

CANADA / JUDGMENT

## R. v. Samuels

2025 ONCA 736

### COURT

Court of Appeal for Ontario

### DECIDED

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R. v. Samuels

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Paciocco, David M.; Zarnett, Benjamin; Dawe, Jonathan

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COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Samuels, 2025 ONCA 736

DATE: 20251028

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Paciocco, Zarnett and Dawe JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Michael Trevor Samuels

Appellant

Joseph Wilkinson and Liam K. Thompson, for the appellant

Lisa Csele, for the respondent

### **Heard: April 2, 2025**

On appeal from the conviction entered on June 28, 2023, and the sentence imposed on December 5, 2023 by Justice Peter C. West of the Ontario Court of Justice.

Zarnett J.A.:

I. OVERVIEW [1] The appellant was convicted of two counts of possession of controlled substances (cocaine and crystal methamphetamine) for the purpose of trafficking, and of one count of failing to comply with a release order which prohibited him from possessing substances considered to be illicit under the Controlled Drugs and Substances Act, S.C. 1996, c. 19. He received a global sentence of two years imprisonment after credit for pre-sentence custody. The trial judge also made a forfeiture order in respect of items that were seized by the police upon the appellant's arrest, including \$6,860 in cash.

- [2] On his appeal against conviction, the appellant submits that the trial judge erred by failing to exclude evidence of the drugs and other items found in his possession when he was arrested due to what he asserts were violations of his rights under s. 8 of the Canadian Charter of Rights and Freedoms to be secure against unreasonable search and seizure, and under s. 10(b) of the Charter to retain and instruct counsel without delay.
- [3] The appellant's assertion of a s. 8 violation relates to searches that were conducted at the scene of his arrest, in the booking hall of the police station to which he was subsequently taken, and in a private room at the station.
- [4] The arrest occurred in a laneway where police had observed the appellant passing small plastic baggies from a larger bag to another person in what looked to them to be a drug transaction. The searches at the scene included an officer lifting the appellant's shirt and removing a plastic baggie sticking out of the waistband of the appellant's underwear as well as an officer pulling down the joggers the appellant was wearing to search the pockets of the jeans he was wearing beneath them. The search in the booking hall involved an officer putting his hands inside the waistband of the appellant's jeans. The appellant submits that the trial judge erred in refusing to find that these were strip searches, subject to a high threshold of reasonableness that was not met.

- [5] The search in the private room at the police station was a strip search. The appellant submits that the trial judge's conclusion that it was necessary was erroneous.
- [6] The appellant's argument about s. 10(b) challenges the trial judge's finding that the passage of approximately two hours from the time of his arrest until he had the opportunity to speak to counsel was justified.
- [7] On his sentence appeal, the appellant submits that the trial judge erred in assessing the appellant's moral blameworthiness by failing to properly consider the impact of systemic discrimination. He supports his sentence appeal with a request to consider fresh evidence about the appellant's mental health challenges. He further submits that the trial judge erred in ordering forfeiture of the funds seized upon his arrest in the absence of proper notice and a forfeiture hearing.
- [8] For the reasons below I would dismiss the conviction appeal. I would grant leave to appeal sentence, admit the fresh evidence, set aside the forfeiture of funds order, but would otherwise dismiss the sentence appeal.

II. FACTUAL BACKGROUND A. The arrest, searches at the scene, and the request to speak to counsel [9] In the afternoon of May 31, 2022, Police Constable ("P.C.") Tillsley and P.C. Marriott were on foot patrol in downtown Oshawa. At 1:27 p.m. they both observed what looked like a drug transaction occurring between the appellant and another person. The appellant was observed with a plastic bag containing numerous individually wrapped baggies from which he poured three into the hand of the other person. The other person was then seen putting something into the hand of the appellant.

- [10] When the appellant and the other person saw the uniformed police officers approaching, they started to leave but were stopped by the officers. As the appellant was being detained by P.C. Tillsley, the plastic bag the appellant had in his hand fell to the ground and some of the small individually wrapped baggies in it also fell out onto the ground. P.C. Marriott dealt with the other individual; he found three small individually wrapped baggies in his pocket.
- [11] P.C. Tillsley noticed cash in the appellant's left hand. He asked the appellant if he had anything with him that could cause him injury or harm – anything sharp or pointy. P.C. Tillsley testified that the appellant responded that "he had another clear plastic bag tucked in his waistline, in the waistline of his underwear...". The appellant was wearing joggers over a pair of jeans and underwear. P.C. Tillsley lifted the appellant's shirt, saw a clear plastic baggie sticking out from the waistband of the appellant's underwear, and pulled out the baggie without touching the waistband of the underwear. The plastic bag contained three other plastic bags containing suspected drugs.
- [12] A sergeant wearing a body camera had arrived on scene around 1:31 p.m.; although the camera did not capture P.C. Tillsley removing the baggie from the appellant's waistband, it did show P.C. Tillsley holding a clear plastic bag. The items that had fallen to the pavement when the appellant was being detained were still on the ground at that time.

- [13] At 1:31 p.m., P.C. Wilson arrived on scene. At 1:32 p.m. P.C. Wilson began what the trial judge found to be a pat-down search of the appellant.
- [14] At 1:34 p.m., P.C. Tillsley told the appellant that he was under arrest for drug trafficking and possession for the purpose of trafficking, cautioned him, and advised him of his right to counsel. The appellant stated that he understood and wished to speak to a lawyer; he named Hicks Block Adams as his preferred counsel.
- [15] After noting the appellant's response, P.C. Tillsley assisted P.C. Wilson with the continued search of the appellant. Since the appellant was wearing a pair of jeans under his joggers, the officers lowered the joggers, while his jeans were up, to search the pockets of his jeans. After searching the jean pockets the appellant's joggers were pulled back up. The officers found a large quantity of cash, eight cellphones, three weight scales, a small propane lighter, white papers, and various cards in the appellant's pockets. A string of watches attached to the waistband of his jeans was also removed.
- [16] In total, 49.5 grams of cocaine and 4 grams of methamphetamines were found on the appellant. The appellant was escorted to the cruiser and taken to the police station where he arrived at 1:46 p.m.

B. The search in the booking hall [17] In the booking area of the police station, P.C. Tillsley asked Acting Sergeant Parcels for authorization to conduct a strip search of the appellant. He stated that his grounds for that request were that "when [the appellant] was arrested at the time a large quantity of individual sized baggies was located in the waistline of his underwear and so for safety concerns I just wanna make sure that there's not more drugs or anything else that could harm him." The sergeant granted authorization and informed the appellant that a strip search would take place. The sergeant then proceeded with the booking questions.

- [18] Prior to the strip search that had been authorized, and while still in the booking area, a different officer, Special Constable ("S.C.") Loschan, conducted another search of the appellant, which he described as a frisk or pat down search to ensure safety of the appellant and the officers. At 2:12 p.m., S.C. Asling, a female special constable assisting S.C. Loschan, but who did not participate in the pat down or frisk search, asked the appellant to remove his jewellery which consisted of numerous rings, bracelets, gold chains, and two watches. S.C. Asling asked the appellant if he was wearing multiple layers of clothing, to which he said yes. At 2:15 p.m., S.C. Asling asked the appellant to remove his belt after which his joggers fell down around his ankles. The appellant was told to remove his joggers. S.C. Loschan held the back of the appellant's jeans to prevent them from falling down because they were loose. S.C. Loschan searched the waistband of the appellant's jeans but testified that he did not pull the waistband away from the appellant's body to look down inside. He did not touch the underwear the appellant was wearing under his jeans. S.C. Loschan also searched the appellant's pockets and checked his clothing using a metal detector.

C. The search in the private room [19] At 2:17 p.m., after S.C. Loschan finished his search, the appellant was brought to a private room for the strip search that had been authorized. This search was conducted by P.C. Tillsley and P.C. Wilson, took approximately one minute, and was completed by 2:18 p.m. This search was audio but not video recorded, and the door to the room was closed while it was taking place. The officers did not touch the appellant, in any way, in the private room. The officers first asked the appellant to remove his shirt and give it to the officers, who inspected it, and returned it to him. After the appellant put his shirt back on, the officers asked the appellant to remove his jeans and socks, which he did. After the officers were satisfied that the appellant did not have anything else hidden under his clothes, they returned the jeans and socks to the appellant, who put them back on. The appellant then returned to the booking area. At 2:27 p.m., the special constables escorted the appellant to a cell.

D. Efforts to put the appellant in touch with counsel [20] After the search in the private room, P.C. Tillsley looked up the phone number for Hicks Block Adams on a computer. At 2:36 p.m. he called and left a message for a lawyer named Kristen Bailey (P.C. Tillsley testified that during the drive to the station, the appellant told him that “Kristen” was the name of his lawyer). After leaving the voicemail, P.C. Tillsley began photographing and logging the items seized from the appellant during his arrest and searches.

[21] Once all the photos were taken, P.C. Tillsley believed the appellant’s jeopardy had changed since the police would be laying additional charges due to the different quantities and type of drugs seized. P.C. Tillsley went to speak to the appellant again at 3:29 p.m. to advise him of this. The appellant told P.C. Tillsley that he wanted to speak to a lawyer named Kathryn “Dora” at the firm he had previously identified. P.C. Tillsley found a Kathryn Doyle online. He then placed a call and spoke to a receptionist at the firm at 3:34 p.m.; he was told that Kathryn Doyle could not take a call but one of her colleagues, Tamara Davidson, could speak to the appellant. P.C. Tillsley transferred the call to the cells and the appellant spoke to Ms. Davidson.

III. DECISIONS BELOW A. Reasons for conviction [22] The matter proceeded as a blended voir dire and trial.

[23] The trial judge found there had been no breaches of the appellant’s Charter rights.

[24] In the trial judge’s view P.C. Tillsley had reasonable and probable grounds to arrest the appellant and P.C. Tillsley and P.C. Wilson were entitled to search the appellant incident to that arrest. The search incident to arrest was lawful and done in an appropriate manner.

[25] On the question of whether a strip search had been conducted at the scene of the arrest or in the booking area of the police station, the trial judge considered the definition of strip search in *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679, at para. 47: “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 considered persuasive, and applied, the decision of *R. v. Choi*, 2021 BCCA 410, [2021] B.C.J. No. 2351, on the question of how to interpret that definition (and its

application in *R. v. Pilon*, 2018 ONCA 959, 144 O.R. (3d) 54). In summary Choi holds that the use of “undergarment” in Golden’s definition of a strip search must be read in context, such that it is not the inspection of anything that may be considered an undergarment that makes a search a strip search, but what the portion of the inspected undergarment was covering. “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...”: Choi, at para. 80.

- [26] The trial judge found that there was no strip search conducted at the scene of the appellant’s arrest. When P.C. Tillsley lifted the appellant’s shirt, and found and removed a plastic bag (containing three other plastic bags) sticking out of the waistband of his underwear, he did not violate the appellant’s personal privacy. He did not touch the waistband of the underwear, or look inside the underwear at the appellant’s genitals or buttocks. Given that the appellant had advised P.C. Tillsley that he had a plastic bag in his waistband, he found that it would have been illogical for P.C. Tillsley to leave it there until they reached the police station, as doing so would be contrary to ensuring the appellant’s safety, officer safety, and ensuring preservation of evidence.
- [27] Similarly, the trial judge found that the action of the officer at the scene of lowering the appellant’s joggers to his ankles to allow access to the pockets of his jeans did not amount to a strip search. In the trial judge’s view, the joggers worn by the appellant were an outer layer of clothing, under which he wore a pair of jeans and, beneath those, underwear. The removal of the outer layer of clothing was not “to permit a visual inspection of a person’s private areas, namely genitals, buttocks, or undergarments.” Indeed, the removal of the joggers left the appellant completely clothed, never exposing his genitals or buttocks or the portion of the undergarments covering them.
- [28] The search conducted in the booking area at the police station also did not, in the trial judge’s view, constitute a strip search, including when S.C. Loschan put his hands inside the waistband of the appellant’s jeans to check if there was anything that could harm the appellant or any of the officers. At no time did S.C. Loschan remove or re-arrange any clothing of the appellant allowing for a visual inspection of a private area.
- [29] The trial judge also found that there was no breach of the appellant’s s. 8 Charter rights involved in the strip search that was approved by Acting Sergeant Parcels and performed by P.C. Tillsley and P.C. Wilson in a private room of the police station. He found that it was not necessary that more drugs be found to justify that strip search. The trial judge further found that there was sufficient evidence to justify the approval of the strip search and that the search was brief and involved limited intrusion to the appellant’s privacy.
- [30] Turning to the alleged breach of s. 10(b), the trial judge found no violation had occurred. There was, according to the trial judge, no deliberate delay in affording the appellant access to counsel. Nor was the delay, approximately two hours, unjustified. The first hour of the delay, from the time the appellant was placed under arrest and advised he wished to speak

to a lawyer to the time P.C. Tillsley left a message for the lawyer he believed to be the appellant's counsel, was the result of the searches and of the time needed to book the appellant and the numerous items discovered on him. As soon as the booking process was completed, P.C. Tillsley looked up the website for the Hicks Block Adams firm and contacted Kristen Bailey, the lawyer that he believed the appellant was referring to. The next 50 minutes of the delay were a result of the absence of a return call by counsel and P.C. Tillsley being involved in photographing and cataloging the items seized from the appellant. As soon as P.C. Tillsley recognized that the appellant's jeopardy had changed, he advised the appellant and again informed him of his right to counsel. When the appellant gave a different name for the lawyer he wanted to speak to, P.C. Tillsley immediately made a call and put the appellant in contact with an associate of that lawyer.

[31] Alternatively, the trial judge found that even if the two hour delay was a breach of his s. 10(b) Charter rights, the drugs obtained should not be excluded under s. 24(2) of the Charter.

B. Reasons for sentence [32] The trial judge imposed a sentence of two years imprisonment after deducting credit for pre-trial sentence custody. He also made a forfeiture order in respect of the items that were seized by the police upon the appellant's arrest, including \$6,860 in cash.

[33] In arriving at the sentence, the trial judge considered several factors including the appellant's age (49) and background, the lengthy time (about three decades) during which he had supported himself through criminal activity, his lengthy criminal record (including prior convictions for possession of controlled substances for the purpose of trafficking), and his failure to do anything to address his own drug use. The trial judge recognized the harsh conditions of the appellant's pre-trial custody, but found little else in the way of mitigating circumstances.

[34] Noting that the appellant was found with sizeable quantities of cocaine and methamphetamine, the trial judge rejected the appellant's submission that he was an addict trafficker, instead finding that the appellant was a street-level commercial trafficker who had been engaged in that business for decades.

[35] The trial judge acknowledged that the existence of anti-Black racism may be an important consideration as it relates to the appropriate sentence for a specific offender, but found that in this case the appellant did not provide sufficient evidence to link his experiences with anti-Black racism to his involvement in the drug subculture or criminal activities.

[36] In the trial judge's view, a penitentiary sentence was necessary to address the paramount sentencing principles in the appellant's case, namely, specific and general deterrence, and denunciation.

[37] The trial judge also directed that the money and items seized upon arrest be forfeited.[1] When counsel for the appellant raised a question about the money being forfeited when the appellant had not been convicted of possessing proceeds of crime, the trial judge noted that the forfeiture request had been made by the Crown during submissions, and defence

counsel had not responded. The trial judge initially suggested that if the appellant had an issue with the forfeiture of funds he would schedule a forfeiture hearing, but later decided to keep his order in place so that the appellant could start serving his sentence, inviting the appellant to appeal the forfeiture order if he wanted to contest it.

IV. ANALYSIS A. The conviction appeal i. The trial judge did not misapprehend the evidence concerning the searches at the scene [38] The appellant argues that at trial the Crown failed to meet its burden to show that the initial, warrantless search incident to arrest was reasonable, because the evidence of the officers at the scene and the body-worn camera video evidence left questions unanswered. For example, the appellant submits that at one point P.C. Tillsley said that the bag in the appellant's waistband was not seized until he and P.C. Wilson together did a pat down search; however, the video shows P.C. Tillsley with a bag in his hand while recording him confirming that the appellant had not yet been patted down. The appellant further submits that after cross-examination of P.C. Tillsley, there was doubt about whether, in addition to the baggie he had taken from the waistband, another fell to the ground.

[39] In his factum, the appellant argues that questions of how and when the drugs were seized, what the grounds for the search were, and what the manner of the search was, could not be resolved, nor could a conclusion that the search and seizure were reasonable be reached, unless this "evidentiary lacuna" in the Crown's case were filled, but it never was. The appellant says the trial judge failed to consider this "gap" in the evidence and its significance for the Crown's onus.

[40] In oral argument, appellant's counsel approached the matter slightly differently – he submitted that the imperfect recollections of P.C. Tillsley undermined the reliability of his evidence generally and had implications for the Crown meeting its burden of proof at least in respect of the first search at the scene, yet the trial judge failed to grapple with the discrepancies.

[41] I do not accept either articulation of this argument.

[42] The trial judge accepted the evidence of P.C. Tillsley that the appellant told him about an additional plastic baggie in his waistband and that P.C. Tillsley retrieved it by lifting the appellant's shirt which allowed him to see the end of the plastic baggie sticking out from the appellant's waistband. He found that the plastic baggie P.C. Tillsley is seen holding in the video was that plastic baggie. To the extent there was a suggestion by P.C. Tillsley that the plastic baggie was not retrieved until P.C. Wilson was also involved in the search, the trial judge was not required to accept that version. In any event, the appellant does not demonstrate why a different conclusion about the reasonableness of the search should follow depending on whether the plastic baggie was retrieved by P.C. Tillsley before or after P.C. Willson was involved in the search.

[43] The trial judge was entitled to treat the evidence of P.C. Tillsley as a reliable recounting of the essential aspects of searches. He was not required to discount the evidence of P.C. Tillsley to the extent the appellant suggests because of any discrepancies between what P.C.

Tillsley recalled about the sequence of events and what the video showed. The trial judge took those discrepancies into account. For example, the trial judge noted that P.C. Tillsley had testified that he believed another officer retrieved the plastic baggies from the ground, but the trial judge found that P.C. Tillsley was simply mistaken in that respect, as the video showed him squatting down where the bags had fallen and it was a reasonable inference that he picked them up. But the question of which officer retrieved the drugs from the ground was simply not important to the disposition of the appellant's main objection to the searches at the scene – that they were unreasonable because they were, in law, strip searches.

ii. The trial judge properly found that the searches at the scene and in the booking hall were not strip searches [44] Both parties accept the definition of strip search in *Golden*, at para. 47: “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.”

[45] The parties disagree on how it should be applied.

(1) The parties' positions [46] The appellant argues that any search that involves a rearrangement of clothing that exposes someone's undergarments is a strip search. He contends that the two searches at the scene were therefore strip searches: the first, conducted by P.C. Tillsley involved moving clothing to see the waistband of the appellant's underwear where the appellant had told P.C. Tillsley that a plastic baggie was located, and the second, conducted by P.C. Wilson and P.C. Tillsley involved removing the appellant's joggers so that his jeans could be searched – the jeans being an undergarment since there had been a layer of clothing (the joggers) over them.

[47] The appellant also argues that the search in the booking area of the police station was a strip search because it involved S.C. Loschan rearranging the appellant's clothes, exposing his underwear, and examining the waistband of his jeans which would give a view of what was under them. The appellant further submits that this search was conducted in a busy area of the police station in the view of multiple officers, including a female officer.

[48] The Crown disputes the appellant's interpretation that each element of the definition in *Golden* is considered separately, and its corollary that rearranging clothing to expose any part of an undergarment is, in all circumstances, a strip search. The Crown argues that only visual inspections of undergarments that cover a private area such as genitals, buttocks, or female breasts constitute strip searches; the searches at the scene or in the booking area do not therefore qualify as strip searches.

(2) Discussion [49] I prefer the Crown's approach to the definition of a strip search in *Golden* to that advanced by the appellant. It better comports with the reasoning in *Golden* and the entire definition, considered as a whole.

[50] In *Golden*, the majority stressed the high standard that must be met before a strip search will be considered to be reasonable.[2] The common law authorizes a search incident to arrest, consisting of a “frisk” or “pat-down” search, where the police have reasonable and probable grounds to effect the arrest, the objective of the search is to guarantee safety of the accused or police (for example by the discovery of a weapon), to prevent escape, or to find evidence related to the arrest, and the search is not conducted in an abusive fashion: *Golden*, at paras. 44,75. But, the majority emphasized, the fulfillment of these criteria without more will not authorize a strip search:

The fact that the police have reasonable and probable grounds to carry out an arrest does not confer upon them the automatic authority to carry out a strip search, even where the strip search meets the definition of being “incident to lawful arrest”: *Golden*, at para. 98.

[51] Instead, the law imposes additional requirements that must be met before a strip search will be considered reasonable.

In order to meet the constitutional standard of reasonableness that will justify a strip search, the police must establish that they have reasonable and probable grounds for concluding that a strip search is necessary in the particular circumstances of the arrest: *Golden*, at para. 98.

Thus, even a strip search carried out in good faith and without violence “will also violate s. 8 where there is no compelling reason for performing a strip search in the circumstances of the arrest”: *Golden*, at para. 95. Strip searches are only constitutionally valid at common law where they are conducted as an incident to a lawful arrest for the purpose of discovering weapons in the detainee's possession or evidence related to the reason for the arrest. In addition, the police must establish reasonable and probable grounds justifying the strip search in addition to reasonable and probable grounds justifying the arrest. Where such preconditions to conducting a strip search incident to arrest are met, it is also necessary that the strip search be conducted in a manner that does not infringe s. 8 of the Charter: *Golden*, at paras. 87, 95 and 98-99.

[52] What is the reason for the different standards as between a pat-down or frisk search incident to arrest on the one hand, and a strip search on the other? The majority in *Golden* explained that the different standards followed from the intrusiveness of a strip search and its effect on the person subjected to it. As for intrusiveness, a strip search involves “a significant and very direct interference with personal privacy” as compared to “less intrusive personal searches, such as pat or frisk searches”: *Golden*, at para. 89. A strip search is one of “the most intrusive manners of searching and also one of the most extreme exercises of police power”: *Golden*, at para. 89, citing *R. v. Flintoff* (1998), 126 C.C.C. (3d) 321 (Ont. C.A.), at para. 24. As for effect, a strip search is, by its nature, a “humiliating, degrading and traumatic experience for individuals subject to them”; “inherently humiliating and degrading” no matter how carried out; may be analogized to a “visual rape”; and may be experienced by women and minorities in particular as “equivalent to a sexual assault”: *Golden*, at paras. 83, 90; see also, *R. v. Thompson*, 2025 ONCA 500, 450 C.C.C. (3d) 383, at paras. 2, 31, 48, and 51-56.

- [53] The Crown's interpretation of the Golden definition of strip search fits within the broader rationale in that case. The rearrangement or removal of clothing so as to permit the visual inspection of a person's private areas namely genitals, buttocks, breasts (in the case of a female) or undergarments covering those private areas, is clearly a direct interference with personal privacy, a highly intrusive and invasive manner of searching, and is inherently humiliating, degrading and traumatic for any detainee. But it is much more difficult to see that description applying to the rearrangement or removal of clothing that permits an inspection of a portion of an undergarment that does not cover a private area – such as the waistband of an undergarment, which only covers the waist – or an intermediate layer of clothing such as jeans worn under joggers but over undergarments.
- [54] Turning to the language of the definition as a whole, I agree with the British Columbia Court of Appeal's decision in *Choi* that the word undergarments in the definition must be read in light of the earlier language that refers to, and specifies, a person's private areas. In *Choi* a police officer had visually inspected the waistband of the accused's underwear, that is, the part of the undergarment covering the waistline. In reversing the trial court's finding that a strip search had been conducted, *Dickson J.A.* stated:
- [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. [Emphasis in original.]
- [55] To adopt the language of Choi, and on the trial judge's findings of fact, none of the searches at the scene or in the booking area involved the inspection of an area of the appellant's body that is inherently private, whether exposed or covered by an undergarment. To repeat the trial judge's critical findings:
- When P.C. Tillsley lifted the appellant's shirt and found and removed a plastic bag (containing three other plastic bags) sticking out of the waistband of his underwear, he did not touch the waistband of the underwear, or look inside the underwear at the appellant's genitals or buttocks.
  - The removal of the joggers to search the appellant's jeans was not "to permit a visual inspection of a person's private areas, namely genitals, buttocks, ... or undergarments."

- The search in the booking area, including of the waistband of the appellant's jeans, did not involve the removal or re-arrangement of any clothing of the appellant allowing for a visual inspection of a private area. Although the appellant asks us to draw a different evidentiary conclusion and infer, from part of the video taken in the booking hall, that the officer did look at the buttocks area, the video is not at all determinative on that point and it was open to the trial judge to make the finding that he did which is owed deference in this court.

[56] I reject the appellant's submissions that this court's decision in *Pilon* either expands the definition of a strip search as articulated in *Golden*, or otherwise assists the appellant in this case. *Pilon* was a straightforward application of *Golden* – the targeted area of the police searches (found to be strip searches) were private areas – the accused's buttocks, penis, and genital area (the accused in *Pilon* was not wearing undergarments). For the reasons given in *Choi*, at para. 79, *Pilon* is distinguishable from a case where a waistband is the only part of an undergarment that is inspected.

[57] Nor would I expand the understanding of the word undergarment to include an intermediate layer of clothing such as jeans worn under joggers but over undergarments.

[58] I therefore reject this ground of appeal.

iii. The trial judge did not err in finding the strip search in the private room of the police station was reasonable [59] The appellant does not challenge the manner in which the strip search in a private room at the police station was conducted. Underscoring that a strip search of individuals who are detained briefly by police still require a high degree of justification (see *Golden*, at paras. 96-98) he submits that the private room strip search lacked that justification because it was authorized only due to the nature of the charges the appellant was facing and in any event was unnecessary in light of the searches that had already been conducted.

[60] The appellant relies on *R. v. Wong*, 2022 ONCJ 566. In that case, the accused had been searched after arrest and some cash had been found, but nothing suggested possession of drugs or weapons. The booking sergeant authorized a strip search without any individual assessment of the accused's situation other than that he was charged with drug trafficking. She admitted "she had no investigative information that gave her grounds to believe he had weapons or drugs on him at the time": *Wong*, at para. 88.

[61] This case is very different than *Wong*. The private room strip search was not authorized for the appellant only due to the type of charge he was facing. The appellant had been found with drugs on his person upon arrest, hidden from plain view; it was therefore important to know if he had any further drugs on his person, secreted in areas that had not been inspected in the previously conducted searches. There was no suggestion that the strip search was conducted as a matter of routine, rather than based on the specific factors related to the appellant and his entry into custody. The trial judge expressly found that the search was authorized based on "the totality of the circumstances presented". I agree with the trial judge that the fact that more drugs were not found during the strip search does not mean that the strip search was unreasonable.

[62] I would not give effect to this ground of appeal.

iv. The section 10(b) issue [63] Section 10(b) guarantees to everyone arrested or detained the right “to retain and instruct counsel without delay and to be informed of that right”. Where, upon being informed of the right, the detained person exercises it, the police must immediately provide the detainee with a reasonable opportunity to speak to counsel: *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, at paras. 38, 42; *R. v. Jarrett*, 2021 ONCA 758, 498 C.R.R. (2d) 38, at para. 41. Where the accused tells police the counsel they would like to speak to, police must make reasonable efforts to connect the detainee with counsel of choice “without delay”: *R. v. Edwards*, 2024 ONCA 135, 434 C.C.C. (3d) 225, at para. 36, citing *R. v. Willier*, 2010 SCC 37, [2010] 2 S.C.R. 429, at para. 29.

[64] The appellant does not contend that the police delayed unreasonably in informing the appellant of his right to counsel; advice in that regard was provided to the appellant within minutes after his arrest. He argues that the delay thereafter was unreasonable.

[65] Some delay in providing access to counsel may be justified but the burden is on the Crown to show that the delay in the circumstances was reasonable. In *R. v. Rover*, 2018 ONCA 745, 143 O.R. (3d) 135, at paras. 26-27, the court explained:

[26] The s. 10(b) jurisprudence has, however, always recognized that specific circumstances may justify some delay in providing a detainee access to counsel. Those circumstances often relate to police safety, public safety, or the preservation of evidence. For example, in *R. v. Strachan*, [1988] 2 S.C.R. 980, the court accepted that the police could delay providing access to counsel in order to properly gain control of the scene of the arrest and search for restricted weapons known to be at the scene. Subsequent cases have accepted that specific circumstances relating to the execution of search warrants can also justify delaying access to counsel until the warrant is executed: see e.g. *R. v. Learning*, 2010 ONSC 3816, 258 C.C.C. (3d) 68, at paras. 71-75.

[27] These cases have, however, emphasized that concerns of a general or non-specific nature applicable to virtually any search cannot justify delaying access to counsel. The police may delay access only after turning their mind to the specifics of the circumstances and concluding, on some reasonable basis, that police or public safety, or the need to preserve evidence, justifies some delay in granting access to counsel. Even when those circumstances exist, the police must also take reasonable steps to minimize the delay in granting access to counsel: see e.g. *R. v. Patterson*, 2006 BCCA 24, 206 C.C.C. (3d) 70, at para. 41; *R. v. Soto*, 2010 ONSC 1734, at paras. 67-71; *Learning*, at para. 75; *R. v. Wu*, 2017 ONSC 1003, 35 C.R. (7th) 101, at para. 78.

[66] In my view the trial judge erred in his approach to the delay question. He was entitled to find that the delay of approximately two hours that elapsed between the appellant indicating he wished to speak to counsel and actually having the opportunity to do so was not deliberate. He was entitled to attribute some of the delay to the fact that the first message P.C. Tillsley left for counsel was not promptly returned. But he did not address whether it was reasonable

for the police to make no effort to even leave that first message until approximately one hour after the appellant had said he wanted to speak to counsel. The fact that police wished to complete four searches of the appellant, book him, and deal with the items they discovered on his person is not a per se justification for the delay in contacting counsel. There were a number of police officers involved in dealing with the appellant. The Crown did not show that it was necessary for police safety or the preservation of evidence – that it was reasonable in the sense explained in *Rover* – for all of the officers to prioritize other tasks over facilitating the appellant’s constitutional right to counsel.

- [67] However, I agree with the result of the trial judge’s alternative analysis. Even if s. 10(b) was breached the evidence of the drugs and other items found when the appellant was searched incident to arrest should not be excluded under s. 24(2) of the Charter. I reach this conclusion after considering, and balancing, the three factors set out in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353.
- [68] The first Grant factor pulls moderately toward exclusion. The failure to take reasonable steps to facilitate immediate access to counsel is a serious breach of the Charter. However, as the trial judge found, the delay was not deliberate or in bad faith.
- [69] The second Grant factor only weakly favours exclusion. There was no causal connection between the s. 10(b) breach and the discovery of the evidence sought to be excluded. The drugs and other items were lawfully discovered in a search of the appellant before the s. 10(b) breach occurred. In such circumstances, the impact of the breach on the appellant’s Charter protected rights is mitigated. The appellant did not incriminate himself after s. 10(b) was breached, there is no suggestion that he would have regained his liberty earlier had he had access to counsel, and the length of the delay and the context do not support a serious contention that there was a significant impact on the “lifeline interest” protected by s. 10(b). Given his extensive experience with the criminal justice system and the absence of any indications of psychological stress while he was waiting to speak to counsel there is no basis to conclude that the appellant would have felt entirely at the mercy of the police prior to enjoying that right. The impact on the appellant’s Charter protected rights was minimal: *R. v. Hamouth*, 2023 ONCA 518, 167 O.R. (3d) 682, at paras. 54-56, leave to appeal refused, [2023] S.C.C.A. No. 387; *R. v. Truong*, 2025 ONCA 69, 445 C.C.C. (3d) 141, at paras. 50-59.
- [70] The third Grant factor strongly favours admission. The truth-seeking function of the criminal trial process would be better served by the admission of the drugs and other items found when the appellant was searched. There is no question about the reliability of that evidence, as it is not tainted in any way by the s. 10(b) breach, and it is central to the prosecution of serious offences: *Grant*, at paras. 79-84.
- [71] Balancing the factors, the admission of the drugs and other items discovered when the appellant was searched would not bring the administration of justice into disrepute.
- v. Conclusion on the conviction appeal [72] I would dismiss the conviction appeal.

B. The sentence appeal i. The length of the sentence [73] In my view the length of the sentence was not unfit and I would not interfere with it.

[74] The trial judge reviewed the principles of sentencing, including the fundamental principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility or moral blameworthiness of the offender, as set out in s. 718.1 of the Criminal Code, R.S.C., 1985, c. C-46. He referred to the drug offences here as serious and to the agreement of the Crown and the defence that denunciation and deterrence were the primary sentencing principles to be considered.

[75] The nub of the trial judge's reasons for rejecting the defence request for a time served (462 days) sentence and for imposing the sentence that he did (net two years after credit for time served) is summarized in the following passage:

Mr. Samuels is not a first offender; he is not youthful and this is not his first conviction for possession for the purpose of trafficking a Schedule 1 substance. As I indicated above, it is my view that although Mr. Samuels was selling street-level quantities of cocaine, he had in his possession a sizable quantity of cocaine (1.75 ounces in total), divided into 65 individually wrapped small baggies (17.6 grams), as well as several other larger quantities (22.9 grams, 7.4 grams, 1.6 grams: totalling more than 1 ounce) and 4 grams of methamphetamines. I find he is someone who is regularly engaged in trafficking illicit substances for commercial gain and greed, having regard to the quantity and the packaging of cocaine he possessed, the nature and quantity of the cash (\$6860.00) found on his person, as well as the drug paraphernalia located of 2 digital scales and numerous cell phones. In fact, Mr. Samuels admitted his continuous involvement in drug trafficking since 1993, when he returned to Canada from Jamaica, in his interview with the probation officer. Taking this into account with his extensive criminal record for similar offences, the length of a number of those sentences for possession for the purpose of trafficking or trafficking in Schedule 1 substance (For example: September 1998: 15 months; March 2007: 5 months September 2007 12.5 months; December 2009: 9 months; January 2014: 32 months + 2 months consecutive related offences; and June 2017: 21 months), and his criminal record for 34 separate convictions for breach of various court orders between 1996 to 2019, it is my view even the upper end of the sentencing range set out in [R. v. Woolcock, [2002] O.J. No. 4927 (C.A.)[3]] is not an appropriate or proportionate sentence for Mr. Samuels. He has been sentenced to mid and upper reformatory sentences and in 2014 was sentenced to the penitentiary (an additional sentence of 27 months, together with 205 days of pre-sentence custody, for a total sentence of 34 months). In my view he can be described as a incorrigible, recalcitrant, recidivist offender, who has shown no interest in addressing his anti-social behaviour or his own use of illicit substances.

[76] The appellant argues that the sentence is unfit as the trial judge failed to properly consider the impact of systemic discrimination (sometimes referred to as social context considerations) in reducing the appellant's moral blameworthiness. On consent of the Crown, he also tenders fresh evidence on the appeal which, among other things, includes a 2024 Clinical Discharge Planning Report that refers to the appellant having been earlier identified as suffering from an intellectual deficit disorder and substance abuse problems,

which he advances as additional mitigating factors.

[77] The trial judge noted, early in his reasons, that the appellant, who was then 49 years old, had left Canada with his mother to live in Jamaica between the ages of 7 and 19, that he described himself (to the author of the pre-sentence report) as growing up in poverty, barely attending school and as impacted by literacy issues. The trial judge also noted that, after returning to Canada at age 19, the appellant had supported himself through criminal activity including selling drugs, had been receiving benefits from the Ontario Disability Support Program for over 20 years due to poor literacy skills and suspected mental health issues, and had not had or sought any significant “law abiding” employment during this period.

[78] Later in his reasons, the trial judge went on to explain why, in his view, systemic anti-Black racism was not, in this case, a mitigating factor:

The defence did not provide an affidavit from Mr. Samuels setting out how his experiences with anti-Black racism or his early childhood experiences and circumstances played any sort of role in his becoming involved in the criminal conduct he engaged in. No evidence, either viva voce or by affidavit, was presented by the defence in this case[.] ... [T]he fact [that] an offender is black, in and of itself, is not a mitigating circumstance. This was also the conclusion of the Court of Appeal in [R. v. Morris, 2021 ONCA 680, 159 O.R. (3d) 641], at para. 97, “... Absent some connection, mitigation of sentence based simply on the existence of overt or institutional racisms in the community becomes a discount based on the offender’s colour. Everyone agrees there can be no such discount.”

[79] The appellant maintains that the trial judge was mistaken in finding there was no demonstrated connection between the appellant’s offending and systemic discrimination or in suggesting affidavit evidence was required to establish this connection. He argues that the necessary connection can be established from three sources. First, the existence of overt and systemic anti-Black racism in Canadian society and the criminal justice system in particular, of which a court may take judicial notice: R. v. Morris, 2021 ONCA 680, 159 O.R. (3d) 641, at para. 42. Second, matters described in a report admitted in evidence for sentencing in Morris (the Morris Appendix), which this court described as warranting “reading and re-reading by those called upon to prosecute, defend, and sentence Black offenders, particularly young Black offenders”: Morris, at para. 43. Third the facts in the pre-sentence report that described the appellant’s incredibly difficult life circumstances – a Grade 7 education, poor literacy – that obviously impacted his ability to obtain legitimate employment. He argues that these circumstances “map onto the criminogenic conditions generated by systemic discrimination, particularly those detailed going to the experience of Black people in education and employment as described in the appendix to Morris.”

[80] There are two principal reasons why these arguments do not result in a conclusion that the sentence was unfit.

- [81] First, as this court explained in both *Morris* and in *R. v. Husbands*, 2024 ONCA 155, 170 O.R. (3d) 486, leave to appeal refused, [2024] S.C.C.A. No. 268, social context considerations are not relevant in calibrating the seriousness of the crime, one of the two aspects of the proportionality analysis: *Morris*, at para. 76; *Husbands*, at para. 59. Even where social context considerations are relevant, the “seriousness of the offence ... can weigh more heavily in the sentencing calculus than any mitigation of the offender’s moral blameworthiness”: *Husbands*, at para. 60.
- [82] The seriousness of the offences committed by the appellant properly played a significant part in the determination of the appropriate sentence. Mitigating factors related to the appellant’s moral fault could have no impact on this, the central consideration in his particular case. Adopting the language of *Morris*, at paras. 100-01, why the appellant chose to deal drugs did not detract from the seriousness of the crimes, and the harm to the public caused by them. Denunciation and deterrence were properly identified as the principal considerations to determining a fit sentence due to the seriousness of the offences and, as the trial judge noted, specific deterrence was deserving of special attention given that the appellant had a lengthy history of similar offences and a long history of being noncompliant with court orders. The author of the pre-sentence report described the appellant as unsuitable for community supervision given his poor record of compliance with community supervision requirements that had been previously imposed.
- [83] Second, the trial judge was alive to the fact that although a direct causal link is not required, social context considerations are relevant to the moral blameworthiness of the offender when there is some connection “between the negative effects of anti-Black racism on the offender and the offence”: *Husbands*, at para. 61; see also, *Morris*, at para. 97.
- [84] As the appellant stresses, he returned to Canada, at age 19, with a Grade 7 education and literacy challenges. The trial judge was aware of and considered this, as well as the existence of systemic anti-Black racism in Canada. But the offending conduct for which the appellant was being sentenced occurred when the appellant was in his late 40s, was part of a three decade long pattern of drug dealing for commercial gain, and was committed in violation of a release order which prohibited him from possessing illicit substances and against the backdrop of a lengthy criminal history including of non compliance with court orders. The trial judge’s reference to the absence of any affidavit that provided specific examples of encounters with anti-Black racism should be understood in this context – the trial judge had to consider the question of whether there was some connection between the current offending in those specific circumstances and social context considerations that would reduce the appellant’s moral blameworthiness for the offences for which he was being sentenced. It was open to him to note the lack of specific examples in his overall assessment of the sentence that should be imposed.
- [85] Nor, in my view does the fresh evidence warrant a change to the length of the sentence. The fact that the appellant struggled with mental health issues and substance abuse was before the trial judge at sentencing. He was entitled to consider any suggestion that those factors

reduced the appellant's moral blameworthiness in light of the appellant's lengthy criminal history and non-compliance with court orders, and to reach the conclusion that despite mental health struggles and substance abuse issues the sentence he imposed was fit given the circumstances of the offences and of the offender.

ii. The forfeiture order [86] The appellant argues that the trial judge erred in making a forfeiture order for the funds found on his person when he was arrested when there was no charge of possession of proceeds of crime, no meaningful advance notice, and no hearing into the matter. The Crown responds that there was no suggestion from anyone during the trial that the money could have come from any source other than drug trafficking. The Crown also notes that defence counsel at trial did not raise any disagreement with the Crown's request for forfeiture. Instead, defence counsel only raised the issue after the sentence was imposed. Accordingly, the Crown submits that there was every reason to believe that the appellant acquiesced to forfeiture, and the court ought not to entertain the appellant's arguments against the forfeiture order on appeal.

[87] The Crown's initial request for forfeiture, made at the end of sentencing submissions and without any other advance notice, was skeletal at best and narrowly based. Crown counsel asked for "a [s.] 490 [of the Code] order for all ... items seized." There was no articulation of the basis on which s. 490 would apply to the funds in this case. Defence counsel did not specifically address that request, and it undoubtedly would have been better if he had, but nothing suggests that he consented to such an order or to the existence of grounds to make it. Prior to the trial judge indicating that a forfeiture order would be made, no other provision was relied on by the Crown.

[88] The actual order for forfeiture that was made refers to four provisions: ss. 462.37, 490.1, and 490 of the Code as well as s. 16 of the CDSA. It contemplates that the property forfeited under each provision will be separately identified later in the order, as the grounds for forfeiture under each provision are different. However, the order contains no separate listing identifying the specific property forfeited under each provision. The order simply says that the property "listed" is forfeited to "Her Majesty the Queen in Right of Canada to be disposed of ... in accordance with the law" and that the property governed by the order is "all items seized".

[89] On appeal, the parties dispute which provision of the Code or the CDSA could provide authority for the forfeiture of the items in issue, specifically the funds. However, the main complaint of the appellant is about the absence of a procedurally fair process for the forfeiture issue as it related to the funds. I agree with this submission.

[90] Forfeiture was not mandatory simply upon the Crown asking for it. In the absence of consent, the trial judge had to be satisfied that the requirements of the section under which forfeiture was being sought were met.

[91] In this case, there was no consent. The fact that the Crown relied on one provision to justify forfeiture, while the actual order cites four, and the parties on appeal contest which provision could apply to the funds, underscores the problem. The trial judge's initial

inclination, when defence counsel queried how the funds could be ordered forfeited in the circumstances, was to direct a forfeiture hearing. That was the procedurally fair way to proceed in these circumstances. The trial judge erred in failing to follow through on that, and in instead directing the forfeiture set out in the order.

[92] Given this error, I would set aside the forfeiture order with respect to the funds seized from the appellant on his arrest, without prejudice to an application for a forfeiture order on proper notice.

V. DISPOSITION [93] I would dismiss the conviction appeal. I would admit the fresh evidence and grant leave to appeal sentence, but would dismiss the sentence appeal except for the disposition related to the forfeiture order reflected in paragraph 92 above.

Released: October 28, 2025 “D.M.P.”

*“B. Zarnett J.A.”*

*“I agree. David M. Paciocco J.A.”*

*“I agree. J. Dawe J.A.”*

- [1] In discussion with the trial judge, the Crown clarified that the seized items included the money on the appellant’s person, the drugs, and the cellphones. Although jewellery had been removed during one the searches, it was never seized.
- [2] For a search to be reasonable within the meaning of s. 8 of the Charter it must be authorized by law, the law itself must be reasonable, and the search must be conducted in a reasonable manner: Golden, at para. 44.
- [3] The sentencing range for low level cocaine trafficking for individuals with little to no criminal history is up to 2 years less a day: Woolcock, at para. 15. The appellant was decidedly not a person with little or no criminal history.

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