

CANADA / JUDGMENT

R. v. Abdullahi

2020 BCSC 1822

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2020 BCSC 1822 R. v. Abdullahi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Abdullahi,

2020 BCSC 1822

Date: 20200911

Docket: X082044

Registry: New Westminster

Regina

v.

Suleiman Mohamed Abdullahi and Ahmed Ali Ismail

Before: The Honourable Justice Shergill

Oral Ruling on Voir Dire #1

Counsel for Crown:

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K. Hamilton

Counsel for the Accused, Ali Ismail:

B. Movassaghi

Place and Date of Trial:

New Westminster, B.C.

July 20-24, 2020

Place and Date of Judgment:

New Westminster, B.C.

September 11, 2020

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I. Overview

- [1] The accused are charged with one count each of robbery, having their faces masked with intent to commit an indictable offence, unlawful confinement, and carrying a weapon for a purpose dangerous to the public peace or for committing an offence. The charges flow from a robbery that occurred at a pharmacy in Surrey, B.C. on October 10, 2017. Mr. Ali Ismail and Mr. Abdullahi are alleged to be two of five masked robbers that committed the robbery. There is no dispute that a robbery occurred on the day in question, the sole question is the identity of the robbers.
- [2] In this voir dire, the accused seek an order under s. 24(2) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), c 11, s 24(2) [Charter] to exclude evidence obtained from a vehicle stop and during the execution of search warrants on two residences.
- [3] The circumstantial evidence that potentially identifies the accused as participants includes:
- a) the use of cellphones associated to them in the location and at the time of the robbery;
 - b) the partial licence plate of the getaway vehicle matching a BMW registered to Mr. Abdullahi (the "Abdullahi vehicle" or "BMW");
 - c) a vehicle stop by the police of the BMW on October 21, 2017 (the "police stop" or "vehicle stop"), at which point the car was driven by Mr. Abdullahi and Mr. Ali Ismail was the passenger;
 - d) at the time of the police stop, Mr. Ali Ismail was dressed in attire and carrying a knife that bore some resemblance to the clothing worn and knife wielded by one of the suspects of the robbery; and
 - e) other clothing similar to items worn by the robbers, which was found following the execution of search warrants on residences believed to be those of the accused (the "residential searches").
- [4] At issue in this voir dire is the legality of the police stop, and the validity of the two search warrants issued on June 27, 2018, pursuant to s. 487 of the Criminal Code, RSC 1985, c C-46, s 487[Code]. It is argued that the police stop was conducted in violation of the accused's rights under ss. 8, 9, and 10(a) of the Charter. As such, evidence obtained from the unlawful police stop should be excluded. Further, any information obtained from the police stop should be excised from the grounds set out in the information to obtain the search warrants ("ITO"). In addition, it is argued that the ITO contains conclusory statements with no objective basis upon which those statements could be believed. Once the conclusory statements and prejudicial information obtained from the unlawful search are excised from the ITO, it is submitted that the search warrant cannot be supported.

II. Issues

[5] The central issues in this proceeding are:

- a) Was the vehicle stop and the ensuing detention and arrest of the accused lawful?
- b) Was the search of the vehicle and its occupants lawful?
- c) Regardless of the lawfulness of the search, should the evidence obtained during the vehicle stop be admitted?
- d) Should any information be excised from the ITO?
- e) After the excised material is removed from the ITO, are there sufficient grounds to support the issuance of the search warrants for the residential searches?
- f) Regardless of the legality of the residential searches, should the evidence obtained pursuant to the search warrants be excluded?

III. The Investigation

- [6] Corporal Richings of the Surrey RCMP Robbery Unit, was assigned as the lead investigator of the robbery. By that time he had been an RCMP officer for about 10 years with two years in the Robbery Unit. I generally found Cpl. Richings to be a credible witness. His testimony was, in many respects, internally and externally consistent, delivered in a straightforward manner and without embellishment. He was non-defensive under cross-examination, and was willing to make admissions against self-interest. However, there are discrepancies in some of his evidence which become apparent when matched against the ITO and other evidence. These discrepancies are difficult to explain and in some instances, have negatively affected my view of the credibility and reliability of some of his evidence.
- [7] On October 10, 2017, around 5:30 pm, the police received a phone call reporting a robbery of pharmacist Ravinder Puri at the Ritecare Pharmacy (the "Pharmacy") in Surrey. Cpl. Richings testified that he attended at the pharmacy the following day. The robbery, and events leading up to and following the robbery, were captured on video by surveillance cameras located inside the Pharmacy, outside the pharmacy, and outside a nearby residence. Cpl. Richings reviewed the surveillance video, and collated it for use as evidence at trial.
- [8] Surveillance video footage inside the Pharmacy reveals five individuals committing the robbery just before 5:30 pm. The robbers all have their faces covered in varying degrees. Most appear to be dark skinned males, though at least one of them has a lighter skin tone. One of the robbers goes in first ("Suspect 1"), and holds the door open for the other four. Suspect 1 is wearing a dark coloured hoodie with what appears to be writing on the sleeve. Suspect 1 hops over a counter and hurriedly grabs items on the shelves behind the counter. He appears to be holding a knife. Another man ("Suspect 2") heads to the back of the Pharmacy where Mr. Puri is. Suspect 2 is wearing a bomber type jacket with red and white banding at the bottom. A yellow shirt is visible underneath. After hurriedly grabbing items

from shelves, the robbers all leave the store. The entire incident lasts less than two minutes.

- [9] Surveillance footage taken inside the pharmacy earlier the same day, shows a dark skinned male wearing a hoodie, attending the Pharmacy. The hoodie is black with a white logo on the left chest area, and is notably different than the one worn by Suspect 1 during the robbery. The man is seen using a cell phone while having a brief conversation with the pharmacist. It is the theory of the Crown that Suspect 1 is the same man who attended at the Pharmacy earlier that day.
- [10] Surveillance video outside the Pharmacy shows Suspect 1 and Suspect 2 using their cell phones prior to the robbery. It is the theory of the Crown that Suspect 1 and 2 were communicating with each other by cell phone to facilitate the robbery.
- [11] Police spoke to a witness who saw four suspicious masked men in the vicinity of the Pharmacy, just prior to the robbery. He was able to jot down a partial licence plate of a silver BMW X3 which he believed was associated with the men. The partial plates were run and matched to a BMW X3 registered to Mr. Abdullahi.
- [12] Around October 18, 2017, a police bulletin created by Cpl. Richings was transmitted throughout the Lower Mainland. The bulletin contained still photos of all five robbery suspects, taken from the surveillance videos. Cpl. Richings received four responses to his bulletin- two of which provided, with varying degrees of certainty, that Suspect 1 might be Mr. Ali Ismail, one who pointed to possibly one of Mr. Ali Ismail's brothers, and the fourth naming two entirely different people.
- [13] On October 20, 2017, Cpl. Richings posted an "added surveillance vehicle" notice on CPIC regarding the Abdullahi vehicle. The notice read in part, "***IF CHECKED, DOCUMENT OCCUPANTS & CLOTHING DESCRIPTION". The day after Cpl. Richings posted his notice on CPIC, Constable Espinosa conducted a police stop of the Abdullahi vehicle. Cst. Espinosa prepared a narrative report after the police stop, which was read by Cpl. Richings on October 24, 2017. At Cpl. Richings request, Cst. Espinosa forwarded the photographs he had taken during the stop, to Cpl. Richings.
- [14] On October 26, 2017, Cpl. Richings got a production order for Cellular Tower Transmission Data. Based on his analysis of the data, he concluded that Suspect 1 and Suspect 2 were communicating with each other around the time of the robbery; Suspect 1's phone was in the vicinity of the Pharmacy during what was believed to be his first visit to the Pharmacy on the date of the robbery; the phone believed to belong to Suspect 2 was associated to the sister of Mr. Abdullahi.

IV. The Detention

- [15] The Crown does not dispute that the accused were detained by Cst. Espinosa when he initiated the police stop. At issue is the validity of the stop. The defence argues that Cst. Espinosa had no legitimate purpose for stopping the Abdullahi vehicle. They say that the stop was motivated by racial profiling, and later became a ruse to gather evidence for Cpl. Richings' robbery investigation.
- [16] The Crown argues that the police stop was motivated by legitimate traffic and vehicle safety reasons, as well as for the purposes of a valid criminal investigation. While it is conceded that Cst. Espinosa also intended to engage in evidence gathering to assist the robbery investigation, it is submitted that such dual purpose stops are not unlawful.

V. The Vehicle Stop

- [17] Cst. Espinosa is a police officer with the Surrey RCMP. He had been working with the Surrey RCMP for about two years when he conducted the police stop of the Abdullahi vehicle.
- [18] Cst. Espinosa testified that on Saturday, October 21, 2017, around 9:45 pm he was on duty seated in a marked police car. He was parked in a Starbucks parking lot facing east. The Starbucks was located in a small strip mall on the corner of King George Boulevard and 74 Avenue in Surrey. 74 Avenue runs between the Starbucks strip mall on the south side, and a larger strip mall on the north side containing a Superstore grocery store. Cst. Espinosa was familiar with this location. The Newton office for the Surrey detachment for the RCMP is located about one block south of the Starbucks.
- [19] Cst. Espinosa testified that from his vantage point, he could see the Superstore parking lot. He saw a BMW heading southward and crossing 74 Avenue to the south. It was driving very slowly. Cst. Espinosa noticed three men sitting inside the vehicle as the car drove right past his vehicle and headed towards the adjacent strip mall. He became suspicious as the Starbucks was closed and there were no other businesses open at that time in that vicinity. He started following the BMW. As it crossed into the next strip mall, he became increasingly suspicious, because the only business open in that area was an A&W. But the car did not head there, and instead kept moving slowly through the strip mall.
- [20] According to Cst. Espinosa this manner of driving was similar to how criminals "case" a place prior to committing a crime. He decided to run the licence plates of the car to see if it was insured, following which it was his intention to stop the car to ascertain the owner, and confirm if the driver was licensed. When Cst. Espinosa ran the vehicle plates of the BMW, he saw the CPIC message posted by Cpl. Richings, identifying this as a "robbery suspect vehicle". He read the instructions from Cpl. Richings asking any officer who "check[s]" the car, to document the interaction and occupants of the car.

- [21] Cst. Espinosa conducted his traffic stop near the Newton bus loop, shortly after the BMW had turned eastbound onto 72 Avenue. He approached the driver's side of the Abdullahi vehicle, and told the driver that he had pulled him over to check the registered ownership of the car. He testified that it was also his purpose at that point, to obtain the information sought by Cpl. Richings, though he did not disclose this to the occupants of the BMW. It was then that he smelled marijuana (which was illegal at the time). He instructed the occupants to get out of the car one by one and told them he was arresting them for possession of a controlled substance. He handcuffed each of the occupants, read them their Charter rights from memory (including notifying them of their right to counsel), and conducted a search of each person and the vehicle.
- [22] The driver of the BMW produced a valid driver's license, which satisfied Cst. Espinosa that this was Mr. Abdullahi. Cst. Espinosa recognized the back seat passenger from a prior arrest. However, the front passenger (Mr. Ali Ismail) was not known to Cst. Espinosa. The front passenger was unable to produce any identification, but gave his name and date of birth to Cst. Espinosa, who ran this information through the police data base and confirmed that the information in the police data base matched what Mr. Ali Ismail told him.
- [23] Though he was satisfied as to Mr. Ali Ismail's identity, Cst. Espinosa decided to keep Mr. Ali Ismail in handcuffs, so that he could photograph him. He took two pictures of Mr. Ali Ismail "for identification purposes". Mr. Ali Ismail had a small pocket knife in his possession, which Cst. Espinosa seized for safety reasons. This knife was also photographed before it was returned to Mr. Ali Ismail.
- [24] Cst. Espinosa did not find any drugs or weapons in the car, and released all three occupants without charging them. As they had not committed any traffic violations, they were not issued any violation tickets.
- [25] Cst. Espinosa took some brief notes of the police stop. These were later incorporated into and expanded upon in his typed narrative report which Cst. Espinosa prepared the next day. The narrative report paid particular attention to the clothing worn by each of the occupants. Though the report noted that the occupants were arrested under s. 4 of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA], based on a smell of fresh marijuana from inside the vehicle, the report made no mention that the occupants were chartered and warned, or of their responses when they were given their Charter rights.
- [26] Cpl. Richings reviewed the narrative report, and asked Cst. Espinosa to forward to him the photographs that he had taken of Mr. Ali Ismail and the knife. Cst. Espinosa supplied the information as requested.

A. Legal Framework

- [27] Section 9 of the Charter prohibits arbitrary detention or imprisonment. It is grounded in the principle enunciated in s. 7 of the Charter that "a person's liberty is not to be curtailed except in accordance with the principles of fundamental justice." *R. v. Grant*, 2009 SCC 32 at para. 54.
- [28] Determining a s. 9 violation involves two steps. First, the court must inquire if the individual was detained or imprisoned. If so, then the court must examine whether the detention or imprisonment was arbitrary: *Grant* at para. 56, citing *R. v. Hufsky*, [1988] 1 S.C.R. 621 at paras. 12-13.
- [29] In *Grant* at para. 44, the Court defined detention as a "suspension of the individual's liberty interest by a significant physical or psychological restraint." As noted by Justice Riley in *R. v. Woody*, 2018 BCSC 2275, at para. 33, "[a] vehicle stop by its very nature involves a detention of the motorist" thus focussing the inquiry in cases of this nature, to determining the basis for the stop.
- [30] Like other Charter rights, s. 9 must be applied using a contextual approach: *R. v. Jacques*, [1996] 3 S.C.R. 312 at para. 20, cited in *R. v. Kang-Brown*, 2008 SCC 18 at para. 76 and *R. v. Mann*, 2004 SCC 52 at para. 30.
- [31] A roadside stop is not a static event: *R. v. Alec*, 2020 BCSC 1040, at para. 32. In the course of a rapidly evolving situation, what started out as a lawful stop can quickly turn into an unlawful one. As such, the court must examine step by step the interactions between the police and the accused, to determine whether the police stayed within their authority as the situation developed: *R. v. Nolet*, 2010 SCC 24, at para. 4.
- [32] In *Woody*, at paragraphs 34 and 35, Justice Riley concisely summarized the approach taken by our courts to determine the lawfulness of a detention involving a vehicle stop. First, a detention may be justified by the Motor Vehicle Act, RSBC 1996 c. 318, if the officer stops a vehicle in order to enforce traffic or vehicle safety laws. This can occur where (a) the vehicle is stopped based on an observed traffic infraction or violation; or (b) where the vehicle is stopped randomly to enforce traffic or vehicle safety laws, so long as the actions of the police fit within the pressing and substantial objective of promoting traffic safety as explained in *Nolet* at para 22.
- [33] Second, a detention may be justified where the vehicle stop relates to a criminal investigation. In such a situation, the officer must have some independent authority for effecting a detention of the driver or other occupants of the vehicle, such as (a) a reasonable suspicion to justify an investigative detention in respect of a crime such as that referenced in *R. v. Clayton*, 2007 SCC 32; or (b) reasonable grounds to justify an arrest for an offence as discussed in *R. v. Storrey*, [1990] 1 S.C.R. 241. Justice Riley goes on to note at para. 35 that, "where the police have no such reasonable suspicion or reasonable grounds, they cannot simply stop the vehicle and detain the driver or occupants for some general inquisition into

possible criminal wrongdoing."

- [34] It is not unusual for a police officer to have multiple reasons or interests when conducting a police stop. Distinguishing between police stops initiated to enforce traffic or vehicle safety laws, versus those initiated in furtherance of a criminal investigation, is a difficult but important exercise. It informs the analytical approach to be used in assessing a section 9 and 10 Charter violation: *Woody* at para. 40.
- [35] Sections 10(a) and (b) of the Charter require the police to advise a person upon arrest or detention, the reason for the detention and their right to retain and instruct counsel without delay. These rights are engaged immediately when a driver is stopped by the police, though the manner in which they operate depends on the nature of the stop, i.e., whether it is for enforcement of traffic or vehicle safety laws, or a criminal investigation: *Woody*, at para. 36.
- [36] When the vehicle stop is based on the enforcement of traffic or vehicle safety laws, the section 10 Charter rights of the detainee are overridden by operation of s. 1 of the Charter. This is because traffic and vehicle safety is considered to be a pressing and substantial objective, which constitutes a reasonable limit on one's s. 10 rights: *Woody* at para. 37; see also *R. v. Strilec*, 2010 BCCA 198 at para. 35, 40.
- [37] The s. 10 Charter right is fully engaged when the stop is based on suspected criminal activity. In that case, the detainee has the right to be informed of the reason for the detention and his or her right to retain and instruct counsel without delay: *Woody* at para. 38. The risk that police might misuse motor vehicle enforcement powers to conduct unfounded general inquiries into criminal activity is of particular concern when dealing with random vehicle stops. The concern is less problematic when the police officer stops a vehicle in connection with an observed infraction of road safety laws: *Woody* at para. 42 and 43. This is because the officer will have an independent basis for stopping a vehicle, and any additional concerns or interests will not invalidate the independent basis for stopping the car to enforce motor vehicle act violations.
- [38] However, the police cannot invoke a lawful aim for a vehicle stop as a "pretext, ruse, or subterfuge" to perpetuate an unlawful aim: *Woody* at para. 47 citing *Nolet* at para. 36; see also *R. v. Nguyen*, 2017 BCSC 105 at para. 18, citing *R. v. Lauriente and Catalano*, 2008 BCSC 187, *aff'd* 2010 BCCA 72.
- [39] I emphasize here that the mere presence of additional reasons to effect a stop does not invalidate the detention: *R. v. Kaddoura*, 2009 BCCA 113 at para. 23. However, the authority of a police officer to stop a vehicle for traffic safety purposes does not entitle the officer to interrogate the occupants or search the vehicle in order to prove the commission of criminal offences. Just because the initial stop is legal, does not mean that the police are insulated from Charter scrutiny of subsequent police conduct: *Kaddoura* at para. 18.

B. Purpose of the Vehicle Stop

- [40] In *R. v. Forsyth*, 2015 BCSC 2663, the Court addressed the admissibility of evidence obtained during what the Crown argued was a dual purpose stop. The accused in *Forsyth* was alleged to have sold cocaine to an undercover police officer. In order to ascertain the accused's identity, Cst. Jacques, who was not involved in the drug investigation, was asked to do a traffic stop of a truck believed to be associated with the accused. Cst. Jacques ran the plates and noted that the registered owner of the truck was a Class 7 driver. He located the truck, which was displaying an "N" indicating that the driver had a Class 7 licence, and pulled it over. There were three males in the truck, including the accused who was a passenger. Cst. Jacques asked all three for their identification, which they provided. At some point, the accused exited the vehicle and stood near the sidewalk. The undercover officer was in a police car that drove past the traffic stop. She saw the accused, and identified him as the person that had sold her the cocaine.
- [41] The accused sought to exclude the identification evidence on grounds that the police stop violated his s. 8, 9 and 10 Charter rights. The defence alleged that the stated purpose (to ascertain if the Class 7 driver was operating the truck contrary to his restrictions) was a ruse, and the real purpose for the police stop was to aid in the drug investigation. The Crown did not deny that one of the purposes of the stop was to identify the occupants to assist the drug investigation. However, it was the Crown's position that the stop was lawful because one of the two purposes was for valid investigatory reasons. In holding that the sole purpose of the stop was to aid in the drug investigation, Justice Blok noted the nature of the questions asked by the police officer during the stop, which made clear his true objective.
- [42] Cst. Espinosa gave several reasons for detaining the occupants of the BMW. He testified that he was suspicious with the manner in which the car was being driven, and wanted to ascertain the owner and confirm if the driver was licensed. After running the plates and seeing the notice posted by Cpl. Richings, he decided to gather the information sought by Cpl. Richings. Later, after smelling the marijuana emanating from the vehicle, he arrested the occupants, and conducted a criminal investigation for drug possession.
- [43] I turn first to considering whether the traffic stop was conducted to enforce traffic or vehicle safety laws. Cst. Espinosa admitted that the BMW had not committed any traffic violations. Rather, he became suspicious because the BMW was driving too slowly, taking an abnormal route through strip mall parking lots, it was late at night, and no businesses were open in the vicinity.
- [44] Under cross-examination, Cst. Espinosa conceded that one would expect a motorist to drive slowly for safety reasons when going through a parking lot. He also agreed that it is possible that the occupants had noticed his police car, and that motorists often slow down when approaching a marked police car.

- [45] Cst. Espinosa was unable to articulate any rational explanation as to why taking a shortcut by crossing 74 Avenue into the Starbucks strip mall, rather than driving down 74 Avenue, was concerning behavior. There was no traffic on 74 Avenue at that time and location which would make such a move unsafe. There was also no evidence of the BMW violating any road signs or crossing any barriers intended to prevent a vehicle from taking the route chosen by the BMW.
- [46] To support his allegation of "suspicious behaviour", Cst. Espinosa relied heavily on his assertion that no businesses other than an A&W were open at that time of night. It was only under cross-examination that he conceded that there were a number of businesses nearby which were open. These included the Shoppers Drug Mart, Save on Foods, Wings restaurant, and McDonald's.
- [47] Having regard to all of the evidence, it is clear that the traffic stop was not conducted to enforce traffic or vehicle safety laws. There is no evidence of any observed traffic infraction or violation.
- [48] Nor do I find evidence to support the contention that Cst. Espinosa stopped the BMW randomly to enforce traffic or vehicle safety laws. While there is no dispute that a police officer has the power to check for licences, ownership, and insurance, these types of road stops are sanctioned in the context of stationary check-point programmes, as in *Hufsky*, and truly random stops, as in *R. v. Ladouceur*, [1990] 1 S.C.R. 1257.
- [49] There was nothing random about Cst. Espinosa's decision to check the licencing, ownership, and insurance of the BMW. Rather, Cst. Espinosa testified that his decision was made due to the suspicious behaviour of the driver of the BMW, which resembled that of a person who was "casing" a place prior to committing a crime.
- [50] Having regard to all of the surrounding circumstances, such as the fact that it was only 9:45 pm on a Saturday night, when a number of restaurants, fast food outlets, and other businesses were open, it stretches credulity that a police officer would become suspicious because a motorist decided to take a shortcut from one strip mall into another while driving slowly as he or she passed by a marked police car.
- [51] Cst. Espinosa's credibility is further undermined by the fact that he actively mislead this Court, by testifying under oath that the occupants of the BMW could have had no legitimate reason for being in the strip mall as all the surrounding businesses were closed. Yet he knew full well that a number of businesses were open at that time. The only logical conclusion is that Cst. Espinosa withheld that information from this Court in order to conceal his true motive for the police stop, which seems to have been initiated for no other reason than his general suspicion that three black men driving a BMW slowly in a strip mall on a Saturday night were up to no good.

- [52] Cst. Espinosa denied that race was a factor in his decision to stop the BMW. Indeed, he insisted that he did not notice the skin colour of the three male occupants when the BMW passed by him. It is implausible that Cst. Espinosa was able to identify the gender of the occupants in the BMW, without noticing their skin colour. There is no evidence that the lighting was poor, that the windows of the BMW were tinted, or that there were any other obstructions preventing him from being able to see the race of three male occupants of the BMW as it passed slowly in front of Cst. Espinosa. His denial that he noticed their race, in circumstances where their race would have been as obvious as their gender, adds to my concerns about his credibility.
- [53] I am also not persuaded that the detention was justified on account of a criminal investigation. The evidence does not support a finding that Cst. Espinosa had a reasonable suspicion to justify investigative detention. Nor am I able to conclude that Cst. Espinosa had reasonable and probable grounds to justify an arrest for drug possession.
- [54] There is no dispute that the odour of vegetative marijuana can provide objective grounds for arrest: see for example, *R. v. Acosta*, 2014 BCCA 218, at para. 22. However, in *Acosta*, the Court was dealing with an experienced police officer who was found to be credible. Such is not the case here.
- [55] Cst. Espinosa lacked the requisite experience to make his evidence on this issue reliable. He testified that his only experience with the smell of fresh marijuana was during his college years, and once while working as a police officer. His experience with the smell of burned marijuana was equally limited, with a vague reference to "a number of times" in his life and while on duty.
- [56] I also have serious concerns about Cst. Espinosa's credibility as a witness. Some of these concerns have already been noted. In addition, there were numerous other inconsistencies in his evidence, including instances where his testimony did not match that given by him at the preliminary inquiry. He was vague when it suited him, evidence was often self-serving, and lacking an air of plausibility.
- [57] In the absence of evidence of actual marijuana having been found during the vehicle stop, this Court is left with determining the veracity of Cst. Espinosa's assertion based solely on his credibility and reliability, both of which are in serious doubt.
- [58] Cst. Espinosa's notes provide support for the defendants' contention that the drug investigation was a ruse. Cst. Espinosa agreed that it was important to take notes in order to document what transpired and help refresh his memory. Indeed, part of his stated reason to keep Mr. Ali Ismail handcuffed was so he could safely pull out his notes. Yet these notes lack crucial details that would corroborate his testimony. Contrary to his assertion that the ongoing detention and arrest were because of suspected drug possession, the handwritten notes contain not even a hint of any suspicion of criminal activity. There is no mention of the reason for the police stop, the smell of marijuana, or the arrest and Charter warning of the occupants. As noted in *R. v. Ghorbanpoor*, 2014 BCPC 157 at para. 43, the lack of such

notes is troubling. It seriously brings into question Cst. Espinosa's evidence about the reasonableness of the detention and arrest.

- [59] The court may accept the olfactory observations of a police officer even where he has not made reasonably contemporaneous notes detailing the same: Acosta, at para. 15. However, it is up to the court to determine, having regard to all of the evidence, whether the testimony of the police officer is to be accepted. For the reasons noted herein, I conclude that it should not.
- [60] In my view, the allegation that he smelled fresh marijuana emanating from the BMW, was a ruse to advance Cst. Espinosa's goal of aiding Cpl. Richings with his robbery investigation. This becomes apparent when one has regard to the manner in which the events unfolded.
- [61] After conducting a thorough search, Cst. Espinosa found no drugs in the car or on the person of any of the occupants. A legitimate criminal investigation should have ended there. Cst. Espinosa admitted under cross-examination that as he was not able to locate any marijuana, he no longer had any grounds to arrest or detain the occupants of the BMW. Despite knowing that he had no legal basis to do so, Cst. Espinosa kept Mr. Ali Ismail in handcuffs, and proceeded to photograph him and the knife.
- [62] When asked to explain why he continued to keep Mr. Ali Ismail in handcuffs Cst. Espinosa replied, "for my safety". Yet there was no evidence that Mr. Ali Ismail had threatened to harm him or in any other way posed a safety risk to the police officer. None of the occupants, including Mr. Ali Ismail, were armed. Cst. Espinosa was armed with a gun and had in his possession the knife that he had confiscated from Mr. Ali Ismail when he searched him. Further, the police officer could not explain why the safety risk disappeared immediately after he photographed Mr. Ali Ismail.
- [63] Cst. Espinosa had no rational explanation for why he needed to take a photograph of Mr. Ali Ismail. It was his evidence that the picture was necessary because there was no photograph of Mr. Ali Ismail in the police database and Mr. Ali Ismail did not have his drivers' licence with him. In such a situation, taking a picture of the suspect was his common practice and "an extension" of his notes. First, I note that a practice does not become lawful just because it is common. Second, I find it difficult to believe that Cst. Espinosa, even with only two years experience on the force, would not know that taking a photograph in such a situation was a violation of Mr. Ali Ismail's rights. It was no more lawful than deciding to fingerprint a detainee or take a DNA sample, in order to supplement one's notes.
- [64] It is clear that the only reason that the detention of Mr. Ali Ismail was continued, was to allow Cst. Espinosa enough time to gather evidence for the robbery investigation. Cst. Espinosa had no other way of ensuring that Mr. Ali Ismail would stay put while he photographed him, except by keeping him in handcuffs. Indeed, when asked to elaborate on what he meant by "for my safety", Cst. Espinosa testified, "so I could pull out my notes and take a picture".

C. Charter Violations

- [65] Having regard to all of the evidence in this case, I conclude that the police stop and subsequent detention and arrest of the accused by Cst. Espinosa on October 21, 2017, were unlawful and in violation of the accuseds' s. 9 Charter rights.
- [66] In my view, the police stop was tainted from the outset. Though I am not able to conclude with any degree of certainty that racial profiling occurred in this case, the evidence leads me to a strong suspicion that this is precisely what motivated Cst. Espinosa to initiate the police stop. As recently noted by the Supreme Court in *R. v. Ahmad*, 2020 SCC 11 at para. 28, "[t]here will rarely be evidence of intentional racial profiling or targeting of the vulnerable."
- [67] In my view, the allegation of the smell of fresh marijuana emanating from the vehicle was nothing more than a ruse, designed by Cst. Espinosa to legitimize an unlawful police stop and to afford him the opportunity to gather evidence for the robbery investigation.
- [68] The evidence leads me to conclude that the accuseds' section 10(a) and (b) rights were violated during the police stop. Those rights were engaged immediately when the vehicle was stopped, and required the police officer to Charter and warn the occupants, as well as to tell them the true reason for their arrest. Even if I were to find that the vehicle stop was initiated for legitimate vehicle safety reasons, and that the need for a Charter warning was obviated by operation of s. 1, the accuseds' s. 10(a) and (b) rights were engaged as soon as Cst. Espinosa had verified the vehicle insurance, ownership, and licence of the driver.
- [69] I do not believe Cst. Espinosa's testimony that he Chartered and warned the accused when he arrested them for drug possession. His memory of the event was spotty, and evidence on this issue was lacking in crucial detail, such as the responses given by the accused when the police officer ostensibly provided them their rights. Given my serious concerns about Cst. Espinosa's credibility, and the lack of corroboration of this testimony in his notes, I find that the accuseds' s. 10(a) and (b) Charter rights were violated.
- [70] Cst. Espinosa also breached the accuseds' rights to be informed of the reasons for their detention, by failing to tell them that the reason for the stop was to aid in the robbery investigation. Cst. Espinosa admits that he did not tell the accused that they were being detained in relation to the robbery investigation. In doing so he was following the explicit instructions of Cpl. Richings. However, Cpl. Richings' instructions to not disclose the reason for the detention, does not absolve Cst. Espinosa of his duty to the accused. As noted by Justice Koenigsberg in *Lauriente* at para. 41, "it is no surprise that [the accused] was not advised of the reason for the stop, but that in no way takes away from the duty of a police officer to advise a person who is detained of the actual reason for the detainment."

VI. The Search Warrants

- [71] A single ITO was prepared for warrants to search two residences: one at 7253 124A Street, and the other at 12305 84 Avenue. Both these residences are located in Surrey. The former is alleged to be the residence of Mr. Ail Ismail, and the latter to be that of Mr. Abdullahi. A search of the two residences produced clothing that is similar to that worn by Suspect 1 and Suspect 2 during the robbery.
- [72] According to Cpl. Richings, the police stop conducted by Cst. Espinosa was significant for a number of reasons. It established the association between Mr. Ali Ismail and Mr. Abdullahi and linked Mr. Ali Ismail to the Abdullahi vehicle. The knife found on Mr. Ali Ismail's person during the police stop, matched the appearance of the knife wielded by Suspect 1 during the robbery. Cpl. Richings also found similarity between Mr. Ali Ismail's clothing and the clothing worn by Suspect 1. All of this information eventually made its way into the ITO.

A. The Information to Obtain

- [73] Section 487(1) of the Code permits a justice to grant a search warrant authorizing a peace officer to search a building, receptacle or place, if the justice is satisfied by information on oath in Form 1, that there are reasonable grounds to believe that the prescribed items might be found in that location, which will afford evidence with respect to the commission of an offence.
1. The Missing Oath
- [74] The ITO, marked as an exhibit during the voir dire, is dated June 27, 2018. Despite the requirement in s. 487(1) of the Code that the information provided to the justice must be on oath and in Form 1, the ITO in this case is unsworn. It is missing the name and signature of the informant, and the name and signature of the Justice or Judge who would be tasked with administering the oath or affirmation.
- [75] Prior to the commencement of oral arguments, I raised the issue of the unsworn ITO with counsel. Crown Counsel advised the court that he was aware that the ITO which had been marked as an exhibit in this proceeding, was unsworn. Defence counsel had brought this issue to Crown Counsel's attention. Crown Counsel had looked for a sworn copy, but had not been able to locate one. Crown Counsel advised the court that he believed that the sworn ITO might be in a sealed court file, and offered to try to obtain it if it was deemed necessary.
- [76] I advised counsel that in my reading of s. 487 of the Code, there was a requirement that the ITO be sworn, and that Crown Counsel may wish to make inquiries to see if a sworn ITO could be located. Crown Counsel advised that he would have to obtain an order unsealing the court file. He estimated that the entire process could take about one week. Defence counsel was opposed to any delays in the proceeding, and took the position that as the evidentiary portion of the voir dire had been completed, it was too late now for Crown Counsel to provide a sworn ITO.

- [77] Nevertheless, I advised Crown Counsel that I would be prepared to entertain an application to unseal the court file in order to expedite the search for a sworn ITO, or consider an application for an adjournment of the voir dire to allow the Crown time to try to locate a sworn ITO. Crown Counsel chose not to make either application. I proceeded to hear arguments on the voir dire, and asked counsel to provide submissions on the implications of an unsworn ITO. Crown counsel made no substantive submissions on the issue.
- [78] Defence counsel took the position that the unsworn ITO does not meet the oath requirements of s. 487(1) and as such, the search of the residences constituted a warrantless search. Defence brought two decisions to my attention on the issue of the requirement for an oath. The first is *R. v. Clark*, 2014 BCSC 1988, rev'd 2015 BCCA 488, aff'd 2017 SCC 3. *Clark* dealt with the telewarrant provisions of the Code, rather than the need for an oath. In *Clark*, the Court of Appeal reversed the trial judge's decision and found that the impracticability requirement for issuance of a telewarrant had been met and the exclusion of evidence was unwarranted.
- [79] The second decision, *R. v. Chen*, 2016 BCCA 506, addressed "whether a search warrant that is in all respects regular except for the lack of the signature of the issuing justice, can be said to be a valid warrant": at para. 3. In concluding that the warrant was validly issued, the Court relied on the surrounding circumstances, together with the presumption of regularity (para. 35). I will address the implications of the *Chen* decision in the following section.

2. The Oath Requirement

- [80] To understand the meaning of the oath requirement in s. 487(1) of the Code, I begin with the modern approach to statutory interpretation, which requires a contextual and purposive approach. In *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26, Justice Iacobucci quoted the following "definitive" formulation from Elmer Driedger's book, *Construction of Statutes* (2nd ed. 1983) at page 87, noting that this is the preferred approach to statutory interpretation across a wide range of interpretive settings:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

- [81] Section 487 of the Code is included under Part XV of the Code "Special Procedure and Powers". This section sets out the procedure that must be followed to obtain a search warrant.
- [82] Section 487 complies with section 8 of the Charter which protects the privacy interests of a person by granting security against unreasonable search and seizure: *R. v. Times Square Book Store* (1985), 21 C.C.C. (3d) 503 (Ont. C.A.). The values underlying these privacy interests are dignity, integrity, and autonomy: *R. v. Plant*, [1993] 3 S.C.R. 281, at page 292.

- [83] Section 8 guards against unjustified intrusions on the privacy interests of a person: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at page 159.
- [84] It is evident from a contextual reading of s. 487(1) that the legislative purpose of this provision is to attempt to strike a balance between two competing interests: the privacy interests of an individual, versus the state's interest in enforcing its laws. In permitting a justice to authorize a peace officer to search a building and seize the prescribed items, Parliament has recognized that advancing legitimate state goals will sometimes require a degree of intrusion into the private sphere: *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 at para. 55.
- [85] Section 487(1) mandates that for a search and seizure to be valid, the state is required to obtain prior authorization in the form of a valid warrant. The warrant is granted only after the state has demonstrated that its interests supersede those of the individual.
- [86] In *Hunter*, the Court dealt with the constitutional validity of the Combines Investigation Act [Combines Investigation Act, R.S.C. 1970, c. C-23] provisions authorizing a search and seizure. In finding the existing provisions invalid, the Court held at page 162 that the purpose of a requirement of prior authorization, "is to provide an opportunity, before the event, for the conflicting interests of the state and the individual to be assessed, so that the individual's right to privacy will be breached only where the appropriate standard has been met, and the interests of the state are thus demonstrably superior."
- [87] In determining the evidentiary standard that would validate intrusion, the Court in *Hunter* held as follows, at pages 167-168:

Section 443 of the Criminal Code authorizes a warrant only where there has been information upon oath that there is "reasonable ground to believe" that there is evidence of an offence in the place to be searched. The state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion. History has confirmed the appropriateness of this requirement as the threshold for subordinating the expectation of privacy to the needs of law enforcement. In cases like the present, reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search, constitutes the minimum standard, consistent with s.8 of the Charter, for authorizing search and seizure.

[Emphasis added]

(See also: *R. v. Galbraith*, 1989 ABCA 122, at paras. 12-14)

- [88] Having regard to the principles of statutory interpretation, the specific wording of s. 487, and the applicable jurisprudence, I conclude that the information to obtain a search warrant must be on oath.

3. Section 8 Rights

- [89] Section 8 of the Charter protects a person against unreasonable search and seizure. To establish a s. 8 breach, the accused must establish that the impugned state conduct amounted to search or seizure and that the state conduct fell below the reasonableness standard demanded by s. 8. As held in *R. v. Collins*, [1987] 1 S.C.R. 265, at para. 23, "a search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which it was carried out is reasonable."
- [90] Conformity with the law is an essential component of reasonableness, though mere minor or technical defects in the warrant will not necessarily make the ensuing search or seizure unreasonable. A search and seizure will be held to be unreasonable where for example, the ITO does not adequately set out the facts upon which a justice acting judicially could be satisfied that there were grounds for issuing the warrant under s. 487(1)(b), or the ITO does not adequately particularize the things to be searched for: *R. v. Harris and Lighthouse Video Centres Ltd* (1987), 35 C.C.C. (3d) 1 (Ont. C.A.), leave to appeal ref'd [1987] 2 S.C.R. vii.
- [91] A search based on a properly issued warrant is considered *prima facie* reasonable. In *Clark*, the Court of Appeal set out the test for determining whether a search warrant has been properly issued, stating as follows at para. 67:
- The question for a trial judge on a *voir dire* is whether the material filed in support of the application, as amplified on review, could support the issuance of the warrant or authorization: see *R. v. Voong*, 2013 BCCA 527 at paras. 21-22, 304 C.C.C. (3d) 546.
- [92] On an application to quash a search warrant, the judge may not substitute her opinion as to the sufficiency of the evidence. Rather, at issue is whether there is evidence upon which a justice acting judicially could determine that a warrant should be issued: *R. v. Turcotte* (1987), 39 C.C.C. (3d) 193 (Sask. C.A.), at p. 210.
- [93] The Crown Counsel does not argue, nor do I find, that the lack of signature evidencing that the ITO was under oath, is a minor technical defect.
- [94] In my view, a justice acting judicially in this case could only issue a warrant based on information under oath. In the absence of a signature from the affiant and a signature from the justice or judge, I am left to consider the surrounding circumstances to see if they can lead me to the conclusion that the oath requirement in s. 487 was complied with.
- [95] In *Chen*, the Court had ample evidence that lead to the inference that the warrant had been properly issued. Such evidence is woefully lacking in this case. I have no evidence before me that the ITO provided to the justice in support of the application for a search warrant of the two residences, was made under oath. During his testimony, Cpl. Richings confirmed that he had been involved in the preparation of the ITO. However, he did not say, nor was he asked, whether the ITO had been sworn. Only an unsworn copy was referred to at trial. Crown counsel was unable to confirm whether a sworn copy even existed.

- [96] In the absence of evidence that the ITO in this case was made under oath, I am unable to conclude that the search warrants of the two residences were properly issued. As such, I find that the search of the residences constitutes a warrantless search.
- [97] A warrantless search is *prima facie* unreasonable. In such a case, the burden falls on the Crown to rebut the presumption of unreasonableness: Hunter at page 160. Here, the Crown does not argue that a warrantless search was reasonable. Nor does the Crown suggest that it was unfeasible or unnecessary to have the ITO sworn. As such, I conclude that the accused's s. 8 Charter rights to be secure against unreasonable search or seizure were violated when the police searched the two residences.

4. Excision and Sufficiency

- [98] Even if the oath requirements of s. 487 had been met in this case, there are other grounds to set aside the search warrants.
- [99] Before granting the warrant the justice must be satisfied that the grounds in the ITO are current and that there is a nexus between the grounds for believing that an offence has been committed and that evidence of the commission of the offence will be found on the premises searched: Turcotte. The informant must set out sufficient details as to the underlying circumstances to enable a justice to satisfy herself that the requisite reasonable grounds exist: R. v. Debot (1986), 30 C.C.C. (3d) 208 (Ont. CA) at para. 17.
- [100] There is no dispute that facts obtained as a result of an unreasonable search must be excised when considering the validity of a search warrant: Grant, at para. 128.
- [101] I conclude that the following information contained in the ITO must be excised as it was obtained as a result of the police stop and in violation of the accused's s. 8, 9, and 10 Charter rights:
- a) In relation to the search of Mr. Abdullahi and the premises located at 12305 84 Avenue, Surrey: paragraphs 17, 42, 69(d)(v); and
 - b) In relation to the search of Mr. Ali Ismail, and the premises located at 7253 124A Street, Surrey: paragraphs 17, 42-44, 69(c) (ii-vii).
- [102] In addition, the following information must be excised from the ITO as these remarks are misleading, false, or conclusory:
- a) Paragraph 16 advising that three police officers told Cpl. Richings that Suspect 1 resembled Mr. Ali Ismail. This statement is provided under the heading "Investigational Summary". It is misleading and contradicts the information provided at paragraphs 36-41 of the ITO, which explains that only two officers suggested that Suspect 1 was Mr. Ali Ismail; the third officer pointed to Suspect 1 being "possibly one of the Ali Ismail brothers".

- b) Paragraph 33 which asserted that Cpl. Richings knew Mr. Abdullahi from previous dealings and was familiar with his appearance. This statement is false. Cpl. Richings admitted under cross-examination that he had not had any direct dealings with Mr. Abdullahi, the first time he saw him was in court.
 - c) Paragraphs 36-41 summarizing the information received by Cpl. Richings in response to the police bulletin referred to at para. 12 above. These paragraphs provide an inaccurate summary of the information actually received by Cpl. Richings in response to his bulletin.
 - d) Paragraphs 65-68 which are intended to support the belief that 12305 84 Avenue is Mr. Abdullahi's place of residence. These paragraphs contain prejudicial and irrelevant information about Mr. Abdullahi's family, and omit critical details which would indicate that Mr. Abdullahi may not live there, as he had provided a different residential address to his probation officer.
 - e) Paragraph 69(d)(i) and (iii) which provides reasons as to why Suspect 2 is believed to be Mr. Abdullahi, which reasons are not supported by the evidence, such as his physique (which Cpl. Richings could not have known), and that Mr. Abdullahi was checked by the police several times driving the crime vehicle (which was false).
 - f) Paragraph 70(g) which is misleading and prejudicial as neither accused had a criminal record.
 - g) The following statements which are conclusory and are not supported by the evidence:
 - i. Paragraph 20 connecting two phone numbers communicating with each other in the vicinity of the pharmacy and just prior to the offence, as belonging to each accused; and
 - ii. Paragraphs 57 and 58 asserting a link between Suspect 1's phone and that of Mr. Ali Ismail.
- [103] After completing the amplification and excision process, I conclude that the balance of the ITO could not support the issuance of the search warrants on the two residences.

VII. Section 24(2) of the Charter

- [104] I turn now to consideration of whether the evidence obtained as a result of the vehicle stop and search of the residences, should be excluded.
- [105] Section 24(2) of the Charter relates to exclusion of evidence in the event of a Charter violation:
24. (2) Where, in proceedings under section (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[106] The purpose of s. 24(2) is to consider whether the overall reputé of the justice system will be adversely affected by admission of the evidence. This inquiry is an objective one and it asks whether a reasonable person informed of all the relevant circumstances and the values underlying the Charter, would conclude that the admission of the evidence would bring the administration of justice into disrepute: Grant at para. 68.

[107] There are three preconditions to a remedy under s. 24(2):

- a) The applicant's rights or freedoms as guaranteed by the Charter must have been unjustifiably limited or denied;
- b) The evidence must have been obtained in a manner that unjustifiably limited or denied a guaranteed right or freedom; and
- c) Having regard to all the circumstances, the admission of the evidence in the proceedings must be capable of bringing the administration of justice into disrepute (Grant).

[108] I have already found that the first precondition has been met, i.e., that the accuseds' s. 8, 9, and 10 Charter rights were unjustifiably denied. I have also found that the second precondition has been met such that evidence obtained during the police stop and search of the residences, was obtained directly as a result of the denial of the accuseds' Charter rights.

[109] I turn then to whether, having regard to all the circumstances, the admission of this evidence in the proceedings is capable of bringing the administration of justice into disrepute. An analysis under s. 24(2) involves consideration of the seriousness of the Charter-infringing conduct, the impact of the breach, and society's interest in adjudicating cases on their merits: Grant at para. 71. "The court's task is to balance the assessments under these three inquiries 'to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute': R. v. Thompson, 2020 ONCA 264 at para. 74, citing Grant, at para. 71.

A. Seriousness of the Conduct

[110] The first line of inquiry considers the seriousness of the police conduct that lead the infringement of Charter rights and the discovery of the evidence: Thompson at para. 83. At issue is whether the breach is of such significance that the court should disassociate itself from the misconduct. Such breaches range from mildly serious, where for example the breach is technical in nature or reflects an understandable mistake; to a breach which was negligent and of moderate seriousness; to a significant breach where the police knew or should have known that their conduct breached the charter.

- [111] I find that the charter-infringing conduct was a serious breach of the accuseds' rights to be free from arbitrary detention and arrest, and unreasonable search or seizure. The arbitrary detention triggered the accuseds' rights to counsel which were also breached. The pattern of repeated breaches in this case is significant.
- [112] The initial stop was premised on unfounded suspicions of wrongdoing which were likely motivated by racial profiling. This was an egregious violation of the accuseds' rights to be treated with dignity and respect. Confidence in our justice system requires that the police apply the law fairly and equally. Such confidence is eroded when young black men who have broken no laws, are stopped by the police for no other reason than unfounded suspicions triggered by the colour of their skin: see *R. v. Le*, 2019 SCC 34 at para. 95.
- [113] The stop also lacked any of the accepted grounds for a police stop, such as in order to enforce traffic or vehicle safety laws or a criminal investigation. Cst. Espinosa lacked reasonable suspicion to justify an investigative detention in respect of a crime, or reasonable grounds to justify an arrest. Cst. Espinosa knew or ought to have known that he had no grounds to detain, question, search, or photograph the accused. He did this all under the pretext of a drug investigation for the sole purpose of assisting in a robbery investigation. The fact that Cst. Espinosa tried to hide the true motives for the detention, both from the accused and this Court, makes the breaches even more serious.

B. Impact of the Breach

- [114] The second line of inquiry under s. 24(2) asks whether the Charter breach "actually undermined the interests protected by the right infringed": *Thompson* at para. 97, citing *Grant*, at para. 76. It involves identifying the interests protected by the Charter and evaluating how seriously the Charter infringements impacted those interests: *Thompson* at para. 97.
- [115] Section 9 of the Charter protects a person from unjustified state interference, to live one's life freely without police intrusion: *Thompson* para. 98. The breach of that right in this case was significant. To be detained, arrested, held in handcuffs, questioned and searched, is not a trivial matter. The detention was far from brief, and was made without any reasonable basis for justification.
- [116] Similarly, the infringement of the accuseds' section 8 rights was a significant violation of their privacy rights, made even more so when the police searched the residences without sufficient basis. The fact that the information used to ground the request for a search warrant was obtained in violation of their Charter rights, heightens the concerns.
- [117] I conclude that the impact on the accuseds' section 8, 9, and 10 Charter interests was significant and favours a finding that the admission of the evidence would bring the administration of justice into disrepute.

[118] Evidence subject to exclusion because of a Charter breach may be included where it would have been discovered inevitably through a continuing lawful investigation: *R. v. Tombs*, 2012 BCSC 1826 at para. 101. In my view, that is not the case here. Independent of the evidence found during the police stop and the search of the residences, the substantive evidence that the police had was evidence of cellphones associated to the accused in the location and at the time of the robbery, and the partial licence plate of the getaway vehicle matching a BMW vehicle registered to Mr. Abdullahi. In addition, Mr. Ali Ismail was not under investigation for any crime, and there is no reason to believe that the police officers would ever have discovered his association with Mr. Abdullahi had they not detained them. I conclude that had the police respected the accuseds' Charter rights, it is highly unlikely that through a continuing lawful investigation, they would have found the evidence at issue in this case.

C. Society's Interests

- [119] The last line of inquiry focuses on the reliability of the evidence and its importance to the Crown's case: *Thompson* at para. 103.
- [120] It is premised on the view that society has an interest that all cases be decided on their merits. Consideration of this interest involves answering the question of whether the truth-seeking function of a criminal trial process is better served by admission of the evidence rather than by its exclusion: *Grant* at para. 79.
- [121] I accept that the evidence in this case is essential to the Crown's case against the accused, and pulls towards inclusion.

D. Balancing the Factors

- [122] The final step under this s. 24(2) analysis involves balancing the factors under the previous lines of inquiry, in order to assess the impact of admission or exclusion of the evidence on the long-term reputation of the administration of justice: *Thompson* at para. 103.
- [123] I conclude that the first two lines of inquiry heavily favour exclusion. In arriving at this conclusion, I am mindful that this Court has to carefully balance the interest of public safety against the Charter violation. I appreciate that exclusion of the evidence could mean that a potential conviction of a person or persons for robbery and other related criminal conduct, may be lost. However, when all factors are balanced, the harm to the reputation of the justice system which would be engendered by inclusion of the evidence, is far outweighed by the harm that would flow from excluding the evidence.

VIII. Conclusion

- [124] As a result of the unlawful police stop, and unlawful search and seizure, I conclude that the following evidence must be excluded from the trial:

- a) Evidence obtained during the police stop, including evidence that the vehicle was driven by Mr. Abdullahi, the identity and description of his passengers, description of the knife, and all photographs taken by Cst. Espinosa during the police stop.
- b) All items seized during the police search of the two residences.

"Shergill J."

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