Case Name:
R. v. [redacted]

Between
Her Majesty the Queen, and
[redacted]

[2014] O.J. No. 5564

2014 ONCJ 752

Toronto Information No. 48119981212005804

Ontario Court of Justice

R.G. Bigelow J.

Heard: January 22 and March 19, 2014.
Judgment: May 8, 2014.

(35 paras.)

Counsel:

D. Morlog, counsel for the Crown.

A. Stastny, counsel for the accused.

Reason for Judgment

1 R.G. BIGELOW J.:-- Mr. [redacted] is charged in an Information which alleges that on the 7th of DEcember, 2012 he had in his possesion Marijuana for the Purpose of Trafficking, had in his possession Marijuana in an amount over 30 grams and had in his possession the proceeds of crime. Counselon behalf of the accused has brought an application pursuant to section 24(2) of the **Charter of** Rights to exclude fromevidence the Marijuana seized from the accuseed at the time of his arrest based on alleged violations of his clients rights under section 8, 9, 10(a) and 10(b) of the

The Evidence

2 At the outset of the trial the nature continuity and weight of the substance seized at the time of arrest was admitted. The substance was marijuana weighing 86.75 grams and it was in the form of one brick and 19 baggies.

3 The Crown called as evidence the two police officers involved in the stop and arrest of the accused and filed an expert report with respect to the issue of whether or not the factual background supported an inference that possession of the substance was for the purpose of trafficking.[1]

4 The evidence of the first officer was that on 7 December 2012 at approximately 6:45 PM he and his partner were working in uniform driving a marked scout car in a laneway in the vicinity of Queen Street West and Tecumseh Avenue in the city of Toronto when they noticed two figures on the other side of Tecumseh Avenue in an alcove at the rear of a either a sports bar located at the corner or the business to the west of it. The two figures left the alcove and walked to Tecumseh Avenue and turned north on the west side of that street.

5 The officer and his partner decided to investigate the two individuals and drove over to them and got out of their car. They approached the 2 young men and asked where they were going and what they were doing in the alley. The accused responded that he was on his way to a skate park at Dundas and Bathurst streets but did not respond with respect to why he was in the alley. The accused was polite but fairly nervous and appeared to the officer to be like a deer caught in the headlights.

6 The officer then spoke to the second individual and received similar responses. He performed a cursory pat down search of this individual for weapons or evidence of breaking and entering into cars or premises. The officer indicated that he did not believe he was detaining the individuals and that they were in fact free to leave until his escort advised him that he had found substances on the accused. His escort then arrested the accused and handed over to the first officer bags and one brick of marijuana.

7 In cross-examination he agreed that there was no specific offence that was being investigated but that he had concerns that something wasn't right and that the individuals might be in possession of break and entry instruments or weapons.

8 The second officer also indicated that he observed the two figures tucked into an alcove and that they came out and started walking north on Tecumseh Avenue. They decided to investigate the reason why they had been in the laneway. This officer spoke to the accused asked him what he was doing in the laneway and where he was going. The accused repeated a number of times that he was going to a skateboard park but did not give an explanation as to why he had been in the alley.

9 He then told the accused that he was going to pat him down and did a cursory search of his arms and the front of his coat although he had not seen anything which could potentially be a

weapon before the search. When he pushed the coat aside he noted a hard object wrapped in the waistband of the accused's pants or underwear along the beltline and was concerned that it could potentially be a weapon. He therefore withdrew the object and found it to be a vacuum sealed plastic bag containing what he believed to be marijuana. He then arrested the accused for possession for the purpose of trafficking in marijuana. After the arrest the accused was advised of his Right to Counsel.

10 In cross examination he agreed that the accused did not have to answer any of the questions he was asked but he also indicated that the accused was detained and not free to go. In fact he went as far as saying that he would have detained and performed a pat down search of the accused even if he had chosen not to respond to any of his questions.

11 When asked about his reasons for detaining the accused he indicated that the area was a "high crime" area where there had been numerous reports of thefts from cars. He also indicated that he took into account the time, the baggy clothes worn by the accused's which could conceal either weapons or tools used to break into vehicles or premises and the accused's nervousness.

Defence Position

12 Mr. Stasny submits that when one considers all of the information available to the officers at the time that they detained the accused it amounts to at its highest a hunch. The officer admitted that there were numerous potential explanations for why two individuals may have been in the area where they were seen and the fact that individuals did not respond to the question as to what they were doing in the alley could be merely the exercise of their rights. He submits further that in order to justify detaining individuals a police officer needs to have more than a general feeling that they are "up to no good" and in this case that is all they had.

13 If the police had no basis to detain the individuals, it follows that they had no right to search them. Since the search was done without warrant it would be up to the Crown to justify the search as being lawful and they have not done so.

14 Therefore, he suggests that his client's rights to be free from arbitrary detention and unreasonable search have been violated. In addition he suggests that the failure to advise the accused of the reason for his detention or provide him with rights to counsel prior to the search violates his section 10(a) and 10(b) rights.

15 Given the number of violations of his client's rights and the seriousness of those violations, he suggests that the test and **R v Grant**[2] for the exclusion of evidence has been met.

Crown Position

16 Mr. Morlog in his written response to the Charter Application submitted that there was no detention until the officer performed the pat down search. However, as I understand his oral

submissions, he accepted that the accused was detained from the time he was stopped by the police given the arresting officer's evidence that he would not have allowed him to leave until after performing a pat down search.

17 However, he submits that the police do not require suspicion of a particular offence in order for investigative detention to be lawful and that in the circumstances described by the officers they had sufficient cause to detain the two individuals. He further submits that the search of the accused was an appropriate use of the officer's ability to lawfully ensure his safety while executing his duty to investigate potential criminal activity and that in the circumstances here there was no violation of either sections 10(a) or (b) of the Charter.

18 He also submits that even if there were breaches of the accused rights the evidence does not support a finding that the criteria for the exclusion of evidence set out in **R v Grant**[3] has been met.

The Law

19 In **R v Mann**[4] the Supreme Court of Canada summarized the common-law development of investigative detention commencing with the decision of the English Court of Criminal Appeals in **Waterfield**[5] and later in Supreme Court of Canada decisions such as **Dedman**[6], **Cloutier c Langlois**[7] and **R v Godoy**[8] as well as the Ontario Court of Appeal decision in **R v Simpson**[9].

20 The court summarized the principles governing the use of detention by the police for investigative purposes as follows:

> The case law raises several guiding principles governing the use of a police power to detain for investigative purposes. The evolution of the *Waterfield* test, along with the *Simpson* articulable cause requirement, calls for investigative detentions to be premised upon reasonable grounds. The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the [page77] interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the *Waterfield* test.
>
> Police powers and police duties are not necessarily correlative. While the police have a common law duty to investigate crime, they are not empowered to

> undertake any and all action in the exercise of that duty. Individual liberty interests are fundamental to the Canadian constitutional order. Consequently, any intrusion upon them must not be taken lightly and, as a result, police officers do not have *carte blanche* to detain. The power to detain cannot be exercised on the basis of a hunch, nor can it become a *de facto* arrest...
>
> 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 that the individual is connected to a particular crime and that such a detention is necessary.

21 The Court's reference to "reasonable grounds to suspect in all the circumstances that the individual was connected to a crime" was considered by the Ontario Court of Appeal in **R v Nesbeth**[10] where the court held that:

> While the court in *Mann* speaks of reasonable grounds to suspect that the individual is connected to a "particular crime", in my view, it is not necessary that the officers be able to pinpoint the crime with absolute precision. Given the respondent's behavior in relation to the knapsack and the desperation with which he fled the police, the police could reasonably suspect that he was in possession of contraband: either drugs or weapons or both. They were therefore entitled to detain him for investigation in accordance with *Mann*.[11]

22 The court in **Mann** also discussed powers to search incident to investigative detention stating:

> The general duty of officers to protect life may, in some circumstances, give rise to the power to conduct a pat-down search incident to an investigative detention. Such a search power does not exist as a matter of course; the officer must believe on reasonable grounds that his or her own safety, or the safety of others, is at risk. **I disagree with the suggestion that the power to detain for investigative searches endorses an incidental search in all circumstances** (emphasis added): see S. Coughlan, "Search Based on Articulable Cause: Proceed with Caution or Full Stop?" (2002), 2 C.R. (6th) 49, at p. 63. The officer's decision to search must also be reasonably necessary in light of the totality of the circumstances. It cannot be justified on the basis of a vague or non-existent concern for safety, nor can the search be premised upon hunches or mere intuition.
>
> The determination as to when a protective search may be merited has been addressed in the United States through several decades of jurisprudence. In *Terry, supra*, at p. 27, the United States Supreme Court carefully circumscribed the search power, by holding that:

> ... there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.
>
> In exercising this authority, the officer must not be acting solely on a hunch, but rather is required [page80] to act on reasonable and specific inferences drawn from the known facts of the situation. The search must also be confined in scope to an intrusion reasonably designed to locate weapons (p. 29)...
>
> Where an officer has reasonable grounds to believe that his or her safety is at risk, the officer may engage in a protective pat-down search of the detained individual. The search must be grounded in objectively discernible facts to prevent "fishing [page81] expeditions" on the basis of irrelevant or discriminatory factors.[12]

23 Both parties also referred to the recent Supreme Court of Canada decision of **R v MacDonald**[13]where the court again considered the authority to search upon investigative detention. Justice LeBel for the majority stated:

> But although I acknowledge the importance of safety searches, I must repeat that the power to carry one out is not unbridled. In my view, the principles laid down in *Mann* and reaffirmed in *Clayton* require the existence of circumstances establishing the necessity of safety searches, reasonably and objectively considered, to address an imminent threat to the safety of the public or the police. Given the high privacy interests at stake in such searches, the search will be authorized by law only if the police officer believes on reasonable grounds that his or her safety is at stake and that, as a result, it is necessary to conduct a search (*Mann*, at para. 40; see also para. 45). The legality of the search therefore turns on its reasonable, objectively verifiable necessity in the circumstances of the matter (see *R. v. Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531, at para. 33). As the Court stated in *Mann*, a search cannot be justified on the basis of a vague concern for safety. Rather, for a safety search to be lawful, the officer must act on "reasonable and specific inferences drawn from the known facts of the situation" (*Mann*, at para. 41).

24 Justices Moldaver and Wagner, although agreeing in the result, were of the opinion that the test set out in **Mann** required that in order to justify a safety search a police officer must have a

reasonable grounds to **suspect** that the individual may be armed and that the majority was extending that test to require that the officer have reasonable grounds **to believe** that the person may be armed.

Was the Accused Detained?

25 There can be little doubt that the accused was detained. I do not accept the evidence of the first officer that the 2 young men were free to go. If they were not detained then there was no basis for the search he performed of the other young man. The evidence of the arresting officer that the accused was not free to go and that even if the accused had said nothing to him he would not have let him leave is much more credible. In addition that officer tells the accused that he is going to search him. No reasonable person in the accused's situation could come to any conclusion other than he was not free to leave.

Was the Detention Lawful?

26 In my view on the arresting officer had no more than a hunch that the accused was, as it was put by defence counsel, "up to no good." The officer mentioned a number of times concerns about cars being broken into in the area but there is no evidence that the accused were anywhere near any cars. He also mentioned break and enters but it would seem unlikely that anyone would be breaking into a business premise at 6:45 PM on a Friday evening in an extremely busy area of Toronto when most of the businesses would still be open. The officer also candidly admitted that there were a number of explanations for the observed behaviour which did not involve criminal activity.

27 Although as noted above by the Ontario Court of Appeal in **Nesbeth** the police do not need to be able to pinpoint with absolute precision the crime being investigated in order to justify an investigative detention, they do have to have more than a hunch that the individual is involved in some type of criminal activity. Therefore, I find that the detention of the accused was unlawful and a violation of his rights under section 9 of the **Charter**.

Was the Search Lawful?

28 Given my finding that the detention of the accused was not lawful, it follows that the search of the accused was also not lawful. However, even if I had found that the detention as lawful, I would not have found that the search was lawful. As stated in **Mann** in order to justify a pat-down search of an individual who has been detained for investigative purposes the officer must have reasonable grounds to believe that his or her safety is at risk and the belief must be grounded in objectively discernible facts.

29 In this both officers involved appeared to believe that they could perform a pat-down search of anyone that they had detained which is not the law. The only information that the arresting officer relied upon in justifying the search of the accused is that he was a young man wearing baggy clothes whom he had seen in an alcove. When approached by the police the accused made no attempt to leave or do anything other than not answering a question which had the potential for

selfincrimination and to which he did not have to respond. If being a young man wearing baggy clothing justified stopping and searching, a substantial percentage of the young men resident in Toronto would be subject to search.

30 Both officers also appeared to believe that they could search individuals under investigative detention not only for weapons which could endanger the officers but also for evidence of criminal offences. However, powers of search pursuant to an investigative detention are limited to search for weapons which could endanger the officer unlike search incident to arrest when searches for evidence may be lawful.

31 Therefore, I find that the search of the accused was unlawful and in violation of section 8 of the **Charter**.

Were the Accused's Rights under subsections 10(a) and 10(b) violated?

32 When the police approached the 2 men they asked them what they were doing in the alley and where they were going. It would have been clear that they were being stopped because they had been in the alley and the police were suspicious about what they had been doing. Although, as I have already indicated, that did not justify the detention, it did explain why they were being detained. Therefore, I do not find that there was a breach of subsection 10(a).

33 With respect to section 10(b) the only grounds which could justify a delay in providing rights to counsel would be the delay required to perform a pat-down search if such a search was reasonable. Having found that the pat-down search was not justified, it follows that the delay in providing rights to counsel was not justified. Accordingly, I find that there was a breach of section 10(b).

Should the Evidence be Excluded?

34 Applying the three part test for determining whether to exclude evidence pursuant to section 24(2) of the **Charter as** set out by the Supreme Court of Canada in **R v Grant**[14] I find:

(a) *Seriousness of the Charter-Infringing State Conduct;*

The detention and search of individuals on the street based solely on a hunch or suspicion is a serious violation of a citizen's rights. The Supreme Court decided **Mann** some 8 years before the incident giving rise to the charges before the court so it cannot be argued that the police could have been under a reasonable misunderstanding of the law.

(b) *Impact on the Charter-Protected Interests of the Accused;*

The impact on the right of the accused to be free from arbitrary detention, unreasonable search was also serious. The impact of the violation of section 10(b) was somewhat less serious in the circumstances; and

(c) Society's Interest in Adjudication on the Merits

Society's interest in adjudication on the merits would be negatively affected if the evidence is excluded since the exclusion of the evidence would result in a dismissal of the charges.

35 When I balance all of the factors including the nature of the substance seized and the long term impact on the administration of justice, I am of the view that the 1st two factors outweigh the 3rd and that the appropriate decision is to exclude the evidence. Accordingly the evidence of the seizure of the marijuana is excluded and absent that evidence, there is no evidence to support any of the charges before the court. All charges are dismissed.

R.G. BIGELOW J.

1 **Counsel for the accused agreed to the introduction of the expert report solely on the trial and not with respect to the voir dire.**

2 **2009 SCC 32**

3 **ibid**

4 **(2004) 185 CCC (3d) 308 (SCC) at paras 23-35**

5 [1963] 3 All E.R. 659

6 [1985] 2 S.C.R. 2

7 [1990] 1 S.C.R. 158

8 [1999] 1 S.C.R. 311

9 (1993), 12 0.R. (3d) 182

10 **2008 ONCA 579 leave to appeal refused [2009] S.C.C.A. No. 10**

11 Ibid at para 18

12 Man Op. cit at paras. 40-41 and 43

13 [2014] S.C.J. No. 3

14 **Op. cit.**