1986 ABCA 15
Alberta Court of Appeal

R. v. Lerke

1986 CarswellAlta 11, 1986 ABCA 15, [1986] 3 W.W.R. 17, [1986] A.W.L.D. 361, [1986] A.J. No. 27, 20 C.R.R. 31, 24 C.C.C. (3d) 129, 25 D.L.R. (4th) 403, 43 Alta. L.R. (2d) 1, 49 C.R. (3d) 324, 67 A.R. 390

R. v. LERKE

Laycraft C.J.A., Haddad and Belzil JJ.A.

Judgment: January 27, 1986
Docket: Edmonton Appeal No. 8403-8045A

Counsel: *I. C. Hutton, Q.C., D. Pomerant* and *K. Lambrecht,* for the Crown.
D. M. Midanik, for respondent.

Subject: Criminal

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Criminal Law --- Search and seizure — Unreasonable search and seizure

Criminal law — Defences — Charter of Rights and Freedoms — Unreasonable search or seizure — Search by private citizen following valid citizen's arrest of accused on Liquor Control Act offence of re-entering premises — Search resulting in discovery of marijuana and charge of possession — Search not necessary to disarm accused, relevant to offence for which accused arrested and circumstances of urgency lacking — Search unreasonable.

Criminal law — Procedure — The search — Search of person — Unreasonable search or seizure — Search by private citizen following valid citizen's arrest of accused on Liquor Control Act offence — Search disclosing marijuana resulting in charge of possession — Search by private citizen being permissible to disarm a person arrested or where necessary to seize or preserve evidence in connection with offence — Search unreasonable where not necessary on either ground.

Criminal law — Defences — Charter of Rights and Freedoms — Exclusion of evidence — Private citizen validly arresting accused on Liquor Control Act offence, searching accused and discovering marijuana resulting in charge of possession — Trivial nature of offence not requiring search and possession offence disclosed being so trivial in comparison to serious Charter breach evidence having to be excluded.

The accused was in a tavern and failed or refused to produce proof of age when asked to do so. He was told to leave the premises but subsequently returned and this action constituted a breach of the Liquor Control Act. Employees of the tavern placed the accused under arrest. One employee, without the accused's authorization, reached into a pocket of the accused's jacket and removed a small bag containing marijuana. The accused was acquitted on a charge of possession of marijuana and the Crown's appeal to Court of Queen's Bench was dismissed. The Crown appealed.

Held:

Appeal dismissed.

The arrest of a person by a private citizen is as much a governmental function as the arrest of a person by a peace officer. The power of a private citizen to make an arrest is derived directly from the powers and duties of citizens in the age of Henry II in relation to maintaining the "King's Peace". Although a private citizen has the right on arresting a person to conduct a search for the purpose of seizing or preserving evidence in connection with an offence, the search must be reasonable, and in most cases reasonableness will dictate that such a search should be left until the person arrested is turned over to authority. The right of a peace officer to search a person who has been arrested is not automatic. It must be a reasonable search as determined by the circumstances. The officer is entitled to search for the purpose of disarming a person where he perceives a danger and is also entitled to search on arrest for the purpose of seizing and preserving evidence connected to the offence. As the power to arrest has the same origin for private citizens as for peace officers, the right to search, attendant upon an arrest, also rests with a private citizen making an arrest. The right of a private citizen to search, at least to disarm, is essential. However, where the search is not for weapons but only to seize or preserve evidence connected to the offence, the circumstances of the case will dictate whether the search was reasonable. The arrest by the tavern employees was valid. However, the circumstances of the offence for which the arrest was being made were so innocent, the offence itself so minor, and the circumstances of urgency so lacking that the search was unreasonable. The employees were not in any danger, nor did they perceive any, and therefore the only ground on which a search could be justified was that of seizing or preserving evidence. The offence of "re-entering" did not require a search for any evidence whatsoever. A search cannot be a fishing expedition.

A search of a person is a serious intrusion of personal privacy and a serious breach of Charter rights. The purpose of this search bore no relation to the offence of "re-entry" and, considering the trivial nature of the offence disclosed by the invalid search in relation to the breach of the Charter right involved, the admission of the evidence obtained by the illegal search would bring the administration of justice into disrepute.

Table of Authorities

Cases considered:

Bessell v. Wilson (1853), 20 L.T.O.S. 233, 1 E. & B. 489, 118 E.R. 518 — *considered*

Dillon v. O'Brien (1887), 20 I.L.R. 300, 16 Cox C.C. 245 — *referred to*

Elias v. Pasmore, [1934] 2 K.B. 164 — *referred to*

Gordon v. Denison (1895), 22 O.A.R. 315 — *considered*

Gottschalk v. Hutton, 17 Alta. L.R. 347, [1922] 1 W.W.R. 59, 36 C.C.C. 298, 66 D.L.R. 499 (C.A.) — *considered*

Leigh v. Cole (1853), 6 Cox C.C. 329 — *considered*

R. v. Alderton (1985), 49 O.R. (2d) 257, 44 C.R. (3d) 254, 17 C.C.C. (3d) 204, 12 C.R.R. 361, 7 O.A.C. 121 (C.A.) — *considered*

R. v. Brezack, [1949] O.R. 888, 9 C.R. 73, 96 C.C.C. 97, [1929] 2 D.L.R. 265 (C.A.) — *considered*

R. v. Cohen (1983), 33 C.R. (3d) 151, 5 C.C.C. (3d) 156, 148 D.L.R. (3d) 78, 5 C.R.R. 181 (B.C.C.A.) — *referred to*

Reynen v. Antonenko, [1975] 5 W.W.R. 10, 30 C.R.N.S. 135, 20 C.C.C. (2d) 342, 54 D.L.R. (3d) 124 (Alta. T.D.) — *considered*

Tyler & Witt v. London & South Western Ry. Co. (1884), Cab. & El. 285*referred to*

U.S. v. Rabinowitz, 339 U.S. 56, 94 L. Ed. 653, 70 S. Ct. 430 (1949) — *considered*

U.S. v. Viale, 312 F. 2d 595 (U.S.C.A. 2nd Circ.) (1963) — *considered*

Statutes considered:

Canadian Charter of Rights and Freedoms, ss. 8, 24(2).

Criminal Code, R.S.C. 1970, c. C-34, s. 449 [re-en. R.S.C. 1970, c. 2 (2nd Supp.), s. 5].

Liquor Control Act, R.S.A. 1980, c. L-17, ss. 73, 84(1) [am. 1985, c. 36, s. 23], 98, 104.

Petty Trespass Act, R.S.A. 1980, c. P-6, s. 4.

Summary Convictions Act, R.S.A. 1980, c. S-26, s. 4(1), (2).

Authorities considered:

Bird, A Manual on Arrest (1963), p. 93.

Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police — 2nd Report, Freedom and Security Under the Law (1981) (McDonald Report).

10 Hals. (3d) 356, para. 652.

Law Reform Commission of Canada, Working Paper No. 30, "Criminal Law: Police Powers — Search and Seizure in Criminal Law Enforcement" (1983), pp. 167-68.

Lee, A History of the Police in England (1901), p. 334.

Salhany, Canadian Criminal Procedure, 4th ed. (1984), p. 44.

Stephen, A History of the Criminal Law of England (1883), vol. I, pp. 184-85, 189, 493-94.

Appeal from dismissal by Rowbotham J., 41 C.R. (3d) 172, 13 C.C.C. (3d) 515, 11 D.L.R. (4th) 185, 11 C.R.R. 1, 55 A.R. 216, of Crown's appeal of acquittal of accused on possession of marijuana.

The judgment of the court was delivered by *Laycraft C.J.A.*:

1 The Crown appeals the dismissal in Provincial Court of a charge of possession of marijuana and the dismissal of its appeal in the Court of Queen's Bench. The appeal brings into question the power of a private person making a "citizen's arrest" to search the person arrested and the application of the Canadian Charter of Rights and Freedoms to the situation.

2 On 25th March 1983 Mr. Lerke was in an Edmonton tavern. Since he looked "fairly young", the tavern supervisor asked him to prove his age. He was unable or unwilling to do so and was then asked to leave.

3 A short time later Lerke re-entered the premises and the supervisor asked him to come to the office. When he arrived there the tavern manager asked him if he now had proper identification and Lerke said he did not. The manager told him he was under arrest "for re-entering". Another tavern employee asked him to put the contents of his pockets on the desk. Mr. Lerke complied. The tavern employees looked at his papers for any proof of age. Mr. Lerke then took off his jacket and placed in on the chair behind him. One of the tavern employees then reached behind him, and without asking Lerke for authorization, removed a small plastic bag which was subsequently found to contain marijuana.

4 The tavern manager was asked his motive for the search. He responded first: "... I haven't got the right to search people". But he said further:

> ... What we were interested was I.D.s for the purpose of if he was old enough or if he wasn't old enough. The way we could handle it to be on the safe side with the liquor board.

5 The police were called and two constables responded in a few minutes. They took Lerke to a police car, gave him a notice to appear and released him. He was subsequently charged under the Liquor Control Act, R.S.A. 1980, c. L-17, with having entered a licensed premise after having been forbidden to do so. This charge was later withdrawn. He was also charged under s. 3(1) of the Narcotic Control Act, R.S.C. 1970, c. N-1, for possession of marijuana, which is the charge dealt with in Provincial Court and the subject of this appeal.

6 In Provincial Court, Saks Prov. J. held that the search of Lerke's jacket by the tavern employee was an unreasonable search and seizure contrary to s. 8 of the Canadian Charter of Rights and Freedoms. Acting under s. 24(2) of the Charter he found that the admission into evidence of the marijuana seized from Lerke would bring the administration of justice into disrepute and declared it inadmissible. The Crown case thus collapsed and Lerke was acquitted.

7 The Crown appealed to the Court of Queen's Bench arguing that the Canadian Charter of Rights and Freedoms does not apply to the actions of one citizen in relation to another. In the alternative it was urged that the search and seizure was not unreasonable or, in any event, was not of such a nature as to warrant exclusion of the evidence obtained by the search.

8 The Crown appeal to the Court of Queen's Bench was dismissed by Rowbotham J. in written reasons ((1984), 41 C.R. (3d) 172, 13 C.C.C. (3d) 515, 11 D.L.R. (4th) 185, 11 C.R.R. 1, 55 A.R. 216). He held that the right to be secure from unreasonable search and seizure applies to protect citizens against actions by other private citizens as well as by governmental bodies. Finally he agreed with the finding that, in the circumstances of the case, the admission of the evidence would bring the administration of justice into disrepute. It was therefore, he held, properly excluded. Neither judge appears to have considered the preliminary question whether a private citizen making an arrest is exercising a governmental function or whether it is a merely private action.

9 Section 84(1) of the Liquor Control Act makes it an offence for a minor to enter a licensed premise and s. 73 empowers a licensee to demand proof of age. Regardless of age, however, no person is permitted to remain in a licensed premise after being requested to leave, or enter having been forbidden to enter (s. 98). The scheme of the legislation is then to declare such a person to be a trespasser. Section 98(3) provides:

> (3) A person who is in
>
> > (*a*) licensed premises, and does not immediately leave the licensed premises when requested to do so by the licensee or his employee ...
>
> is trespassing on the licensed premises ...

10 By s. 104 of the Liquor Control Act, any person who contravenes a provision of the Act is guilty of an offence and penalties are prescribed.

11 A procedure for citizen's arrest of trespassers is contained in the Petty Trespass Act (R.S.A. 1980, c. P-6). The Summary Convictions Act (R.S.A. 1980, c. S-26) also permits citizen's arrest under certain circumstances on summary conviction offences, accomplishing that end by the incorporation by reference of s. 449 of the Criminal Code.

12 Section 4 of the Petty Trespass Act provides:

> 4 Any person found committing a trespass to which this Act applies may be apprehended without warrant by any peace officer, or by the owner or occupier of the land on which the trespass is committed, or the servant of, or any person authorized by the owner or occupier of the land, and may be forthwith taken before the nearest provincial judge or justice of the peace to be dealt with according to law.

13 Section 4(1) and (2) of the Summary Convictions Act provides:

> 4(1) Except as otherwise specially provided, the provisions of the *Criminal Code* (Canada) respecting summary convictions and the proceedings relating thereto apply in respect of all convictions and all orders and the proceedings relating thereto made or to be made by a justice.
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> (2) Without restricting the generality of subsection (1), sections 448 to 454, 457 to 457.6 and 457.8 to 459 of the *Criminal Code* (Canada) apply, with all necessary modifications, to all matters to which this Part applies.

14 Section 449(2) of the Criminal Code provides:

> (2) Any one who is
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> (*a*) the owner or a person in lawful possession of property, or
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> (*b*) a person authorized by the owner or by a person in lawful possession of property,
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> may arrest without warrant a person whom he finds committing a criminal offence on or in relation to that property.
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> (3) Any one other than a peace officer who arrests a person without warrant shall forthwith deliver the person to a peace officer.

I

15 In my opinion the facts of this case do not raise the issue whether the Canadian Charter of Rights and Freedoms applies to the actions of one private citizen to another. In my view the arrest of a citizen is a governmental function whether the person making the arrest is a peace officer or a private citizen. I reach this conclusion from a consideration of the long legal history of citizen's arrest from its common law origins to the statutory expression of the present powers of arrest contained in the Criminal Code of Canada or in the Petty Trespass Act.

16 The system of criminal procedure was, from early times, the function of the Sovereign in maintaining "The King's Peace". Stephen states (vol. I, History of the Criminal Law of England, pp. 184-85):

> The foundation of the whole system of criminal procedure was the prerogative of keeping the peace, which is as old as the monarchy itself, and which was, as it still is, embodied in the expression, "The King's Peace," the legal name of the normal state of society.

17 Each citizen had a part to play in this system of criminal procedure with not only the *right* to make arrests, but the *duty* to do so in appropriate cases. That right and duty, however, was directly derived from the Sovereign himself and the citizen acting in obedience to this royal command functioned as an arm of the state. Reviewing the history of the King's Peace from the Assize of Clarendon in 1164 to the time of Edward III, Stephen says (vol. 1, p. 189):

> Shortly the system just described was as follows. Upon the commission of a felony any one might arrest the offender, and it was the duty of any constable to do so. If the offender was not arrested on the spot, hue and cry might and ought to be raised. The sheriff and constables from the earliest times, the justices of the peace from the beginning of the reign of Edward III., were the officers by whom the cry was to be raised. In order to render the system effective, every one was bound to keep arms to follow the cry when required, all towns were to be watched and the gates shut at night, and all travelling was put under severe restrictions.
>
> The Assize of Arms and the Statute of Winchester fell into disuse, but the right of summary arrest in cases of felony continues to this day to be the law of the land ...

18 The conclusion of English historians is that the citizen's right to arrest should not be analyzed as being derived from the rights of a peace officer or as consisting of some portion only of the rights and powers of a peace officer. The reverse is true. A peace officer possesses the rights of a citizen with some additions. For the most part, he does as a matter of duty the acts which he might have done voluntarily. Stephen says (vol. 1, pp. 493-94):

> The police in their different grades are no doubt officers appointed by law for the purpose of arresting criminals; but they possess for this purpose no powers which are not also possessed by private persons ... A policeman has no other right as to asking questions or compelling the attendance of witnesses than a private person has; in a word, with some few exceptions, he may be described as a private person paid to perform as a matter of duty acts which, if so minded, he might have done voluntarily.

19 The same point is made in Lee, A History of the Police in England (London: Methuen & Co., 1901), at p. 334:

> For all practical purposes ... the only real difference that exists between the powers that are actively made use of by the police, and the latent powers that are vested in every British citizen, is this; a police officer may arrest (without warrant) if he has reasonable suspicion that a felony has taken place; a private person cannot arrest unless he had certain knowledge that a felony has actually been committed.

20 Professor Salhany in Canadian Criminal Procedure (4th ed.) summarizes the application of this history to modern Canada at p. 44:

> The history of the administration of the criminal law of England has long recognized the duty of all citizens to assist in the capture and arrest of all persons suspected of having committed a crime. The foundation of this duty is based upon the prerogative of the "King's Peace", a concept introduced by the Norman Kings which required the citizens of each community to apprehend all felons, and held them collectively responsible for failing to do so. Accordingly, the common law from its earliest times conferred certain powers on private citizens and on peace officers to arrest without the necessity of a warrant.
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> In Canada today, the powers of a private person or a peace officer to arrest without a warrant are contained in the Criminal Code. The powers listed there are essentially those which existed at common law with some additions. When examining these provisions, it is important to remember that a peace officer possesses all of the powers of arrest of a private citizen plus certain additional powers which will be outlined. There also exists under certain federal and provincial statutes creating offences, specific powers of arrest without warrant with respect to those offences.

21 The modifications to the common law power of a citizen to make an arrest incorporated in the Criminal Code or in the Petty Trespass Act do not change the fundamental nature of the citizen's arrest. The power exercised by a citizen who arrests another is in direct descent over nearly a thousand years of the powers and duties of citizens in the age of Henry II in relation to the "King's Peace". Derived from the Sovereign it is the exercise of a state function.

22 It was urged in argument that governmental function is absent in a citizen's arrest, or at least in this citizen's arrest, because its "purpose is to advance a private interest". In my view, this argument confuses *motive* and *purpose*. A citizen making an

arrest, or, indeed, a citizen complaining to a peace officer and setting him in motion, may, and usually will, have a personal motive for doing so. He wishes to recover his property, or to see punished one who has injured him or he wishes to protect his land from crime or trespass. But the purpose of the procedure, the reason for which it exists, is not that of private satisfaction; rather it is the public purpose embodied in maintaining the Queen's Peace. When a landowner arrests a trespasser and takes him to a provincial judge as contemplated by the Petty Trespass Act, that which results is the trial of an offence prosecuted in the name of the Queen with any penalty exacted accruing to the public treasury. The landowner is not a party to the proceeding.

23 In my opinion when one citizen arrests another, the arrest is the exercise of a governmental function to which the Canadian Charter of Rights and Freedoms applies. I do not, therefore, propose to consider in this case the difficult question whether the Charter applies to the actions of private citizens toward each other.

II

24 Does a citizen who has made a valid citizen's arrest have a right to search the person being arrested? Curiously, despite the long history of citizen's arrest, there is surprisingly little authority on the point in either Canada or England. Those cases considering the right to search do so in situations involving peace officers rather than private citizens. Even where a peace officer is involved, there is some inconsistency in the case law whether the right to search is automatic following a valid arrest, or whether it arises only if it can be seen to be a reasonable precaution in the circumstances of the case. I shall commence the analysis by considering the right of a peace officer to search a person who has been the subject of a valid arrest.

25 The starting point in the case law is usually *Bessell v. Wilson* (1853), 20 L.T.O.S. 233, 1 E. & B. 489, 118 E.R. 518, where, in a footnote to the case, Lord Campbell C.J. made general observations to correct an impression he had given during the course of argument. He said:

> ... It is often the duty of an officer to search a prisoner. If, for instance, a man is taken in the commission of a felony, he may be searched to see whether the stolen articles are in his possession, or whether he has any instruments of violence about him; and, in like manner, if he be taken on a charge of arson, he may be searched to see whether he has any fire-boxes or matches about his person ... It may be highly satisfactory, and indeed necessary, that the prisoner should be searched. I have never said that searching a prisoner was always a forbidden act. What I said applied to circumstances such as existed in this case.

26 Another frequently quoted statement was made by Williams J. in *Leigh v. Cole* (1853), 6 Cox C.C. 329. He said in relation to the search of a prisoner at p. 332:

> ... there is no doubt that a man when in custody may so conduct himself, by reason of violence of language or conduct, that a police officer may reasonably think it prudent and right to search him, in order to ascertain whether he has any weapon with which he might do mischief to the person or commit a breach of the peace; but at the same time it is quite wrong to suppose that any general rule can be applied to such a case. Even when a man is confined for being drunk and disorderly, it is not correct to say that he must submit to the degradation of being searched, as the searching of a person must depend upon all the circumstances of the case.

27 This statement was quoted with approval by Maclennan J.A. in dissent in the early Ontario case of *Gordon v. Denison* (1895), 22 O.A.R. 315, though the majority of the court decided the case on other grounds. The right to search for evidence of the offence committed was also affirmed in *Dillon v. O'Brien* (1887), 20 I.L.R. 300, 16 Cox C.C. 245. These and other authorities were relied upon by Robertson C.J.O. in *R. v. Brezack*, [1949] O.R. 888, 9 C.R. 73, 96 C.C.C. 97, [1929] 2 D.L.R. 265 (C.A.). More recently in *R. v. Alderton* (1985), 49 O.R. (2d) 257, 44 C.R. (3d) 254 at 258, 17 C.C.C. (3d) 204, 12 C.R.R. 361, 7 O.A.C. 121 (C.A.), Martin J.A. regarded it as "settled law":

> ... that following a valid arrest a police officer may search the person arrested and may seize anything that he reasonably believes will afford evidence of the commission of the offence with which the person arrested is charged and of the arrested person's connection with it.

28 This statement of the law by Martin J.A. makes no mention of any situation in which a police officer may not search if the arrest is valid. It assumes the right is automatic.

29 In Alberta, the case law also seems to assume that the right to search is automatic after arrest. In *Gottschalk v. Hutton*, 17 Alta. L.R. 347, [1922] 1 W.W.R. 59, 36 C.C.C. 298, 66 D.L.R. 499 (C.A.), Beck J.A., speaking for the full court, said at pp. 301-302:

> It is undoubted law (5 *Corpus Juris tit* "Arrest," p. 434) that
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> > After making an arrest an officer has the right to search the prisoner, removing his clothing, if necessary, and take from his person, and hold for the disposition of the trial Court, any property which he in good faith believes to be connected with the offence charged, or that it may be used as evidence against him, or that may give a clue to the commission of the crime or the identification of the criminal, or any weapon or implement that might enable the prisoner to commit an act of violence or effect his escape.

30 The case law on the topic was again carefully reviewed by H. J. MacDonald J. in *Reynen v. Antonenko*, [1975] 5 W.W.R. 10, 30 C.R.N.S. 135, 20 C.C.C. (2d) 342, 54 D.L.R. (3d) 124 (Alta. T.D.).

31 Working Paper No. 30 of the Law Reform Commission of Canada at p. 167 entitled "Police Powers — Search and Seizure in Criminal Law Enforcement" noted that the English case law contemplated many situations of arrest in which a personal search would be unfounded. The authors also noted the reluctance of Canadian courts to circumscribe the rights of search incidental to arrest. They then posed the question "... should the police not be permitted to perform searches automatically?", and answered it in these terms at p. 168:

> This position offers the advantages of apparent simplicity and common sense, particularly when the arrest is seen as the initial step in placing an individual in institutional custody. It is misleading however, to group together all arrest situations and attribute to them the factors obtaining in the archetypal instance of full-scale custodial arrest. A peace officer acting under section 450 of the Criminal Code may legitimately arrest a person suspected of the commission of a relatively minor offence, such as dangerous driving, and soon afterwards, having ascertained his identity, release him with a form of process pursuant to section 452. It seems difficult to maintain that the need to perform a search in such a case would correspond to the obtaining in, for example, the situation of a robbery suspect apprehended after a chase.

32 To a considerable extent the problem is resolved by s. 8 of the Canadian Charter of Rights and Freedoms. The right to search on arrest is not automatic; it must be a reasonable search. Nevertheless, the reluctance of Canadian courts to invalidate searches after arrest is understandable. Judges cannot be blind to the deaths and injuries suffered by police officers on duty as guns and knives become more common. Situations which appear quite innocent, with no hostile demonstration by the person being arrested, can explode into violence leaving the arresting officer dead or injured. It is difficult to second guess any police officer who ensures that a person is not armed when he perceives danger as he makes an arrest or escorts a prisoner. Moreover the statement by the Law Reform Commission does not deal with the second reason for searches incidental to arrest: the need to seize and preserve property connected to the offence charged. That may in many cases provide an additional reason for search, and for considering the search to be reasonable when tested by s. 8 of the Canadian Charter of Rights and Freedoms.

III

33 The application of the law permitting searches incidental to arrest by police officers is not clear where one private citizen arrests another. In Halsbury's Laws of England (3d), vol. 10, p. 356, it is said:

> A constable *and also, it seems, a private person* may upon lawful arrest of a suspected offender take and detain property found in the offender's possession, if the property is likely to afford material evidence for the prosecution in respect of the offence for which the offender has been arrested. [The italics are mine.]

34 The cases cited in support of this statement are *Dillon v. O'Brien, Tyler & Witt v. London & South Western Ry. Co.* (1884), Cab. & El. 285, and *Elias v. Pasmore*, [1934] 2 K.B. 164. All three cases, however, dealt with search and seizure following an arrest by a peace officer. In Bird, A Manual on Arrest (Toronto: Canada Law Book Co., 1963), it is said at p. 93:

> The provision of search by private persons I can find nowhere supported by law.

35 Despite this paucity of authority it is, in my view, in accord with the principle that the powers of search of the private citizen making a valid arrest are the same as those of a police officer making a valid arrest. The power of each to arrest had the same origin in the common law; both were enforcing the King's Peace. Indeed, the citizen's arrest preceded the peace officer's arrest. In both cases the search is needed for protection of the person making the arrest against later attack by the person arrested who might use a concealed weapon. It is also needed to obtain and preserve evidence related to the offence for which the arrest is being made. There is no rational ground to suppose that the private citizen needs less protection than does the peace officer nor is the need to obtain or preserve evidence less when the private citizen makes the arrest. Of course, there are many fewer occasions when a private citizen is permitted to make an arrest compared to a police officer. But if the private citizen is acting validly within his more limited powers, I see no ground to suppose that his rights of search incidental to that arrest are less or different than those of a police officer.

36 A citizen may, on occasion, have greater need of a right to search than does the peace officer. Citizen's arrests, infrequently as they occur, take place when the police are neither present nor available. Often they result from a chase, in circumstances where violent reaction can be expected. The citizen has neither side-arm, badge, or uniform, let alone warrant, on which to rely. He lacks the coercive presence of these attributes of authority which help the peace officer to avoid violence. The right to search, at least to disarm, is essential.

37 This rationale finds support in case law in the United States. In *U.S. v. Rabinowitz*, 339 U.S. 56, 94 L.Ed. 653, 70 S. Ct. 430 (1949), Minton J. delivering the opinion of the United States Supreme Court said at p. 60:

> The right to search the person incident to arrest always has been recognized in this country and in England ... Where one had been placed in the custody of the law by valid action of officers, it was not unreasonable to search him.
>
> Of course, a search without warrant incident to an arrest is dependent initially on a valid arrest.

38 In *U.S. v. Viale*, 312 F. 2d 595 (1963), federal officers were held to have made a valid citizen's arrest of the appellant acting under a New York State law. The United States Court of Appeals, Second Circuit, held that the citizen making an arrest has the same right of search as an officer. At p. 600 Swan Circ. J. said:

> The rationale that justifies searches incident to lawful arrests — as outlined in United States v. Rabinowitz 339 U.S. 56 — would seem to apply with equal force whether the arrest is made by an officer or a private citizen.

39 Where the search is not for weapons, but only to seize or preserve property connected to the offence, different considerations apply. The urgency present in the search for weapons would not ordinarily be present in those cases. Often the triviality of the offence charged or the improbability, in the circumstances, that any evidence will be uncovered, or will be destroyed even if search is delayed, will mean that search by a citizen would not be a reasonable search. Both the Petty Trespass Act and s. 449 of the Criminal Code contemplate that the offender will be turned over to persons in authority without delay. That being the case, it will be rare that the citizen making an arrest will need to search for evidentiary purposes only. The course of wisdom and the requirement that the search be reasonable will usually dictate that the search for evidence be left until the person arrested is turned over to authority.

IV

40 Was the search by the tavern employees unreasonable? There is unfortunately no litmus-paper test by which one may know an unreasonable search and seizure when it is encountered. Each case must be resolved on a consideration of the facts and circumstances of it. Though the arrest here was, in my opinion, a valid arrest, the circumstances of the offence for which

the arrest was being made were so innocent, the offence itself so minor, and circumstances of urgency were so lacking, that the tavern employees had no right to make the search. It was an unreasonable search.

41 The tavern employees did not perceive any danger. Their search was not designed to protect themselves and this conclusion was also reached by the two police officers. They did not search Lerke but merely gave him an appearance notice and released him. The search had therefore to be justified, if at all, as needed to obtain or preserve evidence in relation to the offence for which Lerke was being arrested. But, of course, proof of age had nothing to do with the offence of "re-entering" for which he was being arrested; he was guilty of that offence regardless of age, once he re-entered after being asked to leave. Whatever other motives the tavern employees may have had for the search, they simply misconceived their right to search for proof of age in relation to a charge of "re-entering". There was no nexus between his age and that charge.

42 That there must be a nexus between the search for evidence and the offence for which the person is arrested is clear from the authorities previously cited. The search cannot be a fishing expedition. In *Bessell v. Wilson*, supra, Lord Campbell C.J. uses the example of a search for "fire-boxes or matches" on a charge of arson. In *R. v. Brezack*, supra, Robertson C.J.O. said that one reason for the search is "to see if any evidence of the offence for which he was arrested is to be found upon him" (p. 101).

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43 Would the admission of this evidence bring the administration of justice into disrepute having regard to the circumstances of this case?

44 Both judges in the Provincial Court and in Court of Queen's Bench concluded without extensive analysis, applying s. 24(2) of the Canadian Charter of Rights and Freedoms, that the evidence should be excluded. Assuming, without deciding, that the Crown's appeal on this point is solely a question of law subject to appeal to this court, I respectfully agree with their conclusion.

45 The search by the tavern employees was in no way outrageous apart from the fact of an invalid search itself. They were courteous in their dealing with Lerke. He was not insulted nor was he manhandled. He had been validly arrested and he was asked to turn out his pockets. He was not wearing his jacket when one of the tavern employees put his hand into the pocket and discovered the marijuana. Nevertheless it was an invalid search because it had no nexus with the offence for which the arrest was made. Moreover there was no urgency in the situation which made it necessary to conduct a search before the police officers arrived.

46 Any search of the person, even if courteously conducted, is a serious intrusion of personal privacy and a serious breach of one's Charter rights if invalid.

47 Section 24(2) of the Canadian Charter of Rights and Freedoms requires the exclusion of the evidence obtained by this search "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". A considerable body of case law is arising on this point as courts balance the many factors involved in each case.

48 A trivial charge such as the one in this case should not be the vehicle for this court's locus classicus on s. 24(2) of the Charter. The case does not present the many factors which would be present in more serious charges and which should be the foundation for the statement of a generalized test for exclusion of evidence under s. 24(2). If this search had uncovered a gun later traced to four murders, for example, rather than possession of a very small amount of marijuana, the public perceptions would be vastly different and the balancing of the social considerations involved would be much more complex. I have considered the scholarly review of these factors by Anderson J.A in *R. v. Cohen* (1983), 33 C.R. (3d) 151, 5 C.C.C. (3d) 156, 148 D.L.R. (3d) 78, 5 C.R.R. 181 (B.C.C.A.), and by the McDonald Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police — 2nd Report, Freedom and Security Under the Law (1981). Considering the trivial nature of the offence disclosed by the search in relation to the breach of the Charter right involved, I do not disagree with the conclusion of Saks Prov. J. and Rowbotham J. that the evidence should be excluded. Accordingly, I would dismiss the Crown appeal.

Appeal dismissed.

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