

CANADA / JUDGMENT

R. v. Sutherland

2026 ONCA 12

COURT

Court of Appeal for Ontario

DECIDED

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R. v. Sutherland

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COA-25-CR-0498

Judges

Huscroft, Grant; Coroza, Steve A.; Gomery, Sally A.

Subject

Criminal

Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Sutherland, 2026 ONCA 12

DATE: 20250114

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Huscroft, Coroza and Gomery JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Shamaul Sutherland

Appellant

Julia Kirby, for the appellant

Colleen Liggett, for the respondent

Heard: January 7, 2026

On appeal from the convictions entered by Justice M.R. Labelle of the Ontario Court of Justice on March 6, 2024, and from the sentence imposed on April 16, 2024.

REASONS FOR DECISION

- [1] On the morning of June 15, 2023, police officers attended an apartment building in Hearst after receiving a report from a homecare worker that she had observed a resident, Jessy Holden, sleeping on a couch next to firearms and drug paraphernalia. Based on the report, the police intended to arrest Mr. Holden on a charge of failure to comply with a release order.
- [2] Mr. Holden exited the driveway of the apartment building carrying a black duffel bag. When Mr. Holden saw a police officer, he ran and jumped a fence. Five minutes later, police officers observed Mr. Holden with the appellant. The two were walking down the street, in a manner that suggested they were evading police. Because of the firearm call, the police initiated a high-risk takedown and both Mr. Holden and the appellant were detained.
- [3] The appellant was patted down and put in the back of a police cruiser. Not having found the firearm after searching Mr. Holden, the police searched the appellant's backpack. Inside the backpack was a small fanny pack. The police searched the fanny pack and located two bags containing 93.5 grams of cocaine and 42.5 grams of fentanyl.
- [4] At trial, the appellant challenged the seizure of the drugs under ss. 8 and 9 of the Canadian Charter of Rights and Freedoms. He argued that his detention was arbitrary. He further alleged that because he was not the subject of the firearm investigation, the search of the fanny pack was unreasonable.
- [5] The trial judge found that the appellant was not arbitrarily detained, but that his s. 8 rights were violated because the search of the fanny pack was unreasonable as there was no urgency to search the bag.

- [6] However, the trial judge decided that the evidence should not be excluded under s. 24(2) of the Charter. The trial judge found that the breach was not serious, and had a lesser impact on the appellant since a warrant would have permitted the police to search the bag anyway. He determined society's interest in the adjudication of the case on its merits to be high.

Conviction Appeal

- [7] The appellant raises the following issues:

- Was the detention of the appellant arbitrary contrary to s. 9 of the Charter?
- Was the search of the backpack unreasonable contrary to s. 8 of the Charter?
- Did the police breach the appellant's right to counsel contrary to s. 10(b) of the Charter?
- Should the evidence be excluded pursuant to s. 24(2) of the Charter?

- [8] We do not accept any of the appellant's submissions on the conviction appeal.

- [9] First, we see no basis to interfere with the trial judge's conclusion that the appellant's detention was not arbitrary. We concur with and adopt the following findings made by the trial judge:

Although [the appellant] was not the target of the gun complaint, he found himself walking with Mr. Holden shortly thereafter, approximately five minutes after. They were walking together and changed direction to evade the police. Mr. Holden was arrestable, but [the appellant] was not. However, in those circumstances it was certainly not unreasonable for police to detain [the appellant] for investigative purposes. It was important for officer and public safety that [the appellant] be detained. There was clearly a reasonable suspicion on the part of the officers that [the appellant] may be involved in criminal activity. The investigative detention of [the appellant] was not cavalier, nor was it racially motivated as suggested by the defence. It was motivated by the facts in this case. The investigation involving Mr. Holden and the fact that [the appellant] found himself in the company of Mr. Holden walking down the street and trying to avoid the police.

- [10] In sum, a constellation of factors provided a strong basis for an investigative detention. We see no basis to interfere with the trial judge's factual assessment of the evidence and deference is owed by this court in the absence of any palpable and overriding error. We reject this ground of appeal.

- [11] The second and third grounds are being raised for the first time on appeal. In the circumstances of this case, the appellant is not permitted to do this.

- [12] The general rule is that this court will not permit new issues to be raised for the first time on appeal, unless the party that wishes to raise the issue satisfies the following criteria:

- (1) the evidentiary record must be sufficient to permit the appellate court to fully, effectively, and fairly determine the issue raised on appeal;

- (2) the failure to raise the issue at trial must not be due to tactical reasons; and
- (3) the court must be satisfied that no miscarriage of justice will result from the refusal to raise the new issue on appeal: *R. v. Reid*, 2016 ONCA 524, 132 O.R. (3d) 26, at para. 43.
- [13] The appellant conceded at trial that the search of the backpack was reasonable, but that the search of the fanny pack was not. Plainly, there was a tactical reason for defence counsel to make this concession, since nothing was found in the backpack. The defence focused on attacking the search of the fanny pack. Before the trial judge, defence counsel acknowledged that it is harder for officers to feel for a firearm in a large item without opening it, making the search of a backpack more reasonable than searching a smaller item like a fanny pack. The trial judge accepted this submission.
- [14] With respect to the s. 10(b) breach, we are not satisfied with the appellant that the record is sufficient to determine this issue on appeal. Significantly, there were no questions put to the police witnesses concerning the reasons for any delay in advising the appellant of his right to counsel. Section 10(b) of the Charter places a time-sensitive obligation on the police to inform the occupants of their right to counsel “immediately ... subject to concerns for officer or public safety”: *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, at para. 2.
- [15] In the absence of questioning these witnesses about the specific circumstances of the delay, the evidentiary record is not sufficient for us to determine the issue. Moreover, the appellant has failed to demonstrate that there will be a miscarriage of justice if this issue is not considered on appeal.
- [16] Turning to the final issue, we accept that the trial judge erred in his s. 24(2) analysis by finding that the drugs were otherwise discoverable because the police could have obtained a warrant to search the fanny pack. We must consider the matter afresh. No deference is owed to the trial judge’s analysis. The trial judge’s findings of fact are, however, entitled to deference: *R. v. Wong*, 2015 ONCA 657, 127 O.R. (3d) 321, at para. 55.
- [17] The analysis of s. 24(2) under the test in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, involves three lines of inquiry: (1) the seriousness of the Charter-infringing conduct; (2) the impact of the breach on the Charter-protected interests of the accused; and (3) society’s interest in the adjudication of the case on its merits. This is followed by a final balancing exercise to determine whether admitting the evidence would bring the administration of justice into disrepute: *Grant*, at para. 71.
- [18] Turning to the first line of inquiry, the police conduct falls at the very low end of the blameworthiness scale. On the trial judge’s findings, which we accept for this purpose, the search of the fanny pack was of a short duration and was minimally intrusive. As noted above, the police were not cavalier in investigating the appellant. They were rightly concerned about a firearm. The police were not acting in bad faith when they searched the appellant’s fanny pack, and in the circumstances, the Charter-infringing conduct does not amount to a willful or reckless disregard of the appellant’s rights.

- [19] The second line of inquiry favours exclusion because the appellant had a reasonable expectation of privacy in the property he carried.
- [20] The third line of inquiry is whether the truth-seeking function of the trial is better served by admitting or excluding the evidence: Grant, at paras. 79-84. It is not disputed that without the evidence, the Crown had no case against the appellant. The seriousness of the alleged offence also increases society's interest in the adjudication of this case on its merits. This was a trafficking case involving a substantial amount of fentanyl, an extremely dangerous drug. The truth-seeking function is better served by admitting the evidence.
- [21] In sum, the first factor does not strongly support exclusion and, while the second factor supports exclusion, the third factor strongly supports admission. In our view, the pull of the first two inquiries cumulatively does not outweigh the third. Admission of the evidence would not bring the administration of justice into disrepute: Grant, at para. 71. Therefore, we would affirm the trial judge's decision to admit the evidence.
- [22] Accordingly, the conviction appeal is dismissed.

Sentence Appeal

- [23] The appellant was a youthful offender with no adult record. In determining a fit sentence, the trial judge considered the deeply harmful impact fentanyl has had on the community. The trial judge recognized further aggravating factors: the quantity of the substances (both fentanyl and cocaine) was substantial, and the appellant had evidently travelled from Toronto, bringing drugs to a small community. Citing this court's decision in *R. v. Lynch*, 2022 ONCA 109, 160 O.R. (3d) 241, which established a range of six to eight years imprisonment for mid-level traffickers, the trial judge imposed a sentence of six years' imprisonment.
- [24] The appellant seeks leave to appeal his sentence and asks this court to reduce his sentence to three years. The appellant submits that the trial judge committed an error in principle by not addressing the Charter breaches as mitigating factors, and by failing to apply restraint given that the appellant was a youthful first-time offender.
- [25] The respondent agrees with the appellant that this court can vary the sentence because the trial judge did not apply the principle of restraint. However, it submits that the sentence should only be varied to a five-year sentence of imprisonment.
- [26] We do not accept that the trial judge erred by failing to take the Charter breach into account as a mitigating factor. During submissions, the trial judge clearly grappled with the issue. It is obvious that he rejected the submission made by the appellant. The appellant has not identified how the Charter breach, which we agree was not egregious, aligned with the circumstances of the offence or the offender, such that it ought to be considered in sentencing: *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 43.

- [27] We also reject the submission that the trial judge committed an error by ignoring the principle of restraint. The trial judge specifically stated he considered “all the principles of sentencing”, and “the appellant’s unblemished record”. He also acknowledged at different points in his reasons that the appellant was a youthful first-time offender. The trial judge was alive to the fact that restraint and rehabilitation were important considerations in sentencing the appellant. In the end, all of the relevant circumstances were taken into account and the trial judge chose a sentence of six years’ imprisonment, the lower end of the range identified by this court in *Lynch*.
- [28] We do not agree with the respondent that the decision of this court in *R. v. Disher*, 2020 ONCA 710, 153 O.R. (3d) 88, supports a reduction of the appellant’s sentence. The circumstances of the offender in *Disher* were very different. The appellant in that case was an addict and an Indigenous person. The sentencing judge in that case did not discuss or indicate what consideration he might have given these factors in determining the length of the sentence. Nor did the sentencing judge address the appellant’s rehabilitative prospects.
- [29] In this case, the trial judge thoroughly set out the principles and was sensitive to the fact that the appellant was a young first-time offender. Still, he noted that he was sentencing the appellant for a grave offence involving a dangerous and highly addictive drug sold for commercial gain, and that the appellant had travelled north to expand his commercial enterprise. The trial judge’s reasons make clear that he carefully weighed all the relevant principles. We agree that a serious deterrent and denunciatory sentence was required. In sum, the trial judge did not impose a sentence that was demonstrably unfit. Nor did he make an error in principle that had an impact on the sentence. Therefore, this court owes significant deference to the sentencing decision: *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089.
- [30] For these reasons, the conviction appeal is dismissed. Leave to appeal the sentence is granted, but the appeal is dismissed.

“Grant Huscroft J.A.”

“S. Coroza J.A.”

“S. Gomery J.A.”

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