

CANADA / JUDGMENT

R. v. Ali

2022 BCSC 1545

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Supreme Court of British Columbia

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2022 BCSC 1545 R. v. Ali

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ali,

2022 BCSC 1545

Date: 20220414

Docket: 29405

Registry: Vancouver

Regina

v.

Ibrahim Ali

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Corrected Judgment: The text of the judgment was corrected throughout on June 6, 2024.

Before: The Honourable Mr. Justice L.W. Bernard

Ruling on "Dual Purpose" Stop

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K. McCullough

B.S. Lynskey

Place and Dates of Hearing:

Vancouver, B.C.

January 24-26 and 28,

February 7, 8, 10, 11,

14 and 15, 2022

Place and Date of Ruling:

Vancouver, B.C.

April 14, 2022

- [1] In this pretrial voir dire, the applicant seeks a declaration that his s. 8, 9, and 10 Charter rights were breached by the police in the course of a traffic-stop of a motor vehicle in which he was a passenger. At the time of the stop, the applicant was the target of police surveillance in a murder investigation.
- [2] In the course of the 12-minute stop, the applicant remained in the rear passenger seat and provided his identification card to the police officer who stopped the vehicle, pursuant to that officer's request.
- [3] The applicant's principal position is that he was arbitrarily detained in this stop because it was not for a legitimate traffic enforcement purpose; rather, it was a ruse or a mere pretext to identify the vehicle's occupants (including him) in furtherance of the murder investigation. He says that even if the stop was not a ruse or mere pretext, in the course of this stop he was held in psychological detention by actions of the police, which included taking his identification card into their possession during the stop. He also submits that taking his identification was an unlawful search and seizure.

- [4] It is not in issue that the police took the applicant's identification card from the applicant and held it for a brief period before returning it to him. The length of this period within the 12-minute stop is in question. It is also not in issue that the applicant was not afforded the s. 10 Charter rights to which he would be entitled if it is determined that he was under police detention during this stop.
- [5] The Crown/respondent's position is that the stop in question was a lawful "dual-purpose" traffic-stop: i.e., the police stopped the vehicle for the legitimate purpose of investigating an observed traffic violation by the driver, while also having another investigative purpose: to attempt to identify the occupants of the vehicle in furtherance of a murder investigation. The respondent says the applicant has failed to establish that he was in detention as that term is defined in law, at any time during the stop, and in the absence of a detention the rights he claims do not arise.
- [6] In this application it is common ground that the onus is on the applicant to prove, on a balance of probabilities, the Charter breaches he alleges. To meet this burden, the applicant called the two traffic-stop officers and three senior officers in the murder investigation as his witnesses. Neither he nor the other occupants of the vehicle testified. The respondent did not call a case.

Background

- [7] The applicant is charged with the first-degree murder of 13-year-old MS. On July 18, 2017, at approximately 1:00 a.m., MS's lifeless and partially-nude body was discovered in a wooded area of Central Park, in Burnaby, B.C. A post-mortem examination suggested she had been sexually assaulted and strangled to death. Semen was found inside MS, and DNA extracted from it was designated "Male 1".
- [8] The principal objective of the ensuing police investigation was to identify Male 1. When a genetic profile of Male 1's DNA indicated he was likely of Kurdish descent, investigative resources and techniques were focused on the local Kurdish community.
- [9] In March 2018, the police obtained DNA samples from approximately 150 men attending a local Kurdish New Year's event. One sample was from a man named Chamdin Ali. An analysis of this sample showed striking similarities to Male 1, but was not a match. On August 17, 2018, a DNA phenotyping of the sample from Chamdin Ali indicated that Chamdin Ali was likely a full brother of Male 1.
- [10] A search of police databases showed that Chamdin Ali had a brother named Ibrahim Ali who resided in Burnaby, B.C. On August 21, 2018, the man the police believed to be Ibrahim Ali was placed under police surveillance. One surveillance objective was to obtain a cast-off sample of his DNA to compare to Male 1; another was to confirm the target's identity as well as possibly identifying other brothers of Chamdin Ali who were in Canada.

- [11] On August 22, 2018, the investigative team decided upon a traffic-stop as an investigative means to confirm the identity of their surveillance target and possibly other brothers of Chamdin Ali in the company of the target. They had observed the target travelling to and from construction worksites in a minivan, as a passenger accompanied by other male passengers. The investigative plan was to pull over this vehicle at a time when the target was believed to be a passenger, and attempt to have all the passengers identify themselves in the course of the investigation of a traffic violation.
- [12] The police referred to this as a "dual-purpose" stop, with the two investigative purposes being the traffic violation and the murder. The investigators' collective understanding as given in evidence, was that: (a) in such stops the police can compel drivers to identify themselves and ask, but not compel, any passengers to do the same; and (b) the stop itself must be in furtherance of the enforcement of an observed driving violation.
- [13] The stop in question occurred at 2:40 p.m. on August 29, 2018. At approximately 2:00 p.m. on that date, the tasked officers, Constables Lim and Bell, received information that the surveillance target was a passenger in a minivan being driven by a man named Khabat Ahmad; they were also given the location of the minivan. The officers located the minivan on the road at approximately 2:14 p.m., and followed it for 23 minutes before observing - according to each of them - the minivan enter a traffic-light controlled intersection on a yellow light in circumstances where it could have safely stopped. The minivan was pulled over for this alleged violation at 2:40 p.m.
- [14] In the course of a 12-minute stop the driver, Mr. Ahmad, was informed of the reason for the stop and he provided his driver's licence and vehicle registration to Cst. Lim. All three passengers (including the applicant, who was seated behind the driver's seat) provided their identification cards to the police upon Cst. Lim's request. All documents were returned to the occupants before the minivan was "sent on its way" at approximately 2:52 p.m. A violation ticket was not issued.
- [15] In relation to all the foregoing, there has been no evidence or suggestion otherwise.

Evidentiary synopsis

- [16] Cst. Lim testified that he attended a briefing on August 22, 2018 regarding a proposed dual-purpose stop in furtherance of a murder investigation. He understood his role was:
- to follow any vehicle in which the applicant was believed to be an occupant, based on surveillance;
 - to stop the vehicle and investigate any traffic violation he observed; and
 - to attempt to identify all occupants of the vehicle in the course of the stop.

- [17] Cst. Lim said it was his understanding that he could ask, but not compel, the passengers to produce identification; if they refused, then "that would be it". He said he received no direction regarding the issuance of a ticket, which he understood was left to his discretion.
- [18] Cst. Lim said that on August 29, 2018, he received information that the surveillance target was travelling as a passenger in a Dodge Caravan, and he was provided with the minivan's description and location. He said he and his cover-man, Detective Cst. Bell, located the minivan shortly after 2:00 p.m. and began following it; at 2:37 p.m., he observed the minivan enter an intersection on a yellow light in circumstances where it could have stopped without slamming on its brakes before entry. He said he followed the minivan through the intersection (after ensuring it was safe to do so), and pulled it over at 2:40 p.m. at a location where there was a side- street the minivan could turn onto and safely stop.
- [19] Cst. Lim testified to stopping his police vehicle one car-length behind the minivan, leaving it completely unblocked from the side or front. He said he approached the driver, identified himself as a police officer, informed him that he was stopped because he had driven through a yellow light, and asked him for his driver's licence and vehicle registration. He said he ran this information on his police computer and confirmed that the driver, Khabat Ahmad, was believed to be an associate of man named Ziad, who had an outstanding warrant for his arrest. He said he returned to speak to Mr. Ahmad, and asked him to step out of the vehicle. He said he had a one-on-one conversation with Mr. Ahmad on the sidewalk while the passengers remained in the minivan.
- [20] In this conversation, Cst. Lim asked Mr. Ahmad if Ziad was one of the men in the minivan. He said Mr. Ahmad replied, "No", and then named the three passengers. Cst. Lim said he and Mr. Ahmad then returned to the minivan where he (Cst. Lim) asked the passengers if he could see their identifications. In this regard, Cst. Lim believes he said to the three passengers collectively, "May I see your identification" or similar words, and in response they each handed an identification card to him. He said he said nothing more to the passengers other than to confirm, using the IDs produced, their names and birthdates. He said Det.-Cst. Bell was outside the minivan at this time.
- [21] When Cst. Lim was questioned about whether he took the identification cards back to his police vehicle to run them on the computer, he said he could not recall doing such.
- [22] Cst. Lim said the entire stop spanned approximately 12 minutes; he gave a verbal warning to Mr. Ahmad and the minivan was on its way by 2:52 p.m. He said if any of the passengers had tried to leave at any time during the stop, he would not have prevented them from doing so. He said he used a normal tone of voice during the stop, and the driver seemed relaxed.
- [23] Det.-Cst. Bell had a poor memory of the August 29, 2018 traffic-stop, and had few notes to jog it. Within his recollection was that he was tasked with being the "cover" person to ensure safety in the stop for Cst. Lim, in relation to a dual-purpose vehicle stop for which the two purposes were the investigation of a Motor Vehicle Act, R.S.B.C. 1996, c. 318 infraction, and the investigation of a murder (by attempting to identify the occupants of the vehicle). He

also recalled that at approximately 2:00 p.m. on August 29, 2018, he and Cst. Lim received information about the location of the target vehicle, and that they began following it sometime thereafter from Richmond into Vancouver.

- [24] Det.-Cst. Bell said it was Cst. Lim's decision to make a traffic-stop if an infraction occurred. He recalled that the traffic was heavy and that a significant amount of time passed before he saw the target vehicle enter an intersection on a "stale" yellow light at an estimated speed of 30 km/hr. He said the vehicle had an opportunity to safely stop at the intersection, but instead drove through it and even slowed down, rather than speed up, as it did so. He said it was clear to him that the vehicle could have stopped safely.
- [25] In contrast to Cst. Lim's evidence that he followed the target vehicle through the intersection after it had entered it on a stale yellow light, Det.-Cst. Bell's recollection was that Cst. Lim stopped for the red light, and then caught up to the target vehicle once the light turned green.
- [26] At the traffic-stop, Det.-Cst. Bell recalled that he took a position six feet away from the passenger side of the minivan while Cst. Lim approached the driver's side and spoke to the driver. He said the front passenger-side window was open, but he could not hear Cst. Lim's exchange with the driver. He said that while Cst. Lim spoke to the driver, he said, "Hello, how are you?" in a calm and cordial tone, to the front seat passenger who responded with, "Hello". He said he saw Cst. Lim return to the police vehicle with whatever he had received from the driver, and then subsequently return to speak to the driver. He said he stepped forward towards the passenger side of the minivan at this point. He said he saw the driver exit the minivan and walk with Cst. Lim over to the sidewalk where the two men had a conversation out of his earshot.
- [27] Det.-Cst. Bell said he resumed his position six feet away from the minivan to maintain a broad view of the scene. He said he saw the driver return to the driver's seat and heard him speak to the passengers in a foreign tongue. He said the front-seat passenger provided him with his identification card and he passed it along to Cst. Lim. He recalled that at some point Cst. Lim said to him that he was "running the IDs to see if any had warrants."
- [28] Det.-Cst. Bell said he did not hear the words spoken between Cst. Lim and the minivan's occupants, but he described Cst. Lim's interactions with them as polite and respectful. He said there were "no issues". He said he saw no one angry or agitated, or trying to exit the minivan at the scene. He said the "overall tenor" was non-confrontational: no weapons were brandished, no voices were raised, no commands were made, and the passengers were polite and relaxed.
- [29] Corporal Kee was the acting team-leader for the murder investigation at the time the dual-purpose traffic-stop was decided upon as an investigative step to confirm the identity of the surveillance target. Cpl. Kee explained that initially the surveillance team was having difficulty identifying their target from a photograph of Ibrahim Ali the police had obtained to use on the target sheet provided to them, and the police wanted confirmation that the

surveillance team had the right man under surveillance. Cpl. Kee believed that it was in a 4:40 p.m. briefing on August 22, 2018 that the dual-purpose stop was discussed for the first time, and that at some point during or after that briefing, Csts. Lim and Paisley were tasked with it. He believes Sergeant Lew may have assigned the task to these officers.

- [30] Cpl. Kee said there was discussion at the briefing to the effect that: (a) the stop would only happen following a violation under the Motor Vehicle Act; and (b) obtaining identification of the passengers had to be voluntary - it could not be compelled. As for issuing a ticket for the traffic violation, Cpl. Kee said this was left up to Cst. Lim to decide.
- [31] Cpl. Kee testified that on August 27, 2018, he received information from IRCC (Immigration, Refugees and Citizenship Canada) that Chamdin Ali had a total of four brothers, and that in a surveillance debriefing on August 28, 2018, he learned that members of the surveillance team suspected that one of the non-targeted passengers in the minivan might be one of those brothers. At this point, although the surveillance team had obtained a cast-off DNA sample from their target, the results of a comparison to Male 1 were not yet known.
- [32] Cpl. Kee said that at some point before the stop on August 29, 2018, he became aware that the driver, Mr. Ahmad, was associated to a man with an outstanding arrest warrant. He said using this information at the stop - as a means of avoiding suspicion by the vehicle's occupants that one or more of them was under investigation - was discussed, and its use was ultimately left to the discretion of the traffic-stop officers. He said it was understood throughout, that the provision of identification by the passengers had to be voluntary. He said he considered that asking them to produce identification to prove that they were not the wanted man was "optically, a grey area", adding that the police wanted only voluntarily-given identification.
- [33] Sgt. Lew was the primary investigator for the murder investigation. She recalled that on August 22, 2018, a dual-purpose traffic-stop was discussed as an investigative option to confirm the identity of the man the surveillance team was targeting, and to identify other occupants of the vehicle taking this man to and from work. She said that at this briefing, Csts. Lim and Paisley were told not to stop the vehicle unless a traffic violation was observed. She said she told Cst. Lim that he was not to compel anyone to produce identification, but left the specifics of how he would identify the occupants to him; he was an experienced officer who did not need to be "spoon fed". As for issuing a ticket, she said this, too, was left up the traffic-stop officers to decide based upon the seriousness of the traffic violation investigated.
- [34] Sgt. Lew said she recalled learning that there was an outstanding warrant for a man associated to Mr. Khabat, the driver of the minivan. She said the idea of using this outstanding warrant as a "natural opportunity" to ask passengers for their identifications was "brought up and not dismissed". She said this idea would have been related to officers tasked with the traffic-stop.

- [35] Inspector Turner was the team commander for the murder investigation. He was on "leave" from August 21 to 27, 2018, and in this period, Cpl. Kee was responsible for the investigation. He recalled that at the time he started his leave, surveillance of Ibrahim Ali was an investigative initiative "in play". In relation to the dual-purpose stop, he said his knowledge of the purpose for it, and the planning of it, was non-existent. He said he was briefed about it on his return on August 28, 2018. He recalled some mention of it as a means of confirming Ibrahim Ali's identity, but had little recollection of the specifics. Based upon an August 29, 2018, 3:18 p.m. entry in his notebook, he said he learned at this time that a traffic-stop had occurred and that the occupants of the vehicle had been identified. He said his notes were brief because he knew he would receive a fulsome reporting of the traffic-stop later.
- [36] Insp. Turner said he was aware that Mr. Ahmad, the driver, was associated to a man with an outstanding warrant, and that this would have formed a basis for asking Mr. Ahmad if he had any knowledge of the wanted man. He said this was not a "pretext" for the stop, and that checking the background of Mr. Ahmad would have been routine once the police knew he was the driver.

Discussion

Arbitrary detention and "dual-purpose" traffic-stops

- [37] Dual-purpose traffic-stops are well recognized in our jurisprudence, and it is well-established that where one of the investigative purposes is a legitimate road-safety investigation, the co-existence of an unrelated legitimate investigative purpose for stopping a motor vehicle is not improper.
- [38] In British Columbia, it is settled law that if the police have proper grounds for stopping a motor vehicle for a violation of the Motor Vehicle Act or its regulations, the existence of a second unrelated proper investigative purpose does not transform an otherwise lawful stop into an unlawful and arbitrary one contrary to s. 9 of the Charter: *R. v. Kaddoura*, 2009 BCCA 113 [Kaddoura].
- [39] Similarly, in Ontario, the case law establishes that a detention or arrest pursuant to the Highway Traffic Act, R.S.O. 1990, c. H.8, is not unlawful simply because the police have another legitimate purpose such as the investigation of criminal activity in mind when they stop a vehicle for a proper road-safety purpose: *R. v. Mayor*, 2019 ONCA 578 [Mayor]. See also *R. v. Humphrey*, 2011 ONSC 3024 [Humphrey].
- [40] In *Kaddoura*, the facts are illustrative. The cover officer for an undercover police officer who had just purchased cocaine from a man, radioed a request for an officer to pull over the car in which the seller had entered the passenger side and left the scene of the transaction, for the purpose of identifying its occupants. Cst. Gock responded to the radio dispatch and located the vehicle. He observed that the left tail-light was damaged, and stopped the vehicle for this violation of British Columbia's Motor Vehicle Act Regulations, B.C. Reg. 26/58. In the course of this stop, he pointed out the damage to the driver, Mr. Kaddoura, and informed

him that it was unlawful to drive the vehicle in that condition. He had Mr. Kaddoura produce his driver's licence and vehicle registration, as was his invariable practice in traffic-stops; he also asked the two passengers to provide him with identification. After obtaining the identities of the occupants, he allowed the vehicle to depart without issuing a ticket.

- [41] At trial, Cst. Gock testified that he would have stopped the vehicle for the broken tail-light if he encountered the vehicle, regardless of the radio-dispatch request.
- [42] The trial judge found that Mr. Kaddoura was arbitrarily detained by Cst. Gock's traffic-stop because the purpose of the stop was to identify the occupants. The Court of Appeal disagreed. Justice Groberman, for the court, said:
- [12] In my view, the trial judge erred in law in finding the motor vehicle stop in this case to be an arbitrary detention contrary to section 9 of the Charter. Constable Gock had proper grounds for stopping the vehicle, as he had observed violation of the Motor Vehicle Act. He was fully entitled to stop the vehicle under that statute, and to request that the driver produce his licence and vehicle registration documents. The fact that the officer had other reasons to want to identify the driver does not transform a lawful stop into an unlawful one.
- [13] The accused's constitutional right is a right not to be arbitrarily detained. A roadside stop of a vehicle with a defective taillight is not an arbitrary detention.
- [15] In the case at bar, whatever other concurrent motivations Constable Gock may have had for the motor vehicle stop, it is clear that one such purpose was to deal with a Motor Vehicle Act violation.
- [22] In cases such as the one at bar, where a violation of the Motor Vehicle Act has been observed, the stop is not arbitrary, and does not constitute a *prima facie* infringement of section 9 of the Charter.
- [24] In summary, Constable Gock's decision to stop the accused's vehicle was not an arbitrary one; he had witnessed a violation of the Motor Vehicle Act, and was entitled to stop the vehicle, and obtain the driver's identification. The fact that he also wished to know who was driving for the purposes of a drug investigation did not transform the lawful detention into an arbitrary one.
- [43] In *Humphrey*, Justice Code, in a thorough consideration of the jurisprudence on dual-purpose stops, made the following apposite remarks:
- [91] There is now a strong line of binding authority holding that the kind of dual purposes for a motor vehicle stop, described by P.C. Stuart, do not violate s. 9 of the Charter. Where the police proceed to stop a vehicle for proper regulatory purposes under the Highway Traffic Act, the fact that they also have criminal investigative interests which, standing alone, would not justify the stop, does not give rise to an arbitrary detention.

[98] Faced with this now formidable line of authority, Mr. Greenspan conceded that the police were entitled to stop the car for "dual purposes", both regulatory and criminal. Indeed, he conceded in light of Nolet and Sandhu that the criminal investigative purpose could even be "predominant". Mr. Greenspan's position, consistent with his "ruse" or "pretext" argument, is that the sole purpose for the stop was to conduct a criminal investigation of suspected gang members and that there was never any intention to investigate the expired val tag.

...

[102] I am simply not persuaded, on a balance of probabilities and on this record, that the expired val tag was a mere ruse or pretext. ...

[104] For all these reasons, I am satisfied that there was no violation of s. 9 of the Charter when the police stopped the accused Raynford Humphrey's car on the night in question.

[Emphasis in original]

[44] In the instant case, the applicant's position is essentially the same as that of Mr. Humphrey: i.e., the traffic-stop was a mere ruse or pretext to stop the minivan for the purpose of furthering a criminal investigation and it was, therefore, an arbitrary detention contrary to s. 9 of the Charter.

[45] I am not persuaded that the evidentiary record establishes, on a balance of probabilities, this position of the applicant. The police evidence of their awareness of the need for a legitimate traffic violation purpose for stopping the vehicle was compelling and not undermined by any other evidence. Both the acting team-commander and the team leader in the murder investigation - upon deciding to employ a dual-purpose traffic-stop as an investigative technique - testified, in so many words, that the existence of an observed traffic violation as the justification for the traffic-stop was an essential aspect of this investigative technique. Similarly, both officers tasked with stopping the vehicle testified that one of the purposes of the dual-purpose stop was to investigate an observed traffic violation.

[46] As for whether the police actually observed a violation or not, Csts. Lim and Bell both testified that they did, and no evidence to the contrary was tendered. Their collective testimony is that they followed the target vehicle for approximately 23 minutes through city streets before seeing it fail to stop for a yellow light at an intersection in circumstances where it would not have been unsafe to stop, and then pulled over the vehicle to enforce that Motor Vehicle Act violation.

[47] Cst. Lim testified that at the outset of the stop he approached the driver, informed him that he had been stopped because he had driven through a yellow light, and asked him for his licence and registration. Cst. Lim said that at the end of the stop he gave the driver a verbal warning rather than a ticket.

- [48] It is not contentious that if such driving occurred, it would constitute a violation of s. 128 of the Motor Vehicle Act, and would be a legitimate basis for stopping the offending vehicle. Although the two officers' testimonies were inconsistent on whether the police vehicle stopped at the intersection or drove through it after the violation was witnessed, they were consistent in relation to the violation itself. The inconsistency does not undermine their evidence of the traffic violation.
- [49] I am not persuaded that the evidence takes the applicant's position (i.e., that the traffic-stop was a mere ruse or pretext) beyond the realm of suspicion; moreover, even if the two investigative officers' testimonies were entirely undermined by the identified inconsistency, the result would be a critical evidentiary lacuna in circumstances where the applicant bears both an evidentiary and persuasive burden.
- [50] I find that the applicant has not established that the minivan in which he was a passenger was stopped without lawful grounds and, thus, arbitrarily detained its occupants.

Detention during the traffic-stop

- [51] It is not contentious: (a) that the applicant remained seated behind the driver of the minivan during the course of the 12-minute traffic-stop; (b) that during the stop Cst. Lim asked to see identification for the applicant and the two other passengers; (c) that all three passengers provided identification cards in response to this request; and (d) that their identification cards were returned to them before the end of the traffic-stop. The applicant says the actions of the police resulted in his detention and triggered the Charter rights afforded to a detained person. He cites, inter alia, *R. v. Forsyth*, 2015 BCSC 2663 [Forsyth], in support.
- [52] The respondent says the alleged detention was merely an investigative delay falling well short of detention as it is defined in our jurisprudence, citing, inter alia: *R. v. Grant*, 2009 SCC 32 [Grant]; *R. v. Suberu*, 2009 SCC 33 [Suberu]; *R. v. Robinson*, 2021 BCSC 899 [Robinson]; and *R. v. Fillery*, 2021 BCSC 1858 [Fillery], in support.
- [53] I turn first to *Forsyth*, which did not consider *Grant* and *Suberu*: two Supreme Court of Canada decisions that essentially reformulated the law on detention. As a result of this reformulation, subsequent British Columbia cases have not followed *Forsyth*: see, for example, *Fillery* and *Robinson*. For the reasons expressed in these two cases, and with due respect for the learned justice who was almost certainly not referred to *Grant* and *Suberu*, I too decline to follow *Forsyth*.
- [54] I turn then to *Grant*, in which Chief Justice McLachlin and Justice Charron, for the majority, recognized the need to revisit the law of detention and define the meaning of "detention" under ss. 9 and 10 of the Charter. In this regard they provided the following helpful summary:
- [44] In summary, we conclude as follows:

1. Detention under ss. 9 and 10 of the Charter refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.
 2. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, inter alia, the following factors:
 - (a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.
 - (b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
 - (c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.
- [55] The foregoing summary was repeated, for convenient reference, in *Suberu*, where the Chief Justice and Justice Charron elaborated on the reasoning behind the *Grant* summary, in the following instructive passages:
- [21] In *Grant*, we adopted a purposive approach to the definition of "detention" and held that a "detention" for the purposes of the Charter refers to a suspension of an individual's liberty interest by virtue of a significant physical or psychological restraint at the hands of the state. The recognition that detention can manifest in both physical and psychological form is consistent with our acceptance that police actions short of holding an individual behind bars or in handcuffs can be coercive enough to engage the rights protected by ss. 9 and 10 of the Charter.
- [22] While a detention is clearly indicated by the existence of physical restraint or a legal obligation to comply with a police demand, a detention can also be grounded when police conduct would cause a reasonable person to conclude that he or she no longer had the freedom to choose whether or not to cooperate with the police. As discussed more fully in *Grant*, this is an objective determination, made in light of the circumstances of an encounter as a whole.
- [23] However, this latter understanding of detention does not mean that every interaction with the police will amount to a detention for the purposes of the Charter, even when a person is under investigation for criminal activity, is asked questions, or is physically delayed by contact with the police. This Court's conclusion in *Mann* that there was an "investigative

detention" does not mean that a detention is necessarily grounded the moment the police engage an individual for investigative purposes. Indeed, Iacobucci J., writing for the majority, explained as follows:

"Detention" has been held to cover, in Canada, a broad range of encounters between police officers and members of the public. Even so, the police cannot be said to "detain", within the meaning of ss. 9 and 10 of the Charter, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed", or "kept waiting". But the constitutional rights recognized by ss. 9 and 10 of the Charter are not engaged by delays that involve no significant physical or psychological restraint. In this case, the trial judge concluded that the appellant was detained by the police when they searched him. We have not been urged to revisit that conclusion and, in the circumstances, I would decline to do so.

[Emphasis added; at para. 19.]

[24] As explained in *Grant*, the meaning of "detention" can only be determined by adopting a purposive approach that neither overshoots nor impoverishes the protection intended by the Charter right in question. It necessitates striking a balance between society's interest in effective policing and the detainee's interest in robust Charter rights. To simply assume that a detention occurs every time a person is delayed from going on his or her way because of the police accosting him or her during the course of an investigation, without considering whether or not the interaction involved a significant deprivation of liberty would overshoot the purpose of the Charter.

[Emphasis in original.]

[56] The respondent submits that the factual circumstances in *Suberu* are helpful in determining whether the applicant in the instant case was under detention rather than permissible investigative delay. Mr. Suberu was delayed for questioning by a police officer who was investigating a report of use of a stolen credit card at a store. As Mr. Suberu was exiting the store, he referred to another man in the store and said to the officer entering the premises, "He did this, not me, so I guess I can go." The officer saw Mr. Suberu taking the driver's seat of a van and said, "Wait a minute. I need to talk to you before you go anywhere" and questioned Mr. Suberu as follows:

Q. Who's the guy inside you were with?

A. A friend.

Q. What is your friend's name?

A. Willy.

Q. Where are you from?

A. Toronto.

Q. How did you come to be in Cobourg today?

A. Willy asked me to drive him.

Q. From Toronto to Cobourg?

A. Yes.

Q. Who's [sic] van is this?

A. My girlfriend's.

Q. Who is your girlfriend?

A. Yvonne.

- [57] Upon a consideration of all the circumstances in light of the factors identified in Grant at para. 44, the majority in Suberu concluded that the trial judge had not erred in finding, in effect, that Mr. Suberu was not detained within the meaning of the Charter during this delay for investigative questioning. In reaching this conclusion, the learned justices noted that the dialogue was very brief and the officer made no attempt to obstruct Mr. Suberu's movement. On the question of whether a reasonable person in the same circumstances would have concluded, by reason of the state conduct, that they had no choice but to comply, the learned justices noted the absence of any evidence of Mr. Suberu's subjective belief and said mere delay is insufficient to ground a reasonable conclusion in this regard.
- [58] In Robinson, the accused was a passenger in a vehicle subjected to a roadside traffic-stop. After asking the driver for identification, the police officer turned to Mr. Robinson and asked his name. Mr. Robinson replied, "James Budd." The officer returned to his car and ran queries on the names of the driver and passenger. The name James Budd came up as an alias for Mr. Robinson and, as the police database showed that he had two outstanding arrest warrants, he was arrested.
- [59] At trial, Mr. Robinson argued that he was arbitrarily detained when the officer switched his attention from the driver to him and asked for his name. In concluding that Mr. Robinson had failed to establish that he was under police detention, Justice Saunders made the following apposite findings and determinations:
- [32] In the present case, Mr. Robinson's physical presence in the vehicle in and of itself did not equate to a detention. He was not physically restrained. Further, nothing in the circumstances of the traffic-stop created psychological restraint. There was only one officer present, and the officer's physical position, at the driver's door, did not hamper Mr. Robinson's freedom of movement; Mr. Robinson was free to walk away. Cst. McLean had advised the driver of the vehicle that he had been pulled over because of the faulty tail light. Unlike Forsyth, where the passengers' age and relationship to the driver could have been relevant to the police officer's investigation of whether the vehicle was being lawfully operated, Mr. Robinson's identity was of no direct relevance, and objectively Mr. Robinson

could not reasonably have perceived the officer's act of asking for his name to be anything more than a casual inquiry. It was not coercive. It did not significantly interfere with Mr. Robinson's liberty. It could not, in the surrounding circumstances, have created a reasonable apprehension on the part of Mr. Robinson that he had been singled out for focussed police investigation. As in *Mooiman*, Mr. Robinson was, in respect of the officer's exercise of his police powers, simply a bystander, free to co-operate, to remain silent, or to walk away. There is no basis on the evidence to conclude that Mr. Robinson, through being asked his identity, was being detained.

[Emphasis added.]

[60] In *Fillery*, Mr. Milne was a passenger in a vehicle driven by Mr. Fillery. In the course of a dual-purpose traffic-stop in which one of the two purposes was to identify the occupants in furtherance of a drug trafficking investigation, Mr. Milne was asked to identify himself. In response, he said he did not have documentary identification, but stated his name and date of birth. The uncontroverted evidence of the officer was that the traffic-stop took less than 15 minutes; that his interaction with the vehicle occupants was "low-key"; that he was calm and relaxed; and that voices were not raised, anger was not displayed, and no threats were uttered. Mr. Milne did not testify. Justice Williams, after a thorough consideration of *Suberu* and other apposite cases, and of the specific circumstances in the case before him, concluded that he was unable to find that Mr. Milne was detained. In so doing, he said:

[57] To summarize, it is my understanding of the authorities that where the police make a valid traffic-stop, the officer is not prohibited from asking or making inquiries beyond the immediate purpose of the stop. A certain level of inquiry relating both to the driver and the passengers is permitted without the circumstances constituting a detention. The matter of asking for identification is an example of a low level of intrusion that falls well short of any basis to find detention. [Emphasis added]

[61] In *Fillery*, Justice Williams described the request for, and provision of, identification as "relatively innocuous" (at para. 60). He noted that the officer's contact with Mr. Milne was "brief and non-confrontational" (at para. 59). He also commented on the absence of any evidence of Mr. Milne's character or personal circumstances that might support a finding of psychological detention.

[62] The facts in *Robinson* and in *Fillery* are similar to those in the case at bar. In all three cases, the accused was a passenger who was asked to identify himself in the course of a brief and uneventful traffic-stop. The requests were casual inquiries that could not reasonably have been perceived as focusing on the accused, and their movements as passengers were not restricted. The passengers were simply bystanders in an investigation of the driver; they were free to cooperate, remain silent, or walk away. There was also nothing in all the circumstances as established in the evidentiary record of each case, that could reasonably support a finding of psychological detention.

- [63] A distinguishing circumstance between the instant case and the other two is the fact that the applicant identified himself by means of an identification card that was temporarily taken from him during the stop. In this regard, the applicant cites: *R. v. Loewen*, 2018 SKCA 69 [Loewen] in support of his position that Cst. Lim's act of taking and holding his identification card for a period of time during the stop is a significant circumstance in determining whether the applicant was under police detention.
- [64] In *Loewen*, the accused was a passenger in a vehicle pulled over for speeding. After Cst. Smith asked the driver for his licence and registration, he asked Mr. Loewen for his identification. Both the driver and Mr. Loewen gave Cst. Smith their respective SGI (Saskatchewan Government Insurance) photo-identification cards. Cst. Smith took these cards back to the police vehicle and handed them to his partner for searches on CPIC (Canadian Police Information Centre) and a local police-records system. Based upon information from these searches, Mr. Loewen was arrested for breaching his parole-release conditions.
- [65] At trial, Mr. Loewen argued that the police request for his identification breached his s. 9 Charter right to be free from arbitrary detention, and the court concluded that Mr. Loewen had not been arbitrarily detained. On appeal, Chief Justice Richards, speaking for the court, concluded that the trial judge had erred in failing to find that Mr. Loewen had been psychologically detained in the stop. He found that Mr. Loewen "suffered a significant deprivation of his liberty when Cst. Smith took his identification back to the police car" (at para. 47). He noted that an SGI card was not something that could easily be abandoned, and found that a citizen in Mr. Loewen's circumstances would have reasonably concluded that they had no meaningful option but to remain in the vehicle until the police returned the card.
- [66] In reaching this conclusion, the Chief Justice considered each of the three Grant factors for psychological detention. As for the first factor, he found that a reasonable person in Mr. Loewen's position would: (a) feel that they were the subject of meaningful investigative detention; (b) believe that they could not simply exit the vehicle and walk away because this would entail abandoning what was most people's standard personal identification in that jurisdiction; and (c) perceive that asking the police to return his identification card to him would not have been a viable or realistic option at three o'clock in the morning on a city street.
- [67] In relation to the second factor, the Chief Justice found that the request for Mr. Loewen's SGI card was, in substance, a demand to hand over his identification rather than a request that he identify himself with the choice of how he would do so left for him to decide. The Chief Justice also found it "significant" that Mr. Loewen's identification card was in the police's possession for approximately 30 minutes while Mr. Loewen waited in the car before his arrest.

- [68] As for the third factor, the Chief Justice said there was little to work with; Mr. Loewen had chosen not to testify and although this was not fatal, it deprived the court of any knowledge of his personal perspectives, education, or sophistication.
- [69] Turning to the instant case, the evidentiary record is wanting in relation to the length of time Cst. Lim held the applicant's identification card before returning it to him at the end of the stop. As for evidence of what occurred in this period (as some evidence of how long Cst. Lim held the applicant's identification card), Cst. Lim said he could not recall whether he took the passengers' identification cards back to the police vehicle for computer queries or not. Det.-Cst. Bell, on the other hand, said that after Cst. Lim received the passengers' identification cards, he went to the police vehicle to do queries; however, he also said nothing about the nature of the queries or how much time elapsed before Cst. Lim returned the identification cards and sent the minivan on its way.
- [70] As for other evidence from which reasonable inferences might be drawn as to the length of time that Cst. Lim held the applicant's identification card, Cst. Lim said the entire stop was 12 minutes in length, and that within this 12-minute period, the following transpired before the applicant gave his identification card to Cst. Lim:
- a) Cst. Lim approached the driver and spoke with him;
 - b) the driver produced his driver's licence and registration;
 - c) Cst. Lim returned to the police vehicle and did a computer query on the driver and confirmed that there was a warrant outstanding for a man associated to the driver;
 - d) Cst. Lim returned to the driver and asked him to step out and accompany him to the sidewalk nearby;
 - e) at the sidewalk, Cst. Lim had a conversation with the driver;
 - f) in this conversation, Cst. Lim asked the driver if a man named Takish Ziad was a passenger in the minivan and the driver said "no";
 - g) the driver identified each passenger by name;
 - h) Cst. Lim asked the driver if it would be okay if he asked the passengers for their identification cards;
 - i) Cst. Lim and the driver returned to the driver's door of the minivan and the driver resumed his place in the driver's seat;
 - j) through the driver's window, Cst. Lim asked all three passengers at once if he could see their identification cards; and
 - k) the passengers provided their identification cards to Cst. Lim.

- [71] Taking into consideration the foregoing, I find that the applicant has not established that he was without his identification card for more than a very brief period. The evidence tendered by the applicant does not permit anything more than a finding of an estimated range for this period, which I would set at one-to-three minutes. Accordingly, even at the upper end of this range, the period in question is but one-tenth of the 30-minute period the court in *Loewen* considered a significant circumstance informing the question of psychological detention. I am satisfied the difference between these two periods is an important distinguishing factor between *Loewen* and the instant case.
- [72] Moreover, to the extent that the time of the stop, i.e., 3:00 a.m., was a circumstance of some weight informing the psychological detention found in *Loewen*, it could not be so in the instant case where the stop was mid-day: a time when the various concerns that exist in the dead of night simply do not arise. For example, at 2:40 p.m., the applicant was not hindered by either darkness or a lack of transport options if he wished to leave the vehicle and continue on his way.
- [73] For all these reasons, I am not persuaded, on the basis of *Loewen* or otherwise, that the applicant has established on a balance of probabilities that he was under police detention during the traffic-stop in question. It is well-established in our law that the police may ask, but not compel, passengers in a legitimate traffic-stop to identify themselves. In this regard, the following words of Justice Iacobucci, writing for the majority in *R. v. Mann*, 2004 SCC 52 at para. 19 (adopted by McLachlin CJC and Charron J, in *Suberu* at para. 23), bear repeating:
- "Detention" has been held to cover, in Canada, a broad range of encounters between police officers and members of the public. Even so, the police cannot be said to "detain", within the meaning of ss. 9 and 10 of the Charter, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed", or "kept waiting". But the constitutional rights recognized by ss. 9 and 10 of the Charter are not engaged by delays that involve no significant physical or psychological restraint.
- [74] While the *Grant* factors recognize that the duration of an investigative delay is a circumstance informing the question of psychological detention, in the instant case the delay was very brief.
- [75] As for whether anything turns on whether a passenger is asked to produce identification rather than asked to identify themselves, in my view it does not. An identification card is a convenient and accurate means of identifying oneself. If an identification card is produced and the police officer takes it into their possession, a detention would not be triggered by this act alone; however, as seen in *Loewen*, in which the passenger was deprived of his identification for a relatively lengthy period, this is a circumstance that may weigh in favour of psychological detention. As already noted, no such circumstance exists in the case at bar.

Search and seizure of identification

- [76] The respondent submits that in the absence of a detention of the applicant, the act of the police taking his identification could not breach his s. 8 right to be free from unreasonable search and seizure: citing *R. v. Harris*, 2007 ONCA 574 [Harris]; *R. v. Frank*, 2012 ONSC 6274 [Frank]; *R. v. Daley*, 2015 ONSC 7367 [Daley]; and *Robinson*.
- [77] The respondent says the reasoning in these cases accords with the general principles in *Grant* and *Suberu*, to the effect that a voluntary non-compelled conversation with an individual does not engage Charter-protected rights. The respondent also cites *Fillery*; *Robinson*; *R. v. Mooiman*, 2016 SKCA 43; *Humphrey*; *Frank*; and *Daley*, as cases in which the request for identification from the accused as a passenger in a motor vehicle involved in a traffic-stop did not engage Charter-protected rights. In each of these cases the accused was not detained and the provision of identification information was voluntary.
- [78] In *Harris* at paras. 33 to 34, Justice Doherty said:
- [33] Section 8 of the Charter protects against unreasonable searches or seizures. A seizure is a non-consensual taking by a state agent of anything in which the person asserting a s. 8 right has a reasonable expectation of privacy. The thing taken may be tangible or intangible. Information can be seized. At its most fundamental, s. 8 preserves an individual zone of privacy against state intrusion. The state can enter into that zone if the intrusion meets a reasonableness standard: see *R. v. Colarusso*, 1994 CanLII 134 (SCC), [1994] 1 S.C.R. 20, [1994] S.C.J. No. 2, 87 C.C.C. (3d) 193, at p. 78 S.C.R., p. 233 C.C.C.
- [34] Answers to police questions may or may not give rise to a s. 8 claim. As with other aspects of the s. 8 inquiry, a fact-specific examination of the circumstances is necessary. Where the subject of the questioning is under police detention and reasonably believes that he or she is compelled to provide the information sought in the questions, I do not think it distorts the concept of a seizure to describe the receipt of the information by the police as a non-consensual taking of that information from the detained person.
- [79] In *Frank* at paras. 50 and 51, Justice Code said:
- [50] For all these reasons, I was not satisfied that Frank was "detained" in the front passenger seat during the motor vehicle stop. Absent a "detention", the law is clear that merely asking for identification does not constitute a s. 8 "search or seizure". In *R. v. Harris*, supra at paras. 33-44, Doherty J.A. repeatedly stressed that asking for identification only engages s. 8 Charter interests when the subject of the request is detained:

Answers to police questions may or may not give rise to a s. 8 claim. As with other aspects of the s. 8 inquiry, a fact-specific examination of the circumstances is necessary. Where the subject of the questioning is under police detention and reasonably believes that he or she is compelled to provide the information sought in the questions, I do not think it distorts the concept of a seizure to describe the receipt of the information by the police as a non-consensual taking of that information from the detained person.

...

A person under police detention who is being asked to incriminate himself has more than a reasonable expectation of privacy with respect to the answers to any questions that are put to him by the police. That person has a right to silence unless he or she makes an informed decision to waive that right and provide the requested information to the police: *R. v. Hebert* (1990), 1990 CanLII 118 (SCC), 57 C.C.C. (3d) 1 (S.C.C.). In the circumstances, Harris's identification in response to the officer's question constitutes a seizure and attracts s. 8 protection.

[51] In the case at bar, Frank was not "detained" when he was asked for identification. In these circumstances, Doherty J.A. held in *Harris*, supra at para. 42, that the *Grafe* line of authority applies and the police may "properly request identification" without engaging either s. 8 or s. 9 of the Charter.

[80] In *Daley* at paras. 136-138, Justice Fairburn said:

[136] Mr. Kanthasamy also says that his s. 8 right were breached when his identification was given over and he answered certain questions. The lack of detention is dispositive of the s. 8 issue in this case. As noted by Doherty J.A. in *Harris*, a s. 8 breach arising from information given to the police and any subsequent database search is contingent on the individual being "detained". In *Harris*, at para. 33, Doherty made this point:

Answers to police questions may or may not give rise to a s. 8 claim. As with other aspects of the s. 8 inquiry, a fact-specific examination of the circumstances is necessary. Where the subject of the questioning is under police detention and reasonably believes that he or she is compelled to provide the information sought in the questions, I do not think it distorts the concept of a seizure to describe the receipt of the information by the police as a non-consensual taking of that information from the detained person.

[137] In a similar vein, Doherty J.A. later said that a person who is "under police detention who is being asked to incriminate himself has more than a reasonable expectation of privacy with respect to the answers to any questions that are put to him by the police": *Harris*, at para. 44.

- [138] My finding that Mr. Kanthasamy was not detained means that his s. 8 interests were not triggered when he provided his identification to the police. Nor were they engaged when his identification was checked against the police database. Aside from the fact he was not detained, the police gleaned no information about Mr. Kanthasamy when they checked his identification in the database. As such, to the extent that such information can be considered privacy protected, there was no such information found in this case.
- [81] In Robinson, following a determination that Mr. Robinson was not detained, Justice Saunders concluded that the act of the police asking for his identification was not a search and seizure engaging s. 8 of the Charter, because he was not detained and the request was not an exercise of police power.
- [82] Having due regard for the foregoing, I am not persuaded the applicant has established a breach of s. 8 of the Charter. The law is clear that the police may request, but not compel, identification from persons who are not under police detention. Identification provided in such circumstances is voluntarily given and thus does not constitute an unreasonable search and seizure.

Disposition

- [83] For all the foregoing reasons, Mr. Ali's application for a declaration that his s. 8, 9, and 10 Charter rights were breached is dismissed.

"Bernard J."

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