

CANADA / JUDGMENT

R. v. Choi

2021 BCCA 410

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 410 R. v. Choi

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Choi,

2021 BCCA 410

Date: 20211101

Docket: CA46522

Between:

Regina

Respondent

And

Sung Hwan Choi

Appellant

Before:

The Honourable Madam Justice Dickson

The Honourable Madam Justice Fisher

The Honourable Mr. Justice Voith

On appeal from: An order of the Provincial Court of British Columbia, dated
May 23, 2019 (R. v. Choi, 2019 BCPC 283, Vernon Docket 50863-1).

Counsel for the Appellant, appearing via videoconference:

J.M. van der Walle

Counsel for the Respondent, appearing via videoconference:

E. Laurie

Place and Date of Hearing:

Vancouver, British Columbia

December 3, 2020

Place and Date of Judgment:

Vancouver, British Columbia

November 1, 2021

Written Reasons by:

The Honourable Madam Justice Dickson

Concurred in by:

The Honourable Madam Justice Fisher

The Honourable Mr. Justice Voith

Summary:

The appellant challenges his conviction for possession of fentanyl and heroin for the purpose of trafficking. At trial the judge admitted the evidence of some drugs as well as the appellant's statement to police, despite finding that his s. 10(b) Charter rights were breached when he was questioned on arrest and s. 8 Charter rights were breached when he was strip searched. The appellant argues the judge erred by ruling that the drugs and police statement were admissible and that the verdict was unreasonable. The Crown responds that the judge erred by finding the appellant was strip searched and by characterizing the s. 10(b) breaches as moderately serious and impactful, and that his decision to admit the impugned evidence and convict the appellant should be sustained on appeal. Held: Appeal dismissed. There is no reason to interfere with the trial judge's decision to admit the drugs and the statement, and the verdict was not unreasonable. In addition, the search was not a strip search given that strip searches are limited to situations where the area of the body inspected is inherently private, whether exposed or covered by an undergarment.

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Reasons for Judgment of the Honourable Madam Justice Dickson:

- [1] Sung Hwan Choi appeals his conviction for possession of a single package of fentanyl and heroin for the purpose of trafficking in the context of a dial-a-dope operation. The trial judge admitted the drugs and Mr. Choi's statement to police despite having found that his s. 10(b) Charter rights were breached when he was questioned on arrest and his s. 8 Charter rights were breached when he was strip searched at the police station. The appeal raises issues concerning the definition of a strip search articulated by the Supreme Court of Canada in *R. v. Golden*, 2001 SCC 83 and the application of recent jurisprudence on s. 24(2) of the Charter. It also requires this Court to decide if the verdict was reasonable given an alleged gap in the evidence regarding the single package of drugs seized by police.
- [2] For the reasons that follow, I would dismiss the appeal.

Background

- [3] On October 27, 2017, police were involved in an investigation into dial-a-dope drug trafficking in Vernon, B.C. As part of that investigation, they conducted surveillance of a vehicle occupied by a driver and a front seat passenger apparently engaged in such activity. Based on their observations, they decided to arrest the occupants of the vehicle. Cpl. Pollock arrested the driver, Dawn Larson. Cpl. Fradette arrested the passenger, Mr. Choi.
- [4] As Cpl. Fradette approached the passenger side of the vehicle to make the arrest, Cpl. Pollock noticed Mr. Choi manipulating something around his pocket or pants. He pointed this out to Cpl. Fradette, who saw a small package he believed to be drugs located between Mr. Choi's legs on the car seat. Cpl. Fradette told Mr. Choi that he was under arrest, directed him to get out of the car and handcuffed him, then asked Cst. Catton to watch him while he retrieved his notebook. When he returned, Cpl. Fradette provided Mr. Choi with his Charter rights and the police caution. In response, Mr. Choi asked to speak to a lawyer.
- [5] Cst. Catton conducted a pat-down search of Mr. Choi incidental to the arrest after Cpl. Fradette had advised him of his Charter rights. He confirmed that Mr. Choi was aware of his rights, but did not ask if he wanted to speak to a lawyer. Nor did Cpl. Fradette tell Cst. Catton that Mr. Choi had already asserted his right to consult counsel.

- [6] When he was conducting the pat-down search, Cst. Catton felt a bulge in Mr. Choi's jacket pocket and asked "what is that?" Mr. Choi replied that it was "more stuff". Suspecting he meant drugs, Cst. Catton removed a sandwich bag from the jacket pocket. The bag contained 44 colour-coded packages of cocaine, methamphetamine and a heroin and fentanyl mixture, commonly referred to as a "dealer pack". The jacket also contained a wallet, \$70 in cash (not in the wallet) and some marijuana.
- [7] Cpl. Pollock transported Mr. Choi and Ms. Larson to the police station and Cst. Catton and Cpl. Fradette searched the vehicle. Several cellphones and other items related to the investigation were located and seized, including a small package the Crown argued at trial was the same package Cpl. Fradette saw between Mr. Choi's legs on the car seat. The package contained a 0.29 gram mixture of heroin and fentanyl.
- [8] At the police station, Cpl. Pollock searched Mr. Choi as part of the booking-in process. The search occurred in the booking-in area, which is monitored by a video-recording camera that broadcast to another room containing several screen monitors. A female guard was working at a computer behind the desk at the time. After obtaining Mr. Choi's personal information, Cpl. Pollock followed his usual booking-in practice, which is designed to minimize physical contact while ensuring that individuals placed into police cells have no means of harming themselves and no access to consuming drugs.
- [9] Cpl. Pollock began the search by removing Mr. Choi's handcuffs. He had Mr. Choi remove his own shoes and jacket, and, after offering him others, cut the drawstring on his pants for safety reasons. Next, he directed Mr. Choi to stand facing the wall and place his hands on the wall to steady himself. Cpl. Pollock then lifted up Mr. Choi's shirt to the mid-chest area to see if there was anything in it. When he did so, a small part of the waistband of Mr. Choi's underwear was visible above the waistband of his pants.
- [10] Cpl. Pollock pulled the elastic waistband of Mr. Choi's pants away from his body and examined it for weapons and drugs. In doing so, he was able to see the top of Mr. Choi's underwear all the way around his waist. Holding the waistband of Mr. Choi's pants back slightly, Cpl. Pollock ran his fingers around it and visually inspected the waistband of his underwear to check for hidden items. Next, after letting the waistband of the pants go, he felt down each of Mr. Choi's legs and inspected the pants pockets, at which point the search was over. The entire booking-in process took about six minutes. The waistband aspect of the search lasted about ten seconds. Nothing was located in the course of the search.
- [11] When the booking-in process was complete, Mr. Choi spoke to counsel. Shortly thereafter, he provided a warned statement to Cpl. Pollock. In the statement, Mr. Choi admitted that he was selling drugs that day, that one of the seized cell phones was a drug phone and that he had made one sale of \$50, so \$20 of \$70 in his jacket pocket belonged to him. He also told Cpl. Pollock that he used marijuana and cocaine.

At Trial

- [12] Mr. Choi and Ms. Larson were jointly charged with three counts of possession for the purposes of trafficking in relation to the seized cocaine, heroin and fentanyl mixture and methamphetamine. At the outset of the trial, they applied for the exclusion of the evidence on the basis that the police lacked reasonable grounds for their arrests. Mr. Choi also alleged that Cst. Catton breached his s. 10(b) Charter rights when he questioned him during the pat-down search and that Cpl. Pollock unlawfully strip searched him at the police station. He admitted that he made his warned statement to Cpl. Pollock voluntarily.
- [13] The parties agreed that the evidence of Cpl. Pollock, Cpl. Fradette and Cst. Catton would be heard in the voir dire on the alleged Charter breaches, including their trial evidence. As to exhibits, Crown counsel advised that Cst. Catton was the exhibits officer and he understood that neither accused took issue with the care and continuity of the exhibits. He also advised that he intended to lead Cst. Catton through his evidence and "if my friends have any concern with what I am doing I am quite confident they'll let me know". Following these introductory remarks, he called the Crown witnesses, each of whom testified about their observations and beliefs in connection with their dealings with Mr. Choi.

Voir Dire

- [14] Cpl. Pollock was the first Crown witness. After describing the investigation and arrests, he testified regarding his search of Mr. Choi at the police station. In doing so, he played the video of the search, which was marked as an exhibit. The video shows that those parts of Mr. Choi's underwear covering his buttocks and groin areas were not rendered visible in the course of the search.
- [15] Cpl. Pollock began this part of his testimony by explaining the purpose of the search, namely, to ensure that Mr. Choi had no means to harm himself and no access to further drugs. He also stated that, as a matter of policy, he had followed the same procedure throughout his 15-year career when booking-in prisoners. Specifically, he stated, "we have to search everybody coming into cells for any contraband, weapons, anything that can harm them, and to--in cells and get them down to one layer of clothing and it's a regular I do a thorough search, checking anywhere where something could be hidden " He went on to state that it was common for people to bring drugs and needles into the cells and that the waistband is a common place in which to hide such things, which is why he pulled the waistband of Mr. Choi's pants away from his body during the search. He stated further that "needles are a very common thing in Vernon and I don't like sticking my hands anywhere I can't see for my own safety. I don't want to get poked."
- [16] On cross-examination, Cpl. Pollock testified that he did not believe Mr. Choi had hidden drugs in his underwear, nor did he believe that he was conducting a strip search. Rather, "[t]o me this was a standard search, part of the booking-in process. I mean I considered it still to be a search incidental to arrest". However, he accepted that the search could be

interpreted as a strip search under the R.C.M.P. National Guidelines definition, namely, "the removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of their private areas, genitals, buttocks, breasts, or undergarments". He went on to state that, while he did not mean "to split hairs," he did not "pull [Mr. Choi's] pants down and have a good look at the underwear". Rather, he said, he visually inspected "the area of the waistline to make sure there was nothing there and in doing so I exposed some of the underwear. If that's a strip search, it's a strip search, and I didn't intend it to be I never pulled the underwear away."

- [17] Cpl. Pollock also testified that he did not seek authorization for the search from a senior officer, as is required for a strip search because he did not believe that he was conducting a strip search. He acknowledged that, while he did not recall receiving specific training on strip searches, he would have read the R.C.M.P. policy at some point. However, he stated "[t]he exposure of the undergarment - obviously I missed something in there, Your Honour. I - I see the - I see the issue. I didn't believe it to be a strip search at the time."
- [18] Cpl. Fradette was the next Crown witness. He described arresting Mr. Choi, at which point, he said, "I could see a little baggy between his legs on the seat that I believed was drugs". He also confirmed that he assisted Cst. Catton with the search of the vehicle "for evidence in relation to the offence".
- [19] Cst. Catton was the final Crown witness. He testified that he joined Cpl. Pollock and Cpl. Fradette at the scene of the arrest and briefly took custody of Mr. Choi. Cst. Catton confirmed that he conducted a pat-down search of Mr. Choi incidental to the arrest and, after feeling a bulge in his jacket pocket, retrieved a sandwich bag full of drugs from his jacket before returning him to Cpl. Fradette's custody. He also confirmed that prior to retrieving the drugs he asked Mr. Choi about the bulge in his pocket, but did not determine whether Mr. Choi wanted to speak to a lawyer before questioning him about the bulge.
- [20] Cst. Catton went on to say that he was designated the exhibit officer for the investigation. He testified that, as such, his task was to formally seize and catalogue any exhibits believed to be important to the investigation that he or other officers located and to take photographs of the seized exhibits at the detachment. On direct examination, he had this exchange with Crown counsel regarding photograph 32:

Q: Constable, if you could turn to page 16, please, and photograph 32, now this is a photograph of a single individually-prepackaged quantity of heroin and Fentanyl that was located on the passenger seat between the legs of Mr. Choi?

A: Yes, Your Honour, that's what I was made aware of. I wasn't the one that located it, but I was advised that.

Q: And - but you - and then you formally seized it and had a sample of that sent off as well?

A: Yes, that's correct, Your Honour.

- [21] Neither defence counsel objected to these questions or answers. Neither Mr. Choi nor Ms. Larson testified on the voir dire.
- [22] At the conclusion of the voir dire, Mr. Choi argued that he was unlawfully arrested and unlawfully searched incidental to the arrest, and thus that his rights under ss. 8 and 9 of the Charter were violated. He also argued that his s. 10(b) Charter rights were violated when Cst. Catton asked him about the bulge in his jacket. In his submission, the police did not have reasonable and probable grounds to arrest him and Cst. Catton was not entitled to search or question him. Nor, he submitted, was Cpl. Pollock entitled to strip search him at the station, which he did in an unreasonable way.

Voir Dire Ruling on Charter Violations

- [23] The judge found that the police had reasonable and probable grounds to arrest Mr. Choi and he was not detained arbitrarily. However, he concluded the search at the police station fell within the definition of a strip search articulated by the Supreme Court of Canada in *Golden*. In reaching this conclusion, he cited the definition in *Golden* set out at para. 47 of the reasons: "the removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person's private areas, namely genitals, buttocks, breasts (in the case of a female), or undergarments". He also noted that, in *Golden*, the Court distinguished strip searches from less intrusive "frisk" or "pat-down" searches, "which do not involve the removal of clothing, and from more intrusive body cavity searches, which involve a physical inspection of the detainee's genital or anal regions": at paras. 53-54.
- [24] The judge observed that the reference in *Golden* to the removal of clothing could mean that what occurred in Mr. Choi's case was closer to a pat-down search than a strip search. However, he noted there was no argument on that point, so he did not rely on it: at para. 55. He went on to conclude that the search Cpl. Pollock conducted was a strip search:
- [55] I accept that a strip search includes the re-arrangement of clothing to allow a visual inspection of underwear and does not require that clothing be removed. A lawful strip search can only be done incident to a lawful arrest for the purpose of discovering weapons or evidence related to the arrest and police must establish reasonable and probable grounds justifying the strip search itself. This was a search incident to a lawful arrest. I find that this was a strip search.
- [56] I find that Cpl. Pollock purposefully inspected the entire waistline including the waistline of Mr. Choi's underwear in his search because the purpose of the search was to find anything that might be concealed. A belt or elastic waist of pants created "tension", as he described it. He felt he had to inspect that as a place where items might be hidden. The waistband of underwear also creates "tension". Visually inspecting the underwear fulfils the purpose of the search and is consistent with inspecting the waistband of pants. I am sure that is why he testified that his intention was to visually inspect the waistline and that it did not look like there was anything in the underwear.

- [25] The judge also concluded that Cst. Catton violated Mr. Choi's s. 10(b) Charter rights when he asked him about the bulge in his jacket pocket after Mr. Choi had told Cpl. Fradette he wanted to speak to a lawyer. In doing so, he found "the police officers were careless in not communicating with each other clearly," Cst. Catton "expected an inculpatory response" and, while he tried to ensure that Mr. Choi was fully informed of his Charter rights, had he known that Mr. Choi had asserted his right to counsel, Cst. Catton may have been more diligent about respecting his obligation to hold off asking potentially incriminating questions: at paras. 63, 66.
- [26] After the judge delivered his ruling, the parties made their arguments on s. 24(2) of the Charter. Mr. Choi submitted that the connection between the ss. 8 and 10(b) Charter breaches and the discovery of the evidence, together with the circumstances, warranted its exclusion. His counsel also advised the judge that he would not be making any arguments in the trial if the evidence, or part of it, was ruled admissible. In response, the judge suggested it was possible that he might exclude the drugs, but admit Mr. Choi's statement to Cpl. Pollock. His counsel replied that was "a nuance that I hadn't really considered," but made no further submissions with respect to the possibility.
- [27] Crown counsel argued that the drugs found in the pat-down and vehicle searches were admissible. However, he did not seek the admission of Mr. Choi's statement to Cst. Catton made during the pat-down search.
- [28] The judge delivered his ruling on s. 24(2) of the Charter the same day counsel made their arguments, with written reasons to follow. He found that the drugs in the car and the drugs on Mr. Choi were sufficiently connected to the Charter violations to engage s. 24(2), but that his statement to Cpl. Pollock at the police station was not obtained in a Charter-infringing manner. Then, "balancing the various factors," he excluded the drugs found on Mr. Choi, but admitted the package of drugs found in the car. After the judge announced the ruling, Mr. Choi's statement was marked as a trial exhibit and the proceedings were adjourned.

Voir Dire Ruling on s. 24(2) of the Charter

- [29] The judge began his written reasons by summarizing his conclusions on the ss. 8 and 10(b) Charter breaches and outlining his factual findings. In describing the search at the station, he stated that the video showed "more than the waistband of Mr. Choi's underwear became visible" during the search, but did not say how much of the underwear could be seen. He also stated that Cpl. Pollock testified he could see the top of the underwear going all the way around but did not have a good look at it and that he did not believe, or have reason to believe, Mr. Choi had hidden drugs in his crotch or underwear: at paras. 11-12. He stated further that Cpl. Pollock regularly conducted such searches for anyone going into cells, he was aware of Golden but did not think it applied and he knew that a number of additional steps were required to conduct a strip search: at paras. 12-14.

- [30] Next, the judge reviewed and applied the salient legal principles. On the threshold question of whether the Charter breaches were too remote from the evidence to justify its exclusion, he found there was a temporal and contextual connection between the drugs located on the front passenger seat and the s. 10(b) violation, which was part of the arrest and occurred a few minutes later: at para. 18. He also found the s. 10(b) violation related directly to the drugs located on Mr. Choi "temporally, contextually and causally": at para. 19. As to the search at the police station, he said this:
- [20] With respect to the strip search, there was no causal connection to the drugs and other evidence, but there was a temporal connection. It followed as a matter of course after police found the drugs and other items. There is a temporal and contextual connection between the strip search and the seized items.
- [31] Turning to Mr. Choi's statement to Cpl. Pollock, the judge found that it was entirely disconnected from the Charter breaches:
- [21] Mr. Choi's voluntary statement, Exhibit 3 in the voir dire, was obtained after he had been at the police detachment for some time and received legal advice. There was no argument advanced that it was obtained in violation of the Charter. There is nothing in it that suggests it may have been influenced by the prior Charter violations. It was not caused by the prior Charter violations and I find the legal advice and passage of time both serve to entirely disconnect it from the prior Charter violations. It was too remote and not obtained in a manner that violated his rights. The threshold test is not met for it. It is admissible at trial.
- [32] The judge went on to consider the three factors identified in *R. v. Grant*, 2009 SCC 32, namely, the seriousness of the Charter-infringing conduct, the impact of the breach on the Charter-protected interests of the accused and society's interest in the adjudication of the case on its merits. He described Cst. Catton's failure to hold off questioning Mr. Choi as "careless" and exhibiting neither good faith nor bad faith, and he characterized the breach as moderately serious misconduct: at para. 26. As to the search conducted by Cpl. Pollock, the judge found it was "at the lowest end of strip searches," but nevertheless "very serious Charter infringing conduct": at paras. 30-31.
- [33] The judge stated that the aggravating aspects of the search included its recording and potential visibility to others, Cpl. Pollock's failure to obtain prior authorization, the lack of independent grounds and its conduct as a matter of policy. He found the fact that many arrestees were subjected to the same kind of search in the preceding 15 years made it a more serious violation and that Cpl. Pollock's lack of training on strip searches made it a very serious systemic problem. On the other hand, he noted, the search was brief and not intended as a strip search, "the intrusion was as minimal as possible" and it was part of an otherwise lawful search conducted for a proper purpose. In addition, he found, there was no visual or physical inspection of exposed buttocks or genitals and no intentional misconduct or bad faith, and Cpl. Pollock was otherwise a diligent officer respectful of Charter values: at paras. 27-30. In sum, he concluded, the very serious nature of the Charter infringing strip

search strongly supported exclusion of the evidence despite the absence of a causal connection: at para. 31.

- [34] As to the impact of the breaches on Mr. Choi's Charter-protected interests, the judge found that Cst. Catton's Charter-infringing question significantly impacted those interests and tended to favour exclusion of some evidence. He also found that Cpl. Pollock's search of Mr. Choi "was a moderately significant invasion of his privacy interests": at para. 44. In reaching this conclusion, the judge rejected Crown counsel's submission that lifting up Mr. Choi's shirt to inspect the waistband of his pants and visually inspect his underwear was a legally "gray area". Citing paras. 47 and 94 of *Golden*, he considered it clear that searches should generally be limited to searching over the top of clothing:
- [38] [Paragraph 94 of *Golden*] makes it clear that searches should generally be limited to a search over top of clothes that does not involve lifting or re-arranging clothing. Police may only go further where circumstances require it. There was no evidence in this case that anything more than a frisk search was required. Although the officer did it to increase his safety in case there was a sharp object in that area, he did not even suspect that he might encounter such an object. Cpl. Pollock's strip search was part of his usual routine with every person he booked into custody. The court in *Golden* also differentiated between those entering a prison, where a more intrusive search may be justified, and those who are detained at a police station - even overnight - who should not be so searched as a matter of routine.
- [35] The judge went on to say that, even if visually inspecting Mr. Choi's underwear was a "gray area," Cpl. Pollock should have erred on the side of caution and treated the search as a strip search: at para. 39. He stated that in *Golden* the Court "seems to suggest that [strip searches] are inherently humiliating, degrading and will always be serious infringement of privacy and personal dignity," but "if those statements are considered to be categorical, they would preclude an assessment of the impact of a wrongful strip search on a person's protected interests in a particular case", which must be done under s. 24(2): at para. 40. He also observed that some people wear clothing that exposes their underwear, some undergarments are meant for public display and some people may find others viewing their underwear a significant intrusion on their privacy, but others may find it of little or no consequence:
- [42] For most people, having others view, let alone inspect, their underwear - even the waistband - will be a significant intrusion on their privacy. For some it may be highly invasive. For others it may be of little or no consequence. Inspection of undergarments should not be an area of uncertainty, leaving police to guess whether lifting a shirt to conduct an otherwise lawful search might expose underwear and whether it is permissible in the circumstances. The violation of Charter rights should be prevented.
- [36] Because having others view their underwear could provoke differing responses in different people, the judge considered a "bright line" approach to be desirable. In his view, such an approach would create certainty and promote Charter values:

- [43] A bright line creates certainty and promotes Charter values by ensuring that privacy will be protected rather than requiring a review of judgment calls by police after the fact - a standard set decades ago. It helps protect all citizens and it protects police and the state from possibly being deprived of otherwise probative evidence. The result for police is not novel and is fairly simple: follow the guidelines set out in *Golden*, unless the person clearly waives their rights in accordance with the law, and err on the side of caution. The Crown had ample opportunity to call evidence to support a submission that following *Golden* would create havoc or be overly burdensome for police. No evidence was led on the issue. Following the law and erring on the side of caution when in doubt may take more time, but that is part of the role of police - to respect Charter values and protect everyone's privacy.
- [37] Applying a bright line approach, the judge found that the search was a moderately significant invasion of Mr. Choi's privacy interests. In reaching this conclusion, he noted that it had no visible impact on Mr. Choi, but occurred when he would have felt compelled to follow police directions. He also noted that, while the search was brief, it was broadcast elsewhere in the station: at para. 44.
- [38] The third Grant factor that the judge considered was society's interest in an adjudication of the case on the merits, which clearly favoured the admission of the evidence:
- [45] All of the evidence sought to be tendered is real, reliable and probative of the charges. Drug trafficking is pernicious and harms society in many ways, directly and indirectly. These are serious charges, especially Count 2 where the substance includes fentanyl. The importance of the evidence to the prosecution's case is also a factor: excluding highly reliable evidence that will, in effect, terminate or eviscerate the state's case would likely have a negative impact on the repute of the administration of justice. Excluding such evidence would significantly hinder, if not preclude, a trial on the merits. As conceded by Mr. Choi, this line of inquiry favours admission of the evidence.
- [39] Finally, the judge conducted the requisite balancing exercise. In doing so, he acknowledged Mr. Choi's submission that the analysis in *R. v. McGuffie*, 2016 ONCA 365, mandated exclusion of the evidence because the first two Grant factors pulled in that direction: at para. 47. However, he remarked, the comments in *McGuffie* that he relied upon were made in the context of numerous and significant Charter violations before and leading to the discovery of the evidence, which differed from this case:
- [48] [The comments at paras. 62 and 63 of *McGuffie*] were made in the context of numerous and very significant Charter violations that occurred before and led to the discovery of the evidence against the accused and the reasons must be read in that light. In this case, the factual matrix is different. The Crown does not seek to have Mr. Choi's reply to Cst. Catton admitted. That was the only evidence obtained as a result of a Charter breach.

- [40] The judge concluded his reasons by explaining his view that the drugs found on Mr. Choi should be excluded and the drug package found in the car should be admitted. As to the latter, he said this:
- [50] The drug package in the car was in plain view. Mr. Choi had a minimal expectation of privacy in the vehicle. There was no causal connection between the evidence and the Charter violations. Excluding it would effectively terminate his prosecution. On balance, he has not met the test for its exclusion. For similar reasons, he has not met the test for exclusion of other items that are not controlled substances. They are pieces of evidence that may assist in proof of possession for the purpose of trafficking. In and of themselves, Mr. Choi has little or no privacy interest in them and there was no significant impact on his privacy rights. They were all properly obtained pursuant to lawful arrests. They are admissible.

Trial Proceedings

- [41] When the trial resumed, the admissible exhibits from the voir dire were marked as trial exhibits. Then counsel made their closing submissions.
- [42] Crown counsel invited the judge to convict Mr. Choi of simple possession of the single package of 0.29 grams of heroin and fentanyl depicted in photograph 32, which had been marked a trial exhibit. He submitted that, while Mr. Choi's statement to Cpl. Pollock suggested the package was possessed for purposes of trafficking, it was possible he possessed it for a different reason and, therefore, a conviction for possession for the purpose of trafficking would not be justified. In response, the judge challenged the proposition that there were other reasonable possibilities for which Mr. Choi could have possessed the single package of heroin and fentanyl. He emphasized there was concrete evidence that Mr. Choi did not use heroin, then asked, rhetorically, "what, on the evidence or the absence of evidence, is there to say it would be other than [the small package] was for sale?"
- [43] Defence counsel submitted that the Crown case on possession was unproven because Cpl. Fradette did not testify that he picked up the small package he saw between Mr. Choi's legs and passed it to Cst. Catton and Cst. Catton testified only that an unnamed police officer told him the package depicted in photograph 32 was located between Mr. Choi's legs, which was hearsay. Accordingly, he argued, the Crown had failed to prove that Mr. Choi had knowledge and control of that particular package of drugs, which could have been found elsewhere in the vehicle. In other words, he argued, "the continuity issue comes into play at the initial stages of the analysis" because, while Cpl. Fradette testified that he saw what he believed to be drugs, there was "no evidence whatsoever of him actually finding that [package] and passing it to Catton" and "no admissible evidence of any officer actually finding what looked to be drugs on the seat and then sending it over to the lab."

- [44] Defence counsel made no submissions on the issue raised by the judge, namely, whether, if possession was established, the Crown had proven that Mr. Choi possessed the single package of heroin and fentanyl for the purpose of trafficking. Rather, at the conclusion of his submissions defence counsel stated "I don't intend to go to the statement to try to raise a doubt about the trafficking."

Trial Reasons

- [45] After summarizing the positions of the parties and the key evidence on the question of possession, the judge identified the "real issue" as "the effect of [Cst. Catton's] testimony in response to the leading question about where the package shown in photograph 32 was found": at para. 15. In analysing that issue, he noted that Cst. Catton and Cpl. Fradette were the only officers who searched the vehicle, Cst. Fradette was the officer who knew about the package on the seat and Cst. Catton was the exhibit officer whose task it was to seize any items. He also noted there was no suggestion "that somehow the package moved from where [Cpl.] Fradette saw it before it was seized": at para. 16.
- [46] The judge had no doubt that Cpl. Fradette pointed out the package he saw between Mr. Choi's legs to Cst. Catton when they were searching the vehicle so that Cst. Catton could formally seize it: at para. 17. He also had no doubt that Cst. Catton seized the package from where Cpl. Fradette pointed it out to him. He rejected the defence proposition that other drugs seized by police could have been depicted in the photograph, which he characterized as speculation. Rather, he stated, "[o]n all of the evidence, including gaps in the evidence, there is no reasonable inference other than the photographs in Exhibit 3 show the package [Cpl.] Fradette saw between Mr. Choi's legs at the time of arrest; and Exhibit 4 is the results of that package's analysis": at para. 19.
- [47] The judge observed that Mr. Choi admitted to having just sold heroin, to having just started his shift that day and to using marijuana and cocaine. Given the manner in which dial-a-dope drug trafficking operates and Mr. Choi's admission that he was actively engaged in such trafficking, he found that Mr. Choi "would have drugs ready for the next sale": at paras. 20-21. All things considered, the judge was left with no doubt that Mr. Choi was in possession of the small package of heroin and fentanyl in question. Referring back to the "real issue", he stated:
- [22] Cst. Catton's testimony does not contradict or exclude that possibility. I find that is what he meant in testifying as he did: he did not locate it but was told it had been located between Mr. Choi's legs on the passenger seat. He then seized it from where it lay.
- [48] As to the purpose of Mr. Choi's possession, the judge observed that he was not bound by Crown counsel's position on whether the Crown had met its burden: at para. 23. He summarized the Crown's submission that there were plausible explanations other than Mr. Choi possessing the small package of drugs for the purpose of trafficking and noted that defence counsel "did not make any submissions at the hearing on this issue and declined to

make any submissions afterwards when provided the opportunity": at para. 24. Then he asked what other reasonable possibilities there could be in light of all of the evidence and the gaps in the evidence, but could not identify any such possibility: at paras. 25-33.

[49] The judge expressed his final conclusion like this:

[34] In the context of all of the evidence, I conclude that the package of drugs was for sale. People usually keep their own money in their wallet. There would be no reason why Mr. Choi did not have his own personal money, \$20 as he claimed, in his empty wallet, as opposed to intermingled with drug sale money. That would keep personal money and business money separate and easier to account for. The shift had just started and Mr. Choi expected to make a significant amount of money. For him, that would not be \$50, or even \$70. He had stayed at a hotel for a few days. He had travelled from the lower mainland. Those expenses would be more than \$70. I conclude he had sold drugs that shift more than once. I repeat the evidence: the car had gone to three known 'hot spots' at the start of a selling shift, he admitted to one sale, he went directly to another 'hot spot', the Blue Moon Esso, where the Ford parked near a fence line on the south side of the parking lot, before police boxed it in. Given all of the admissible evidence and gaps in evidence, including the operation of dial-a-dope drug trafficking and his admission that he was actively engaged in trafficking different drugs in a dial-a-dope operation, I conclude Mr. Choi would have drugs ready for the next sale. That is why he had the package of drugs out that [Cpl.] Fradette saw between his legs on the passenger seat. I convict Mr. Choi of Count 2 on Information 50863-1.

On Appeal

[50] Mr. Choi raises two grounds of appeal within which several issues arise for determination:

A. Did the judge err in law and in fact in his s. 24(2) Charter analysis?

- i. Did the judge err in admitting the single package of fentanyl and heroin upon which Mr. Choi's conviction was based under the Grant test?
- ii. Did the judge err in concluding that Mr. Choi's statement to Cpl. Pollock was too remote from the Charter breaches to engage s. 24(2)?

B. Did the judge render an unreasonable verdict?

[51] In respect of the first ground of appeal, Mr. Choi contends that the judge relied heavily on the absence of a causal connection between the discovery of the single package of drugs and the Charter breaches in the balancing exercise under s. 24(2), essentially treating it as a determinative. In his submission, this was a legal error. In support of his submission, Mr. Choi cites *R. v. Robertson*, 2019 BCCA 116, which he says establishes that the requirement of a connection between evidence and a Charter breach is unique to the threshold stage of the inquiry, and erroneously focused on his minimal privacy expectation in the vehicle, which was irrelevant because the privacy interest at issue did not relate to the vehicle. He erred

further, he says, by declining to exclude the drugs despite having assessed the breaches as serious and impactful, as mandated by *R. v. Le*, 2019 SCC 34 and *McGuffie*.

- [52] Mr. Choi contends further that the judge erred in ruling his statement to Cpl. Pollock was not sufficiently connected to the Charter breaches to satisfy the threshold component of s. 24(2) of the Charter. In his submission, the judge overlooked Cpl. Pollock's many references in the statement to the inadmissible bag of colour-coded drug packages when those references carried the conversation forward and were temporally connected to his self-incriminating admissions. He also says the judge erred in finding the Charter breaches were disconnected from the statement by his consultation with counsel when they were obviously connected. Further, he submits, the judge's reasoning is so drastically at odds with cases such as *R. v. Flintoff*, 1998 CanLII 632 (ONCA), *R. v. Coderre*, 2016 ONCA 276 and *R. v. Lauriente*, 2010 BCCA 72, that it amounts to a severable error of law.
- [53] Based on these alleged errors, Mr. Choi asks this Court to conduct its own s. 24(2) Charter analysis, staying faithful to the judge's untainted factual findings. In his submission, the judge's well-founded findings that Cpl. Pollock conducted a strip search, that the strip search was a serious systemic problem and that both officers lacked good faith clearly render the Charter breaches serious, which weighs in favour of exclusion. The same is true, he says, of the judge's findings that both Charter breaches significantly impacted his Charter-protected interests. Citing *Le* and *McGuffie*, he notes that where the first two Grant factors pull strongly in favour of exclusion, the third factor will "seldom, if ever" tip the balance in favour of admissibility and argues that, in this case, given the judge's findings on the serious and impactful nature of the breaches, the evidence must be excluded.
- [54] In respect of the second ground of appeal, Mr. Choi contends that the judge's reasoning was fundamentally flawed because it was based on a misapprehension of Cst. Catton's evidence, namely, his meaning when he referred to "formally seizing" exhibits. According to Mr. Choi, properly understood, Cst. Catton's evidence was that, as exhibits officer, he "formally seized" and catalogued items located by others which he did not necessarily pick up himself, so the judge was not entitled to find that Cst. Catton picked up the package of drugs from "where it lay." Nor, he says, was there any evidence of what happened to the small package that Cpl. Fradette saw between his legs in the car. Given this evidentiary gap and the Crown's burden of proof, Mr. Choi submits there was no proper basis for the judge's finding that the package of drugs upon which the conviction was based was the package observed by Cpl. Fradette and, therefore, its possession was not proved beyond a reasonable doubt.
- [55] Crown counsel responds that, while she does not endorse the whole of the judge's analysis, he did not err in admitting the single package of drugs or Mr. Choi's statement to Cpl. Pollock. In particular, in her submission, the judge erred in concluding that Mr. Choi was strip searched and in characterizing Cst. Catton's s. 10(b) Charter violation as moderately serious and significantly impactful. However, she says, those errors did not compromise his finding that admitting the package of drugs and the statement would not bring the administration of justice into disrepute, which was reasonable and fully supported on the

evidence. On the contrary, she says, recognizing both as errors underscores the solid basis upon which their admission rests. Nor, she submits, was the guilty verdict unreasonable. Rather, for the reasons expressed by the judge, the verdict was available and one that a properly instructed jury could have reached on the evidence.

Discussion

Standard of Review

- [56] The standard of review to be applied to a s. 24(2) determination on whether to admit or exclude unconstitutionally obtained evidence is well-settled. Where the trial judge has considered the proper factors under Grant and made no unreasonable findings, the determination is owed considerable deference on appeal. However, where a s. 24(2) determination is based on a legal error, unreasonable findings or an improper assessment of the evidence, it is not entitled to appellate deference. In such circumstances, an appellate court may conduct the s. 24(2) analysis afresh, but must do so with due regard to the judge's untainted findings of fact: *R. v. Côté*, 2011 SCC 46 at paras. 44, 51-52; *R. v. Pawar*, 2020 BCCA 251 at paras. 42, 60; *R. v. Vu*, 2013 SCC 60 at para. 67.
- [57] The factual findings of a judge are subject to a standard of review of palpable and overriding error. In *Côté*, such errors were described in the s. 24(2) context as "clear and determinative" errors: *Côté* at paras. 51-52; *Pawar*, at para. 42.
- [58] The standard of review to be applied when an appellate court decides whether to set aside a verdict under s. 686(1)(a)(i) of the Criminal Code as unreasonable or unsupported by the evidence is also well-established. The role of the appellate court is not to substitute its own view for that of the trial judge. Rather, the role of the appellate court is to re-examine and, to a limited extent, re-weigh and consider the effect of the evidence, viewed through the lens of judicial experience: *R. v. Biniaris*, 2000 SCC 15 at paras. 36-42; *R. v. Kwok*, 2002 BCCA 177 at para. 27. As Justice Cromwell explained in *R. v. Villaroman*, 2016 SCC 33, a verdict is reasonable if a properly instructed jury acting judicially could reasonably have rendered that verdict. As he also explained, where the Crown's case depends on circumstantial evidence, the question for determination is whether the trier of fact, acting judicially, could reasonably be satisfied that the guilt of the accused was the only reasonable conclusion available on the totality of the evidence: *Villaroman* at para. 55.

Section 24(2) of the Charter

- [59] Pursuant to s. 24(2) of the Charter, where evidence was obtained in a Charter-infringing manner, it must be excluded if, having regard to all the circumstances, its admission would bring the administration of justice into disrepute. In such circumstances, exclusion is required to maintain the integrity of, and public confidence in, the justice system: *Le* at para. 139; *Grant* at paras. 68-70. In assessing whether the administration of justice would be brought into disrepute by admitting evidence, courts focus on the overall repute of the

justice system, viewed in the long term by a reasonable person familiar with all relevant circumstances and the importance of Charter rights: Le at para. 140. In doing so, they recognize that the term "administration of justice" applies to "the processes by which those who break the law are investigated, charged and tried" and it "embraces maintaining the rule of law", a necessary component of which is the existence of a safe and ordered community: R. v. Omar, 2018 ONCA 975 at para. 135, Brown, J.A. dissenting (Omar ONCA); rev'd 2019 SCC 32 substantially for the reasons of Brown, J.A. (Omar SCC).

- [60] A s. 24(2) Charter analysis has two components. The first engages a threshold determination of whether the evidence was obtained in a manner that infringed or denied a Charter right; the second, an evaluation of whether the admission of the evidence obtained in a Charter-infringing manner would bring the administration of justice into disrepute: Robertson at para. 50.
- [61] At the threshold stage, in determining whether evidence was obtained in a Charter-infringing manner courts assess the nature of the connection between the violation and the evidence obtained employing a purposive and generous approach. Evidence will be found to be tainted if the breach and the discovery of the evidence are part of the same transaction or course of conduct. A causal relationship between the breach and the discovery is unnecessary; the required connection may be temporal, contextual, causal, or a combination of the three. However, a connection that is too tenuous or too remote is insufficient. A finding on the strength of the connection between impugned evidence and a Charter breach is a finding of fact: R. v. Mack, 2014 SCC 58 at paras. 38-39; R. v. Pino, 2016 ONCA 389 at para. 72.
- [62] At the evaluative stage, courts conduct an objective assessment of whether the admission of evidence found to have been obtained in a Charter-infringing manner would, having regard to all the circumstances, bring the administration of justice into disrepute. As established in Grant, this exercise involves three lines of inquiry: the seriousness of the Charter-infringing conduct, the impact of the breach on the Charter-protected interests of the accused and society's interest in an adjudication on the merits. The first two lines of inquiry typically pull toward exclusion of the evidence, although they need not do so with identical degrees of force to compel its exclusion. It is their sum, not their average, that determines the extent of the pull towards exclusion. The third line of inquiry typically pulls in the opposite direction, towards admissibility: Le at paras. 141-142.
- [63] In McGuffie, Justice Doherty discussed the manner in which the three lines of inquiry operate:
- [62] The first two inquiries work in tandem in the sense that both pull toward exclusion of the evidence. The more serious the state-infringing conduct and the greater the impact on the Charter-protected interests, the stronger the pull for exclusion. The strength of the claim for exclusion under s. 24(2) equals the sum of the first two inquiries identified in Grant. The third inquiry, society's interests in an adjudication on the merits, pulls in the opposite

direction toward the inclusion of evidence. That pull is particularly strong where the evidence is reliable and critical to the Crown's case: see *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at paras. 33-34.

- [63] In practical terms, the third inquiry becomes important when one, but not both, of the first two inquiries pushes strongly toward the exclusion of the evidence: see e.g. *Harrison*, at paras. 35-42; *Spencer*, at paras. 75-80; *R. v. Jones*, 2011 ONCA 632, 107 O.R. (3d) 241, at paras. 75-103; *Aucoin*, at paras. 45-55. If the first and second inquiries make a strong case for exclusion, the third inquiry will seldom, if ever, tip the balance in favour of admissibility: see e.g. *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215, at paras. 81-89; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at paras. 98-112. Similarly, if both of the first two inquiries provide weaker support for exclusion of the evidence, the third inquiry will almost certainly confirm the admissibility of the evidence: see e.g. *Grant*, at para. 140.
- [64] In *Le*, the Supreme Court of Canada affirmed the foregoing passages from *McGuffie* in the majority discussion of the three *Grant* lines of inquiry: at paras. 141-142. In *Omar ONCA*, Justice Brown, speaking in dissent, emphasized that no overarching rule governs how the balance is to be struck and that all the circumstances must be considered in the s. 24(2) balancing exercise. He also observed that Justice Doherty's statement in *McGuffie* that "[i]f the first and second inquiries make a strong case for exclusion, the third inquiry will seldom, if ever, tip the balance in favour of admissibility" should be read in the context of the very serious Charter breaches at issue and expressed concern that his statements might risk being turned into a kind of "two-strikes-and-the-evidence-is-out" rule if taken out of context: at paras. 112-121. A majority of the Court in *Omar SCC* allowed the appeal from *Omar ONCA* substantially for the dissenting reasons of Justice Brown: see also, *Pawar* at para. 98.

Did the judge err in finding that Cpl. Pollock strip searched Mr. Choi?

- [65] The judge's finding that Cpl. Pollock conducted a strip search in the booking room forms part of the basis for Mr. Choi's argument that the judge erred in admitting the single pack of drugs and his statement. However, as noted, the Crown contends that the judge erred in finding the search amounted to a strip search. Although the issue was not raised directly by Mr. Choi as a ground of appeal, in these circumstances I consider it necessary to assess whether, as the Crown argues, the judge erred in his interpretation and application of the principles discussed in *Golden*. In my view, he did.
- [66] The leading authority in Canada on strip searches incident to arrest is *Golden*. In *Golden*, the search in question occurred as an incident of the appellant's arrest for trafficking in cocaine in a sandwich shop. After conducting a "pat-down" search and finding no weapons or drugs, the arresting officer took the appellant into a stairwell area, undid his pants and looked inside his underwear, where he saw a package protruding from his buttocks. The officer tried to retrieve the package, but a scuffle ensued and, for safety reasons, he escorted the appellant to a booth at the back of the shop, where he was forced to bend over a table.

Thereafter, an officer pulled down the appellant's underwear, exposing his buttocks and genitalia, and tried unsuccessfully to remove the package, then placed him face-down on the floor until another officer removed the package when the appellant unclenched the muscles of his buttocks. The package contained 10.1 grams of crack cocaine. At the police station, the appellant was strip searched again.

- [67] The appellant applied to have the evidence obtained from the search excluded under ss. 8 and 24(2) of the Charter. However, it was admitted at trial and the appellant was convicted of possession of cocaine for the purpose of trafficking. On appeal, the Supreme Court of Canada concluded that the search did not meet the common law requirements for a valid strip search, it was unreasonable and the courts below erred in finding the impugned evidence was admissible.
- [68] In *Golden*, the Court emphasized the need to strike an appropriate balance between the privacy interests of the accused and the realities of law enforcement, as well as a balance between the interests of citizens "to be free from unjustified, excessive and humiliating strip searches" and those of police and society in ensuring that arrestees "are not armed with weapons that they may use against the police, themselves or others, and in finding and preserving relevant evidence": at para. 46. It also accepted the definition of a "strip search" proposed by the appellant: "the removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person's private areas, namely genitals, buttocks, breasts (in the case of a female), or undergarments". In doing so, the Court stated that this definition distinguished strip searches "from less intrusive 'frisk' or 'pat-down' searches, which do not involve the removal of clothing, and from more intrusive body cavity searches, which involve a physical inspection of the detainee's genital or anal regions": at para. 47. Applying this definition to the facts, the Court found the appellant was subjected to three separate strip searches.
- [69] The Court went on to consider whether the scope of the common law power to search incident to arrest included the power to strip search. Following an extensive review of English, American and Canadian law, it answered that question in the affirmative. In conducting its review, the Court noted the four categories of searches set out in English legislation, namely, the "superficial" search, "full" search, "strip" search and "intimate" search, which it explained like this:
- [57] Superficial searches do not require the suspect to remove any indoor clothing, while a full search may involve the removal of clothing but does not involve the removal of underclothing.

- [58] A strip search, which is defined in [the English legislation] as "a search involving the removal of more than outer clothing" may only be carried out in compliance with the rules relating to strip searches set out in the [legislation] Although the search involves the removal of all clothing, it should be done in such a way that the person is never completely undressed and [w]hile a visual inspection of genital and anal areas may be conducted, no physical contact may be made
- [59] An "intimate" search under the [legislation] is analogous to a body cavity search
- [70] Throughout its discussion in *Golden*, the Court placed considerable emphasis on the highly intrusive and humiliating nature of strip searches. For example, it stated, strip searches "represent a significant invasion of privacy," are "highly intrusive" and involve "one of the most extreme exercises of police power": at paras. 83, 89. In addition, it stated, regardless of the manner in which they are carried out, strip searches are "inherently humiliating and degrading" and have even been described by some commentators as "visual rape": at para. 90.
- [71] Ultimately, the Court held that, to be constitutionally valid, strip searches must be: incident to a lawful arrest; conducted for the purpose of discovering weapons or evidence related to the reason for the arrest; based on reasonable and probable grounds; and conducted in a reasonable manner in accordance with prescribed guidelines. Except in exigent circumstances, they should be conducted at a police station and not "in the field": at paras. 99-102. Importantly, the Court also found that the guidelines on the conduct of strip searches in the English legislation accord with the constitutional requirements of s. 8 of the Charter and provide a framework for police in deciding how to conduct a Charter-compliant strip search:
- [101] The following questions, which draw upon the common law principles as well as the statutory requirements set out in the English legislation, provide a framework for the police in deciding how best to conduct a strip search incident to arrest in compliance with the Charter:
1. Can the strip search be conducted at the police station and, if not, why not?
 2. Will the strip search be conducted in a manner that ensures the health and safety of all involved?
 3. Will the strip search be authorized by a police officer acting in a supervisory capacity?
 4. Has it been ensured that the police officer(s) carrying out the strip search are of the same gender as the individual being searched?
 5. Will the number of police officers involved in the search be no more than is reasonably necessary in the circumstances?
 6. What is the minimum of force necessary to conduct the strip search?

7. Will the strip search be carried out in a private area such that no one other than the individuals engaged in the search can observe the search?
8. Will the strip search be conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time?
9. Will the strip search involve only a visual inspection of the arrestee's genital and anal areas without any physical contact?
10. If the visual inspection reveals the presence of a weapon or evidence in a body cavity (not including the mouth), will the detainee be given the option of removing the object himself or of having the object removed by a trained medical professional?
11. Will a proper record be kept of the reasons for and the manner in which the strip search was conducted?

[Emphasis added.]

- [72] Notably, for present purposes, the searches at issue in *Golden* were plainly strip searches. Given that context, it is perhaps unsurprising that the Court focused its analysis on the constitutional requirements of s. 8 of the Charter when strip searches are conducted and spent relatively limited time on the precise parameters and nuances of the definition of a strip search. That being so, it is particularly important to bear in mind the purpose and animating concerns of the *Golden* definition when that definition is interpreted and applied.
- [73] In my view, Cpl. Pollock's search of Mr. Choi fell outside the *Golden* definition of a strip search, interpreted purposively, in the context of the reasons read as a whole. As I see it, to fall within the *Golden* definition a search must involve the removal or rearrangement of clothing so as to permit an inspection of the private areas of the body of an arrestee, whether those areas are fully exposed or they are covered by undergarments alone. The Court's discussion of the four English categories of searches makes it clear that the purpose of a strip search is to enable police to inspect private areas of the body, which is inherently humiliating and thus requires additional safeguards to protect personal privacy and dignity. As discussed in *Golden*, the related English guidelines set out those additional safeguards. In using the word "only" with respect to a visual inspection of an arrestee's genital and anal areas, question 9 of the guidelines suggests that a search of this kind falls at the low end of intrusiveness for strip searches.
- [74] As I have explained, the Court in *Golden* endorsed and adopted the English guidelines for the Charter-compliant conduct of strip searches. It also adopted counsel's definition of a strip search for purposes of its analysis. In doing so, the Court implicitly extended the English categorization of strip searches, which contemplates the removal of undergarments. Under the extended *Golden* definition of a strip search, in Canada the additional safeguards also apply where the private areas of the body to be visually searched (including female breasts) remain covered by undergarments.

- [75] In this case, Cpl. Pollock rearranged Mr. Choi's clothing and visually inspected the waistband of his underwear, but not his genital or anal area, either covered or uncovered. There was nothing inherently humiliating or degrading about the search given its limited nature and the context in which it took place, namely, as part of a standard booking-in procedure at police cells. Nor was there anything to suggest that Mr. Choi found it humiliating or degrading for the officer to see the exposed waistband of his underwear. On the contrary, he was apparently and predictably unfazed by that aspect of the search. As the judge recognized, in modern times the waistband of underwear may be displayed in public in an overt and intentional way.
- [76] I agree with Crown counsel that the judge erred by employing an unduly literal interpretation of the Golden definition of a strip search disconnected from its underlying purpose and context. In my view, the reference in that definition to undergarments must be read in the context of the preceding phrase. To repeat, the definition of a strip search articulated in Golden is: "the removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person's private areas, namely genitals, buttocks, breasts (in the case of a female), or undergarments": at para. 47, emphasis added.
- [77] Undergarments may well cover private areas of a person's body, but they are not, in and of themselves, "a person's private areas". In my view, when the reasons in Golden are read as a whole, it is apparent that the visual inspection contemplated by the definition is an inspection of private areas of the body, whether those body areas are exposed or covered by undergarments. It follows that the salient consideration when a court determines whether a search falls within the definition of a strip search is the private nature of the body area in question, not the nature of a garment worn under an outer layer of clothing.
- [78] I also agree with Crown counsel that the cases upon which Mr. Choi relied below are distinguishable from this case. In *R. v. Pilon*, 2018 ONCA 959, the Court found that the arresting officer conducted two searches that constituted strip searches. In the first search, the officer looked inside the appellant's second pair of shorts, discovered he was not wearing underwear and observed the top of his buttocks and an elastic band attached to his penis. In the second, the officer pulled back the waistband of the appellant's shorts in an effort to visually inspect his genital area. The targeted area of the appellant's body for inspection in both searches was inherently private and, accordingly, the Court characterized the conduct as minimally intrusive strip searches. Similarly, in *R. v. Byfield*, 2020 ONCA 515, an arresting officer reached into the appellant's underwear and retrieved a package of cocaine from his groin, which the Court found was a strip search because, while the appellant's clothes were not removed, they were rearranged and his groin area was "inspected".

- [79] The important point for present purposes is that the searches in both Pilon and Byfield pertained to private areas of the body of the arrestee. Neither concerned a visual inspection of a non-private area of the body covered by an undergarment. In contrast, in this case, Cpl. Pollock intentionally limited his visual inspection of Mr. Choi's body to his waistline area, which is not a private area. As I have explained, the elasticized waistband of his underwear inspected by Cpl. Pollock covered only this area of the body.
- [80] In my view, the judge made a clear and determinative error in concluding that the search conducted by Cpl. Pollock was a strip search as defined in *Golden*. While I agree with the judge that, to the extent reasonably possible, a "bright line" approach to strip searches is desirable to provide certainty and promote Charter values, that line should be drawn when the search is categorized as a strip search, not when the s. 24(2) balancing exercise is conducted, as seemingly occurred in this case. Unless the area of the body inspected is inherently private, whether exposed or covered by an undergarment, the search will not fall into the category of a strip search and the additional safeguards will not apply.
- [81] Adopting the foregoing approach strikes an appropriate balance between the privacy interests of citizens "to be free from unjustified, excessive and humiliating strip searches" and those of police and society "in ensuring that persons who are arrested are not armed with weapons and finding and preserving relevant evidence," while accommodating the realities of effective law enforcement: *Golden* at para. 46. In my view, it would be impractical to require arresting officers to seek prior authorization from a senior officer or risk committing a s. 8 Charter violation whenever they conduct a search incident to an arrest that may expose any part of an arrestee's underwear. It is also unnecessary to treat every search in which any part of an arrestee's underwear is rendered visible as a strip search and apply the additional safeguards described in *Golden* in order to protect Canadian citizens from undue exposure to inherently humiliating and degrading searches at the hands of police.

Did the judge err in characterizing the s. 10(b) Charter violation as moderately serious and significantly impactful?

- [82] In addition to erring by categorizing Cpl. Pollock's booking-in search as a strip search, the Crown contends the judge erred in characterizing Cst. Catton's failure to hold off questioning Mr. Choi at the arrest scene as a moderately serious s. 10(b) Charter violation that was significantly impactful. In its submission, recognition of this error also lends support to the judge's conclusion that the single package of drugs and Mr. Choi's statement were admissible under the Grant test, properly applied. Again, although Mr. Choi did not raise this issue directly in his grounds of appeal, given the position of the Crown I consider it desirable to address the issue.
- [83] In the Crown's submission, given the judge's findings that Cst. Catton attempted to ensure Mr. Choi was fully informed of his rights and was simply careless in communicating with Cpl. Fradette, the breach of his s. 10(b) rights fell at the low end of seriousness. In other

words, the Crown says, as in *R. v. Ashby*, 2013 BCCA 334, the s. 10(b) breach in this case was merely technical and thus not moderately serious in nature. In addition, it submits, the impact of the breach on Mr. Choi's Charter-protected rights was insignificant given that Crown counsel did not seek to introduce his response to the impugned question as evidence and that the drug evidence was independently discoverable.

- [84] In my view, the Crown's submission on this point lacks merit. I see no error in the judge's assessment of the seriousness of the s. 10(b) Charter breach or its impact on Mr. Choi's Charter-protected rights bearing in mind his related findings of fact. The judge found that, in addition to exhibiting carelessness by failing to ascertain that Mr. Choi had already asserted his right to counsel, Cst. Catton expected an inculpatory answer when he questioned him about the bulge in his jacket. His findings and assessments in this regard are reasonable and grounded in the evidence. They are entitled to deference on appeal.

Did the judge err in admitting Mr. Choi's statement?

- [85] Mr. Choi contends that the judge erred in concluding his statement to Cpl. Pollock was too remote from the Charter breaches to satisfy the threshold component of s. 24(2) of the Charter and, therefore, was admissible. In his submission, the judge's findings in this regard are fraught with error. In particular, he says, the judge misapprehended the content of the statement in which Cpl. Pollock repeatedly referred to the dealer pack of drugs, which was obtained in breach of the Charter and ruled inadmissible. Like the officer in *R. v. Wittwer*, 2008 SCC 33, he says, Cpl. Pollock used references to that inadmissible evidence to help carry the conversation, thus leading to his incriminating admissions. Accordingly, the connection between the Charter breaches and the statement was direct and obvious.
- [86] In addition, Mr. Choi argues, as in *Wittwer*, contrary to the judge's finding, his intervening consultation with counsel did not disconnect the statement from the Charter breaches. On the contrary, they were obviously connected, temporally and contextually, particularly the strip search, which took place only an hour before. Accordingly, he says, the judge failed to give effect to binding authorities such as *Flintoff*, *Coderre* and *Lauriente*, which required him to take a generous approach to the threshold component of s. 24(2) and find a sufficient contextual connection in the circumstances of this case.
- [87] I am not persuaded by these submissions.
- [88] First, Mr. Choi did not make these arguments to the trial judge. Rather, as the judge noted, the defence made no submissions on the connection between the Charter breaches and Mr. Choi's statement to Cpl. Pollock.
- [89] Second, I have concluded that the search at the station was not a strip search. Accordingly, the only Charter breach was the s. 10(b) breach committed by Cst. Catton at the scene of the arrest.

- [90] Third, and most importantly, there is nothing to indicate that the judge misapprehended the content of the statement. Rather, in my view, he interpreted the evidence differently than Mr. Choi urges us to do.
- [91] As Justice Doherty explained in *R. v. Morrissey*, (1995) 22 O.R. (3d) 514 (C.A.), a misapprehension of evidence "may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to evidence": at 538. However, as Justice Stromberg-Stein explained in *R. v. Swales*, 2014 BCCA 350, it is not enough for an appellant to suggest a different interpretation of the evidence or point to evidence that arguably weighs against a trial judge's finding to justify appellate intervention based on a material misapprehension. Mere differences in the interpretation of the evidence do not demonstrate that the evidence was misapprehended. They simply reflect an appellant's disagreement with the judge's different view of the evidence.
- [92] The judge's finding that the content of Mr. Choi's voluntary statement to Cpl. Pollock did not suggest that he was influenced by the prior Charter violation was an available interpretation of the evidence. The facts are significantly different than those at issue in *Wittwer*, where an interviewing officer deliberately used a prior statement obtained in breach of the appellant's Charter rights to obtain incriminating admissions in the statement at issue. In contrast, in this case, unlike the statement in *Wittwer*, though connected to a Charter breach, the drugs did not result from that breach, nor did Cpl. Pollock know when he spoke with Mr. Choi that the dealer pack would be found inadmissible. Further, and in any event, the influential effect alleged by Mr. Choi is not obvious on the face of the statement.
- [93] It is not for this Court to impose a different interpretation of the evidence than the interpretation of the judge. The judge's finding on the disconnection between the Charter breaches and Mr. Choi's voluntary statement is a factual finding driven by the particular circumstances of the case. It is entitled to appellate deference: *Mack* at para. 39.

Did the judge err in admitting the single package of drugs?

- [94] Next, Mr. Choi contends that the judge erred in admitting the single package of fentanyl and heroin. In his submission, read closely, his reasons show the judge used the phrase "obtaining evidence as a result of" a Charter breach interchangeably with the concept of "causal connection" and treated the lack of a causal connection as essentially determinative. According to Mr. Choi, the judge relied heavily on the lack of a causal connection between the breaches and the package of drugs to distinguish *McGuffie*, where the impugned evidence was causally connected with the breaches at issue. However, he argues, given his conclusions that s. 24(2) was engaged and that the breaches were serious and impactful, the lack of a causal connection was no longer of any moment and the judge erred in law by considering it in the final balancing exercise.

- [95] Mr. Choi goes on to argue that the judge erred in failing to apply Justice Doherty's reasoning in *McGuffie*, which, read together with *Le*, practically mandates exclusion where, as here, the first two Grant factors pull strongly in that direction. In addition, he argues, the judge erred in the final s. 24(2) balancing analysis by attempting to justify excluding the majority of the drugs but admitting the single package by pointing out the single package was in plain view in the vehicle, where he had a minimal expectation of privacy. However, he says, his minimal privacy interest in the vehicle was irrelevant to the final balancing exercise, given that his arrest was lawful and the privacy interest impacted by the breaches was otherwise derived.
- [96] In support of his submission, Mr. Choi relies on Justice Fitch's statement in *Robertson* at para. 56 that the requirement of a connection between evidence and a Charter breach is unique to and at the heart of the threshold stage of the 24(2) inquiry and should not be similarly incorporated into the evaluative stage. He also relies on the Supreme Court of Canada's endorsement in *Le* of Justice Doherty's reasoning in *McGuffie*. In his submission, in upholding Justice Brown's dissent in *Omar SCC*, the Court should not be taken to have endorsed his narrow view of *McGuffie*, which view was expressed in obiter and does not align with *Le* or the well-established principle that the third Grant factor cannot be permitted to overwhelm a s. 24(2) analysis.
- [97] I am not persuaded by these submissions.
- [98] The judge was required to consider all the circumstances in his s. 24(2) analysis. He did not err in taking the lack of a causal connection between the breaches and the discovery of the package into account at the evaluative stage of the analysis. While not required, the lack of a causal connection was one aspect of the overall circumstances for consideration in the final balancing exercise: see *R. v. Perjalian*, 2011 BCCA 323 at para. 66.
- [99] Contrary to Mr. Choi's submission, *Robertson* does not suggest the nature and extent of the connection between impugned evidence and a Charter breach is irrelevant at the evaluative stage of a s. 24(2) analysis. In *Robertson*, this Court simply held that the judge erred by incorporating an additional requirement of a connection between the breach of a third party's Charter rights and the appellant at the evaluative stage. As to Mr. Choi's submission on the combined effect of *Le*, *Omar SCC* and *McGuffie*, I do not accept that their practical effect is to mandate the admission of evidence whenever Charter breaches are found to be serious and impactful. On the contrary, as Justice Brown emphasized in *Omar ONCA*, *McGuffie* did not purport to establish an inflexible "two-strikes-and-the-evidence-is-out" rule. The Court in *Le* did not hold otherwise.
- [100] In this case, the judge considered the proper factors under Grant and made no unreasonable findings. His determination is owed appellate deference. I would not accede to this ground of appeal.

Was the verdict unreasonable?

- [101] Finally, Mr. Choi contends that the verdict is unreasonable. In his submission, there was an unbridgeable gap in the evidence regarding the single package of fentanyl and heroin that the judge found was in his possession. In particular, Mr. Choi says, there was no admissible evidence that the package of fentanyl and heroin "seized" by Cst. Catton was the same package that Cpl. Fradette saw between his legs in the vehicle, nor was the inference that they were one and the same the only reasonable inference available on the evidence.
- [102] In support of his submission, Mr. Choi argues that it is clear from a close examination of Cst. Catton's testimony that he did not mean to suggest he would invariably pick up items from where they were found by the locating officer when he spoke of formally "seizing" them. Rather, he says, properly understood, Cst. Catton's testimony was that, in his capacity as exhibits officer, he formally "seized" and catalogued exhibits that he did not necessarily pick up personally. According to Mr. Choi, the judge misapprehended his evidence on this critical point. In addition, he says, the evidence was that Cst. Catton did not locate the package of drugs in question. Rather, the evidence was that he was told where the package was located by an unnamed officer, which was inadmissible hearsay as to the location of the package.
- [103] Mr. Choi goes on to submit that the only admissible evidence that he possessed the package of fentanyl and heroin formally seized by Cst. Catton was circumstantial in nature. However, he says, there were other reasonable inferences that were also available on the evidence. For example, he says, the small package Cpl. Fradette saw between his legs could have contained candy or pills, not fentanyl and heroin. Further, the "mysterious" origin of the small package, as the judge described it, weighed in favour of the defence and not the Crown, which bore the burden of proving possession beyond a reasonable doubt.
- [104] According to Mr. Choi, when the judge's misapprehension of Cst. Catton's evidence is cleared away and the record is re-examined it becomes apparent that the totality of the evidence did not eliminate reasonable possibilities inconsistent with his guilt. In particular, he says, the totality of the evidence did not and could not prove to the criminal standard that the small package Cpl. Fradette saw between Mr. Choi's legs was the same package seized by Cst. Catton, which was later found to contain fentanyl and heroin. In his submission, it follows that the verdict was unreasonable and this Court should enter an acquittal.
- [105] I do not accept this submission.
- [106] The judge's finding that the small package Cpl. Fradette saw between Mr. Choi's legs was the same package that Cst. Catton seized was reasonable and available on the evidence for the detailed reasons that he articulated. Although the evidence connecting the two was not adduced as fully and directly as it might have been by the Crown, the explanation for this approach is clear. As noted near the outset of these reasons, Crown counsel was essentially invited by defence counsel to lead Cst. Catton through his testimony on the "care and continuity" of the exhibits and no objection was taken to the hearsay aspect of his

testimony to the effect that the small package "was located on the passenger seat between the legs of Mr. Choi." While this did not relieve the Crown of its burden to prove the case beyond a reasonable doubt on admissible evidence, it does place the purported evidentiary gap of which Mr. Choi now complains into its proper context.

[107] As the Court explained in Villaroman, circumstantial evidence need not totally exclude all other conceivable inferences and a verdict is not unreasonable simply because alternative possibilities do not raise a doubt for a trier of fact. It is for the trier of fact to decide whether "any proposed alternative way of looking at the case is reasonable enough to raise a doubt": at para. 56. In this case, in my view, the judge was entitled to find on the admissible evidence that Cst. Catton seized the package from where Cpl. Fradette pointed it out to him and to infer that the package later found to contain fentanyl and heroin was the same package that Cpl. Fradette saw between Mr. Choi's legs.

[108] On this ground of appeal, Mr. Choi is largely repeating his trial arguments and inviting this Court to interpret the evidence differently than did the trial judge. As previously discussed, that is not the role of this Court. I would not accede to this ground of appeal.

Conclusion

[109] For all of the foregoing reasons, I would dismiss the appeal.

"The Honourable Madam Justice Dickson"

I AGREE:

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Mr. Justice Voith"

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