

CANADA / JUDGMENT

R. v. Ali

2026 ONCA 186

COURT

Court of Appeal for Ontario

DECIDED

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Zarnett, Benjamin; Dawe, Jonathan; Madsen, Lene

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COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Ali, 2026 ONCA 186

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Zarnett, Dawe and Madsen JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Dyllan Ali

Appellant

Chris Rudnicki and Theresa Donkor, for the appellant

Deepa Negandhi, for the respondent

Heard: December 8, 2025

On appeal from the convictions entered by Justice Shannon B. McPherson of the Ontario Court of Justice, on January 18, 2023.

REASONS FOR DECISION

- [1] In July 2021, two Peel Regional Police officers pulled over the appellant, Dyllan Ali, while he was driving a rental car, ostensibly to check whether he was a properly licensed driver. The officers saw what they believed was cannabis packaging and a joint in the vehicle, and decided to search the car pursuant to s. 12(3) of the Cannabis Control Act, 2017, S.O. 2017, c. 26, Sch. 1 (“the CCA”). They did not first advise Mr. Ali of his right to counsel or give him an opportunity to speak with a lawyer.
- [2] One of the officers, PC Bartlett, proceeded to search the car while Mr. Ali stood outside making a videorecording on his phone. PC Bartlett noticed that the leather skirt around the emergency brake handle was loose. He pulled the skirt aside and saw a handgun in a space under the centre console. When PC Bartlett made a signal to his partner, PC Lamarre, Mr. Ali ran away. PC Lamarre apprehended him after a brief foot chase. The handgun PC Bartlett had found turned out to be loaded.
- [3] The trial judge dismissed Mr. Ali’s Charter application claiming breaches of his ss. 8, 9 and 10(b) rights. Her finding that Mr. Ali’s s. 10(b) right to counsel had not been infringed was based in part on her determination that the suspension of Mr. Ali’s s. 10(b) rights that began during the initial traffic stop continued after the stop changed into a CCA search.
- [4] When the trial judge gave her ruling in January 2023, she did not have the advantage of this court’s judgment in *R. v. McGowan-Morris*, 2025 ONCA 349, which held that that detainees’ s. 10 Charter rights are not suspended during CCA searches, absent exceptional circumstances: *McGowan-Morris*, at paras. 84-104. The Crown accordingly concedes on appeal that Mr. Ali’s s. 10(b) rights were infringed when the officers failed to advise him of his right to counsel after they formed the intention of conducting a CCA search of his rental car, and that the trial judge erred by not finding a s. 10(b) breach.

- [5] Since the trial judge found no Charter breaches, she did not consider the issue of exclusion of evidence under s. 24(2). She went on to convict Mr. Ali of multiple firearms offences, all relating to the loaded handgun the police had found under the centre console.
- [6] Mr. Ali appeals his convictions on three grounds, the first of which would, if successful, lead to acquittals being substituted. His second and third grounds, if successful, would both result in a new trial being ordered.
- [7] Mr. Ali's first ground of appeal renews his contention at trial that the police search of the rental car violated his s. 8 Charter rights, and that the gun should have been excluded as a s. 24(2) remedy. Since the gun was critical evidence for the Crown on all counts, success on this ground would entitle Mr. Ali to have acquittals entered.
- [8] Mr. Ali's second ground is that the trial judge made analytic errors in her reasons dismissing his claim that the initial traffic stop was tainted by impermissible racial profiling, and thus violated his s. 9 Charter right. The remedy he seeks on this ground is a new trial at which the racial profiling issue can be relitigated.
- [9] As his third ground, Mr. Ali contends that the evidence of his flight should be excluded under s. 24(2) as a remedy for the now-acknowledged breach of his s. 10(b) rights. Since the trial judge relied on the evidence of his flight to find that the Crown had proved that he had knowledge of the gun in the car, he argues that excluding the flight evidence should also result in a new trial.
- [10] For the following reasons, we conclude that the trial judge did not err in finding that there was no breach of Mr. Ali's s. 8 Charter rights. We thus reject his request that we set aside his convictions and enter acquittals. However, we allow the appeal and order a new trial on the basis of his third ground.
- [11] We agree that Mr. Ali has a viable argument that the evidence of his flight should be excluded as a s. 24(2) remedy for the breach of his s. 10(b) Charter right. However, since deciding this issue would require us to make findings of fact that were not made by the trial judge, we find it preferable to order a new trial and leave the admissibility of the flight evidence under s. 24(2) to be determined by the new trial judge. This makes it unnecessary for us to address Mr. Ali's racial profiling ground, which if successful would also lead to a new trial being ordered. Mr. Ali will be free at his new trial to renew his claim that the initial traffic stop was tainted by racial profiling, and it will be for the new trial judge to assess the evidence, make findings of fact, and apply the governing legal principles to these findings.

A. Did the vehicle search infringe section 8? [12] Mr. Ali's first ground of appeal renews his contention at trial that the police search of the rental car he was driving violated his s. 8 Charter rights. He argues (i) that the police did not have sufficient grounds to conduct a CCA search; and (ii) that PC Bartlett exceeded the bounds of a lawful CCA search when he looked in the space under the centre console.

[13] The relevant portions[1] of Section 12 of the CCA provide as follows:

Transporting cannabis

12 (1) No person shall drive or have the care or control of a vehicle or boat, whether or not it is in motion, while any cannabis is contained in the vehicle or boat.

Exception

- (2) Subsection (1) does not apply with respect to cannabis that,
 - (a) is in its original packaging and has not been opened; or
 - (b) is packed in baggage that is fastened closed or is not otherwise readily available to any person in the vehicle or boat.

Search of vehicle or boat

- (3) A police officer who has reasonable grounds to believe that cannabis is being contained in a vehicle or boat in contravention of subsection (1) may at any time, without a warrant, enter and search the vehicle or boat and search any person found in it. [Emphasis added.]
- [14] The trial judge accepted the evidence that during the initial traffic stop PC Lamarre saw what he believed was an empty open cannabis package fall out of the glove compartment when Mr. Ali reached in to get the car rental agreement. She noted that although Mr. Ali initially disputed that this actually was a cannabis package, he ultimately agreed that it might have been. PC Lamarre also saw what he thought at the time was a cannabis roach in the car's rear floor area, but the officers later determined that it was actually just a piece of cardboard.
- [15] We agree with the trial judge's conclusion that these observations gave the officers objectively reasonable grounds to believe that cannabis was being stored in the vehicle in contravention of s. 12(1) and (2) of the CCA. It could reasonably be inferred that some of the contents of the empty open cannabis package might be either in the vehicle or on Mr. Ali's person. Indeed, when PC Bartlett conducted a pat-down search of Mr. Ali before searching the car, Mr. Ali removed a small baggie of cannabis from one of his pockets. This discovery reinforced the reasonableness of the officers' grounds for believing that there might be more cannabis in the car. In these circumstances, even if PC Bartlett had examined the supposed roach on the rear floor and discovered that it was not actually cannabis, this would not have negated his grounds to continue the search.

- [16] We also do not agree that PC Bartlett exceeded his lawful authority under the CCA when he pulled back the parking brake skirt and looked into the space under the centre console. The trial judge accepted PC Bartlett's evidence that he could see that the leather skirt was "completely unattached from the centre console itself", making the area underneath readily accessible to the driver. This took this space outside the exception in s. 12(2)(b), and brought it within the ambit of PC Bartlett's search powers under s. 12(3).
- [17] We accordingly see no basis for interfering with the trial judge's finding that the police searches of Mr. Ali's person and of the rental car were lawfully authorized under s. 12 of the CCA, and that his s. 8 Charter rights were accordingly not infringed.

B. Should the evidence of Mr. Ali's flight be excluded as a remedy for the breach of his s. 10(b) Charter rights? [18] The Crown concedes that in light of this court's decision in McGowan-Morris, Mr. Ali's s. 10(b) right to counsel was violated when the police formed the intention of searching the rental car under s. 12 of the CCA, but did not advise Mr. Ali of his right to counsel. We agree that the trial judge, who did not have the benefit of McGowan-Morris, erred by finding no s. 10(b) breach.

- [19] Mr. Rudnicki, with his customary candor, acknowledges that the s. 10(b) Charter breach is insufficient on its own to support excluding the gun under s. 24(2), having regard to the factors in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353. However, he argues that an appropriate remedy for the s. 10(b) breach would be to exclude the evidence of Mr. Ali's flight after PC Bartlett found the gun, which the trial judge relied on as evidence supporting the inference that he had knowledge of the gun's presence in the car.
- [20] The trial judge cited five factors that led her to conclude that "the only reasonable inference is that Mr. Ali was in constructive possession of the firearm". The first four factors were that: (i) Mr. Ali had been alone in the rental car; (ii) the place in the car where the gun was hidden was "in close proximity" to the driver's seat; (iii) the hiding place would have been readily accessible to the driver "by simply moving the leather skirt and reaching under the clipped compartment"; and (iv) as a matter of human experience, it was unlikely that the gun's owner would have left it in the car "without a knowledgeable caretaker".
- [21] The fifth factor was Mr. Ali's flight. The trial judge stated:
- Mr. Ali's flight from the police and the timing of the flight immediately upon the discovery of the firearm satisfies me beyond any doubt that he had knowledge of the firearm in the vehicle.
- [22] The Crown notes that since the criminal standard of proof did not require the trial judge to be satisfied "beyond any doubt", the trial judge might still have been satisfied of Mr. Ali's guilt beyond a reasonable doubt even without the evidence of his flight. That may well be. However, we cannot be sure that she would inevitably have reached the same conclusion if she had not relied on the flight evidence.

- [23] The Crown argues further that Mr. Ali's trial counsel did not expressly ask the trial judge to exclude the evidence of flight if she found a breach of Mr. Ali's s. 10(b) rights but no other Charter violations. That is also true. However, Mr. Ali's Charter notice was framed broadly to request "s. 24(1)/s. 24(2) exclusion", and in his oral submissions trial counsel requested exclusion of "everything the Crown seeks to be tendered here". Given the large number of different Charter breaches Mr. Ali's trial counsel was alleging, we are not persuaded that his failure to expressly address every possible permutation of potential breaches and remedies forecloses Mr. Ali from arguing on appeal that the flight evidence should be excluded as a remedy for the now-conceded breach of his s. 10(b) Charter right.
- [24] Evidence may be excluded under s. 24(2) when it was "obtained in a manner that" infringed the accused's Charter rights. This requires a consideration of the "temporal, contextual and causal" connection between the breach and the obtaining of the evidence at issue: see e.g., *R. v. Plaha* (2004), 188 C.C.C. (3d) 289 (Ont. C.A.), at para. 45; *R. v. Pino*, 2016 ONCA 389, 130 O.R. (3d) 561, at paras. 50-78. There was plainly a close temporal and contextual link between the breach of Mr. Ali's s. 10(b) Charter rights that occurred when the search commenced, and his flight a few minutes later. Moreover, Mr. Rudnicki argues that there may also have been a causal connection, since if Mr. Ali had been advised of his right to counsel and had exercised this right, the advice he received from counsel might have led him to act differently and not run away when PC Bartlett found the handgun.
- [25] The Crown disputes that Mr. Ali's flight was sufficiently connected to the s. 10(b) breach to be subject to exclusion under s. 24(2), making two main arguments in support of this position. First, the Crown submits that it would be speculative to conclude that Mr. Ali would have chosen to call counsel if he had been given the opportunity to do so, or that advice from counsel would have changed his behaviour. Second, the Crown argues that even if the trial judge had found a s. 10(b) violation she might also have found that Mr. Ali's flight was "spontaneous", making the connection between the breach and his flight "tenuous and remote": see e.g., *R. v. Pearson*, 2017 ONCA 389, 348 C.C.C. (3d) 277, at para. 31, leave to appeal refused, [2017] S.C.C.A. No. 465.
- [26] The Crown's arguments fail to account for the location of the burden of proof. In *R. v. Bartle*, [1994] 3 S.C.R. 173, at pp. 209-10, Lamer C.J.C. held that although Charter applicants bear the overall burden of establishing that evidence should be excluded under s. 24(2), the burden of persuasion on specific issues can shift to the Crown. In particular, he held at p. 211:
- [T]he Crown should bear the legal burden (the burden of persuasion) of establishing, on the evidence, that the s. 24(2) applicant would not have acted any differently had his s. 10(b) rights been fully respected, and that, as a consequence, the evidence would have been obtained irrespective of the s. 10(b) breach.
- Lamer C.J.C. added that "[i]f the state subsequently claims that there was no causal link between this breach and the obtaining of the evidence at issue, it is the state that should bear the burden of proving this assertion": *Bartle*, at pp. 212-13.

- [27] In short, it is not Mr. Ali's burden to demonstrate that he would have called counsel if he had been advised of his rights and given the opportunity to do so, nor is he required to show that the advice of counsel would have caused him to act differently. Rather, it is the Crown's burden to disprove one or both of these things on a balance of probabilities. The trial judge, who found no Charter violations and thus did not conduct a s. 24(2) analysis, made no findings in favour of the Crown on these issues.
- [28] That said, the trial judge also did not make the factual findings that would be necessary for us to carry out a proper s. 24(2) admissibility analysis on appeal, as she did not make factual findings on a number of important issues that bear on both the first and second Grant lines of inquiry: *Grant*, at paras. 72-78.
- [29] With respect to the first Grant line of inquiry, which calls for an assessment of the seriousness of the Charter-infringing state conduct, the trial judge made no findings about whether the officers' mistaken belief that they did not have to advise Mr. Ali of his s. 10(b) Charter rights and give him an opportunity to speak with counsel was reasonable and held in good faith. PC Bartlett testified that he believed that no right to counsel was required during CCA detentions "[b]ecause it's a provincial offence", while PC Lamarre testified that he had been trained that detainees only needed to be advised of their right to counsel if the detention extended "for a long period of time". The trial judge mentioned PC Lamarre's evidence in passing but made no express findings.
- [30] With respect to the second Grant line of inquiry, which considers the impact of the Charter breach on the accused's Charter-protected interests, the trial judge made no findings about how the s. 10(b) breach affected Mr. Ali's protected Charter interests, including his right against self-incrimination.
- [31] We are not a fact-finding court, and it is inappropriate for us to conduct our own s. 24(2) analysis when the evidential record and findings of fact in the court below are insufficient for this purpose: see e.g., *United States v. Ighedoise*, 2019 ONCA 937, at para. 52; *R. v. Bruyere*, 2012 ONCA 329, 291 O.A.C. 1481, at paras. 16-18.
- [32] It would not be appropriate for us to make our own findings of fact based on the paper trial record. Moreover, if we were to find that the evidence of Mr. Ali's flight should have been excluded under s. 24(2), the remedy would be to order a new trial rather than enter acquittals. In this context, we find it preferable to leave the question of exclusion under s. 24(2) to the new trial judge, who will be able to make the required findings of fact on a proper record.
- [33] We accordingly allow the appeal on the basis that the trial judge made a "wrong decision on a question of law" by finding that Mr. Ali's s. 10(b) Charter rights were not infringed: *Criminal Code*, R.S.C. 1985, c. C-46, ss. 686(1)(a)(ii). Pursuant to s. 686(2)(b), we set aside his convictions and order a new trial.

[34] Our conclusion that a new trial is required on this ground makes it unnecessary for us to address Mr. Ali’s argument that the trial judge erred in her analysis of his racial profiling claim, since if this argument were successful the remedy would also be to order a new trial. A new trial that is ordered under s. 686(2)(b) of the Criminal Code is a full trial de novo, at which the new trial judge is not bound by any Charter or other admissibility rulings made at the first trial: see e.g., *Duhamel v. The Queen*, [1984] 2 S.C.R. 555; *R. v. Hilson*, [1958] O.R. 665 (C.A.), at pp. 667-668. It will accordingly be for the new trial judge to decide any such issues that arise, including the question of whether the lawfulness of the initial traffic stop was tainted by racial profiling and, if so, what remedy should be granted to Mr. Ali, based on the evidence at the new trial and the legal principles that govern racial profiling claims: see e.g., *R. v. Dudhi*, 2019 ONCA 665, 147 O.R. (3d) 546; *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692.

C. Disposition [35] In the result, the appeal is allowed, Mr. Ali’s convictions are set aside, and a new trial is ordered on all counts. Pursuant to s. 686(5) of the Criminal Code, R.S.C. 1985, c. C-46, and in accordance with Mr. Ali’s request in his Notice of Appeal, the new trial shall be held before a court composed of a judge and jury.

“B. Zarnett J.A.”

“J. Dawe J.A.”

“L. Madsen J.A.”

[1] Subsection 12(4) of the CCA deals with medical cannabis and was not engaged in Mr. Ali’s case.

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