

CANADA / JUDGMENT

R. v. Pahal

2025 ONCA 668

COURT

Court of Appeal for Ontario

DECIDED

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Zarnett, Benjamin; Coroza, Steve A.; Favreau, Lise G.

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COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Pahal, 2025 ONCA 668

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Zarnett, Coroza and Favreau JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Rajwant Pahal

Appellant

Stephanie Brown, for the appellant

Deepa Negandhi, for the respondent

Heard: November 29, 2024

On appeal from the convictions entered on January 28, 2022, by Justice Bruce E. Pugsley of the Ontario Court of Justice.

Coroza J.A.:

I. OVERVIEW [1] Following a trial before a judge of the Ontario Court of Justice, the appellant was convicted of multiple firearm-related offences: (1) intentional discharge of a firearm while being reckless as to the life or safety of another person (s. 244.2(1)(b) of the Criminal Code); (2) possession of a weapon for a dangerous purpose (s. 88(1)); (3) assault with a weapon (s. 267(a)); (4) possession of an unauthorized firearm without a licence (s. 92(2)); (5) possession of a loaded restricted firearm (s. 95(1)(b)); and (6) possession of a firearm without a licence (s. 91(1)).

[2] Central to the Crown's case were two statements the appellant made to the police on May 18, 2020. The first statement was made while the police were executing a search warrant at the appellant's residence. The appellant admitted to police that on the evening of May 16, 2020, he discharged a firearm several times, maintaining that he had done so to repel two attackers that were approaching his home. He was then arrested, cautioned, informed of his right to counsel, and transported to the police station, where he was interviewed and provided a second statement. Throughout both statements, the appellant maintained that he acted in self-defence.

[3] At trial, the appellant argued that he was detained during the execution of the search warrant. Therefore, the failure of the police to provide a caution and to inform him of his right to counsel constituted a breach of his s. 10 rights under the Canadian Charter of Rights and Freedoms.

[4] The appellant further argued at trial that during his interview at the police station, he asked the interviewing officer to contact a friend to obtain a lawyer's name. This request was not fulfilled because, as the officer testified, he misheard what the appellant said. The appellant contended that this constituted a further violation of his s. 10(b) Charter rights.

- [5] The trial judge rejected these arguments and admitted the statements. The statements provided overwhelming evidence for the Crown. As a result, based on the evidence led by the Crown, the appellant was convicted on all counts.[1]
- [6] On appeal, the appellant asserts that the trial judge erred in admitting the statements. He urges this court to reconsider the matter, exclude the statements under s. 24(2) of the Charter, and enter acquittals. He argues that if the statements were excluded, there would be insufficient evidence to support a conviction.
- [7] I agree that the trial judge erred in concluding that the appellant's statement at his residence was Charter-compliant. In my view, this statement was made while the appellant was detained. The police violated his s. 10(a) and s. 10(b) rights by failing to immediately advise him of the reasons for the detention, and his right to counsel. Consequently, his subsequent arrest was unlawful and a violation of s. 9 because the police formed their grounds for arrest upon the appellant's first statement. However, I reject the appellant's further submission that the trial judge erred in finding no additional and discrete s. 10(b) violation arising from the appellant's interview at the police station.
- [8] Whether the statements obtained by the police should be excluded under s. 24(2) of the Charter involves an examination of two components: *R. v. Beaver*, 2022 SCC 54, 475 D.L.R. (4th) 575, at para. 94. First, the appellant must establish that the evidence was "obtained in a manner" that infringed the appellant's Charter rights. The appellant has demonstrated a connection between the identified Charter breaches and the evidence, necessitating consideration of the second component: whether the statements should be excluded under s. 24(2) by applying the three-part test established in *R. v. Grant*, 2009 SCC 32, 2 S.C.R. 353.
- [9] Applying the test, I conclude that the admission of this evidence would not bring the administration of justice into disrepute. Balancing the seriousness of the state conduct and its impact on the appellant with society's interest in an adjudication on the merits, the statements should not be excluded. The statements provide overwhelming evidence of the appellant's guilt. They were properly admitted. Accordingly, I would dismiss the appeal.

II. FACTUAL BACKGROUND A. The Shooting and Early Investigation [10] On May 16, 2020, at around 10:00 p.m., gunshots were fired in a residential neighbourhood in Brampton. A bullet passed through the front door of the house at 57 Garibaldi Drive and lodged in the front closet. The residents of 57 Garibaldi Drive called 911 at 1:00 a.m., shortly after they found the bullet.

- [11] As part of the investigation, the police obtained surveillance footage from a camera at 63 Garibaldi Drive. The video captures two people approaching 48 Garibaldi Drive, yelling in Punjabi. A third person is seen raising his arm in the air, though it was impossible to tell from the video whether he was holding a gun. Gunshots are heard and a car is seen driving away. A person is seen running after the car on foot.

- [12] The police inquired of the resident of 63 Garibaldi Drive and learned that she heard five or six gunshots that evening. She looked out the window and saw a white car speed by, two people run after the car, and then heard five or six more gunshots. Then she saw two people get into a black car and drive off, followed a few minutes later by another person getting into a black vehicle and driving off.
- [13] Based on the video surveillance, the police believed that someone associated with 48 Garibaldi Drive was involved in the incident. This address is located directly across the street from 57 Garibaldi Drive, where the bullet entered. The police asked a female resident at 48 Garibaldi Drive for surveillance footage and were told that the cameras were not working. The resident also told the police that she did not see or hear anything in relation to the shooting.
- [14] The police obtained a warrant to search 48 Garibaldi Drive for firearms, ammunition, and surveillance footage. At this point, the police did not have any suspects. They considered anyone associated with 48 Garibaldi Drive to be a person of interest.

B. The Execution of the Search Warrant [15] On May 18, 2020, between 3:00 and 3:30 a.m., a tactical team conducted a no-knock entry at 48 Garibaldi Drive to carry out the search warrant.[2] While they cleared the residence, police officers removed all adult occupants from the house, one of whom was the appellant. The police officers led the appellant and the other residents outside of the house. Because it was raining, the police officers advised the residents that they could wait in unmarked police vehicles to stay dry. They agreed to do so. The doors to the vehicles were left open while officers stood outside the vehicles. At no point were the residents advised that they were free to go.

- [16] Once the tactical team cleared the residence, at 3:53 a.m., police officers brought the residents back into the house and asked them to sit in the living room. As the occupants were exiting the police vehicles, one of the officers, Detective Ball, asked the appellant about the shooting. He testified that he probably asked this question because the appellant was the last person to leave the vehicle. The appellant replied in broken English that he was having “an issue with parties”. Detective Ball was unable to ask follow-up questions of the appellant due to the language barrier. When the appellant and the occupants were all in the living room, another officer, Detective Salmon, asked, “Do you know what this is about? Do you know about the shots being fired?” The residents spoke Punjabi and had a limited understanding of English. The appellant responded that people were after him, and that he was scared. Upon hearing this utterance, Detective Salmon believed that the appellant was a potential victim of the shooting. At 3:59 a.m., Detective Salmon requested the assistance of a Punjabi-speaking officer.

- [17] Constable Sandhu, a Punjabi-speaking officer, arrived at the residence at 4:14 a.m. to assist Detective Salmon with questioning the appellant. Constable Sandhu's first language is English, but he spoke Punjabi at home and had taken two Punjabi language courses. When Constable Sandhu arrived, he explained to the residents in Punjabi what was happening regarding the search warrant and why the police were there. He told them that no one was under arrest.
- [18] Constable Sandhu and Detective Salmon then spoke to the appellant. The officers did not inform the appellant of his right to counsel or advise him that he did not have to answer any questions. Constable Sandhu asked the appellant what he had told Detective Salmon about people being after him. The appellant took Detective Salmon and Constable Sandhu into the garage and told them that two men he knew had come to his home the night before. One of the men had a handgun. He said that he disarmed the man with a garden tool, picked up the firearm, and fired four to five shots.
- [19] At this point, Detective Salmon believed that the appellant's jeopardy had changed, and he was now arrestable. Constable Sandhu told the appellant not to say anything else. Detective Salmon left to speak with Detective Ball about arresting the appellant.
- [20] Detective Ball, having watched the video surveillance, did not believe that the appellant was acting in self-defence. With Constable Sandhu's help, Detective Ball arrested the appellant at 4:33 a.m. and read him his rights and a caution. Both were translated into Punjabi by Constable Sandhu. When asked if he understood that he could contact a lawyer, the appellant replied, "I was protecting myself, but it is what it is". Constable Sandhu told the appellant that he could access free legal advice, and the appellant said, "Yes, I know the law". He asked the appellant whether he wanted to call a lawyer now, and the appellant replied, "No, man, I was protecting myself".

C. The Appellant's Interview at the Police Station [21] Following the arrest, Constable Sandhu took the appellant to the police station. At the station, Constable Sandhu asked the appellant if he had a lawyer, to which the appellant replied, "I understand, I was protecting myself". The appellant refused a lawyer. Constable Sandhu asked if the appellant wanted duty counsel and the appellant replied, "No, brother".

- [22] At 5:37 a.m., Constable Sandhu began the appellant's formal interview. Although the majority of the interview was in Punjabi, there were English words interspersed throughout by both Constable Sandhu and the appellant. Throughout the interview, Constable Sandhu reminded the appellant that he had the right to speak to counsel, and that he did not have to tell the police what happened.

- [23] In the interview, the appellant repeated his explanation that he had a dispute with some men who came to his house with a gun. He disarmed the men, picked up their gun, and shot back. Following the encounter, the appellant said that he took the gun and disposed of it by throwing it over a bridge near Williams Parkway. The police searched that area, but no gun was ever found.
- [24] The appellant asked Constable Sandhu if he could show him text messages on his cellphone between himself and the men who came to his house. Constable Sandhu told the appellant that he did not have to show him his cellphone and that it could be used as evidence. Once again, Constable Sandhu asked the appellant if he wanted to contact a lawyer. The appellant asked Constable Sandhu if he could call a friend who has a lawyer. Constable Sandhu said he could not contact his friend, but he could contact a lawyer. Constable Sandhu and the appellant were speaking over each other during this exchange. At trial, Constable Sandhu testified that he did not hear the appellant say that he wanted to hire his friend's lawyer. However, after a recording of the interview was played in court, Constable Sandhu agreed that this was what the appellant was indicating. Had he understood the appellant's request, he would have made arrangements to get the lawyer's contact information.

III. ISSUES ON APPEAL [25] The appellant raises the following issues on appeal:

- First, whether the appellant was detained at the time of his statement in the garage, thereby triggering his rights under ss. 10(a) and 10(b)[3];
- Second, whether the appellant's s. 9 rights were "consequentially" breached since the basis for his arrest flowed from the admissions in the first statement;
- Third, whether the appellant's s. 10(b) rights were further breached during his interview at the police station when the appellant asked to call a friend so that he could contact a lawyer; and
- Fourth, if the appellant's statements were obtained in a manner that infringed the appellant's Charter rights, whether they should be excluded pursuant to s. 24(2).

IV. Analysis A. First Issue: Was the Appellant Detained at the Time of His Statements in the Garage, Thereby Triggering His Rights Under ss. 10(a) and (b)? (i) The Position of the Parties and the Decision Below [26] The appellant argues that the trial judge erred in admitting his pre-arrest and post-arrest statements at trial. The crux of the appellant's argument is that he was detained prior to his arrest. Specifically, the appellant contends that the trial judge neglected to conduct the objective test mandated by Grant.

- [27] The respondent submits that the appellant was not detained prior to his arrest. The police were not asking focused, interrogative questions. The officers approached the appellant as a victim. The appellant was the one to invite the police to follow him to the garage where he volunteered the information about his involvement.

[28] The parties agree that the issue regarding the appellant's detention is reviewable on a standard of correctness.

[29] For ease of reference, I reproduce the relevant passages of the trial judge's reasons on the issue of detention below:

... The defendant submits that as soon as they were taken out of the house by the tactical unit, all of the residents were then detained and should have been given their right to counsel and told they didn't have to say anything to the police. In particular, [the appellant] with the other adults was in a police minivan and the detention even more obvious, it is submitted. There is difficulty with these assertions. The only evidence is that of the Crown witnesses and the onus to show the Charter breach here under s. 10 lies on [the appellant]. For example, I'm asked to infer psychological detention without evidence of [the appellant's] psychological mindset at the time. Not everyone who is present when a search warrant is executed is detained by the police. Their movements within the place to be searched may be temporarily restricted so as to not interfere with the search, but their freedom to leave remains. The police acting with judicial authority had the right to control movement to allow that authorized search to take place. But this is not the same as detention. Detention means state intervention to restrain an individual's liberty, either physically or psychologically.

As *R. v. Grant* stated, the state conduct "left me no choice but to comply." Such was not the case on the unanswered evidence here. First, the adults had to leave while a tactical squad cleared the house. This was required by the nature of the search warrant, part of an investigation into a very serious firearms offence. Second, it was cold and raining. A dry place was available and was offered. The family took advantage of the offer and entered the van. The van was not locked. The police gathered no evidence while the family was in the van. Each officer stated that the family was not detained. As Constable Sandhu was told when he arrived, no one was arrestable, no one was a suspect. They were waiting for the police to search the residence. The defendant was no more liable to receive his right to counsel advice than the other family members or the downstairs tenant and her friend.

They were bystanders to a search warrant execution. Similarly, when the tactical unit left, they were asked to sit in the living room. They were allowed some movement during the search as long as it did not interfere with the conduct of the search. Again, they were not then detained, and no constitutional advisement was in my view required. Detective Salmon and or Detective Ball either asked [the appellant] asked [sic] a question or were there when the other did so. The question was an open-ended investigative question asked in most investigations when that investigation is starting, whether it's a car accident or a homicide. In other words, what happened? The police are entitled to ask members of the public this. The fact that the possible answer may be in some cases be self-incriminatory is not relevant. What happened in the context of the execution of a search warrant is an open-ended and natural question for a police officer conducting or starting an investigation to ask. Similar questions are asked every day, such as do you know you were speeding? Or do you know why we are here?

As noted in *R. v. Grant* under far more egregious circumstances, not every contact between police and a citizen is a detention. Beyond that, not every police question is an interrogation. Again, I don't have the benefit of any evidence from [the appellant], or any evidence called by him on the issue of his perception of this police question. What is apparent though, as he stated multiple times that evening, was that he knew why the police were there, and that he had been the target of wrongdoers who had threatened him. His immediate response to the open-ended question was to explain that he had been targeted. Detective Salmon understood this but could not ask [the appellant] to elaborate since he did not speak Punjabi. He called for a Punjabi officer to attend, and Officer Sandhu was dispatched to the scene. One flaw in the defendant's thesis is that there's no evidence at all that the police came to the search intending to question anyone. They were all unilingual English speaking police officers going to search a house occupied by people they knew to be Punjabi from the earlier contact by Detective Hope. Plainly put, they were there to search the house. [Emphasis added.]

[30] The trial judge rejected the appellant's argument that he was psychologically detained.

(ii) Test for Psychological Detention [31] As the Supreme Court has held, detention can be physical or psychological. Psychological detention may occur where:

- (1) a person has a legal obligation to comply with a police direction; or
- (2) where "the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand": *Grant*, at paras. 30-31.

(iii) The Trial Judge Erred in His Application of the Test [32] Whether a person is psychologically detained is an objective inquiry: how would a reasonable person in the appellant's shoes perceive the state's conduct in the circumstances? This objective standard underscores the importance of police themselves recognizing when a detention has occurred, so they can fulfill their Charter obligations to detained individuals: *Grant*, at para. 32; *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, at para. 22.

[33] In the trial judge's opinion, the appellant was detained only at the time of arrest. Before that, both the appellant and the other occupants of the home were simply "bystanders" during the execution of the search warrant. As noted above, the trial judge focused on: (1) the subjective views of the officers at the scene; and (2) the absence of evidence from the appellant regarding whether he felt detained.

[34] Respectfully, the trial judge failed to approach the detention issue from the objective standpoint of a reasonable person. The proper inquiry does not focus on the appellant's subjective state of mind or the officers' intentions, but rather how a reasonable person would interpret the situation: *R. v. Tutu*, 2021 ONCA 805, 407 C.C.C. (3d) 137, at para. 15; *R. v. McSweeney*, 2020 ONCA 2, 451 C.R.R. (2d) 357, at para. 35. The focus should have been on the conduct of the police and, considering the totality of the circumstances, how that conduct would reasonably be perceived. The trial judge committed an error of law and, as

such, his ruling does not attract deference under the applicable standard of review.

(iv) The Appellant Was Psychologically Detained [35] After conducting the proper inquiry, I conclude that the appellant was psychologically detained prior to his arrest in the garage. His rights under ss. 10(a) and (b) of the Charter were violated and the incriminating statement obtained by the police in the garage of 48 Garibaldi Drive was not Charter-compliant.

[36] The proper inquiry considers the following factors (Grant, at para. 44):

A. Circumstances giving rise to the encounter;

B. The nature of the police conduct; and

C. The relevant personal characteristics of the appellant.

(v) Circumstances Giving Rise to the Encounter [37] The search was initiated in the appellant's home, in the middle of the night, with the use of a tactical team of officers armed with rifles. This represented an inherently coercive search. In *R. v. Lafrance*, 2022 SCC 32, [2022] 2 S.C.R. 393, at para. 32, the Supreme Court held that the very execution of a search warrant at the accused's home demonstrated a targeted investigation that would support a finding of detention:

In my view, it is inconceivable that a reasonable person in Mr. Lafrance's shoes – woken and confronted by armed police officers in his home telling him to leave – would believe that they had arrived to “provid[e] general assistance”, “maintai[n] general order” or make “general inquiries”. The reasonable person would immediately understand that he or she is being singled out for investigation. While, of course, the police were authorized by warrant and as such had “legitimate reasons” for the steps they took, this is not determinative of – and indeed is unlikely to affect – how a reasonable person perceives his or her interactions with the police[.] [Emphasis added.]

(vi) The Nature of the Police Conduct [38] In *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, the Supreme Court clarified that the power dynamic that grounds a detention does not require “loud stern voices, curt commands and clear orders about required conduct”: *Le*, at para. 45. No matter how an encounter between the police and an individual begins, the police's subsequent actions and language can show they were “exerting dominion” over the individual: *Le*, at para. 47.

[39] In *McSweeney*, Strathy C.J.O. held that “during the execution of a search warrant police are entitled to segregate the occupants of the premises to ensure officer safety, to prevent the loss or destruction of evidence, and to maintain the integrity of the search”: *McSweeney*, at para. 38. Where the interference with liberty was modest and where police questions were not focused on the person's involvement in a crime, courts have found no detention: *McSweeney*, at para. 44. In *McSweeney*, this court held that the police were engaged in a focused investigation during the execution of a warrant to search for child pornography. There, police had immediately singled out the appellant with questions that were accusatory and invited self-incrimination: *McSweeney*, at para. 45.

- [40] In this case, the police's treatment of the appellant was not necessarily accusatory. Nor was the appellant singled out right at the outset of the search. However, it cannot be said that the police officers' questions were simply directions made in order to maintain the integrity of the search. The incriminating statements were obtained after the tactical team had cleared the home. There were no live officer safety concerns, and the appellant was being led back into the home. The occupants were all accounted for, and their movements controlled. Even if the officers only asked open-ended questions, it cannot be said that the officers were acting solely to ensure the integrity of the search. They were attempting to ascertain the appellant's involvement in a crime.
- [41] Furthermore, I would not describe the police conduct as a modest restriction on the appellant's liberty. The appellant and the other occupants of 48 Garibaldi Drive were segregated for approximately one hour, first in unmarked police vehicles, and then in the residence's living room. While the duration of this segregation may well have been necessary in the context of this investigation (i.e., the search of a home where shots were fired), a reasonable person in the appellant's position would perceive these circumstances as amounting to a targeted investigation.
- [42] Moreover, there was testimony of physical contact, which is a relevant consideration. Detective Salmon testified that a tactical officer held the appellant by the arm while leading him out of the residence and into the unmarked police vehicle. The police then remained in close proximity to the appellant and all other occupants both by standing outside the vehicles while they sat inside, and by standing guard over them in the living room (with the exception of Detective Tyrer, who escorted and stayed with the appellant's wife upstairs where the children slept).
- [43] The police exerted dominion over not only the house, but also its occupants, for at least an hour. The occupants were never informed that they could leave. At trial, each officer testified that the occupants were not detained. Yet not a single officer could remember telling the occupants that they were free to go, nor did they make any notation to this effect. While the officers did tell the occupants that no one was under arrest or in any trouble, I do not think these statements would hold much significance to a reasonable person in the appellant's position. I note that the testimonial evidence also discloses that the appellant was wearing no socks or jacket at the time; he had to be escorted upstairs by police to retrieve these following his arrest. Realistically viewed, there was nowhere else the appellant could have gone. I disagree with the trial judge's description of the appellant and occupants as mere "bystanders" to the execution of a search warrant in their own home.

(vii) The Particular Characteristics or Circumstances of the Individual [44] In *Le*, the Supreme Court noted that "individuals in some communities may have different experiences and relationships with police than others and such may impact upon their reasonable perceptions of whether and when they are being detained": *Le*, at para. 73. In relation to race, the Court indicated that:

[T]he question is how a reasonable person of a similar racial background would perceive the interaction with the police. The focus is on how the combination of a racialized context and minority status would affect the perception of a reasonable person in the shoes of the accused as to whether they were free to leave or compelled to remain. [Emphasis added].

[45] The Le majority urged courts, when carrying out this analysis, to conduct a contextual and wide-ranging inquiry that considers “the larger, historic and social context of race relations between the police and the various racial groups and individuals in our society”: Le, at para. 75. With that said, the Supreme Court in Lafrance cautioned that racialized status will not always “weigh in favour of finding a detention”: Lafrance, at para. 58. In particular, the majority directs reviewing courts not to assume that all interactions between racialized persons and police “are Charter non-compliant or otherwise oppressive,” or that all racialized people are “vulnerable [...] when interacting with police”: Lafrance, at para. 58. The court asked: “whether the reasonable person in Mr. Lafrance’s position would understand [their] options as limited to cooperating by reason of an Indigenous background.” In the circumstances, it found that this factor “weigh[ed] somewhat in favour of detention” but “not heavily”: Lafrance, at para. 59.

[46] I reach the same conclusion here in relation to the appellant’s race. There was evidence that the appellant, a South Asian male, had a limited ability to understand and communicate in English. Detectives Ball and Salmon both testified to their concerns that the appellant and his family were not understanding their explanations, that the appellant himself would not have understood an English-language caution, and that they were struggling to understand the appellant’s utterances in response to their questions. At least half an hour passed before police requested a Punjabi-speaking officer to attend the residence.

[47] The appellant’s identity and difficulties communicating with English-speaking officers are relevant considerations that favour a finding of detention in the circumstances of this case. A reasonable person in the appellant’s position, particularly with these language barriers, confronted by police officers at their home, would believe their options were limited.

(viii) Conclusion on the First Issue [48] In sum, the trial judge approached the issue from the subjective perspective of the police, rather than applying the objective framework mandated by the Supreme Court in Grant. In Lafrance, the Supreme Court advised “police and reviewing courts” to “be alive to the possibility that the execution of a warrant at a residence – being a means by which the police exercises control of the home – can itself support the finding of a detention where it is also applied in such a manner as to take control of the person”: Lafrance, at para. 47. That is what occurred in this case.

[49] The detention of the appellant had already crystallized by the time he spoke to the police in the garage. When the police began asking the appellant what he knew about the offence, while executing a search warrant inside his residence, this triggered the appellant’s rights under ss. 10(a) and 10(b) of the Charter.

[50] There is no dispute that the appellant was not advised of the reason for his detention or provided his right to counsel until after he gave his first statement, when he was arrested by Constable Sandhu in the garage. As a result, the police elicited an incriminating statement that was not Charter-compliant. This statement provided the grounds to arrest the appellant. I now turn to the second issue.

B. Second Issue: Whether the Appellant's s. 9 rights Were "Consequentially" Breached [51] The respondent concedes that if the police violated the appellant's rights by obtaining a non-Charter compliant statement in the home, his subsequent arrest was arbitrary and unlawful. I agree with this concession. An unlawful arrest is a violation of s. 9: see *Grant*, at paras. 54-56; and *R. v. Zacharias*, 2023 SCC 30, 487 D.L.R. (4th) 571. The s. 9 violation may be categorized as "a cascading breach": *Zacharias*, at para. 47. The impact of such a breach is factored into the s. 24(2) Charter analysis. I will consider this breach when applying the *Grant* test relating to s. 24(2).

C. Third Issue: Whether the Appellant's s. 10(b) Rights Were Breached During His Interview at the Police Station [52] The appellant argues that the trial judge erred in finding that the police did not violate his s. 10(b) rights during the police interview following his arrest. I disagree.

[53] The appellant makes two submissions under this ground of appeal. I will address them in turn.

[54] First, the appellant argues that the trial judge failed to consider his difficulty communicating in English when deciding whether he was adequately informed of his right to counsel. The appellant contends that he had difficulty understanding the language in which his right to counsel was read, and that Constable Sandhu was required to take additional steps to ensure that he understood.

[55] I would reject this submission. The appellant did not testify on the voir dire, so the only evidence that the trial judge could consider on this issue was the evidence led by the Crown. As the respondent points out, the trial judge addressed the issue in his reasons and made specific findings of fact. These findings are entitled to deference and are reviewable on appeal only for palpable and overriding error.

[56] The trial judge concluded:

Here [the appellant] was given his right to counsel advice at the scene of his arrest and stated clearly that he understood that right. When asked if he wanted to call a lawyer, he said, "No, man, I was protecting myself." He was told of the availability of duty counsel and stated that he understood. At the station his right to counsel was raised again on booking, and he stated that he understood and again stated that he was protecting himself. He was asked about duty counsel and replied, "No, brother." He was told by Constable Sandhu that he could change his mind at any time. The only times [the appellant] at any time referenced the possibility of speaking to counsel was when he mused that he might call a friend and that unnamed friend might have a lawyer. He and Constable Sandhu moved from that right into [the appellant's] video statement supplemented by the use of his phone. Again, although he could have testified on his application without being

subject to cross-examination on the case at large, [the appellant] chose not to testify. What he actually said and what he would have done are not in evidence, only what he may have said. For example, as the Crown submits, he might have meant that he would speak to a lawyer later, although I find that seems unlikely in the context.

[57] The trial judge found that the appellant specifically told Constable Sandhu, an officer who spoke and understood Punjabi, that he understood his rights. While the appellant's ability to communicate in English was limited, the trial judge noted that the appellant and Constable Sandhu were using both English and Punjabi in their conversations and that "they understood each other, they communicated, the conversations flowed". I see no basis to interfere with the trial judge's conclusions.

[58] Second, the appellant argues that the trial judge erred in finding that the appellant was not reasonably diligent in asserting and pursuing his right to counsel. The appellant argues that during the interview he asked to speak to a friend to contact counsel and this request was effectively ignored.

[59] The trial judge held:

Certainly the defendant having been told his rights, never raised the topic again. Although I don't understand the Punjabi language, I have had the advantage of watching the video statement repeatedly. At this part of the dialogue between [the appellant] and Constable Sandhu, they were talking quickly, over each other and [the appellant's] voice was unclear. I accept that Constable Sandhu only heard the words from [the appellant] talking about speaking to a friend as that to call a friend, not to call a friend in the context of having that friend give the name of a lawyer. Only when he heard the video replayed more than once at trial did the officer catch what the second certified translation said about calling a friend to ask for the name of a lawyer. To his credit, he agreed in retrospect that this is what [the appellant] had said. It's clear from the unanswered evidence of Constable Sandhu and from the video statement that the police took reasonable steps to tell [the appellant] what his rights were, both in formal terms and informally. Constable Sandhu used his knowledge of Punjabi to translate these into that language, and [the appellant] agreed that he understood. His comment about later and his comment about calling a friend are equivocal comments, particularly given the two translations and by what Constable Sandhu understood. [The appellant], knowing his rights, did not take reasonable steps I find to follow up on the call a friend request. Did not make it clear that this was his request, for example, by naming the friend. The issue is the reasonable implementation of [the appellant's] subsection s. 10(b) Charter right. Immediately after the first call a friend comment, Constable Sandhu again spoke of free legal counsel and quickly told [the appellant] that the police would allow a private call to duty counsel. [The appellant] did not ever seek such advice. [Emphasis added.]

[60] I see no basis to interfere with the trial judge's factual findings. In the passage above, the trial judge recognized that there was a dispute over the translations of the interview. He considered the circumstances of the statement and the request. After reviewing the tape and transcripts, the trial judge found that the appellant's comment about calling a friend was an

“equivocal” comment, “particularly given the two translations and by what Constable Sandhu understood.” This court has not been pointed to any palpable and overriding error in the trial judge’s finding. I find that the appellant’s s. 10(b) rights were not breached during the police interview.

D. Fourth Issue: If the Appellant’s Statements Were Obtained in a Manner that Infringed the Appellant’s Charter Rights, Whether They Should be Excluded Pursuant to s. 24(2) [61] As I have explained, the appellant’s right to counsel was violated pre-arrest, as he was detained when the police first elicited his statement in the garage. Consequently, there was an additional breach of s. 9 when the appellant was arrested based on the tainted statement. It is therefore necessary for this court to consider whether all the appellant’s statements – both pre-arrest and post-arrest – should be excluded under s. 24(2).

[62] The trial judge did not conduct a s. 24(2) analysis, because he found there was no violation of the appellant’s Charter rights.[4] As I have found there were violations, it is necessary to do the analysis: *McSweeney*, at para. 75.

(i) Test Under s. 24(2) [63] Section 24(2) of the Charter provides:

Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[64] The test for exclusion under s. 24(2) is well established. The onus is on the appellant to satisfy the court that the statements should be excluded.

[65] To determine whether the evidence should be excluded under s. 24(2), the court must first address a threshold question: whether the statements were “obtained in a manner” that infringed or denied a Charter right. If this threshold is met, the court proceeds to the “evaluative component,” which involves three lines of inquiry: *McSweeney*, at para. 58; *Grant*, at para. 59.

(ii) Statements Were Obtained in a Manner that Infringed the Appellant’s Charter Rights [66] The appellant’s statements were obtained in a manner that infringed his Charter rights. There is no serious dispute that the impugned statements were part of the same transaction or course of conduct: *R. v. Wittwer*, 2008 SCC 33, [2008] 2 S.C.R. 235, at paras. 19-21. Applying a purposive and generous approach, there is a strong connection between the appellant’s statements and the breaches of his rights. There is no suggestion that anything the police did after arresting the appellant severed the link between the first statement at the home and the subsequent statement at the police station: *Beaver*, at paras. 94-103. Therefore, both statements were “obtained in a manner” that infringed the appellant’s Charter rights.

(iii) Evaluative Component [67] This component involves three lines of inquiry: (1) the seriousness of the Charter-infringing conduct; (2) the impact of the breach on the Charter-protected interests of the accused; and (3) society's interest in the adjudication of the case on its merits. This is followed by a final balancing exercise to determine whether admitting the evidence would bring the administration of justice into disrepute: Grant, at para. 71.

(a) Seriousness of the Charter-Infringing State Conduct [68] The police's misconduct must be placed on a spectrum, ranging from wilful or reckless disregard for Charter rights to inadvertent or minor violations. The former will negatively affect public confidence in the rule of law: Grant, at para. 74.

[69] The police conduct did not demonstrate significant disregard for the appellant's Charter rights. I do not accept the appellant's submission that the initial breaches of ss. 10(a) and 10(b) were "severe," "egregious," or "deliberate," or that the police conduct amounted to wilful or reckless disregard of the appellant's rights.

[70] The police were executing a search warrant related to a firearm discharge on a residential street. Armed with the lawful warrant and their knowledge that gunfire originated from a specific residence, they reasonably believed they could ask the occupants about the incident. The initial questioning was open-ended and not accusatory or interrogative.

[71] The subsequent failure to advise the appellant of his right to counsel, before asking him to elaborate on his initial statement, appears to have been based on an erroneous belief that the appellant was not detained. The police subjectively believed that the appellant was a potential victim. This was not a deliberate attempt to disregard the appellant's rights. As the trial judge noted, "someone targeting [the appellant] and shots then being fired was a reasonable thesis at that stage of the investigation". To be sure, the police officers' subjective belief that the appellant had not crossed the line into detention was wrong. But it was not a wilful or reckless disregard of the appellant's rights. As the respondent notes, once the appellant's jeopardy changed, the police immediately complied with the appellant's rights. They told him to stop talking and advised him of his right to counsel.

[72] There is also no evidence of systemic misconduct. I would add that the Supreme Court's decision in Lafrance was not available to the police or the trial judge at the time the decision below was made. Lafrance clarified how the execution of a search warrant could affect a person's perception of detention. I agree with the respondent that prior to Lafrance, the officers' belief that they could ask open-ended questions about potential involvement in an offence during the execution of a lawful warrant was more tenable.

- [73] While the appellant's subsequent arrest was a consequential breach, this does not significantly increase the seriousness of the conduct: *Zacharias*, at para. 56. Following *Zacharias*, absent "independent state misconduct", a breach that is entirely consequential is unlikely to significantly increase the seriousness of the Charter-infringing state conduct: *Zacharias*, at para. 2. Here, the breach of s. 9 was entirely consequential. The focal point remains the initial breach.
- [74] Even considering the additional breach of s. 9, this factor does not strongly favour exclusion because the police's conduct was not wilful or reckless. As in *R. v. O'Brien*, 2023 ONCA 197, there is no basis in this case for suggesting that the police intentionally set out to detain the appellant or acted negligently in doing so. In the interest of providing guidance to police, however, I would reiterate what *Paciocco J.A.* said in that decision (at para. 37):
- [G]iven the inherently coercive nature of warrant execution, and the reaffirmation in *R. v. Lafrance*, 2022 SCC 32, 416 C.C.C. (3d) 183, that psychological detention can occur during the execution of search warrants, police officers who assume control over occupants in order to secure the scene of a search should pay closer attention to whether there are objectively reasonable indications that those persons may consider themselves to be detained than the police officers did in this case. It is a simple matter to explain to occupants why they are being directed, and to notify them when and where they are free to go.
- [75] To avoid crossing the line and effecting a detention while executing a search warrant, police officers should act "solely to ensure the integrity of the search"; this includes any concerns about officer safety and the loss or destruction of evidence. They should interfere with occupants' liberty only to the extent necessary for this purpose and withhold from questioning that is focused on an occupant's involvement with the crime: *McSweeney*, at paras 38, 44. If or when they exceed these parameters, they must provide any occupants of the premises with their s. 10(b) rights.
- (b) The Impact of the Breach on the Charter-Protected Interests of the Accused [76] This inquiry evaluates how the breaches undermined the interests protected by the infringed rights: *Grant* at para. 76.
- [77] I agree that the police deprived the appellant of his right to counsel, undermining his ability to make a meaningful choice to exercise his right to silence at his home. It is also fair to say that the violation of his right to counsel had a significant impact on his protection against self-incrimination. The coincident breach of s. 10(a), as well as the consequential s. 9 breach flowing from the unlawful arrest, engage the appellant's liberty interest. In *Zacharias*, the court found that additional breaches necessarily result in a more significant impact under the second prong of the *Grant* test: *Zacharias*, at para. 72. Here, there is no question that the ensuing unlawful arrest impacted the appellant's liberty.
- [78] That said, based on the evidence in this case, I am confident that the appellant would have made his incriminating statement in the garage even if he had been advised of his Charter rights. As noted above, the appellant asked Constable Sandhu and Detective Salmon to come

to the garage so he could explain his story. He was immediately told to stop talking when he stated that he was responsible for the gunshots. Upon being given his s. 10(b) rights on arrest, he simply said, “Yes, I know the law,” and only sought to explain that he thought his actions were justified (“I was protecting myself, but it is what it is”).

[79] Once the appellant was taken to the police station, he was repeatedly given the chance to consult a lawyer. He did not seem to want a lawyer, nor did he think he needed one. Instead, he was keen to continue elaborating on his version of events in his interview with Constable Sandhu. I am confident that, had the police given the appellant his s. 10(b) rights upon his detention prior to his arrest, the appellant would have declined the opportunity to call a lawyer and would instead have proceeded to tell the police what he in fact told them.

[80] I agree with the following observations of the trial judge:

[The appellant] volunteered that he’d been the subject of persons out to get him. He asked the police to come to the garage so he could explain what had happened. He was happy to tell that story to Constable Sandhu. These are not the hallmarks of someone who was intimidated and who had his will overcome by the police. [Emphasis added.]

[81] In *Grant*, the court held that the impact of a s. 10(b) breach may be attenuated when an individual utters an incriminating statement “spontaneously following a Charter breach” or in the exceptional case “where it can confidently be said that the statement in question would have been made notwithstanding the Charter breach”: *Grant*, at para. 96, citing *R. v. Harper*, [1994] 3 S.C.R. 343. In light of the trial judge’s findings above, I find this to be such a case. The record here supports that the impact on the appellant’s s. 10(b) rights is somewhat attenuated.

[82] For these reasons, while I agree that this factor points towards exclusion, it does so less strongly than in other cases. The impact of the breaches on the appellant’s Charter-protected interests is somewhat attenuated in this case because of the appellant’s apparent desire to speak to the police.

(c) Society’s Interest in the Adjudication of the Case on its Merits [83] This inquiry asks whether the truth-seeking function of the trial is better served by admitting or excluding the evidence: *Grant*, at paras. 79-84.

[84] The evidence is reliable and critical to the Crown’s case. The appellant does not suggest otherwise. There is no genuine question that the truth-seeking function is better served by admitting the statements.

[85] The seriousness of the crime also increases society’s interest in the adjudication of this case on its merits. A gun was fired several times in a residential neighbourhood. One bullet went through the front door of a house across the street, lodging in the door of a closet. The police had to secure the safety of the residents in this neighbourhood. Where gun violence is involved, society’s interest is accordingly high.

(d) Final Balancing [86] The first two factors do not favour admission, but it is their cumulative strength that must be weighed against the third, which strongly favours admission: *R. v. McColman*, 2023 SCC 8, 478 D.L.R. (4th) 577, at para. 74.

[87] In this case, the first factor does not strongly support exclusion, and while the second factor favours exclusion more strongly, its effect is attenuated as described above. The third factor strongly supports admission, and since the first two inquiries cumulatively do not strongly pull towards exclusion of the evidence, this is a case where the evidence should not be excluded under s. 24(2).

[88] I would affirm the trial judge's decision to admit the statements.

V. Disposition [89] For these reasons, I would dismiss the appeal.

Released: September 25, 2025 "B.Z."

"S. Coroza J.A."

"I agree. B. Zarnett J.A."

"I agree. L. Favreau J.A."

[1] The trial judge also dismissed a challenge to the search warrant issued for the home. He held that the search warrant for the home was properly issued. Based on the police's investigation, there was a basis to believe that the shots fired came from the area of the appellant's home. The appellant does not challenge this ruling.

[2] Although the trial judge found that the execution of the search warrant began "between 3:30 and 3:53 a.m.," every officer who testified about this timing gave an estimate ranging between 3:00 and 3:30 a.m. As the trial judge observed, 3:53 a.m. was when the occupants were escorted back into the house by the police.

[3] The appellant argues in his factum that the appellant's statements to the police at his residence and the police station were not voluntary. This was a separate inquiry from the Charter issues raised by the appellant at trial. The appellant also argued that the pre-arrest detention was a breach of s. 9. These arguments were not pressed in oral argument. In any event, I am satisfied that there is no merit to these arguments. The real issue urged by the appellant in his factum and oral argument was an alleged s. 10(b) violation.

[4] The trial judge found that, even if Constable Sandhu's conduct at the police station during the police interview amounted to a breach of s. 10(b), he would not have excluded the statement pursuant to s. 24(2).

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