

Case Name:
R. v. Dene

Between
Her Majesty the Queen, Respondent, and
Daniel Dene (a.k.a. Dinel Dene) and Julian Telfer, Appellants

[2010] O.J. No. 5012

2010 ONCA 796

91 W.C.B. (2d) 250

2010 CarswellOnt 8800

Dockets: C51654, C51687

Ontario Court of Appeal
Toronto, Ontario

S.T. Goudge, R.J. Sharpe and E.E. Gillese JJ.A.

Heard: November 17, 2010.
Judgment: November 24, 2010.

(10 paras.)

Criminal law -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Legal rights -- Protection against arbitrary detention or imprisonment -- Protection against unreasonable search and seizure -- Remedies for denial of rights -- Specific remedies -- Exclusion of evidence -- Appeals by accused from convictions and sentences for weapons offences dismissed -- Police detained and searched accused after they displayed suspicious behaviour and body movements indicating they were carrying concealed weapons or drugs and fled from police -- Evidence accused were carrying handguns was not obtained in breach of Charter -- Even if police did not have reasonable and probable grounds to arrest accused, ample evidence to support investigative detention -- Even if searches exceeded permissible limits, Charter-infringing conduct not serious, impact of breach minor and state's interest in adjudication on merits high.

Criminal law -- Sentencing -- Criminal Code offences -- Weapons offences -- Particular sanctions -- Imprisonment -- Sentencing considerations -- Aggravating factors -- Mitigating factors -- Previous record -- Related -- Jump principle -- Maximum or minimum sentence available -- Age of accused -- Appeals by accused from convictions and sentences for weapons offences dismissed -- While sentences were at high end of range, no error in principle which justified appellate interference -- Trial judge took into account youth of accused -- Parliament had prescribed minimum sentence and both accused had criminal records -- Telfer's record included prior weapons conviction which

triggered minimum five-year sentence -- Sentences imposed did not amount to unjustified jump from previous sentences imposed on accused -- Sentence: For Telfer, eight years' imprisonment; for Dene, five and one-half years' imprisonment.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 8, s. 9, s. 24(2)

Appeal From:

Appeals from the convictions entered on January 7, 2010 and the sentences imposed on January 29, 2010 by Justice John F. Hamilton of the Superior Court of Justice.

Counsel:

Jill Presser, (duty counsel) for the appellants.

Emile A. Carrington, for the respondent.

ENDORSEMENT

The following judgment was delivered by

- 1 THE COURT:-- The central issue at trial and on this appeal is whether the appellants' ss. 8 and 9 *Charter* rights were breached and, if there were *Charter* breaches, whether the evidence that the appellants were carrying handguns should be excluded under s. 24(2).
- 2 Despite the very skilful argument advanced by Ms. Presser, acting as duty counsel on behalf of both appellants, we are not persuaded that the evidence at issue was obtained in breach of ss. 8 and/or 9, and even if it was, that it should be excluded under s. 24(2).
- 3 The appellants challenge the trial judge's finding that the police had reasonable and probable grounds for arrest and that the police therefore were entitled to conduct the personal searches at issue.
- 4 Assuming, without deciding, that the police did not have reasonable and probable grounds to arrest the appellants, there was still ample evidence to support a valid investigative detention of both appellants. Their behaviour in the taxi was suspicious and evasive. Their posture and body movements indicated that they could be carrying concealed weapons or drugs. Finally, and most significantly, their flight from the police when the taxi stopped, combined with their earlier behaviour, provided the police with grounds for an investigative detention.
- 5 The trial judge found that the police conducted a "pat down" search of Telfer and a "cursory" search of Dene. These findings bring both searches within the category of "a protective pat-down search of the detained individual" to ensure officer safety that is permitted in the context of an investigative detention: *R. v. Mann*, [2004] 3 S.C.R. 59 at para. 45
- 6 Finally, even if, as the appellants submit, the searches exceeded what would be permitted in the context of an investigative detention, we would not interfere with the trial judge's conclusion that the

evidence should not be excluded under s. 24(2). Putting the appellants' case at its highest, the searches barely exceeded the permissible limits. The *Charter*-infringing state conduct was not serious; the impact of the breach on the *Charter*-protected interests of the appellants was minor; and the state's interest in adjudication of the case on the merits is high.

7 We see no merit in Telfer's submission that the trial judge should have recused himself on grounds of reasonable apprehension of bias. The trial judge indicated his tentative views only to prompt debate on the *Charter* issue and a reasonable observer would conclude that his mind remained open to argument and persuasion.

8 We see no basis upon which we can interfere with the sentences of 8 years for Telfer and 5 1/2 years for Dean before credit for pre-trial custody. While these sentences appear to us to be at the high end for these offenders and these offences, we see no error of principle that would justify appellate interference.

9 The trial judge took into account the youth of both appellants. This is a situation where Parliament has prescribed a minimum term and a penitentiary sentence was inevitable. Both appellants had prior criminal records. Telfer's record includes a prior weapons conviction which triggered a minimum five-year sentence. While Dene's record was considerably less serious, it did include a prior conviction for drug trafficking and the offences were committed in an area plagued by drug dealing and handguns. We are unable to accept the submission that the sentences imposed amounted to an unjustified "jump" from the previous sentences imposed upon these offenders.

10 Accordingly the appeal from conviction is dismissed. Leave to appeal sentence is granted but the sentence appeal is dismissed.

S.T. GOUDGE J.A.
R.J. SHARPE J.A.
E.E. GILLESE J.A.