where the defence, through no fault of its own, cannot provide a detailed summary of the evidence that it anticipates it will call in support of an application to exclude evidence. If fairness requires that the accused be given some latitude to explore potential *Charter* issues which he or she had no opportunity to develop prior to trial, then the trial judge should grant it, but the trial judge should control the proceedings to ensure that legitimate exploration does not become a fishing expedition.

APPEAL from a judgment of the District Court (1990), 1990 CanLII 6673 (ON SC), 74 O.R. (2d) 205, 50 C.R.R. 311, 57 C.C.C. (3d) 507, 78 C.R. (3d) 181, dismissing the accused's appeal from conviction on a charge of refusing to provide a breath sample.

R. v. L. (W.K.), 1991 CanLII 54 (SCC), [1991] 1 S.C.R. 1091, 4 C.R.R. (2d) 298, 64 C.C.C. (3d) 321, 6 C.R. (4th) 1, 124 N.R. 146, [1991] 4 W.W.R. 385, consd

Other cases referred to *R. v. Arbour* (1990), 4 C.R.R. (2d) 369 (Ont. C.A.); *R. v. Aruguman*, Ont. Gen. Div., Keenan J., November 26, 1990 [summarized at 11 W.C.B. (2d) 555]; *R. v. Collins*, 1987 CanLII 84 (SCC), [1987] 1 S.C.R. 265, 28 C.R.R. 122, 13 B.C.L.R. (2d) 1, 33 C.C.C. (3d) 1, 56 C.R. (3d) 193, 38 D.L.R. (4th) 508, 74 N.R. 276, [1987] 3 W.W.R. 699; *R. v. Dietrich*, 1970 CanLII 377 (ON CA), [1970] 3 O.R. 725, 1 C.C.C. (2d) 49, 11 C.R.N.S. 22 (C.A.), leave to appeal to S.C.C. refused, [1970] S.C.R. xi, [1970] 3 O.R. 744n, 1970 CanLII 1000 (BC CA), 1 C.C.C. (2d) 68n; *R. v. Hamill* (1984), 1984 CanLII 39 (BC CA), 14 C.C.C. (3d) 338, 41 C.R. (3d) 123, 13 D.L.R. (4th) 275, [1984] 6 W.W.R. 530 (B.C. C.A.) [affd 1987 CanLII 86 (SCC), [1987] 1 S.C.R. 301, 28 C.R.R. 148, 13 B.C.L.R. (2d) 24, 33 C.C.C. (3d) 110, 56 C.R. (3d) 220, 38 D.L.R. (4th) 611, 75 N.R. 149, [1987] 3 W.W.R. 726]; *R. v. Keifer*, Ont. Gen. Div., Ewaschuk J., November 9, 1990

[summarized at 11 W.C.B. (2d) 295]; *R. v. Keller* (1990), 25 M.V.R. (2d) 7 (Ont. Gen. Div.); *R. v. McNulty*, Ont. C.A., November 18, 1991; *R. v. Mills*, 1986 CanLII 17 (SCC), [1986] 1 S.C.R. 863, 58 O.R. (2d) 543 (note), 21 C.R.R. 76, 26 C.C.C. (3d) 481, 52 C.R. (3d) 1, 29 D.L.R. (4th) 161, 67 N.R. 241, 16 O.A.C. 81; *R. v. Myers* (1984), 1984 CanLII 3004 (PE SCAD), 14 C.C.C. (3d) 82, 11 D.L.R. (4th) 446, 28 M.V.R. 144, 49 Nfld. & P.E.I.R. 70, 145 A.P.R. 70 (P.E.I. C.A.); *R. v. Parrino* (1990), 50 C.R.R. 328 (Ont. Dist. Ct.); *R. v. Rodrigues* (1990), 1990 CanLII 10956 (MB QB), 60 C.C.C. (3d) 370, 67 Man. R. (2d) 306 (Q.B.); *R. v. Sproule* (1975), 1975 CanLII 1354 (ON CA), 26 C.C.C. (2d) 92, 30 C.R.N.S. 56 (Ont. C.A.); *R. v. Stankovic* (1991), 6 C.R.R. (2d) 189 (Ont. Gen. Div.); *R. v. Stinchcombe* (1991), 1991 CanLII 45 (SCC), 83 Alta. L.R. (2d) 193, 68 C.C.C. (3d) 1, 8 C.R. (4th) 277, 130 N.R. 277, [1992] 1 W.W.R. 97 (S.C.C.); *R. v. Zevallos* (1987), 1987 CanLII 169 (ON CA), 32 C.R.R. 373, 37 C.C.C. (3d) 79, 59 C.R. (3d) 153, 22 O.A.C. 76 (C.A.)

Statutes referred to *Canadian Charter of Rights and Freedoms*, ss. 10(b), 11(c), 24, 24(2) *Constitution Act, 1982*, s. 52, *Criminal Code*, R.S.C. 1985, c. C-46, ss. 254(5) [rep. & sub. R.S.C. 1985, c. 27 (1st Supp.), s. 36], 482 [am. R.S.C. 1985, c. 27 (1st Supp.), s. 66]

Authorities referred to Tse, J. Sandy, "Charter Remedies: Procedural Issues" (1989), 69 C.R. (3d) 129, pp. 136-40

Nicholas A. Xynnis, for appellant.

Susan G. Ficek, for the Crown, respondent.

The judgment of the court was delivered by

FINLAYSON J.A.:--The appellant seeks leave to appeal and appeals from the dismissal of his appeal by the summary conviction appeal court. He was convicted of refusing to comply with a demand for a breath sample for analysis by an approved screening device (A.L.E.R.T.) contrary to s. 254(5) [rep. & sub. R.S.C. 1985, c. 27 (1st Supp.), s. 36] of the *Criminal Code*, R.S.C. 1985, c. C-46 (the *Code*). This appeal raises the issue of the appropriate procedures to be used with respect to applications pursuant to s. 24(2) of the *Canadian Charter of Rights and Freedoms* (the *Charter*).

The appellant's trial proceeded before His Honour Judge A.V. Couto in Provincial Court. Police Constable (P.C.) Herbert testified that, while on foot patrol, he and his partner, P.C. Gary, stopped the appellant in a car in what P.C. Herbert described as a "well known drug driving parking lot". The lot was adjacent to a shopping complex. The constable described the drug activity associated with the lot, stating that individuals drove in and bought drugs from others who approached the cars. Alternatively, individuals drove in and momentarily left their cars to enter the shopping complex before returning outside. The two officers observed the appellant drive into the parking lot, get out of his car and enter the complex for a few minutes. The appellant then returned to the car. The car engine was left running while the appellant was in the complex.

Police Constable Herbert went to investigate the appellant for suspected drug possession. He approached the appellant's vehicle to speak to him. In the course of talking to the appellant, the constable noticed a slight smell of alcohol on his breath. The appellant first denied that he had been drinking, but then admitted that he had consumed two beers approximately two hours earlier.

Police Constable Herbert ordered an A.L.E.R.T. device by police radio and it was brought to the scene by P.C. Woodburn. The appellant was seated in the rear of a police cruiser and an A.L.E.R.T. demand was made to him by P.C. Herbert. Three tests were administered, but the appellant failed to provide a breath sample adequate for testing. He was arrested for refusing to comply with the A.L.E.R.T. demand. He was informed of his right to counsel and released on an appearance notice.

Police Constables Herbert and Woodburn gave evidence at the trial of the appellant. Under cross-examination, P.C. Herbert testified that the appellant was not impaired and no illegal drugs were found on his person or in his car. The officers also gave evidence pertaining to the appellant's refusal to comply with the A.L.E.R.T. demand. Defence counsel made no objection to the admission of this evidence, either at the time it was tendered and accepted into evidence or at any time before the Crown closed its case.

At the close of the Crown's case, counsel for the appellant stated that he had a *Charter* application to make and requested a *voir dire* to permit him to call P.C. Gary and other evidence. Counsel conceded in this court that he had had adequate disclosure of the Crown's case before trial and had intended from the outset to make a *Charter* motion. He had deliberately deferred his motion until the close of the Crown's case.

The learned trial judge inquired about the nature of counsel's *Charter* application and was informed that it was being brought to exclude the evidence already heard pursuant to s. 24(2) of the *Charter*. When he inquired further about the grounds for exclusion, the trial judge was told that the defence was taking the position that the appellant had been arbitrarily detained when first approached by P.C. Herbert. When pressed for further particulars, defence counsel asserted that the police officers had had no reason to "stop" the appellant in the first place and that a detention had then occurred requiring the officers to inform the appellant of his right to retain and instruct counsel under s. 10(b) of the *Charter*.

Couto Prov. Ct. J. dismissed the *Charter* application as being without merit or foundation in law. The appellant called no evidence and was convicted and sentenced to 30 days in jail, to be served intermittently.

The appeal of this decision to the Honourable Judge Borins in District Court was dismissed. Borins Dist. Ct. J. held that the trial judge did not err when he refused to permit defence counsel to conduct *a voir dire* for the purpose of establishing a violation of the *Charter*. In an extensive and carefully reasoned judgment (*R. v. Kutynec* (1990), 1990 CanLII 6673 (ON SC), 74 O.R. (2d) 205, 57 C.C.C. (3d) 507 (Dist. Ct.)), he went on to set out what he described as the desirable practice for seeking a remedy under s. 24 of the *Charter*. His suggestions are set out in his reasons at pp. 215-16 O.R., pp. 517-18 C.C.C.:

> From the cases which I have reviewed it is, in my view, clear that the desirable practice is that s. 24 issues should ordinarily be raised by pre-trial motion returnable before the trial judge. This practice contains two preliminary requirements. The first is essentially one of pleading. It consists of the notice of motion which identifies the *Charter* right infringed or denied and particulars of the alleged infringement or denial. The second requirement is one of a preliminary offer of proof consisting of affidavits of potential defence witnesses directed to the proof of the alleged *Charter* violation. What is proposed is intended to promote the orderly and efficient conduct of a criminal trial, to prevent the trial from being used as a means of discovering evidence of possible *Charter* violations by way of extensive cross-examination, and, to adopt the

> expression of Southin J. in *R. v. Lee*, *supra*, to prevent defence counsel from "popping up" at any time during a trial to bring a *Charter* motion. In the normal course, pre-trial disclosure by the prosecution together with effective pre-trial preparation by defence counsel should enable counsel to determine whether grounds exist warranting an application for a s. 24 remedy.

This judgment of Borins Dist. Ct. J. has found considerable, although not unanimous, support among trial judges: see, e.g., *R. v. Rodrigues* (1990), 1990 CanLII 10956 (MB QB), 60 C.C.C. (3d) 370, 67 Man. R. (2d) 306 (Q.B.); *R. v. Keller* (1990), 25 M.V.R. (2d) 7 (Ont. Gen. Div.); *R. v. Parrino* (1990), 50 C.R.R. 328 (Ont. Dist. Ct.); R. v. Keifer, a judgment of Ewaschuk J., Ont. Gen. Div., released November 9, 1990 [summarized at 11 W.C.B. (2d) 295]; *R. v. Aruguman*, an unreported decision of Keenan J., Ont. Gen. Div., released November 26, 1990 [summarized at 11 W.C.B. (2d) 555]; *R. v. Stankovic*, a judgment of Morin J., Ont. Gen. Div., released May 22, 1991 [now reported 6 C.R.R. (2d) 189].

I think this appeal can be quickly disposed of on the merits by stating that it was not demonstrated in this court that the trial judge erred in dealing with the motion for a *voir dire*. Borins Dist. Ct. J. held that the trial judge had not erred in refusing to permit the appellant's counsel to conduct a hearing for the purpose of establishing a violation of the *Charter* right not to be arbitrarily detained. He found that the trial judge correctly concluded that there was no evidence the appellant had been detained when he was first approached by the police.

This would have been sufficient to dispose of this appeal. This court, however, was asked to find Borins Dist. Ct. J. was in error with respect to his statements as to the procedure for bringing a *Charter* motion. While I agree with the learned appeal judge's final conclusion that the trial judge was not obliged to permit a *voir dire* simply because "defence counsel wished to do so", I must respectfully differ with him as to the procedure to be followed in dealing with *Charter* issues. Some element of discipline must be introduced into the bringing of *Charter* motions, but what is proposed by Borins Dist. Ct. J. is too rigid and restrictive.

Prior to the proclamation of the *Charter*, no one conversant with the rules controlling the conduct of criminal trials would have suggested that an objection to the admissibility of evidence tendered by the Crown could routinely be initiated after the case for the Crown was closed. It is self-evident that objections to admissibility of evidence must be made before or when the evidence is proffered. This common-sense proposition is equally applicable to *Charter* applications to exclude evidence: *R. v. Myers* (1984), 1984 CanLII 3004 (PE SCAD), 14 C.C.C. (3d) 82, 28 M.V.R. 144 (P.E.I. C.A.), at p. 91 C.C.C., p. 155 M.V.R.; J. Sandy Tse, "Charter Remedies: Procedural Issues" (1989), 69 C.R. (3d) 129, at pp. 136-40.

Litigants, including the Crown, are entitled to know when they tender evidence whether the other side takes objection to the reception of that evidence. The orderly and fair operation of the criminal trial process requires that the Crown know before it completes its case whether the evidence it has tendered will be received and considered in determining the guilt of an accused. The ex post facto exclusion of evidence, during the trial, would render the trial process unwieldy at a minimum. In jury trials it could render the process inoperative.

I should point out that I am dealing here only with applications to exclude evidence. Although he was particularly concerned with applications to exclude evidence, in his judgment, Borins Dist. Ct. J. addressed s. 24 applications in general. Since his reasons, the Ontario Court (General Division), pursuant to s. 482 [am. R.S.C. 1985, c. 27 (1st Supp.), s. 66] of the *Criminal Code*, has made rules with respect to

criminal proceedings in that court. Rule 27 applies to certain applications brought pursuant to s. 24 of the *Charter* or s. 52 of the *Constitution Act, 1982*. The rules are not yet in force and do not apply to applications to exclude evidence under the *Charter*. Nothing said here should be taken as applicable to *Charter* applications specifically addressed in these new rules.

As a basic proposition, an accused person asserting a *Charter* remedy bears both the initial burden of presenting evidence that his or her *Charter* rights or freedoms have been infringed or denied, and the ultimate burden of persuasion that there has been a *Charter* violation. If the evidence does not establish whether or not the accused's rights were infringed, the court must conclude that they were not: see R. *v. Collins*, 1987 CanLII 84 (SCC), [1987] 1 S.C.R. 265, 33 C.C.C. (3d) 1, at p. 277 S.C.R., p. 13 C.C.C. It is obvious that counsel for the accused is not entitled to sit back, as he did in this instance, and hope that something will emerge from the Crown's case to create a *Charter* argument or assist him in one he is already prepared to make. The onus is on the accused to demonstrate on a balance of probabilities that he is entitled to a *Charter* remedy and he must assert that entitlement at the earliest possible point in the trial. Otherwise, the Crown and the court are entitled to proceed on the basis that no *Charter* issue is involved in the case.

I also agree with the substance of the observations made by Borins Dist. Ct. J. that defence counsel often confuse the issue of admissibility of evidence with the assertion of a *Charter* right. Admissibility is the problem of the party with the burden of adducing evidence. Where the evidence is directed to the proof of a criminal offence, the onus of showing it is admissible is upon the Crown. Counsel for the accused can wait until the evidence is proffered and make timely objection. Unfortunately, defence counsel have become too comfortable with this format; they have not adjusted to the new reality of the *Charter*. Under the *Charter*, the burden of having the court reject evidence that is otherwise admissible passes to the defence. The Crown does not have to anticipate that the defence will seek to exclude Crown evidence on the basis of an alleged *Charter* breach. The defence must make its application for relief under s. 24(2) before the evidence is admitted, not after it has been accepted: *R. v. McNulty*, a judgment of the Ontario Court of Appeal, released November 18, 1991.

In *R. v. McNulty*, *supra*, this court held that where counsel desired to challenge the admissibility of the evidence of a breathalyzer technician, he had to do so before it was admitted in evidence. This statement was made without reference to the provisions of s. 24(2) of the *Charter*, which provides that if evidence was obtained in a manner that was in breach of 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.

Manifestly, the *Charter* application by the accused must precede the admission of the evidence. To have it admitted before a jury subject to later exclusion following a successful *Charter* application would invite a mistrial. The procedure to be followed is no different when a judge is the trier of fact.

If these two processes relating to the reception of evidence by the court are not kept conceptually separate, the trial process becomes confused and repetitive. In the interests of conducting an orderly trial, the trial judge is entitled to insist, and should insist, that defence counsel state his or her position on possible *Charter* issues either before or at the outset of the trial. All issues of notice to the Crown and the sufficiency of disclosure can be sorted out at that time. Failing timely notice, a trial judge, having

taken into account all relevant circumstances, is entitled to refuse to entertain an application to assert a *Charter* remedy.

I do not suggest that a trial judge can never consider, at a later point in the trial, the admissibility of evidence which has been tendered without objection. A trial judge has a discretion to allow counsel to challenge evidence already received and will do so where the interests of justice so warrant. For example, as in *R. v. Arbour*, a judgment of the Court of Appeal for Ontario, released July 28, 1990 [now reported 4 C.R.R. (2d) 369], a question as to the admissibility of evidence already before the trier of fact may arise from evidence given at a subsequent point in the proceedings. In such cases, a trial judge may well be obliged to consider the question of the admissibility of the earlier evidence and, if the circumstances warrant it, allow counsel to reopen the issue.

This use of pre-trial and preliminary *Charter* motions has been recognized from the outset of *Charter* litigation. As early as 1984, the British Columbia Court of Appeal addressed this procedural issue in *R. v. Hamill* (1984), 1984 CanLII 39 (BC CA), 14 C.C.C. (3d) 338, [1984] 6 W.W.R. 530 [affd 1987 CanLII 86 (SCC), [1987] 1 S.C.R. 301, 33 C.C.C. (3d) 110]. Speaking for the court, Esson J.A. stated at pp. 366-67 C.C.C., pp. 558-59 W.W.R.:

> It is not in every case in which an accused applies to exclude evidence under s. 24(2) that it will be necessary to conduct an inquiry as to the reasonableness of the search, or that it will be necessary to hear evidence at all. Where an accused applies for an order to exclude evidence on the ground that there has been a breach of s. 8 of the *Charter*, the onus is on him to assert and establish:
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> 1. that the evidence was obtained in a manner which infringed or denied his right to be secure against unreasonable search or seizure;
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> 2. that, having regard to all the circumstances, the admission of the evidence would bring the administration of justice into disrepute. . . . . .
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> In those cases where the accused does apply to exclude the evidence, it will be for the trial judge to decide what procedure should be followed but, at the least, counsel for the accused should be required to state with reasonable particularity the ground upon which the application for exclusion is made. That much is essential for an orderly trial of the issue. It follows that, if the statement of grounds does not disclose a basis upon which the court could make an order excluding the evidence, the application may be dismissed without hearing evidence.

To my knowledge, this suggested manner of proceeding has never been questioned and appears to have been endorsed, at least by implication, in what was later said by McIntyre J. in *R. v. Mills*, 1986 CanLII 17 (SCC), [1986] 1 S.C.R. 863, 26 C.C.C. (3d) 481. McIntyre J. stated at pp. 956-57 S.C.R., pp. 494-95 C.C.C.:

> Procedure
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> Problems have arisen in connection with the procedure to be followed relating to *Charter* remedies and some confusion has existed in various courts. As has been said on many occasions, the *Charter* was not enacted in a vacuum. It was created to form a part -- a very important part -- of the Canadian legal system and, accordingly, must fit into that system. It will be noted at once that s. 24(1) gives no jurisdictional or procedural guide. This absence makes it clear that

> the procedures presently followed must be adapted and used for the accommodation of applications for relief under s. 24(1).
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> Pre-trial motions
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> There will be occasions when it will be advisable to move for relief under s. 24(1) of the *Charter* before trial. In my view, however, it is by no means necessary to erect a new procedural scheme for this purpose. The pre-trial motion and its near relative, the preliminary motion or preliminary objection, are well known in the law and may be employed in seeking s. 24(1) relief once an indictment has been preferred.

The accused in *R. v. Mills*, *supra*, was complaining of a violation of his s. 11(b) right to be brought to trial within a reasonable time. The remedy sought was a stay of the criminal proceedings under s. 24(1), not the exclusion of evidence under s. 24(2). However, s. 24(2) has been specifically addressed by this court in *R. v. Zevallos* (1987), 1987 CanLII 169 (ON CA), 32 C.R.R. 373, 37 C.C.C. (3d) 79. That case dealt with the desirability of having a trial judge deal with alleged *Charter* violations where the only remedy sought is the exclusion of evidence obtained therefrom. Speaking for the court, Morden J.A. obviously contemplated a motion at or before trial when he stated at p. 378 C.R.R., p. 84 C.C.C.:

> Although the issues of infringement of rights guaranteed by s. 8 of the *Charter* and of satisfaction of the requirements of s. 24(2) are separate issues a large body of the same evidence will be considered in applying each provision: see *Collins v. The Queen*, [1987[S.C.J. No. 15 (S.C.C., April 9, 1987), at pp. 17-8, 1987 CanLII 84 (SCC), 33 C.C.C. (3d) 1 at pp. 18-19, 38 D.L.R. (4th) 508, [1987] 1 S.C.R. 265). To avoid duplication in the adducing and consideration of the evidence it is preferable that it be heard at one time by the same judge. It is also preferable that the judge who finds infringement of s. 8 rights, if such be the case, be the one who characterizes the nature and extent of the infringement for s. 24(2) purposes.

Returning to the case under appeal, I agree with Borins Dist. Ct. J. that the trial judge was correct in concluding that nothing adduced in evidence before him suggested that the appellant was detained when he was first approached by the police. Furthermore, counsel did not indicate that he proposed to call evidence which would provide some basis for a finding that the appellant's *Charter* rights had been violated. Counsel simply asserted that he was entitled to a *voir dire* to explore the issue.

Absent any basis on which it could be argued that the appellant was detained, the trial judge was well within his authority in declining to exercise his discretion to re-open the question of the admissibility of the evidence tendered by the Crown. Had some basis been shown for questioning the admissibility of the evidence, the trial judge would then have had to address the other considerations relevant to the exercise of his discretion. Here, the trial judge did not err in refusing to allow an after-the-fact challenge to the admissibility of the evidence.

I turn now to the consideration of the procedural requirements laid down by Borins Dist. Ct. J. in respect to applications under s. 24(2) of the *Charter*. A number of problems present themselves to me.

> (1) These requirements place an onus on the appellant in this case to swear an affidavit setting out the basis for his belief that his *Charter* rights had been infringed. In straightforward cases such as this, the accused usually will be the only pre-trial source for such an affidavit. Forcing the appellant to swear an affidavit would appear on its face to infringe his common law right to

> remain silent and his s. 11(c) *Charter* right not to be compelled to testify against himself. This problem would become particularly acute where the appellant is exposed, as logically he should, to cross-examination on his affidavit. To avoid this consequence, counsel will inevitably resort to the clumsy subterfuge of submitting affidavits by articled law students, secretaries and para-legal personnel. These affidavits recite second-hand what the accused told these people. Cross-examination of these deponents would expose them to possible breaches of solicitor-client privilege.
>
> (2) The requirements presuppose full disclosure of the Crown's case to the defence and, additionally, depend on the Crown having disclosed any facts relevant to potential *Charter* violations, even though these facts may not have been part of the Crown's case. The recent decision of the Supreme Court of Canada in *R. v. Stinchcombe* (1991), 1991 CanLII 45 (SCC), 68 C.C.C. (3d) 1, [1992] 1 W.W.R. 97, reaffirms the legal duty of the Crown to make full disclosure to all relevant information to the defence. Disclosure practices, however, are uneven in this province and are sometimes rudimentary for summary conviction offences. Disclosure is most essential in summary conviction trials because the accused does not have the advantage of a preliminary hearing where counsel can explore possible *Charter* issues and lay the groundwork for a *Charter* motion.

I understand that the current disclosure guidelines are now being considered and evaluated by the Advisory Committee to the Attorney General, under the chairmanship of the Honourable G.A. Martin, Q.C. Until more specific rules relating to disclosure practices have been considered and established, variation in the extent of disclosure made by the Crown requires that defence counsel should have flexibility in how they bring *Charter* motions to exclude evidence.

> (3) The requirements constitute an unnecessary interference with the inherent jurisdiction of the trial judge to control the conduct of the trial. The formality of what is suggested by Borins Dist. Ct. J. will only lead to arguments by the Crown as to whether there had been compliance with the procedures, and arguments by defence counsel as to whether compliance had been possible given the disclosure made by the Crown.

The great majority of criminal cases in this province are disposed of by judges of the Provincial Division of the Ontario Court of Justice. Mandated pre-trial procedures will do nothing to assist them in carrying out their duties or to ease their caseloads. Rather than invent yet another procedural strait- jacket to compound their problems, it is better to leave to these trial judges the discretion to determine the sufficiency of notice and the extent of the offer of proof.

> (4) The requirements must also be assessed in light of the administrative practices and procedures followed by trial courts. A trial court which hears cases that have been through a preliminary inquiry and a detailed pre-trial, and that regularly assigns trial judges to cases well before the date of trial, may well use different procedures respecting *Charter* applications to exclude evidence than a trial court that conducts summary trials without any pre-trial or early designation of trial judges.

On this appeal, counsel for the Crown conceded that the guidelines suggested by Borins Dist. Ct. J. were too restrictive, but still supported the requirement that the Crown should be entitled to written notice particularizing the *Charter* breach complained of. Such notice would allow Crown counsel to be

prepared to respond properly to the challenge and to be in a position to ensure the availability of all Crown witnesses necessary to address the issue. I think this is a desirable practice, particularly in a busy judicial district where more than one Crown counsel may become involved in the ongoing carriage of a case. This practice, however, should not be mandatory. A prudent defence counsel will place himself on record in these matters to avoid misunderstandings.

Borins Dist. Ct. J. also raised the question of what evidentiary threshold should be expected of the accused when giving notice of a *Charter* application. I do not think it is helpful for the court to attempt to establish the extent or the form of the offer of proof to be made in all cases. A trial judge, as part of his or her general authority to control the trial proceedings, is entitled to inquire of counsel before the trial what issues will be encountered. This power includes the authority to ask counsel for the accused what *Charter* issues he or she foresees. Since the accused bears the onus of raising the *Charter*, no one else can know what *Charter* issues will be raised. It is basic to any adversarial system that a litigant applying for curial relief advise the court and the opponent of the application.

In some cases, when the defence indicates, prior to the calling of evidence, that it intends to advance a *Charter* application to exclude evidence, the trial judge may call upon the defence to summarize the evidence that it anticipates it would elicit on the application. This kind of procedure is well known to the criminal process: see *R. v. Sproule* (1975), 1975 CanLII 1354 (ON CA), 26 C.C.C. (2d) 92, 30 C.R.N.S. 56 (Ont. C.A.), at pp. 97-98 C.C.C., pp. 62-64 C.R.N.S., and *R. v. Dietrich*, 1970 CanLII 377 (ON CA), [1970] 3 O.R. 725, 1 C.C.C. (2d) 49 (C.A.), leave to appeal refused, [1970] S.C.R. xi, [1970] 3 O.R. 744 n, at pp. 738-39 O.R., p. 62 C.C.C. If the defence is able to summarize the anticipated evidentiary basis for its claim, and if that evidence reveals no basis upon which the evidence could be excluded, then the trial judge need not enter into an evidentiary inquiry. In other words, if the facts as alleged by the defence in its summary provide no basis for a finding of a *Charter* infringement, or a finding that the evidence in question was obtained in a manner which infringed the *Charter*, or a finding that the test for exclusion set out in s. 24(2) was met, then the trial judge should dismiss the motion without hearing evidence.

There is nothing unique in this position. Where an accused bears the burden of proving the admissibility of evidence, it is incumbent on counsel to put forward a factual and legal basis on which the evidence could be admitted. Counsel is not entitled to proceed immediately to a *voir dire* on the issue. The same principle should be applied where the onus is on an accused to establish that certain evidence is inadmissible.

In many cases, the accused's entitlement to an evidentiary hearing with respect to an alleged *Charter* violation will be readily established on the basis of information provided through disclosure, cross-examination at prior proceedings, or by an indication by counsel for the accused that he or she intends to call evidence which will substantiate the *Charter* violation. I see no difficulty in a trial judge asking counsel what evidence will be called on the application to exclude evidence and what witnesses will be called. Direct answers to these simple questions will often quickly determine the need for an evidentiary inquiry and will assist in deciding the format and timing of that inquiry.

I do not see defence counsel's obligation to respond to such inquiries as derogating from the presumption of innocence or the defence right to refrain from assisting the prosecution. As Sopinka J. observes in *Stinchcombe*, *supra*, at p. 7 C.C.C., p. 102 W.W.R., the defence is entitled to "assume a purely adversarial role toward the prosecution". The requirement that the party bearing the burden of

proof outline the basis of his or her application is part of, and in no way inconsistent with, our adversarial process.

I think it would be a rare case where the Crown has provided full disclosure, the accused has had an opportunity to have a preliminary inquiry, and the matter has been thoroughly pre-tried, that the defence would be unable, at the outset of the trial, to outline the nature of the alleged violation and to summarize the nature of the evidence counsel will call on the application. Armed with this information, the trial judge can weed out the applications which have no basis in fact or law, and can decide how and when those with potential merit should be resolved. If, on the other hand, it should appear that the accused has not taken full advantage of all the opportunities available to him to be apprised of the case against him in the light of the defences available to him, then he should expect little sympathy from the trial judge when he asks for permission to explore a *Charter* remedy.

I recognize, particularly in cases tried in the Provincial Division, that there will be instances where the defence, through no fault of its own, cannot provide a detailed summary of the evidence that it anticipates it will call in support of an application to exclude evidence. It may be that fairness requires that the accused be given some latitude at some stage of the trial to explore potential *Charter* issues which he or she had no opportunity to develop prior to trial. If fairness requires that leeway, the trial judge will grant it, but he will control the proceedings to ensure that legitimate exploration does not become a fishing expedition, which will serve only to waste time and delay the expeditious determination of not only the particular case but other cases which await trial in the same court.

My emphasis in these reasons has been upon flexibility on the part of counsel and the exercise of discretion on the part of the trial judge. In *R. v. L. (W.K.)*, 1991 CanLII 54 (SCC), [1991] 1 S.C.R. 1091, 64 C.C.C. (3d) 321, Stevenson J. referred to informal procedures used in that case at trial. While he agreed with the Alberta Court of Appeal that the procedures employed by the trial judge on the *Charter* motion were inadequate, I do not take him to be disapproving of either informality or flexibility in this area. He stated at p. 1103 S.C.R., p. 330 C.C.C:

> I do not read the judgment of the Court of Appeal as saying that any particular procedure must always be employed in resolving applications under s. 24. It might, for example, be open to the parties to put forward an agreed statement of facts. The decision to continue to trial and argue the motion at the end of the Crown's case, to submit evidence by affidavit, or to agree to a statement of facts will depend on the extent to which the parties can agree and the nature of the facts which the parties seek to establish. I agree with the Court of Appeal that the informal procedure employed on this motion was inadequate since it did not produce the evidence required to support the submission of the accused. I reiterate that neither this court nor the Court of Appeal addresses the question of defining the circumstances in which an accused may successfully invoke ss. 7 or 11(d) of the *Charter*.

I take from this statement by Stevenson J. that he shares with me a reluctance to propound a detailed judge-made rule to cover all *Charter* motions. It is impossible to provide a list of prefabricated rules for distinguishing between legitimate inquiry and illegitimate fishing expeditions. Accepting that this court cannot anticipate every eventuality, I would prefer to leave the resolution of how to proceed in a particular case to the good sense of counsel and the discretion of the trial judge.

Accordingly, for the reasons given, I would allow leave to appeal and dismiss the appeal.

Appeal dismissed.