
CANADA / JUDGMENT

R. v. Parchment

2005 BCSC 1871

COURT

Supreme Court of British Columbia

DECIDED

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2005 BCSC 1871 R. v. Parchment

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: R. v. Parchment

2005 BCSC 1871

Date: 20050728

Docket: 58504-3

Registry: Nanaimo

Regina

v.

O'Neil Constantine Parchment

Before: The Honourable Mr. Justice Taylor

Oral Ruling on Voir Dire

July 28, 2005

Counsel for Crown:

B. Jones

Counsel for Defence:

T. Russell

Place of Trial/Hearing:

Nanaimo, B.C.

- [1] THE COURT: At the commencement of the trial of Mr. Parchment on three counts of possession of a controlled substance for the purpose of trafficking, a voir dire was held to determine the admissibility of various exhibits seized either prior to or after Mr. Parchment's arrest. Those included objects removed from the accused's person and removed from a motor vehicle that he was operating just prior to his arrest.
- [2] The basis of the voir dire, as agreed to by Crown counsel, was that the accused had raised a section 8 challenge with respect to the admissibility of this evidence.
- [3] The factual underpinning of the issues of admissibility is not particularly controversial, despite defence counsel's rigorous cross-examination of the two investigating officers.
- [4] On January 21st Constable Toye and Bouey, members of the Nanaimo municipal drug section, a group within the Nanaimo RCMP detachment tasked with the responsibility of investigating street-level drug trafficking, received information from another police officer, who was, in turn, told by a source, that "Bing and a blonde were dealing drugs out of a white van with B.C. licence number 3847HS." The officers knew of this person by the name of Bing as being a nickname for the accused and that he had been previously associated with the described white van. Constable Toye testified that the information also included the word "today."
- [5] Constable Reason testified, that what he told his officers on the 21st as to the informant's information did not include the words as testified to by Constable Toye that the dealing would be occurring "on that day" or "today."
- [6] Constable Toye had no information as to the reliability of the information or the source that was provided through Constable Reason.
- [7] Constable Toye from his work on the drug section was aware that the accused had a nickname of Bing, that he had previous convictions for possession for the purpose of trafficking of controlled substances or narcotics and, based on that and other information, knew the accused had a reputation as a drug dealer in the Nanaimo area.
- [8] In the afternoon of 21st January of 2005 at approximately 3:30, the officers, who were in an unmarked pick-up truck, went to the Nicol Street McDonalds Restaurant in Nanaimo so Constable Toye could use its washroom. Constable Toye was driving, and Bouey, a recent addition to the drug squad, was a passenger in the extended cab pick-up that had clear front windows and tinted rear windows. There is no evidence that they were looking for the accused's van. Their stop at McDonalds was simply to let Constable Toye use the washroom.
- [9] While there, the officers saw a white pick-up truck with blue stripes and dual rear tires. Constable Toye, the more senior of the two, decided to watch it. He drove to the corner of Nicol and Milton Street and stopped at the south-west corner on Nicol. As they were stopped, they saw a white van that fitted the description given earlier that morning as being the van from which Bing was to be dealing drugs. It had the same B.C. licence plate and two occupants in it, as had been described by the informant tip. The van moved on to the

McDonalds parking lot, and the officers moved on to Milton Street to better observe it.

- [10] The white truck then left, leaving the van in the parking lot. Within a minute of this occurring, a black Blazer SUV entered on to the lot. Constable Toye had seen that SUV, as he described it, before and said it was the same. As I will later observe, the only characteristics of the SUV was it was black and it was a Blazer. He said that he had seen it whilst doing surveillance work and had observed it to meet with another vehicle being driven by the accused. As well, on an earlier occasion on the 12th January the van that he saw that day on the 21st he had also seen being driven by the accused.
- [11] When I say that he had seen these vehicles before, as I point out his evidence was that the black SUV was a Blazer as those were the only distinguishing features that he could describe. The van, as I say, he had seen on 12th January at another location in Nanaimo.
- [12] The black SUV pulled up to the van so that the driver's doors were opposite each other. The accused was observed to step out of his vehicle and go to the driver's door of the SUV. Because of the position of the vehicles, both officers could only see the accused's upper torso. As Constable Bouey described it, it was from chest up. They could not see the accused's hands nor say whether or not there appeared to be any conversation. The officers were some fifty metres away while making these observations. Constable Bouey, when pressed in cross-examination, estimated the distance at fifty metres and said that it was not as much as one hundred metres.
- [13] The accused went to the SUV driver's door and remained there for a very brief period of time. Constable Toye estimated it to be thirty to forty seconds; Constable Bouey forty to sixty seconds.
- [14] Although challenged as to what they could see from their position on Milton Street, I am satisfied the two officers were in such a position that they could see the front portions of the van and the SUV and thus see the movement of the accused to the SUV driver's door, albeit only his upper torso. I am confirmed in this view by the fact that the officers had in fact moved from their position on Nicol Street to that on Milton Street so as to better observe the van itself once the pick-up truck had left.
- [15] Upon the accused returning to and getting into his van, the SUV left. Constable Toye did not recall its licence number, but Constable Bouey did and shortly thereafter radioed that number to the dispatcher at the RCMP detachment. The van began to move forward when the officers activated their lights and siren. It came to a stop slightly west of where it had been when it was side-by-side to the SUV, but still in the parking lot of McDonalds and Shell Gas Station that are joined by this parking lot.

- [16] Constable Toye testified that he believed that he had just observed a drug transaction based upon the information that he had prior to the van's arrival and what he had seen occur in the parking lot in respect to the van and the SUV. Additionally, he knew of the accused's previous history, including previous drug-related convictions and the general reputation of the accused, at least among police officers.
- [17] Constable Toye then approached the driver's door and informed the accused that he was a police officer and asked him to get out of the van, which he did. He then advised him that he was being detained for investigation, provided him with his 10(a) and 10(b) Charter rights. He provided a standard police warning about any utterances by the accused. There was some question as to whether or not the accused provided his name and telephone number prior to this, but Constable Toye asserts that that occurred after he gave him his initial Charter. The accused acknowledged that he understood what had been told to him. I accept the sequence described by Constable Toye.
- [18] Constable Toye knew of the accused before and believed that he was in the habit of carrying a knife. The accused was wearing coveralls on top of pants and had a fleece jacket on top of the coveralls. Constable Toye then handcuffed him preparatory to his conducting a search to see if he had any weapons. Constable Toye frankly admitted, as I will discuss later, that he was searching for both weapons and drugs. In the upper right vest pocket of the fleece, Constable Toye found a small plastic-wrapped object, and in the coverall pocket he found a four inch folded knife. He removed both of these from the pockets of the accused. Constable Toye did not do a pat-down search before entering the accused's pockets.
- [19] Based upon his experience, he concluded the plastic object was what is known as a spitball of cocaine, a term used to describe a half gram quantity of this drug. It was subsequently analysed to be such.
- [20] Constable Toye conceded his search was for both weapons and for drugs. Having found and seized the knife and the spitball, he ceased his search of the accused and then advised him that he was under arrest for possession of a controlled substance. He re-gave him the standard police warning, to which the accused acknowledged his understanding. The accused, other than initially stating his name and address and phone number made no further statements. The accused was then subsequently turned over to another officer who had arrived at the scene.
- [21] Constable Toye then waited at the van until a dog unit came.
- [22] Constable Bouey, upon the van being stopped, dealt with the passenger, who identified himself as a Jeffrey Kane. She searched for weapons. She found only a cellular phone on him, which she then returned to him. The two of them walked to the driver's side where Constable Toye was occupied with the accused. Thereafter, according to Constable Bouey's evidence, she had no further dealings with Kane, whom she believed left the area.

- [23] A police dog unit arrived, and after an examination of the van, Constable Toye then went in behind the centre console between the two front seats of the van, where a substantial quantity of various controlled substances was found and later analysed to be such. In total, there was some seventy six and a half grams of cocaine, six point nine grams of heroin and twelve point three grams of amphetamines contained in various blue and yellow plastic wrappings.
- [24] Under the driver's seat were found blue plastic bags similar to the plastic in which the various controlled substances were wrapped, as well as a number of pieces of plastic that were cut from similar plastic.
- [25] From the glove box was seized the registration papers of the van in the accused's full name and with the corresponding licence plates that were mounted to the vehicle.
- [26] Located on top of the centre console was a cellular phone, which has been marked exhibit 27, which was subsequently seized by Constable Bouey and, as I will describe in a moment, used by her.
- [27] In his search of the vehicle, Constable Toye found no needles or pipes that are customary in the usages of heroin and cocaine.
- [28] Without reviewing in detail the evidence of Constable McRitchie, an expert called by the Crown on the aspects of trafficking such substances and amounts, the essence of his evidence can be said to be that these amounts were inconsistent with personal use and consistent with the purpose of trafficking.
- [29] Constable Bouey said that at about 3:45 the cellular phone that she had seized began to ring and over the next two hours it rang some forty times. She answered the first dozen of these calls. She described in a summary way the gist of these calls. They included a number of calls in which orders were placed for drugs, either by the use of jargon or code words. By way of an example, one of the calls referred to two down and a package of cigarettes to which the caller referred to forty to sixty dollars being the normal price. There was a call for delivery of curtains. There was a call with respect to a Pete wanting an ounce. A reference was made to a carton and that Player's Light referring to down, a term that is commonly used in the jargon of the drug trade for heroin. A further call referred to a full package and that the caller would "shoot her some" referring to Constable Bouey who answered the telephone.
- [30] The first of these phone calls referred to O'Neil, which is the accused's first name. Thereafter the name "Bing" was used on seven calls, with the only reference to a person being to "he" in the other phone calls.

- [31] Although Constable Bouey said the cell phone had call display and she recorded the numbers, she did not later seek to trace any of these calls, nor did she seek to determine to whom the cellular phone was in fact registered. No calls were answered by Constable Bouey in which any reference to Jeffrey Kane by any name or form were made.
- [32] Constable Bouey also located a small notebook in the sunglass holder in the centre roof console that contained a number of what were described as score sheets in which the names and numbers in terms of dollar amounts were recorded. According to Constable McRitchie, an expert qualified in the field of drug trafficking and jargon, that is the common way in which dealers keeps track of drugs advanced or fronted on credit to others.
- [33] The accused was escorted back to the police detachment. He was searched. A quantity of bills was found upon his person in various pockets in various denominations. As well, in the accused's pockets was found another notebook which, among other entries, contained what has been described as score sheets.
- [34] It is the admissibility of these exhibits that is at issue in this voir dire.
- [35] Thus, fundamental to the issue is the lawfulness of the seizures, both from the accused's person and from his vehicle in terms of the substances seized and the various documents, telephone, and ultimately messages heard by Constable Bouey, and along with other paraphernalia associated with the packaging of a controlled substance for the purpose of trafficking.
- [36] The question therefore is whether the detention by Constable Toye of the accused was for "investigative purposes" as he told the accused or an arrest founded upon reasonable grounds.
- [37] As this was a warrantless search of the accused and his vehicle, the burden rests upon the Crown to establish the search was, on a balance of probabilities, reasonable. To be reasonable, the search must be authorized by law, which is in and of itself reasonable, and must be conducted in a manner that is also reasonable. See *R. v. Collins* (1987), 35 C.C.C. (3d) 1.
- [38] Crown's position is that what Constable Toye did was in accordance with the proposition that permits a search before actual arrest where independent of the personal search reasonable grounds existed for an arrest. That proposition is enunciated best in *R. v. Sinclair*, [2005] M.J. No. 96, a decision of Mr. Justice Freedman of the Manitoba Court of Appeal, where at paragraph 20 he observed:

Searches usually follow an arrest, but there is ample authority that a search prior to arrest will still be incidental to the arrest provided that prior to the search there were reasonable and probable grounds for the arrest. See *R. v. Debot* (1986), 30 C.C.C. (3d) 207 (Ont. C.A.)

That proposition enunciated originally in *Debot* by Mr. Justice Martin of the Ontario Court of Appeal was later upheld in the Supreme Court of Canada at 52 C.C.C. (3d) 193.

- [39] Counsel for the accused does not disagree with that general proposition. Rather, the position taken on behalf of the accused is that prior to the search, the results of which cannot be considered when determining the reasonableness of the arrest, there did not exist such reasonable grounds, and at best all the police could do was to detain for investigative purposes. Such detention, it is correctly argued, does not permit of searches of the nature that occurred here, which admittedly went beyond a pat-down search.
- [40] The question, therefore, is, has the Crown established the existence of reasonable grounds for an arrest of the accused when Toye purportedly detained the accused for investigation. It is therefore necessary to consider what existed as opposed to what words may have been used by Toye when he detained the accused prior to searching him.
- [41] The Crown says there is a plethora of evidence upon which it can be concluded there were reasonable grounds existing at the moment that Mr. Parchment was detained. These included the following:
1. That prior to 3:30 p.m. on 21st January of 2005 Constable Toye was possessed of information provided to him by other officers that the accused was a drug trafficker and that he had a reputation as one;
 2. Constable Toye knew that the accused had a criminal record that included assault and a number of drug offences for controlled substances where the precursor is narcotics;
 3. Constable Toye believed the defendant carried a knife;
 4. in an earlier investigation Constable Toye found drugs in a vehicle in which the accused was present or associated but that the accused was acquitted of possession of those drugs;
 5. that on the earlier occasion a black SUV similar to that which he identified as being the one in the parking lot on the 21st had been present;
 6. that on the morning of 21st January of 2005 Constable Toye had been informed by Constable Reason of his drug section that another officer had received information from a source, the reliability of which was unknown to Toye, that the accused, known as Bing to Toye, would be dealing drugs out of a white van, licence number HS3487, with another person described simply as a blonde. So far as Toye was concerned, the source was anonymous and unproven in terms of reliability;
 7. that on 12th January he had seen the accused in the white van with B.C. licence number HS3487;
 8. that a black Blazer SUV, the same or similar to that which had been earlier seen in association with the accused in another drug-related matter, drove by and stopped driver's door to driver's door in the parking lot of McDonalds Restaurant on 21st January;

9. that the accused got out of his vehicle, came to the SUV driver's door, where he remained for between forty to sixty seconds, returning to his own vehicle, when each vehicle then began to depart the parking lot;
 10. that the accused drove that white van on 21st January and was accompanied by another person;
 11. Constable Toye believed on the basis of the foregoing observations and knowledge that a drug transaction had occurred. He did not know whether the accused was the buyer or the seller.
- [42] Can such evidence and information known to Constable Toye provide reasonable grounds for the arrest for possession of a controlled substance?
- [43] In *R. v. Debot* Mr. Justice Martin considered whether such tip information might form a basis for a lawful arrest. He began in the printed version provided to me at page 10 of 18 to consider the use of such information as a "reasonable ground to believe such as to obtain a search warrant". He held that mere conclusory statements made by an informant would not constitute reasonable grounds to conduct a warrantless search or for the making of an arrest without a warrant. He noted that:

The standard of reasonable ground to believe or probable cause is not to be equated with proof beyond a reasonable doubt or a *prima facie* case. The standard to be met is one of reasonable probability.

He considered that when one considered the "totality of the circumstances" available to an officer, the officer in the case before him had reasonable grounds to believe that Debot was in possession of a prohibited drug. Mr. Justice Martin further then noted that in respect of Debot, the informant had not made a "mere conclusory statement" that the accused was engaged in dealing drugs, but rather provided information as to "the underlying circumstances of the expected transaction, including location". In addition to the informant information being something the arresting officer could rely upon in Mr. Justice Martin's view, he also concluded the police officer could rely upon Debot's reputation as a drug dealer in considering the question of reasonable and probable grounds for an arrest.

- [44] Madam Justice Wilson for the Supreme Court of Canada decision in *Debot* agreed with Mr. Justice Martin and at page 215 she held, in considering tip information:

Rather I concur with Martin J's view that the totality of the circumstances must meet the standard of reasonableness. Weakness in one area to some extent may be compensated by strength of the other two.

She had in that sense been referring in terms of the three aspects earlier in that paragraph when she commented:

First, was the information predicated the commission of a criminal offence compelling? Secondly, where that information was based on a "tip" originating from a source outside the police, was that source credible? Finally, was the information corroborated by police investigation prior to making the decision to conduct the search?

She then went on to consider the question of reputation evidence at page 216, when she observed as follows:

Evidence of bad character or prior criminal misconduct by an accused is excluded at his or her trial on a criminal charge, not on the ground that the evidence has no probative value, but on policy grounds because the prejudicial effect of such evidence outweighs its probative value.

These policy reasons are obviously not as cogent at the investigatory stage where the liberty of the subject is not directly at stake. Moreover, I think it is somewhat artificial to assume that any one factor, be it reputation or something else, is responsible for turning a previously "insubstantial" case into a sufficient one. Having said that, I add the following caveats to the use of reputation as germane to the issue of a reasonable search. First, the reputation of the suspect must be related to the ostensible reasons for the search. A background of driving offences, for example, has little relevance to drug trafficking. Secondly, if the reputation of the suspect is based on hearsay rather than police familiarity with the suspect, its veracity cannot be assumed. In the present case, it appears that the police relied on both direct experience and hearsay.

[45] The observations in Madam Justice Wilson's judgment in *Debot* were considered by the Court of Appeal of this province in the decision of *R. v. Charlton*, [1992] B.C.J. No. 1405, delivered by Mr. Justice Cumming. There the police had received information from a known cocaine user that a black over grey Mercury Marquis carrying B.C. licence plate LAW 118, with more than one occupant, had arrived from Vancouver the previous day, the occupants of the vehicle in possession of a substantial quantity of cocaine, the occupants had come to the Greater Victoria area to sell the cocaine, a weapon might be in the vehicle.

[46] As will be noted, no precise number of occupants or the names of the occupants were provided in the information referred to by Mr. Justice Cumming as were provided in this case, when a specific British Columbia licence plate number was provided and a name given to at least one of the two occupants of the vehicle, in addition to the general description of the second occupant as being a blonde. As well, as with that provided in *Charlton*, the information alluded to cocaine dealing was going to occur.

[47] In *Charlton*, the vehicle was then observed to make a number of stops before it was finally stopped by a police officer and the occupants informed that they were being detained for investigation of a narcotic. Mr. Justice Cumming at page 8 of 10 in the version provided to me commented upon the use of tip information as follows:

In many instances the police may properly act upon information received from an untried source (i.e. concerned citizens, crime-stopper tips, first-time informant). The use of such evidence in establishing reasonable and probable grounds is dependent upon the totality of the circumstances. The inability to assess the credibility of the informant may be compensated for by the quality of the information as well as by any corroborating or confirmatory evidence: *R. v. Cook*, [1990] B.C.J. No. 37 . . . and *R. v. Debot*.

He then commented that while reputation alone would not be sufficient to provide a reasonable ground, it may in itself be a relevant factor if related to the reasons for the search and was not based solely upon hearsay. He concluded his consideration of the basis for finding reasonable and probable grounds as follows at pages 9 and 10 when he said:

Even in circumstances where police do not have specific information that an accused is in possession of narcotics, they are entitled to "put two and two together" and conclude that the accused is in possession of narcotics. Thus, where an unknown accused makes a "furtive visit ... of the fleeting sort which is to be expected when drug trafficking is going on" to a residence being surveilled by police pursuant to an informant's advice that cocaine was being sold out of the premises, the conclusion that the accused is in possession of cocaine would meet both tests enunciated in *R. v. Storrey*.

The quality of the information provided by the informant and the confirmatory surveillance evidence removed "the possibility of innocent coincidence", and thus the learned trial judge was correct in finding that reasonable and probable grounds existed for the police officer's belief that the appellant was in possession of cocaine which he was attempting to sell. See *R. v. Debot* . .

[48] He further confirmed that a search may occur before or after formal arrest "as long as the grounds for the arrest exist prior to the search".

[49] The opinions expressed by Mr. Justice Martin, endorsed by Madam Justice Wilson in *Debot*, were considered and applied in subsequent cases such as *R. v. Zammit* (1993), 81 C.C.C. (3d) 102 and in *R. v. Polashek* (1999), 134 C.C.C. (3d) 187, when in the latter decision Mr. Justice Rosenberg of the Ontario Court of Appeal again considered the issues raised some thirteen years before in *Debot* Mr. Justice Martin, and at page 198 observed as follows, referring to a passage from an earlier judge, Mr. Justice Doherty of that court in *R. v. Golub* (1997), 34 O.R. (3d) 743 at 750.

The dynamics at play in an arrest situation are very different from those which operate on an application for a search warrant. Often, the officer's decision to arrest must be made quickly in volatile and rapidly changing situations. Judicial reflection is not a luxury the officer can afford.

He then continued at paragraph 21:

In the circumstances, I would not interfere with the trial judge's conclusion that the officer had the requisite grounds for an arrest. The officer was, therefore, entitled to search the appellant as an incident of a lawful arrest. In *R. v. Debot* [citation given] Martin J.A. held that where an officer has grounds for a lawful arrest, "the fact that the search preceded the arrest does not preclude it

from being a search incident to a valid arrest, where the arrest quickly follows on the search". Accordingly, the initial search of the appellant, which led to the finding of the cannabis resin, was lawful and reasonable.

- [50] Thus the exactitude required by a police officer applying to a judicial official for a warrant to search is not required by an officer faced with the fluid situation in which he or she must make quick and rapid decisions. That decision must be made with despatch before suspects or evidence disappear.
- [51] In the course of his submissions, counsel for the accused suggests that the officer could have simply followed the van for whatever time it took to get a telewarrant, a period of time that Constable Bouey testified to in her experience was never less than an hour. That, with respect, is not how such matters are or should be approached. The officer must be able in a fluid situation, to act on information at hand with the awareness that such information or evidence may be lost or enhanced with the passage of time. He does not know in which direction events will turn in this respect. His duty is to act, provided that he has the basis to do so.
- [52] There is no question that if reasonable grounds to arrest did not exist prior to the search of Mr. Parchment, then the search that did occur, with Constable Toye entering the pockets of Mr. Parchment to find not only the knife but the spitball, went far beyond that permitted by the law settled in *R. v. Mann* and summarised at paragraph 45 of the decision of 2004 SCC 52 by Mr. Justice Iacobucci when he commented as follows:

To summarize, as discussed above, police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances the individual is connected to a particular crime and that such detention is necessary. In addition, where a police officer has reasonable grounds to believe that his or her safety or that of others is at risk, the officer may engage in a protective pat-down search of the detained individual. Both the detention and the pat-down search must be conducted in a reasonable manner.

- [53] This was not a pat-down search. Indeed, Constable Toye did not pat down Mr. Parchment but, rather, went into his pockets in the invasive manner prohibited by *R. v. Mann*. There was nothing about the pocket in which the "spitball" was found to suggest it was a weapon. It was fairly conceded by Constable Toye that his search was for both weapons and drugs. Thus, absent reasonable and probable grounds to arrest prior to the search occurring, the search would be unlawful as it went beyond that permitted by law as described by Mr. Iacobucci in *R. v. Mann*.
- [54] Counsel for the accused reviewed each of the components of Constable Toye's state of knowledge and assailed each one individually.
- [55] In my view, that approach does not comply with the approach originally enunciated by Mr. Justice Martin and followed consistently by the courts since, which is an examination of the totality of circumstances. While the officer's belief must be assessed or considered on both

his own subjective view as well as an objective view, it is to be done, as I say, in the totality of the information available to him, not in some piecemeal fashion by which one aspect does not measure up and thus discarded. It is thus the totality of the circumstances that must give a basis to a finding of reasonable and probable grounds. Simply put, many weak fibres may by themselves make a strong rope. Likewise, individually assessed weaknesses may be given strength when combined with evidence that is a strength or is corroborative in nature.

- [56] Constable Toye was aware of the accused's reputation as a drug dealer. He knew this from information provided by other police officers and from his own observations and investigations involving the accused in the past. He was aware the accused had several convictions for the possession of controlled substances for the purpose of trafficking. He had seen the accused drive a van on 12th January that was white and had a stripe along its side, as did the van he saw on the 21st. He had noted its licence plate and said it was the same as he saw on the 12th. When he said that he saw the accused drive from Seafield to Crescent View Streets in Nanaimo. The van had British Columbia licence 3487HS. He saw no one else in the van at the time.
- [57] On the morning of the 21st he had received information, to which I have referred earlier, in which the reference to Bing was made. He knew the accused's nickname was Bing. He was in error when he described that the tip had referred to "that day" referring to the 21st January. The information was more general in terms of timing. It simply referred to a person by the name of Bing dealing drugs out of a specifically described motor vehicle in the company of another person described as a blonde. He saw the accused drive the same van on to the parking lot. There was another occupant. Constable Toye had never seen Kane, the passenger, before. His being at McDonalds was unrelated to the accused and, indeed, preceded surveillance of the accused's van and thus was circumstantial, caused by the circumstances of the van arriving on the lot.
- [58] As the van stopped in the lot, not in a parking stall in front of McDonalds, as evident in the photographs, a black Blazer SUV drove up to it door-to-door. The SUV, in Toye's opinion, was the same as he had earlier seen in earlier drug-related transactions, although involving another vehicle driven by the accused. He described the SUV by colour, model and make. The accused he observed alighted from his own vehicle, came to the driver's door of the SUV, where he remained for forty to sixty seconds, returning to his own vehicle and began to leave, as did the SUV.
- [59] While it is true that no movement or speech was noted, as observed in Charlton, police officers are permitted to use common sense and logic and put, as Mr. Justice Cumming observed, "two and two together".
- [60] Constable Toye, in my view, given the body of information he then possessed and in my view believed was correct, was entitled to conclude a probability that a drug transaction had just occurred before his eyes and that he accused was not meeting ever so briefly with the black Blazer SUV coincidentally. Toye had seen it the time before meet with the accused in what

he concluded then had been a drug transaction. The meeting was sufficiently brief that, given this totality of circumstances, he was entitled to draw the probable inference that a transaction had just occurred and that the accused was either a seller or buyer.

- [61] Drug transactions do not occur in public places in some languid manner or fashion. They occur with dispatch, as Constable McRitchie observed and any drug officer would know that.
- [62] In either scenario, whether buyer or seller, in my view Constable Toye had, upon the totality of circumstances that I have reviewed, reasonable grounds to conclude the accused was in possession of a controlled substance. That being so, I am of the conclusion that he had reasonable grounds to arrest the accused for that offence, and thus the search that followed of the accused person was lawfully incidental to that arrest.
- [63] The existence of reasonable grounds takes what occurred on the 21st January 2005, out of the prohibited conduct discussed in the 2004 decision of *R. v. Mann* and earlier decision of Mr. Justice Groberman in *R. v. Bartoli*, [2003] B.C.J. No. 2986, where Mr. Justice Groberman noted in paragraph 22:

... that while the required degree of suspicion of investigative detention is lower than for arrests, the power to interfere with the person is correspondingly reduced. Serious intrusions on personal liberty and privacy cannot be countenanced in the name of investigative detention.

- [64] I agree with defence counsel that Constable Toye may not know the law in terms of distinguishing between investigative detention and arrest. Nevertheless, his conduct is to be judged, as I have said earlier, not by what he said but rather by what in fact occurred and the basis of his belief.
- [65] Mr. Russell points out that such lack of knowledge may create a situation fraught with danger when an accused knowledgeable in the law, or at least as discussed in this case, takes an officer at his word and does not assess why and what was being done. I agree that the potential of confrontation over the law may occur. To avoid situations where such a search is resisted, an officer would be wise to express themselves more correctly and precisely to avoid an accused asserting his belief that if detained for investigative purposes the ability of a police officer to do a "full search" is limited pursuant to a *R. v. Mann*.
- [66] That, however, does not detract from the reality of what occurred here, being that Constable Toye, in my view, had reasonable grounds to arrest the accused prior to conducting his search of him. That he appears not to have considered arrest as opposed to detention is of no consequence where there existed a reasonable ground to arrest.
- [67] In terms of the search of the van, I am satisfied that that was also a lawful search, based upon the principles outlined in *R. v. Caslake*, [1998] 1 S.C.R. 51, paragraphs 12 to 14. As noted by Mr. Justice Freedman in *R. v. Sinclair*:

Caslake makes it clear, as had *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, that the common law power of search incident to arrest does not require a warrant. Provided that three circumstances exist, a warrantless search incident to arrest is not a violation of s.8. Those circumstances are:

1. the search power does not impose a duty; it is discretionary and must be recognized as such;
2. the search must be for a valid objective, e.g. obtaining evidence; and
3. the search must not be conducted in an abusive fashion.

[68] In my view, the search of the vehicle was done under the existence of those three circumstances. It was a vehicle directly associated with a validly believed to be drug transaction. It was conducted, as described by Constable Toye, in an area within reasonable reach of the driver and done so only after the use of the dog, by which a specific location for the search was identified.

[69] For these reasons, the objects seized as a consequence of the search of the accused's person and the van which he was driving is admissible in evidence.

"P.D. Dohm, A.C.J. for J.D. Taylor, J."

The Honourable Associate Chief Justice P.D. Dohm

for The Honourable Mr. Justice J.D. Taylor

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