

CITATION: R. v. Abdulatif, 2017 ONSC

COURT FILE NO.: CR-15-90000343-000

DATE: 20170227

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN

Elizabeth Bellerose, for the Respondent

Respondent

- and -

IBSA ABDULATIF

Allan J. Lobel, for the Applicant

Applicant

HEARD: February 14, 15, 16, 2017

RULING ON APPLICATION UNDER SECTIONS 8, 9, and 24(2) OF THE
CHARTER

HIMEL J.

[1] Ibsa Abdulatif is charged with the offences of possession of cocaine for the purpose of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act* and possession of proceeds contrary to s. 354(1)(a) of the *Criminal Code*. He has elected to be tried by a judge sitting without a jury.

[2] Mr. Abdulatif brings an application for an order declaring that his rights protected by ss. 8, and 9 of the *Canadian Charter of Rights and Freedoms* have been breached and for an order excluding the evidence under s. 24(2). Crown counsel opposes the application and the remedy sought and asks that the application be dismissed. The parties agreed that the *Charter* application and the trial would be heard as a blended hearing. The parties have also filed certain admissions: the identity of the accused is not in issue; the continuity of exhibits including drugs and money is not in issue, and the drugs tested to be cocaine. At this juncture in the case, the evidence has been

called and submissions have been made on the *Charter* application. The following are my reasons for decision on the application.

OVERVIEW OF THE POSITIONS OF THE PARTIES

[3] The applicant submits that Detective Constable Merritt, the arresting police officer, did not have reasonable and probable grounds to believe that he had committed the offences charged. Counsel argues that the applicant was subjected to an unreasonable search since the arresting officer did not have reasonable and probable grounds to arrest him. Further, it is submitted that the applicant was subjected to arbitrary arrest and detention. Therefore, any evidence obtained from the applicant's person or the car in which he was riding as a result of the breach of his rights should be excluded as the admission of the evidence at trial would bring the administration of justice into disrepute.

[4] The Crown takes the position that the applicant's rights, as protected by ss. 8 and 9 of the *Charter*, have not been infringed as the officer had reasonable and probable grounds to arrest him for possession of cocaine for the purpose of trafficking. On the facts of the case, the arrest and search of the person and the car were lawful and there were no breaches of the applicant's *Charter* protected rights. Further, even if there have been breaches of his rights as protected by the *Charter*, the admission of the evidence obtained in these proceedings would not bring the administration of justice into disrepute.

FACTUAL BACKGROUND

[5] The applicant was charged with offences alleged to have occurred in the late afternoon on Saturday, June 21, 2014. On that date, police from 14 Division's Major Crime Unit were in the area of Kensington Market in the City of Toronto in response to ongoing community complaints regarding drug use and disorderly behavior in the area. The officers had no specific target in mind. The weather was nice and there were a lot of people in the vicinity and, in particular, in Bellevue Square Park. Officer Chad Merritt was dressed in plain clothes and was patrolling the area near Bellevue Square Park with Detective Matys and Detective Constable Chhinzer. Officer Merritt is now in his eleventh year with the Toronto Police Service. He has been involved in the investigation of robberies, break and enters, and drug and liquor offences. He has worked on drug investigations and assisted with take downs and surveillance.

[6] D.C. Merritt was on foot across the street from Bellevue Park, approximately 20 to 25 feet away, when he observed Peter Mymuller, nicknamed "Bones," finish drinking a beer in a patio bar and then walk south-west from the bar through the park. Officer Merritt said that he saw Mr. Mymuller meet up with a group of people in the south end of the park and they were smoking marijuana. Shortly after, he saw a black Acura with licence plate number BREM 122 pull up and park on the south-east side of the park at Augusta Avenue and Wales Street. Officer Merritt then saw Mr. Mymuller leave the group and approach the persons from the Acura. Ibsa Abdulatif had exited the driver's side of the vehicle and Mohammed Hashimi had exited the passenger side of the vehicle and walked around to the driver's side.

[7] Officer Merritt said that he recognized these two people as Project Original gang members. Officer Merritt saw Mr. Mymuller approach Mr. Abdulatif and have a brief conversation followed by an exchange of an item in what he described as a "hand to hand" drug transaction. He said that he saw something pass but that "it looked smooth and normal but they were trying to conceal something." He could not see the size of the item. Although he was across the street, Officer Merritt said that the car was not blocking his view and that he was looking at the men from an angle. He said he saw a hand to hand transaction between Mr. Mymuller and Mr. Abdulatif but did not see anything handed back. He said he saw Mr. Mymuller put his hand in his pocket. He recalled this but it is not in his notes.

[8] Then, Officer Merritt observed Mr. Mymuller walk away quickly through Bellevue Park. When asked by defence counsel, he said that Mr. Mymuller stepped over the fence to enter the park. That was not in his notes. The officer was shown a photograph of the park and surrounding area and acknowledged that there is a fence approximately three to three and a half feet high surrounding the park.

[9] Officer Merritt described that Mr. Mymuller looked down at his hands and seemed pleased. The officer acknowledged that is not in his notes. He said that he seemed "excited" and "there was a purpose to his walk." It was "a happy walk." He said that he has seen that behavior in the past and when he has arrested people before, "he has all those times found drugs." Officer Merritt said that, initially, he was going to follow him but decided to stay with the vehicle and maintain observations of the applicant and his passenger.

[10] It was at this point that Officer Merritt said he formed the reasonable and probable grounds to arrest the occupants of the vehicle for possession for the purpose of trafficking in a controlled substance. However, he acknowledged he never saw a controlled substance. He said he saw two hands touching. In his evidence, Officer Merritt said that he knew Mr. Mymuller as a drug user; he did not know the accused as a drug user. However, the area was a high drug traffic area and prevalent for drug use. Officer Merritt described that the police were responding to community complaints of drug use and disorderly conduct in the area. Mr. Mymuller had been seen smoking marijuana with a group of males. He said that Mr. Mymuller left the group when the black Acura arrived and walked over to the driver and the passenger of the vehicle.

[11] Once the hand to hand transaction was completed, Mr. Abdulatif got back into the driver's side of the car and Mr. Hashimi got into passenger side and they stayed in the vehicle. As he did not have a police radio, Officer Merritt asked Officer Zerucelli, who was in an unmarked police vehicle and had access to the police radio, to request uniformed officers to attend at the scene to arrest the persons in the car for possession of a controlled substance for the purpose of trafficking.

[12] Officer Merritt said he did not tell Officer Zerucelli any details about who the two men in the car were or about Mr. Mymuller's involvement. He said that he gave information to Detective Constable Chhinzer who prepared a search warrant application for the vehicle and for cell phones. The application for the phones was denied. The application to search the car was granted.

[13] Officer Randee Chhinzer was on foot, along with the other officers from the Major Crime Unit from 14 Division, making observations in the area of Bellevue Park. He was on the north side of the park when he saw Mr. Mymuller, whom he also knew as "Bones," walking southbound just north of Denison. He recognized him as a drug user and dealer with whom he had had prior dealings. He watched Mr. Mymuller approach two men who were standing at a vehicle which was a 2004 Acura with licence number BREM122. He had no idea how long the vehicle was parked there. He described that the men "had a huddle" and then Mr. Mymuller continued to walk southbound. He did not see where he went. He said he believed it was possibly a drug transaction but did not observe any hand to hand transaction. He did not think about following him.

[14] Then, Officer Chhinzer saw one male get into the driver seat and one male get into the passenger seat. Uniformed officers attended at the scene and arrested the men and transported them to the police station. Another officer arranged for the car to be towed to 14 Division pending a search warrant. Officer Chhinzer spoke to the officers involved and prepared an Information to Obtain (ITO). In the ITO, at paragraph 8, Officer Chhinzer mentioned that the officers observed Mr. Mymuller walking westbound and that they attempted to stop and investigate him but lost him in back alleyways and laneways. He believed that he received that information from Officer Merritt.

[15] The warrant was denied for the search of the four cell phones as the request was too broad. In the new ITO that was submitted, the request to search the phones was removed and the Justice of the Peace granted a warrant to search the vehicle. Officer Chhinzer searched the vehicle and said that no items of evidence were located.

[16] Police arrived at the scene quickly on bicycles and attended at the vehicle. Officer Merritt was still observing from across the street. Once the two men got back into the car, he could not see what was happening in the car. He saw the officers arrest the two men and take them out of the vehicle.

[17] In cross-examination, Officer Merritt acknowledged that he had never arrested Mr. Mymuller before, he did not know that he had a medical marijuana licence since 2013, and he did not know that, on the day in question, the World Cup was being played and there were a lot of people in the bars watching soccer and in the park on the Saturday afternoon. He said that Mr. Mymuller approached the two men by crossing the park and that when he left and went back into the park, he climbed the fence. He did not agree that Mr. Mymuller was walking south on Augusta on the sidewalk when he met up with the men in the car. He also conceded that he had never arrested Mr. Abdulatif, did not know his criminal record at the time, or that he had no outstanding charges at the time of his arrest.

[18] Officer Merritt described Mr. Abdulatif as a member of the Project Original gang but had based that on having seen him rapping in a YouTube video. The officer said that he knew that Mr. Abdulatif grew up in the area of Vanelli Walk, that gang membership was prevalent there, and that Mr. Abdulatif's sister was dating Rowan Athens who was a member of the Project Originals and had been in jail for firearms offences. He agreed that he is not a gang expert. He also said that he had never arrested Mohammed Hashimi before but had seen him in the area.

[19] Officer Zerucelli was in the Kensington Market area doing drive by observations when he saw Peter Mymuller walking southbound on Augusta Avenue. As he drove around the park, Officer Merritt stopped him and requested that he call for uniformed officers to come to the area in relation to a possible drug transaction. He was asked to relay the information to other officers. No reference to a drug transaction was made in his notes. Then he saw Mr. Mymuller walk southbound through the park. He was not present at the arrest. He was never asked to locate Mr. Mymuller.

[20] Officer Merritt did not request that other police officers follow Mr. Mymuller. Instead, all the officers focused on the people in the vehicle. This was despite the fact that Officer Merritt knew it was Mr. Mymuller when he saw him drinking a beer and then when he walked into the park. He knew he was a drug user and he knew that he lived in the Vanelli Walk area.

[21] Officer David Monteiro, Officer Brian Bell, and Officer Chris McFayden were on bicycles in the Trinity-Bellwoods area when Officer Monteiro received the call to assist with the investigation of a trafficking charge. They drove over by bicycle and located the vehicle matching the description given. Officer Monteiro approached along the roadway at the passenger door and made observations. He made two requests to open the door and then the passenger complied. The officer took the passenger out of the car and arrested him for trafficking. He said that the reason for arrest was "investigation for trafficking" and that it was "due to the information he received." He identified the passenger with a driver's licence as Mohammed Hashimi with a birth date of November 8, 1988. The officer said he knew him from dealings through 14 Division.

[22] Officer Bell testified that Officer Monteiro received the call that there were two males parked in a car on Augusta Avenue and that they were arrestable for possession for the purpose of trafficking in a controlled substance. They were asked to attend to arrest them. Officer Bell said that he went to the sidewalk towards the driver side of the car and looked into the vehicle. He saw that the driver, Mr. Abdulatif, made a quick grab for something, then arched himself from the seat and took his right hand and stuffed it into his pants. The officer assumed that he was putting drugs or drug paraphernalia into his pants. The officer opened the door, took him to the ground, and arrested him for possession for the purpose of trafficking in a controlled substance. Constable McFayden assisted in the arrest. Officer Bell picked Mr. Abdulatif up and the officers searched his pockets and found a large amount of money in his pockets and in his wallet. He could feel a bulge at the bottom of his pants. The officer read him his rights and provided his right to counsel. They transferred him to the police division and the police officer sat in the back seat with him to ensure that nothing happened to the article which was in his pants.

[23] Once Mr. Abdulatif was paraded before the Staff Sergeant and processed, police conducted a Level three search. Police located a baggy containing a golf ball size of crack cocaine and a little baggy with powder cocaine in his underwear. The drugs were given to an officer to retain and process.

[24] Officer Bell said that he had never dealt with Mr. Abdulatif before, he did not know Mr. Hashimi, and he had never dealt with Peter Mymuller. He relied totally on Officer Merritt's views for the grounds for arrest.

[25] Officer McFayden was the third officer on bicycle in the Trinity-Bellwoods area. He testified that Officer Monteiro received information that there were two males who were arrestable for possession for the purpose of trafficking in a controlled substance in Bellevue Square Park. The officers rode over and located the vehicle. Officer McFayden said that he could see through the rear window that there were two males in the vehicle. When he approached the car, he could see the males shuffling. He could not see their hands. Police removed the males from the vehicle. Officer McFayden assisted Officer Bell in the arrest. Then he searched the vehicle on the driver side first, then the passenger side and the back seat. He located three bundles of cash in the centre console. He does not recall where they were. He held onto the money and handed the money to Officer Bell when they were finished at the scene. Officer McFayden said that he had never met Mr. Abdulatif or Mr. Hashimi before and did not know of them. He said that the vehicle was registered to Mr. Abdulatif's father.

[26] Officer McFayden was present when Mr. Abdulatif was paraded before the Staff Sergeant and identified the parties in the booking video which was submitted as an exhibit at the trial. During that time, Officer Bell took the cash out of his pocket and put it on the counter in the same bundles as was found in the console. Officer McFayden and the Staff Sergeant counted the money that was submitted, which totaled \$1,725 Canadian and \$20 in U.S. funds. The video of the booking showed that the officers then went into a room to conduct a Level three search during which time they removed two bags from Mr. Abdulatif's buttocks area. They recovered one large ball of crack weighing 23.41 grams and a smaller bag of crushed crack or powder cocaine weighing 4.15 grams. The video showed the officers advising Mr. Abdulatif of the charges he faced and treating him in a courteous manner. Mr. Abdulatif was co-operative with the police.

[27] Crown counsel also called evidence from Detective Constable Sean Sutton. He has been qualified as an expert witness on numerous occasions in the past and was found by me to have the necessary background and experience to provide the court with opinion evidence on pricing, packing, and paraphernalia related to the use and sale of cocaine, and the *modus operandi* and language used in drug offences. This evidence dealt with a hypothetical situation concerning the circumstances leading up to an arrest of a person with an amount of drugs and money being found on the person or in the vehicle which he was driving. These matters would be relevant to the trial proper.

[28] The defence called Peter Mymuller as a witness on the application. He had never testified before in court. He has known the applicant since he was very young as they grew up in the same neighbourhood around Vanelli Walk. Mr. Abdulatif is much younger than he is but he would see him going to school. Mr. Mymuller said that he had not seen Mr. Abdulatif since the date of his arrest and had not talked to him since then. Mr. Mymuller no longer lives in that area.

[29] Mr. Mymuller has a criminal record dating back to 1992 for assault with a weapon as a youth, followed by robbery as a youth in 1997. From 2000 until 2011, he committed the offences of theft under, trafficking, fail to attend court, theft under, obstruct police, fail to comply, traffic in cocaine, fail to attend court, fail to comply, possession of marijuana, and fail to comply. Since 2011, he has not been convicted of any offences. He is now thirty-eight years old.

[30] Mr. Mymuller outlined that he was born in Ethiopia and moved to Canada with his family when he was ten years old. He has not seen his father since 2009 and believes he lives in Vancouver. He has two brothers and two sisters, and his mother is currently in hospital. He has lived alone since April 2016. He said that he had a difficult childhood as his father beat him severely and, when they arrived in Canada, they lived in the Regent Park area. He was taken into the care of the Children's Aid Society and was molested when he was living in a boarding school. He has lived in the Vanelli Walk area since 1997 and recently moved to another area of the city. He enjoys music and has been using drugs since he was sixteen years old. In 2013, he received a medical marijuana licence. He uses marijuana daily in the morning, for appetite, and before bed. It has helped him cut down the use of other drugs such as cocaine.

[31] Mr. Mymuller related to the court what he was doing on June 21, 2014. He had been watching the soccer game on the patio at the Amadeus Café on Augusta Street at the north-east corner of the park. After the game was over, he left the restaurant to cross into the park to smoke some marijuana and ran into some people he knew. They walked to the south-west corner of the park to smoke the marijuana as it was less busy and there were trees in that corner. Then, one of the people asked him about riding his electric bicycle which was parked next to the Amadeus Café. Mr. Mymuller said that he could not find his key and decided to go back to the restaurant to see if he left it at the café. When he inquired, he was told that the key was not there. Mr. Mymuller became very stressed. It was a crowded Saturday afternoon and he wanted to find his key.

[32] He started to walk south on Augusta Avenue to go back to the park to see if he left the key there. That is when he saw Ibsa Abdulatif and Mohammed Hashimi. He said he had known them for a long time and it was disrespectful not to greet them and give them a hand bump. He did a fist bump with each of them which lasted not more than ten seconds. He was so stressed about the key that he left immediately and walked down the street over to the same location where he had been earlier. He saw his key on top of a fence post in the area where he had smoked the marijuana.

[33] Once he had found his key, Mr. Mymuller said he was not in a rush so he went to another restaurant to watch the next soccer game. While he was there, he heard the news about the two persons being arrested. Mr. Mymuller was asked about whether he had entered the park by jumping over the fence. He said that the fence has spokes and that it is not easy to get over it. He was asked whether he received any drugs from either Mr. Abdulatif or Mr. Hashimi that day and he said he did not. In cross-examination, he acknowledged that he has been addicted to cocaine, has a record for trafficking, and has committed offences to obtain money to buy drugs. He said that he has never bought drugs from Mr. Abdulatif and that he would never buy drugs on a bright afternoon with children and lots of police around. He said that he would not purchase drugs during the day and wait to use it later in the evening. Once you buy cocaine, you use it immediately as you become anxious and the "temptation eats you up."

THE NATURE OF THE CHARTER APPLICATIONS

[34] As outlined above, the applicant argues that his rights, as protected under ss. 8 and 9 of the *Charter*, were infringed. The onus to establish such breaches rest on the defence on a balance

of probabilities. With respect to s. 8, once the applicant establishes that the search was without a warrant (which is the situation here), the onus shifts to the Crown to demonstrate that the search was reasonable and justified in the circumstances. A search will be reasonable if it is authorized by law, the law itself is reasonable, and the manner in which the search was carried out is reasonable: see *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278.

[35] Whether the search was reasonable or not and whether the applicant was arbitrarily detained will depend on whether the police had reasonable and probable grounds to arrest and search the applicant. The applicant's position, as stated above, is that there were no reasonable and probable grounds to arrest, search, and detain the applicant. As a result of breaches of ss. 8 and 9, the applicant requests that the evidence obtained following arrest and search be excluded.

THE ISSUE OF THE OFFICERS' NOTES

[36] Counsel for the applicant submits that the evidence of certain police officers (particularly Officer Merritt) is not reliable or credible because of a lack of notes on certain issues. He argues that a negative inference should be drawn where a police officer testifies about matters that were not mentioned in the officer's notes. Counsel submits that the court should conclude that the observations did not take place.

[37] For example, counsel for Mr. Abdulatif points out that Officer Merritt had no notes about Mr. Mymuller crossing the park and climbing over the fence which had spokes in it to greet Mr. Abdulatif or when he finished buying the drugs from him. Officer Merritt described that Mr. Mymuller looked down at his hand after the hand to hand exchange and that he did the "happy walk" when the transaction was finished. Neither of these observations are mentioned in his notes. Officer Chhizner testified that he observed Mr. Mymuller and Mr. Abdulatif in a "huddle" but there was no note about that.

[38] Crown counsel submits that notes are taken by police officers for the purpose of refreshing their memory. It is not uncommon for police to remember things other than what is contained in the notes. It is for the court to decide what weight to give to the evidence and how important the omissions in the notes are to the matters before the court.

[39] Police officers are trained to make notes in order to refresh their memory of events for the purpose of relating evidence to the court. The absence of certain notes may be relevant in assessing a police officer's credibility. In the case of *R. v. Truong*, 2012 ONCA 91, the court referred to the trial judge attaching less weight to a police witness' testimony where, "he had no recollection of the events at issue, few notes of what occurred and very limited experience as a police officer, let alone as a police witness in judicial proceedings, at the relevant times." In *R. v. Zack*, [1999] O.J. No. 5747 (Ont. Ct. J.), the trial judge noted that an experienced police officer did not have in his notes the observation of an accused being unsteady on her feet or that she was confused. The court wrote, at para. 6, "...the failure to note these observations is a serious omission and, as I have noted to counsel, it cannot be accepted." The trial judge concluded that the observations were not, in fact, made at the time. A similar approach was taken by the court in *R. v. Mercer*, [2006] O.J. No. 5522 (Ont. Ct. J.), where the court commented, at para. 6: "...There was nothing in his notes about her being unsteady on her feet, that she was using the

vehicle to steady herself, that she almost fell back into the vehicle. In fact, what we are left with at the scene as it relates to notes, ends with his observations of the accused before she attempted to exit the vehicle.” The court held that it could not conclude that the observations were made.

[40] In the case of *R. v. Antoniuk*, [2007] O.J. No. 4816 (Ont. Sup. Ct.), on an appeal from a conviction for driving while over the legal limit, Justice Garton considered the issue of whether a court should accept an officer’s testimony where the officer had not recorded his or her observations. At para. 22, she said: “Certainly the absence of a note is a fair issue for cross-examination and may support an inference that the unrecorded event did not take place. However the fact that there is no mention of an event in an officer’s notebook does not *necessitate* a finding that it did not take place.” She went on to explain, at paras. 24–25:

It should be remembered that an office’s notes are not evidence, but are merely a testimonial aid. Trial judges routinely tell officers on the witness stand that they may use their notes to refresh their memory, but that they must also have an independent recollection of the events. To elevate the absence of a notation to a mandatory finding that the event did not occur would eliminate the officer’s independent recollection from the equation. The notes would become the evidence.

The significance of an omission in an officer’s notebook, just like the significance of an inconsistency in a witness’s testimony, must be determined by the trier of fact on a case-by-case basis. The determination of that significance is entitled to deference on appeal.

[41] In *R. v. Fox*, 2012 ONSC 2147, the summary conviction judge relied on *Antoniuk* and held that it was open to the trial judge to find, where the police officers had no notes concerning that a formal breath demand had been made, that the requirements of section 254(3) had not been met.

[42] In summary, the significance of the absence of police notes is to be determined on a case by case basis with reference to the specific circumstances of the case. The lack of mention of certain information in the notes of the officer does not mean that the events did not take place. It is a factor that is relevant to the consideration of the credibility and reliability of the police witness.

DID THE POLICE HAVE REASONABLE AND PROBABLE GROUNDS TO ARREST THE APPLICANT?

Positions of the Parties

The Defence

[43] The defence argues that the arresting officer did not have reasonable and probable grounds to arrest the applicant under s. 495(1) of the *Code*. Counsel submits that Mr. Abdulatif was subjected to unreasonable search and seizure and was arbitrarily detained. Counsel argues that the subjective belief of Officer Merritt is questionable and that his beliefs were not

objectively reasonable. Counsel asks the court to look to the overall evidence and discount his belief that he had reasonable and probable grounds to arrest Mr. Abdulatif. The evidence of Officer Merritt lacks reliability and credibility. At best, Officer Merritt was speculating that there had been a drug transaction. Officer Merritt made the assumption that he had observed Peter Mymuller, whom he described as a known crack addict, purchase drugs from Mr. Abdulatif. He recognized Mr. Abdulatif from the neighbourhood and pegged him as a gang member because he had been in a rap video and his sister was in a relationship with a gang member. He was of the view that to survive in the neighbourhood, you had to be a gang member. However, he had never arrested Mr. Abdulatif before. He had never investigated him before. He did not know whether he had a criminal record. Counsel argues that no expert on gang membership was called and that the evidence fell short of establishing any kind of support for such speculation.

[44] Second, Officer Merritt's evidence was full of problems, both internally and externally. There are contradictions between what he said and what is in his notes. He also contradicted himself based on what others saw. Counsel submits that the facts do not objectively support the belief of reasonable and probable grounds.

[45] Mr. Lobel submits that the onus is on the defence to demonstrate that a breach has occurred on a balance of probabilities. The court must look at the surrounding circumstances and consider the factors to analyze whether reasonable and probable grounds existed. The factors include the location of the events, the surrounding circumstances, the history of the individual and the area, the time of day, the level of community activity, the history of drug dealing in the area, the physical actions of the person, and the consistency of the events to support the conclusions.

[46] Counsel takes the position that the officer's comment that the hand touching of Mr. Mymuller and Mr. Abdulatif looked "smooth and normal" was the basis of him concluding that there had been a hand to hand drug transaction. However, he did not see what passed between them and no one else described a hand to hand transaction. Nobody saw anything pass back between Mr. Abdulatif and Mr. Mymuller. The witnesses also differ in their observations concerning the alleged hand to hand transaction. Mr. Mymuller described that the two men pumped fists when they ran into each other as a greeting. He denied that he received any drugs from Mr. Abdulatif.

[47] Mr. Mymuller said that he walked south along the west side of the park. Officer Merritt said that Mr. Mymuller crossed the park to come over to Mr. Abdulatif "with a purpose." Officer Zuracelli saw Mr. Mymuller walking around the pond area. Officer Chhinzer saw him walking south on Augusta before he met up with Mr. Abdulatif. Only Officer Merritt said that Mr. Mymuller walked across the park to smoke marijuana with friends, walked across the park to the car to see Mr. Abdulatif, and then walked back across the park after climbing the fence which has spokes and is not easy to climb. Counsel submits that there are contradictions in the evidence between trial and during the preliminary hearing as to where the black Acura was parked and whether there were any cars behind the vehicle. Counsel asks, how could the officer see any hand to hand transaction when he was across the road approximately twenty feet away, there was a car between them, and he did not have a clear view as Mr. Abdulatif had his back to him? All Officer Chhinzer could see, meanwhile, was that the men were in a huddle.

[48] Third, Officer Merritt told Officer Zerucelli to call for uniformed officers to come to investigate which got translated into a drug transaction. No details were given to Officer Zerucelli or to Officer Chhinzer. They merely accepted that grounds to arrest existed. Counsel submits that no detail was given because Officer Merritt wanted them arrested so that he could search and find evidence. Further, Officer Merritt said that he observed Mr. Mymuller purchase drugs from Mr. Abdulatif but does not tell Officer Zerucelli that he was interested in Mr. Mymuller and to go follow and arrest him. There was no effort to locate Mr. Mymuller and to stop and search him. Counsel asks, why did the police not go after Mr. Mymuller? He suggests the reason is that Officer Merritt knew that he did not have anything on him.

[49] Defence counsel also says that the description written by Officer Chhinzer, as informant in the ITO for the warrant to search the telephones and the vehicle, made reference to information that the officer said he obtained from Officer Merritt saying that he followed Mr. Mymuller but lost him in alleyways and laneways. In fact, in their evidence, all police agreed that they did not follow Mr. Mymuller or seek his whereabouts. This misrepresentation affects the credibility of Officer Merritt.

[50] Counsel for Mr. Abdulatif submits that there were no grounds to arrest either Mr. Abdulatif or Mr. Hashimi. He argues the fact that Mr. Hashimi was arrested and the charges were withdrawn on the first court date shows no grounds existed. He submits that the police had a cavalier attitude about the investigation. They considered that Mr. Abdulatif was a member of a gang and that there had been a drug purchase but based it on observing their hands meet, that Mr. Mymuller did the "happy walk," and that he put his hand in his pocket.

[51] Mr. Lobel submits that the case law on whether reasonable and probable grounds existed to support an arrest, detention, and search of a person are fact driven. Here, where no one saw anything pass between Mr. Mymuller and Mr. Abdulatif, reasonable and probable grounds cannot be made out. Furthermore, the subsequent acts of police, in arresting Mr. Abdulatif and finding money in the vehicle he was driving and later two baggies of cocaine on his person during a Level three search, cannot support the conclusion of Officer Merritt that reasonable and probable grounds existed to effect an arrest. In other words, items located after the arrest was made cannot provide the necessary grounds for the arrest and search.

[52] In that the threshold for reasonable and probable grounds is not met, counsel submits the arrest is inherently unlawful and violates section 9 of the *Charter*. Further, any evidence gathered following an unlawful arrest will have been gathered in violation of the applicant's s. 8 rights. Counsel does not bring an application under s. 7 concerning the Level three search because of the observations of Officer Bell concerning the applicant placing an object in his pants while seated in the vehicle just before the arrest. For the breaches under ss. 8 and 9, the applicant argues that the evidence obtained following the unlawful arrest ought to be excluded pursuant to s. 24(2) of the *Charter*.

[53] I should note that in *R. v. Golden*, 2001 SCC 83, at para. 83, the Supreme Court of Canada stated that strip searches are "a significant invasion of privacy and are often humiliating, degrading, and traumatic experience for individuals subjected to them." In reviewing the circumstances of this case, I am satisfied that the conditions outlined in *Golden* which would

[58] Finally, the Crown submits that the officer was forthright and his evidence was consistent with Officer Zerucelli, who observed Mr. Mymuller walking southbound in the park. Officer Monteiro, along with other officers on bicycle, received information that Officer Merritt had grounds to arrest the accused for trafficking. Officer McFayden, who did not arrest the accused, found large sums of money in the centre console of the vehicle. The Crown is not suggesting that the finding of the money has anything to do with reasonable and probable grounds. She does say, however, that Officer Bell witnessed Mr. Abdulatif arch his back and put an item in the back of his pants as he was being arrested for possession for the purpose. She argues that Officer Bell's observations involving the cocaine that was eventually seized can be considered as part of the possession for the purpose charge. Ms. Bellerose submits that Officer Merritt had reasonable and probable grounds which were sufficient. Officer Bell had additional grounds to arrest when he conducted a pat down search and located money in Mr. Abdulatif's pant pockets and could feel a bulge in the butt area. He had the basis to conduct a Level three search at the police station, which revealed two baggies with cocaine in his boxer shorts. The drugs were 27.5 grams of cocaine. The amount of money found was \$1,725 Canadian and \$20 U.S. but officers could not say how much was in the centre console of the car and how much was on his person.

[59] Ms. Bellerose submits that an experienced police officer observed what he honestly believed was a hand to hand transaction in a high drug use area with a known drug addict and two known gang members, followed by Mr. Mymuller leaving the scene quickly. In the totality of circumstances, she argues, the officer had reasonable and probable grounds to believe that the offence of possession of a controlled substance for the purpose of trafficking was being committed. Therefore, the arrest was lawful and the search incident to arrest was reasonable and does not constitute a violation of the *Charter* or bad faith on the part of police. Even if the court finds a breach, the evidence should be admitted under s. 24(2) of the *Charter* as the exclusion of the evidence would bring the administration of justice into disrepute.

What is the test for reasonable and probable grounds to arrest for the offence of possession of cocaine for the purpose of trafficking?

[60] Determining reasonable and probable grounds is a fact-based exercise that will depend on the facts of each particular case. The reasonable and probable grounds requirement does not rise to the level of a *prima facie* case. It does not approach the threshold of beyond a reasonable doubt: see *R. v. Bush*, 2010 ONCA 554, at para. 37. However, it is a higher standard than mere suspicion. "It is to be remembered that the concept of reasonable and probable grounds resides in a continuum of standards of proof within the criminal process:" *R. v. Censoni*, [2001] O.J. No. 5189, at para. 29. In *R. v. Bush*, the court wrote, at para. 38:

Reasonable and probable grounds have both a subjective and an objective component. The subjective component requires the officer to have an honest belief the suspect committed the offence: *R. v. Bernshaw*, [1995] 1 S.C.R. 254 at 51. The officer's belief must be supported by objective facts: *R. v. Berlinski*, [2001] O.J. No. 377 (C.A.) at para. 3. The objective component is satisfied when a reasonable person placed in the position of the officer would be able to conclude there were indeed reasonable and probable grounds for the arrest: *R. v. Storrey*, [1990] 1 S.C.R. 241 at p. 250.

[61] A police officer may rely on hearsay information to base the determination of reasonable and probable grounds. In *R. v. Debot*, [1989] 2 S.C.R. 1140, at paras. 34–35, Justice Lamer wrote as follows:

Citing the decision of this Court in *Eccles v. Bourque*, [1975] 2 S.C.R. 739, Martin J.A. pointed out that the fact that the information Constable Birs received was hearsay from another officer did not preclude it from establishing probable cause. Martin J.A. also ruled, at p. 220, that the reputation of a person as a drug user and drug trafficker may be “a relevant factor constituting part of the total circumstances that induce a reasonable belief that the suspect has upon his person a prohibited drug “even although it would not by itself constitute reasonable grounds. The policy rule that excludes such evidence at trial has no application, he stated in determining probable grounds for an arrest or search.

Martin J.A. also held that even if Constable Birs did not, personally, have any information establishing reasonable grounds for a search, he was entitled to rely on the orders of a superior officer against a claim of arbitrariness as long as the superior officer had reasonable grounds to believe that the suspect had a prohibited drug in his possession. It would be unrealistic and impractical, Martin J.A. stated, to require a police officer to obtain from his or her superior all the information supporting the order to search a person suspected of the commission of a crime especially where the suspect may be fleeing from the scene.

What are the powers of a police officer to arrest without a warrant?

[62] Section 495(1) of the *Code* provides that an officer has the power, without a warrant, to arrest a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence. The test for a warrantless arrest is outlined in the case of *R. v. Storrey*, [1990] 1 S.C.R. 241, at para. 17: the officer may arrest an accused where, first, he or she subjectively believes that an accused has committed an offence and, second, that belief is justifiable from an objective point of view. In other words, the officer’s subjective belief must be objectively supported by the circumstances of the case. The Supreme Court wrote as follows, at para. 17:

The *Criminal Code* requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a *prima facie* case for conviction before making the arrest.

[63] In *Storrey*, the arresting officer's belief that the accused had committed aggravated assault such that he could arrest him without a warrant was supported by the facts: the type of car the accused owned matched the description of the car given by the victims of the assault, the victims selected the accused's photo out of a photo line-up, and the accused had been stopped in the past driving the car described by the victims. The court held that, based on these facts, the officer's subjectively held belief was objectively justifiable. The officer had reasonable and probable grounds to arrest for aggravated assault.

[64] In the case of *R. v. Lawes*, 2007 ONCA 10, at para. 4, the court wrote that, "[t]he totality of the circumstances relied upon by the arresting officer will form the basis for the objective assessment." In *R. v. Williams*, 2009 ONCA 35, the court wrote, at para. 8: "The determination of whether the officer had reasonable grounds must be made in the context of the circumstances presented to the officer." In the case of *R. v. Johnson*, [2006] O.J. No. 2182 (C.A.), the Court of Appeal wrote, at paras. 5, 7–8:

For an arrest to be lawful, there must be both subjective and objective reasonable and probable grounds to believe that an offence has been committed.

[...]

In our opinion the trial judge did not conflate the subjective and objective grounds to arrest. She correctly stated that the objective person is a person with the knowledge that the police had. That is, the objective person would know the particular area involved and the particular location within that area was frequently used for drug trafficking. The reasonable person standing in the shoes of the officers would also know of Warden's drug use. The police also had other information about Warden's drug use. Evidence that Warden was a known crack user was properly before the court. Information received from individuals can form part of the grounds for a subsequent arrest.

On an objective basis a person standing in the shoes of the police officer would have also seen:

- Warden's behavior of pacing in a location known for crack cocaine trafficking;
- The guarded mode of acknowledgment between Warden and the appellant, typical of drug transactions;
- The appellant's act of showing Warden a small item in his cupped hands, typical of drug deals; and
- Both men walking off together.

[65] Crown counsel submits that in *Johnson*, the court accepted that it was sufficient that the officer had reasonable and probable grounds to arrest for possession for the purpose of

trafficking even where there was no observation of what was exchanged between the accused and the other person.

[66] In the case of *R. v. Brown*, 2012 ONCA 225, the Ontario Court of Appeal allowed an appeal and quashed the appellant's convictions for drug-related offences. The appellant had been on the corner of Church and Granby streets in Toronto and was found in possession of cocaine, marijuana, and cash. The officer testified that he believed he had reasonable and probable grounds to arrest the appellant based on his observations from his position in the police car. The court found that the issue considered by the trial judge was whether there was "cause to detain" the appellant which was not the relevant issue before the court. Rather, the appellant claimed that his s. 9 rights were breached based on the contention that the officer did not have reasonable and probable grounds to arrest him and that was the issue to determine. The Court of Appeal reviewed the evidence and accepted that the arresting officer honestly believed that the appellant was in possession of drugs and had attempted a hand-to-hand transaction. However, the court wrote as follows, at para. 14:

In our view, however, there must be something in the conduct observed by the officer, placed in the context of the rest of the circumstances, that lends some objective justification or verification to the officer's belief. Section 495 of the *Criminal Code* and, more importantly, s. 9 of the *Charter* demand that the belief be "reasonable", meaning that a reasonable person standing in the shoes of the police officer be able to see the grounds for the arrest. Without this objective component, the scope of the police power to arrest would be defined entirely by the police officer's perception of the relevant circumstances. The individual's constitutional right to be left alone by the state cannot depend exclusively on the officer's subjective perception of events regardless of how accurate that perception might be. The issue is not the correctness of the officer's belief, but he need to impose discernable objectively measureable limits on police powers.

The Law on Section 8: Search and Seizure

[67] Section 8 of the *Charter* reads: "Everyone has the right to be secure against unreasonable search or seizure."

[68] In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, the Supreme Court considered s. 8 of the *Charter* and held that it confers a broad and general right to be secure from unreasonable search and seizure. Justice Dickson held that s. 8 protects, at minimum, a "reasonable expectation of privacy." An assessment of the constitutionality of a search and seizure must focus on its "reasonable" or "unreasonable" impact. In *R. v. Edwards*, [1996] 1 S.C.R. 128, the Supreme Court discussed the scope and content of s. 8. It is a personal right and, as such, it protects people and not places. An alleged breach of s. 8 invites two distinct inquiries: (1) did the accused have a reasonable expectation of privacy? (2) if so, was the search by the police conducted reasonably? Whether there is a reasonable expectation of privacy is to be determined by assessing the totality of the circumstances. A search not authorized by law is unreasonable. A warrantless search must be justified by the Crown as being reasonable. Searches will be reasonable within the meaning of

s. 8 if (1) the search is authorized by law; (2) the law itself is reasonable; and (3) the search is conducted in a reasonable manner. If any of these conditions are not met, the search is not reasonable: see *R. v. S.A.B.*, 2003 SCC 60.

[69] Section 8 relates to the need to protect the property and privacy rights of persons against unwarranted incursions by the state. Once the applicant establishes that the search is a warrantless search, the Crown must show that the search was reasonable. To establish a lawful arrest and a reasonable search, the Crown must show that the officer had reasonable and probable grounds to arrest.

[70] The applicant takes the position that the arresting officer did not have reasonable and probable grounds to believe that the applicant had committed the offence of possession of a controlled substance for the purpose of trafficking and, therefore, lacked the grounds to arrest the applicant and search his person. Crown counsel argues that the evidence called by the Crown meets the necessary test.

[71] In *R. v. Oldfield*, 2006 ONCJ 18, Reinhardt J. considered an application to exclude evidence where the police officer received information concerning a physical description of a male. The information included certain clothing, that he was riding a mountain bike, and that he was dealing crack cocaine. The officer made observations and said that he observed what he believed to be a “hand-to hand transaction.” He saw something which could have been “like paper” but could not say it was paper or money. He did not see the item that may have been exchanged. The officer radioed for assistance and the Community Response Unit officers stopped the accused and placed him under arrest. They retrieved two baggies containing crack cocaine and some money. At trial, the officer said that the basis of his request for the other officers to stop the accused was his observations of the hand to hand transaction, as well as the information received from the informant and his familiarity with the area as a high drug area. However, in his radio dispatch to the other officers who stopped the accused, he did not mention the hand to hand transaction.

[72] The defence argued that the police did not have reasonable and probable grounds to stop the accused and search and arrest him. Justice Reinhardt noted that the officer could not see what, if anything, was exchanged, no buyer was either stopped or searched, and the officer did not mention any hand to hand transaction. He found the Crown’s evidence had an internal lack of consistency and was not reliable. He concluded that there was a pre-existing police stand to stop the accused and investigate him rather than any observations that precipitated the stop. He accepted the accused’s version of events and found there had been a breach of his rights under s. 8 of the *Charter*. He concluded that the breach was serious and that the evidence should be excluded.

[73] Crown counsel argues that the case is distinguishable from the case at bar as the accused in that case testified on the application. Here, the accused did not testify; rather, Mr. Mymuller testified. The Crown submits that what is relevant is what was in the mind of the officer who made the observations in all the circumstances at the relevant time.

[74] In *R. v. Hanson*, [2009] O.J. No. 4152, Garton J. held that there were reasonable and probable grounds to believe that an offence took place and that the accused was the offender with

respect to that offence, where an experienced police officer on patrol late at night observed three males standing together and that the person in the middle appeared to be moving small articles on the palm of his left hand. He concluded that that person had crack cocaine in his hand and that a drug transaction was about to take place. The officer testified that he would have arrested the accused but he required the presence of another officer. By the time another officer arrived, the person was in a taxi cab and the officer instructed the other officer to arrest him. Police discovered the evidence after he was searched. Garton J. held that the subjective branch of this test had been made out and the objective branch was also satisfied. She wrote, at para. 58:

The totality of the circumstances relied upon by the arresting officer will form the basis for the objective assessment. It would constitute an error in law to assess each fact or observation in isolation. An objective assessment will include the dynamics within which the police officer acted, as well as his or her experience. Because a trained officer is entitled to draw inferences and make deductions drawing on experience, a reviewing court must take these factors into account: *R. v. Lawes*, 2007 ONCA 10, [2007] O.J. No. 50 (QL), at para. 4; *R. v. Simpson* (1993), 12 O.R. (3d) 182, 79 C.C.C. (3d) 482 (C.A.) at 501; *R. v. Cunsolo*, [2008] O.J. No. 3754 (Sup. Ct.) (QL) at para. 68; *R. v. Polashek* (1999), 45 O.R. (3d) 434, [1999] O.J. No. 968 (C.A.) at paras. 13-14; and *R. v. Juan*, 2007 BCCA 351, 222 C.C.C. (3d) 289 (B.C.C.A.) at para. 19.

[75] In *R. v. Bennett*, [2010] O.J. No. 6152 (Ont. Ct. J.), Chapin J. held that the arresting officer had reasonable and probable grounds to arrest the accused and that the search was reasonable. She wrote, at paras. 34-35:

...the area where the arrest took place is a high crime area well known for its high drug activity, prostitution and street robbery, the drug activity in the area is known to occur at all times of the night and day, the officer has had extensive experience in drug investigations including hand to hand transactions, the two men he observed appeared to be unusually close to one another and were looking down in the cupped hands of Mr. Bennett. And as soon as they spotted the police, they quickly turned and walked in the opposite direction at a quick pace.

Once the officers caught up to the two men, Officer Benevides noted that Mr. Bennett was continually putting his left hand in his left pocket and the officer asked him to remove it. When the officer looked back at his fellow officers who were dealing with the second male, he also observed Century Sam Cigar which was known to him to be drug paraphernalia.

[76] In *R. v. Henry*, 2010 ONSC 5206, Belobaba J. found that the accused's ss. 8 and 9 rights were breached and excluded the evidence under s. 24(2) of the *Charter*. In that case, the accused was driving his car and was stopped by police and arrested. When the car was searched, they found 18 grams of cocaine in a baggie under the front passenger seat and \$2,900 in cash in the console. The accused and the arresting officer testified at the application. The court did not accept the evidence of the police officer concerning the hand to hand exchange. Belobaba J.

found the officer's explanation for not requesting back up immediately and not pulling the vehicle over once he said he observed the transaction not to be plausible. He "was not persuaded that Currie ever saw a hand to hand."

[77] Crown counsel argues that that the case is distinguished from the one at bar as the accused testified and the court did not believe the evidence of the officer.

The Law on Section 9: Arbitrary Detention

[78] Section 9 of the *Charter* provides as follows: "Everyone has the right not to be arbitrarily detained or imprisoned."

[79] The meaning of detention was considered in *R. v. Therens*, [1985] 1 S.C.R. 613 and *R. v. Thomsen*, [1988] 1 S.C.R. 640. Detention is a compulsory restraint of liberty that is not an arrest. A state agent such as a police officer assumes control over the movement of a person by a demand or direction. An arbitrary detention is one which is "capricious, despotic, or unjustifiable:" see *R. v. Cayer* (1988), 66 C.R. (3d) 30 (Ont. C.A.).

[80] The applicant takes the position that he was arbitrarily detained because the police did not have reasonable and probable grounds to arrest him in the car while parked beside the Bellevue Square Park.

[81] In *R. v. Grant*, 2009 SCC 32 at par. 54, the Supreme Court wrote:

A lawful detention is not arbitrary within the meaning of s. 9 (*Mann*, at para. 20), unless the law authorizing the detention is itself arbitrary. Conversely, a detention not authorized by law is arbitrary and violates s. 9.

CONCLUSIONS

[82] In reviewing the evidence led on this application, I note the following comments of Justice Doherty in *R. v. Gholub* (1997), 34 O.R. (3d) 743 (C.A.), at para. 18:

...Both a justice and an arresting officer must assess the reasonableness of the information available to them before acting. It does not follow, however, that information which would not meet the reasonableness standard on an application for a search warrant will also fail to meet that standard in the context of an arrest. In determining whether the reasonableness standard is met, the nature of the power exercised and the context within which it is exercised must be considered. The dynamics at play in an arrest situation are very different than those which operate on an application for a search warrant. Often, the officer's decision to arrest must be made quickly in volatile and rapidly changing situations. Judicial reflection is not a luxury the officer can afford. The officer must make his or her decision based on available information which is often less than exact or complete. The law does not expect the same kind of inquiry of a police officer deciding whether to make

an arrest that it demands of a justice faced with an application for a search warrant.

[83] I recognize that Officer Merritt was out conducting observations on a summer day on a Saturday afternoon in the busy area of Kensington Market. Dressed in plain clothes and standing more than twenty feet away, he made observations of Mr. Mymuller and the applicant and saw what he thought was a hand to hand drug transaction between them. This led him to the subjective belief that there were reasonable and probable grounds to arrest Mr. Abdulatif for the offence of possession of a controlled substance for the purpose of trafficking. As the Court of Appeal said in *R. v. Brown*, at para. 14, "...The issue is not the correctness of the officer's belief, but the need to impose discernable objectively measurable limits on police powers."

[84] I find that the actions of Mr. Abdulatif, as observed by police, did not provide any objective basis upon which to believe that he and Mr. Mymuller were involved in a drug transaction. That Mr. Mymuller was a known drug user in the area or that the two men met momentarily and then Mr. Mymuller walked away quickly doing a "happy walk" did not make the interaction any more suspicious. To suggest that police also knew the applicant and Mr. Hashimi as members of the Project Original Gang and that was also a consideration in believing a crime was being committed is extremely far-fetched. The view that he was a gang member was based on Mr. Abdulatif being in a rap video and that his sister had a boyfriend who was a member of the gang and was incarcerated on firearms offences. Mr. Abdulatif had not been investigated or arrested by the police officer in the past.

[85] Mr. Mymuller provided an explanation for why he was walking back to the park – to find the key for his electric bicycle – and how he stopped to greet Mr. Abdulatif as he knew him from the area. He testified about the momentary touching of their hands as a fist bump greeting. He denied that he purchased any drugs from Mr. Abdulatif. Mr. Mymuller was a witness who had never testified in court before, who has had a difficult life, and has an extensive criminal record. Nonetheless, he was honest, sincere, and credible in his testimony and not shaken in cross-examination. Furthermore, Officer Merritt said he saw what he believed was a hand to hand drug transaction but did not see what item was passed and did not see anything being passed back from Mr. Mymuller to Mr. Abdulatif. Officer Chhinzer, who was also out doing observations, saw the two men in what he described as a "huddle" but saw nothing else.

[86] What is telling is that Officer Merritt did not follow Mr. Mymuller after his interaction with Mr. Abdulatif nor did the officer ask other police to follow Mr. Mymuller. This was despite the fact that they knew where he resided and where he spent his time. Had they followed him and located drugs on his person, then the belief that he purchased drugs from Mr. Abdulatif could have been supported. What is also telling is that when Officer Merritt requested the assistance of uniformed officers to arrest Mr. Abdulatif and Mr. Hashimi, no detail was given to those officers about Officer Merritt's observations that led to Mr. Abdulatif being arrestable for the offence.

[87] I acknowledge that the police officers who testified on this application described the area as having high drug use and trafficking. In my view, that did not elevate the circumstances which led to the officer's views to the required threshold. Despite the police officer's honest belief that he had reasonable and probable grounds to arrest the applicant and convey those to the arresting officer, the totality of the circumstances do not provide a basis upon which that belief could be

said to be objectively reasonable. At best, police had a mere suspicion or hunch that a drug transaction had taken place and nothing more.

[88] I note that the police, upon arrest, located money in the vehicle and on his person and made observations of Mr. Abdulatif which led to finding cocaine on his person during the Level three search at the police station. However, the observations of Officer Bell and others once Mr. Abdulatif was placed under arrest cannot be used to justify or corroborate the beliefs of Officer Merritt who said he formed reasonable and probable grounds to arrest the applicant. In *R. v. Lal*, [1998] B.C.J. No. 2446, 113 B.C.A.C. 47, the appellant, who was convicted of gun charges, argued that his s. 8 rights were breached. The case dealt with an investigative stop as opposed to an arrest but the comments of the court, at para. 26, are analogous: "The mere fact that the officer who instigated the stop relied on another police officer is not enough. The evidence obtained through the stop will be admissible only if the Crown can establish that the officer upon whom the instigating officer relied possessed a reasonable suspicion justifying a stop." In *R. v. Montgomery*, 2009 BCCA 41, the British Columbia Court of Appeal wrote at para. 27:

I agree with the appellant that the trial judge improperly relied on evidence discovered after the arrest of the appellant in concluding that the officer objectively had reasonable and probable grounds to make the arrest. He should not have relied on the fact that drugs and weapons were found in the Spindrift Road residence when it was subsequently searched (para. 40 above) or the fact that drugs and cash were found on the occupants of the van after they were arrested (para. 46 above)...

[89] Similarly, the observations of the arresting officer in the case at bar cannot be used to strengthen the reasonable and probable grounds of Officer Merritt given that the arrest was taking place regardless of the fact that the second officer saw the applicant hiding something under himself in the car.

[90] Accordingly, I find that the arrest of Mr. Abdulatif was unlawful and infringed his right not to be arbitrarily detained and not to be subjected to unreasonable search and seizure.

REMEDIES: APPLICATION TO EXCLUDE EVIDENCE UNDER S. 24(2)

[91] Having found that reasonable and probable grounds did not exist to support the arrest, detention, and search of Mr. Abdulatif and that there were violations of ss. 8 and 9 of the *Charter*, I now consider the remedy being sought by the defence.

[92] The defence submits that a breach of ss. 8 and 9 would justify the exclusion of the evidence. To be excluded under s. 24(2), evidence must be "obtained in a manner" that infringed a right. However, there need not necessarily be a causal connection between the evidence obtained and the *Charter* breach, such that the evidence would not have been obtained but for the *Charter* breach. There may also be a temporal connection such that the discovery of the evidence and the *Charter* breach took place in a single transaction. The evidence cannot be too remote from the *Charter* breach.

[93] The test for exclusion under s. 24(2) was laid down in *R. v. Grant*, *supra*, at para. 71, where the Supreme Court of Canada said that the court should assess:

1. The seriousness of the *Charter*-infringing state conduct. Would the administration of justice be brought into disrepute by communicating that the courts effectively condone state deviation from the rule of law? Relevant under this inquiry is the seriousness of the state conduct. Public confidence would surely be undermined if people were unnecessarily exposed to humiliating strip searches. However, good faith on the part of the police can serve to reduce the need for the court to dissociate itself from the state conduct.
2. The impact on the *Charter*-protected interests of the accused. To what extent did the breach actually undermine the accused's protected interests? Strip searches are one of the most intrusive manners of searching.
3. Society's interest in an adjudication on the merits. Would the truth-seeking function of the court be better served by the admission of the evidence or by its exclusion? At this stage, the reliability of the evidence as well as its importance to the prosecution's case can be considered. The seriousness of the offence ought not to be considered. The impact of failing to admit the evidence in this case would result in the case not being proven.

[94] In applying *Grant*, I assess and balance the factors outlined above. The first inquiry is with reference to the seriousness of the *Charter*-infringing state conduct. This is a fact-specific inquiry and involves consideration of the officer's conduct on a spectrum "from blameless conduct, through negligent conduct, to conduct demonstrating a blatant disregard for *Charter* rights:" see *R. v. Kitaitchik* (2002), 166 C.C.C. (3d) 14 (Ont. C.A.), at para. 41.

[95] Crown counsel argues that if this court finds there was a breach, it should be considered a good faith error and not arbitrary, malicious, or a deliberate violation of the applicant's constitutional rights. I accept that Officer Merritt honestly believed he had grounds to arrest the applicant. However, I find that his actions demonstrated a significant disregard for Mr. Abdulatif's right to be free from arbitrary detention. The officer did not consider the possibility of exercising police powers short of actual arrest such as further investigation by following Mr. Mymuller, the alleged purchaser of the drugs. None of the police officers involved considered it important to follow Mr. Mymuller and investigate him further. None of the police officers, including the arresting officer, had received any details to support an arrest. In my view, further investigation was appropriate before resorting to arresting the applicant. I consider the rather cavalier attitude of the police towards the exercise of the powers of arrest to be a serious violation of ss. 8 and 9. Despite the fact that there did not appear to be any animosity or disrespect by the officers to Mr. Abdulatif, as shown in the booking video, they subjected him to a Level three search in circumstances where his arrest was not justified.

[96] As for the impact on the *Charter*-protected interests of the accused, the applicant was arrested, searched at the scene, taken to the station, and subjected to a Level three search in circumstances where the officer did not have reasonable and probable grounds to arrest and detain and search the applicant. The police interference was neither fleeting nor technical. The officers took Mr. Abdulatif from the vehicle, brought him to the ground, and arrested him in a busy neighbourhood on a Saturday afternoon. Their actions were highly intrusive of his liberty

and privacy interests. I am satisfied that the breach was done with the police officers giving short shrift to the *Charter* rights of the applicant.

[97] I now turn to the third issue of “whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion.” The evidence seized consists of 27.5 grams of cocaine, \$1,725 in Canadian currency, and \$40 in U.S. currency. The evidence is reliable and essential to the Crown’s case and favours the admission of the evidence. There is strong public interest in having criminal charges determined on their merits, especially where the charges are serious.

[98] However, in balancing these factors, I am led to the conclusion that the reputation of the justice system would be better served by the exclusion of the evidence. I conclude that a reasonable person informed of the relevant circumstances and familiar with *Charter* values would conclude that the admission of the evidence in this case would bring the administration of justice into disrepute. The police conduct was serious and had a significant impact on the applicant’s liberty.

RESULT

[99] Having found that the applicant has met his onus and established breaches of his rights under ss. 8 and 9 on a balance of probabilities, and having engaged in a balancing exercise which is to be undertaken in accordance with the decision of *R. v. Grant*, I conclude that the evidence should be excluded. The application for an order excluding the evidence under s. 24(2) of the *Charter* is, therefore, granted.


Himel J.

Released: February 27, 2017

CITATION: R. v. Abdulatif, 2017 ONSC
COURT FILE NO.: CR-15-90000343
DATE: 20170227

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

IBSA ABDULATIF

Applicant

**RULING ON APPLICATIONS UNDER SECTIONS
8 AND 9 OF THE *CHARTER***

Himel J.

Released: February 27, 2017