NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Demirovic*, 2022 NSCA 56

Date: 20220915
Docket: CAC 508327
Registry: Halifax

Between:

Jasmin Jasco Demirovic

Appellant

v.

His Majesty the King

Respondent

Judge:	The Honourable Chief Justice Michael J. Wood
Appeal Heard:	June 13, 2022, in Halifax, Nova Scotia
Subject:	Criminal Law – Arrest and Search – Reasonable Grounds *Voir Dire* Decision – Sufficiency of Reasons
Summary:	The appellant was a passenger in a vehicle which was stopped by police and the occupants arrested. Police believed the occupants were involved in activities related to trafficking of cocaine. The vehicle was searched incident to the arrests and cocaine was found in a locked suitcase. The appellant was charged with possession of cocaine for the purposes of trafficking. The appellant alleged the police did not have proper grounds for the arrests and search and the evidence of cocaine should be excluded from trial under s. 24(2) of the *Charter*. The trial judge conducted a *voir dire* following which she dismissed the defence motion and indicated that her reasons for doing so would be set out in her trial decision. She never provided those additional reasons.

The appellant appealed, alleging errors in both the *voir dire* and trial decisions.

Issues: Were the reasons found in the preliminary *voir dire* decision sufficient to permit appellate review of the lawfulness of the arrests and search?

Result: Appeal allowed and new trial ordered.

The reasons found in the *voir dire* decision were conclusory in nature and did not permit proper appellate review. The central issue was whether the police had grounds to arrest the occupants of the vehicle and conduct a search of it. The trial judge identified the proper principles from the decisions in *Debot* and *Garofoli* but her preliminary decision did not explain how these were applied to the circumstances. In addition, her decision referred to, and applied, *obiter* comments suggesting an unlawful arrest might not be arbitrary under s. 9 of the *Charter*. This is an incorrect statement of the law.

The Court concluded the *voir dire* decision was inadequate to allow appellate review. The appeal was allowed and a new trial ordered.

NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Demirovic*, 2022 NSCA 56

Date: 20220915
Docket: CAC 508327
Registry: Halifax

Between:

Jasmin Jasco Demirovic

Appellant

v.

His Majesty the King

Respondent

Judges:	Wood, C.J.N.S.; Beveridge and Bryson, JJ.A.
Appeal Heard:	June 13, 2022, in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Wood, C.J.N.S.; Beveridge and Bryson, JJ.A. concurring.
Counsel:	Brian H. Greenspan and Naomi M. Lutes, for the appellant David Schermbrucker and Maile Graham-Laidlaw, for the respondent

Reasons for judgment:

[1] On March 22, 2016, members of the Halifax Police Integrated Guns & Gangs Unit were conducting surveillance of Great Buys Auto Sales on Sackville Drive in Sackville, Nova Scotia ("Great Buys"). They suspected that individuals associated with Great Buys were involved in drug trafficking activities.

[2] The police had received information from confidential sources that cocaine was being delivered to Great Buys hidden in motor vehicles shipped from out of the province.

[3] Shortly after 11:00 a.m. a black Audi Q7 arrived at Great Buys carrying three individuals, two males and a female. The driver, Tyler Richards, was identified by one of the police officers as a person believed to be associated with drug trafficking. Shortly after their arrival, a "dealer" plate was placed on a silver Mercedes and the individuals left the premises in that vehicle. They returned a short time later with an additional passenger, the appellant, Jasmin Demirovic.

[4] Other than Mr. Richards, none of the occupants of the Mercedes were known to the members of the surveillance team.

[5] After Mr. Richards, Mr. Demirovic and the female passenger went into Great Buys' premises; the other passenger, Anthony Roberts, transferred a black suitcase from the trunk of the Mercedes to the Audi. An hour later, the three males left Great Buys in the Audi and the female drove off in the Mercedes.

[6] The police followed the Audi and ultimately stopped the vehicle in Halifax where they arrested the three occupants on suspicion of trafficking in cocaine. They searched the vehicle. The locked suitcase was opened, and two 1-kilogram packages of cocaine were discovered. Messrs. Richards, Roberts, and Demirovic were charged with possession of cocaine for the purpose of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act*. Mr. Demirovic was also charged with breach of a probation order contrary to s. 733.1(1)(a) of the *Criminal Code*.

[7] Mr. Richards passed away and the charges against him were discontinued in May 2016. Messrs. Roberts and Demirovic went to trial before Judge Rickcola Brinton of the Nova Scotia Provincial Court.

[8] Messrs. Roberts and Demirovic made an application to exclude the evidence of the cocaine found in the suitcase and a *voir dire* hearing took place before Judge Brinton on December 7 and 8, 2017. In that proceeding, the defence argued the arrests and subsequent search of the vehicle were illegal and contravened s. 8 and s. 9 of the *Canadian Charter of Rights and Freedoms*. They submitted that because of the breach of their *Charter* rights, the evidence obtained by the police should be excluded from trial pursuant to s. 24(2) of the *Charter*.

[9] The arguments of the Crown and defence at the *voir dire* focused on whether the police had sufficient grounds for the arrest of the occupants of the Audi and, if not, whether the cocaine found during the search should be excluded from the trial evidence.

[10] On December 20, 2017, Judge Brinton gave a brief oral decision in which she dismissed the defence *Charter* application. The judge's reasons set out her conclusion without any significant analysis. She explained that she would give a detailed decision later:

> It is my intention to give an overview of my decision today. I'll give my full decision later along with the trial decision.

[11] Despite promising to provide more detailed reasons for the *voir dire* decision, Judge Brinton never did so.

[12] The trial took place in May 2019, and in June 2019 the trial judge gave a brief oral decision acquitting Mr. Roberts on the basis that the Crown had failed to prove he had knowledge of the cocaine in the suitcase.

[13] In August 2020, counsel made post trial submissions with respect to the charges against Mr. Demirovic, and on November 3, 2020 the trial judge gave an oral decision convicting him of possession of the cocaine for the purpose of trafficking and breach of a probation order.

[14] Mr. Demirovic appeals alleging errors in the judge's *voir dire* and trial decisions.

[15] I am satisfied that the December 20, 2017 *voir dire* decision does not contain sufficient information to permit meaningful appellate review. It does not demonstrate whether the trial judge properly applied the required legal principles or how she weighed the circumstances which needed to be considered in order to determine whether the arrest and subsequent search was lawful. It may have been

her intention to provide those details in her trial decision, but she did not do so. For this reason, I would set aside Mr. Demirovic's conviction and order a new trial.

[16] Since I have determined that Mr. Demirovic is entitled to a new trial, because of the deficiencies in the *voir dire* decision, I need not address the substance of Mr. Demirovic's complaints concerning the trial decision.

Issues

[17] The Notice of Appeal lists six substantive grounds of appeal. The appellant's factum reorganizes and restates them as follows:

> **I. Unreasonable Verdict**
>
> 47. It is the position of the Appellant that the verdict is unreasonable. There were rational inferences arising from the evidence and the lack of evidence which were inconsistent with guilt.
>
> **II. Insufficient Reasons**
>
> 57. The Appellant argues that the learned trial judge's reasons for both conviction and in relation to the *Charter* application were inadequate and do not permit meaningful appellate review.
>
> **III. Errors in Taking Judicial Notice**
>
> 58. The Appellant submits that the trial judge erred in in taking judicial notice of facts not in evidence. Her assumptions about airport procedures and the inferences drawn as a result were not properly the province of judicial notice.
>
> **IV. The *Charter* Application**
>
> 59. The Appellant contends that the trial judge erred in dismissing the *Charter* application. The grounds articulated by Det. Cst. Baird simply did not rise to the level of reasonable and probable grounds to arrest, particularly given the uncorroborated nature of the source information upon which he relied.

[18] My analysis will focus on the evidence presented at the *voir dire* and the trial judge's decision on the *Charter* motion. I will not analyze the errors alleged in the trial decision.

Analysis

[19] I start my analysis with a review of the requirements for establishing grounds to arrest without warrant. I will then review the evidence at the *voir dire* and the submissions of counsel and consider the adequacy of the reasons delivered on December 20, 2017.

Requirements for Lawful Arrest

[20] The authority for a police officer to arrest a person without warrant is found in s. 495(1) of the *Criminal Code* which provides:

> Arrest without warrant by peace officer
>
> **495 (1)** A peace officer may arrest without warrant
>
> > **(a)** 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;
> >
> > **(b)** a person whom he finds committing a criminal offence; or
> >
> > **(c)** a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

[21] In this case, the arrest of the occupants of the Audi on March 22, 2016 would have to be justified under subsection (a). The test for what constitutes "reasonable grounds" is found in the Supreme Court of Canada decisions in *R. v. Debot*, [1989] 2 S.C.R. 1140 and *R. v. Garofoli*, [1990] 2 S.C.R. 1421.

[22] In *Debot*, the issue was whether the police had reasonable grounds to believe the appellant was in possession of a controlled drug when they decided to search him. If not, the search would be unlawful. In assessing this question, the Court outlined the considerations in play (page 1168):

> In my view, there are at least three concerns to be addressed in weighing evidence relied on by the police to justify a warrantless search. First, was the information predicting the commission of a criminal offence compelling? Second, where that information was based on a 'tip' originating from a source outside the police, was that source credible? Finally, was the information corroborated by police investigation prior to making the decision to conduct the search? I do not suggest that each of these factors forms a separate test. Rather, I concur with Martin J.A.'s view that the 'totality of the circumstances' must meet the standard of reasonableness. Weaknesses in one area may, to some extent, be compensated by strengths in the other two.

[23] As this passage indicates, the assessment of whether police have reasonable grounds is fact specific and varies depending upon the quality of the information known to them. For example, an informant whose tip is general in nature or whose reliability is unknown heightens the importance of having corroborative evidence.

In the circumstances before the court in *Debot*, Justice Wilson described it this way (page 1172):

> The failure of the police to spot the courier is the most serious deficiency in the corroborative evidence of the police. In my opinion, it should not be necessary for the police to confirm each detail in an informant's tip so long as the sequence of events actually observed conforms sufficiently to the anticipated pattern to remove the possibility of innocent coincidence. As I noted earlier, however, the level of verification required may be higher where the police rely on an informant whose credibility cannot be assessed or where fewer details are provided and the risk of innocent coincidence is greater. Having regard to the quality of the information and the reliability of the informant in this case, I am satisfied that the police surveillance yielded sufficient corroborative evidence to warrant the belief that a drug transaction had occurred…

[24] In *Garofoli*, Justice Sopinka outlined the propositions to be considered when police rely on an informer to establish reasonable grounds to conduct a search (page 1456-1457):

> Although *Greffe* concerns admissibility under s. 24(2), in my opinion the discussion has a bearing on the sort of information that must be put before a judge issuing an authorization for electronic surveillance. I see no difference between evidence of reliability of an informant tendered to establish reasonable and probable grounds to justify a warrantless search (the issue in the cases cited by Lamer J.) and evidence of reliability of an informant tendered to establish similar grounds in respect of a wiretap authorization. Moreover, I conclude that the following propositions can be regarded as having been accepted by this Court in *Debot* and *Greffe*.
>
> (i) Hearsay statements of an informant can provide reasonable and probable grounds to justify a search. However, evidence of a tip from an informer, by itself, is insufficient to establish reasonable and probable grounds.
>
> (ii) The reliability of the tip is to be assessed by recourse to "the totality of the circumstances". There is no formulaic test as to what this entails. Rather, the court must look to a variety of factors including:
>
> (a) the degree of detail of the "tip";
>
> (b) the informer's source of knowledge;
>
> (c) indicia of the informer's reliability such as past performance or confirmation from other investigative sources.
>
> (iii) The results of the search cannot, *ex post facto*, provide evidence of reliability of the information.

[25] This Court recently considered these principles in *R. v. Simon*, 2020 NSCA 25. In that case, police stopped Mr. Simon's car and placed him under arrest for possession of drugs for the purpose of trafficking. The grounds for arrest were based primarily on confidential source information. After referring to the principles in *Garofoli* and *Debot*, the Court upheld the trial judge's finding that the police did not have sufficient grounds to arrest Mr. Simon. The confidential sources indicated that Mr. Simon had been selling cocaine and prescription pills and stored them in his home. The Court described these statements as "conclusory" and "not compelling". The analysis as to whether the informants were credible and reliable was as follows:

> [31] In my view, the record does not support a finding that the informants were credible and reliable. Although the tips were not anonymous and neither informant had a criminal record for public mischief or perjury (ITO, ¶9-10), there were, as the trial judge noted (2019 NSSC 69, ¶15-19, 21-24), minimal if any objective indicators of their credibility and reliability.
>
> [32] Corporal Kuchta's testimony that the informants had previously provided information multiple times, once leading to a charge, reveals—without more detail—little, if anything, about the informants' credibility or reliability.

[26] With the lack of compelling information and the unknown reliability of the informants, the issue of corroborative evidence was crucial. Its absence led directly to the conclusion there were not reasonable grounds to arrest Mr. Simon:

> [35] The only information the police corroborated was the respondent's name, address, what car he drove, his plate number, and his being in the Port Hawkesbury area on August 30, 2017. While the respondent was known to the police and had a criminal record (ITO, ¶19), there was no information before the court as to whether the respondent's criminal record included drug-related offences. It was also clarified on the *Charter* motion that the other time the police had stopped the respondent resulted in cocaine being found on a passenger in his car—not in the respondent's possession (2019 NSSC 69, ¶39). Corporal Kuchta testified that the charges against Mr. Simon relating to that stop were withdrawn.
>
> [36] Given the weaknesses of the first two factors, it is significant that the police did not see the respondent engage in any criminal or suspicious activity in the slightest, nor did they see him with either of the two alleged cocaine suppliers. Police surveillance merely involved: driving by the respondent's workplace, Island Concrete, located on Highway 105 on August 30, 2017; seeing the respondent's vehicle at his workplace; waiting for an hour or two at the rotary near Highway 105; and seeing the respondent enter the rotary at 5:11 p.m. that day. Nothing suspicious or criminal was observed before pulling the respondent over, arresting him for possession for the purposes of trafficking, and searching him incident to that arrest.

> [37] In *Chioros*, there were insufficient grounds to justify an arrest despite the fact that the police saw Chioros engage in counter-surveillance techniques and with a suspected drug dealer (*Chioros*, ¶20). See also *R. v. MacDonald*, 2015 NSSC 297 where Arnold, J. found that the officer seeing the accused with the person the informant alleged was supplying the accused drugs at the address identified by the informant was also insufficient to overcome the lack of specificity (¶36-38).
>
> [38] While confirmation of criminal activity or suspicious circumstances is not necessary in all cases, in my view, such confirmation was necessary here in light of the fact that the informants had not been proven reliable nor credible and the information provided was not sufficiently detailed to be considered compelling.
>
> [39] There was, therefore, no meaningful corroboration given that most of the confirmed information is readily available public information (*Chioros*, ¶19) and given that the respondent worked in the Port Hawkesbury area and presumably would be found there most days.

[27] This approach to the assessment of reasonable grounds ensures police have more than a mere suspicion. They must believe it is probable the target is engaged in criminal activity, and this belief must be objectively reasonable.

Voir Dire Evidence

[28] Four police officers testified at the *voir dire* hearing. Each described their role in the process leading to the search of the Audi. Detective Constable Robbie Baird said he was the one who made the decision to stop the Audi and arrest the occupants following discussions with fellow officers.

[29] Detective Constable Michael Carter had information concerning Great Buys. A confidential source indicated cocaine was transported in vehicles from Toronto to Great Buys and distributed to drug dealers from there. The informant had previously provided information which was determined to be accurate and, therefore, Det. Cst. Carter considered the source to be reliable.

[30] When the Audi first arrived at Great Buys, Det. Cst. Baird recognized the driver as Tyler Richards. He had information from an informant that Mr. Richards was a mid-level drug dealer with a stash house in the Gottingen Street area. That information was somewhat dated as it was from 2013 and 2014. Det. Cst. Baird said he was able to corroborate information from this source on approximately 15 prior occasions. It led to one search where drugs were located.

[31] In addition to the source information, Det. Cst. Baird described three other observations which factored into his decision to arrest the occupants of the Audi.

The first was when Mr. Richards and his associates arrived at Great Buys and switched vehicles. The other two related to driving behaviour which he considered suspicious.

[32] The first "evasive" driving maneuver was when Mr. Richards and his two associates left Great Buys in the Mercedes. As they traveled along Sackville Drive, Mr. Richards made a sudden lane change to take the exit to Highway 102. Det. Cst. Baird testified he thought this was a "heat check" designed to make sure the vehicle was not being followed.

[33] The second example of suspicious driving involved the female associate. When she drove the Mercedes off the lot shortly before the departure of the Audi, she travelled along Sackville Drive a short distance before performing a U-turn and driving quickly in the opposite direction. Det. Cst. Baird described this as another "heat check". He testified that once he saw this maneuver, it confirmed his decision to follow the Audi and arrest the occupants.

[34] Other than Mr. Richards, Det. Cst. Baird and the other officers did not recognize the individuals who drove in the Audi and Mercedes that day.

Voir Dire Decision

[35] In their submissions on the *Charter* application, Crown and defence counsel focused on whether the arrest of Roberts and Demirovic was lawful. If it was not, they agreed the subsequent search of the vehicle incident to the arrest was likewise unlawful.

[36] According to counsels' submissions, the lawfulness of the arrest would be determined by whether the police had reasonable grounds to believe the occupants of the Audi were engaged in trafficking of cocaine.

[37] The Crown also argued that if the arrest and subsequent search was unlawful, the evidence of the cocaine should not be excluded under s. 24(2) of the *Charter* when the factors set out by the Supreme Court of Canada in *R. v. Grant*, 2009 SCC 32 are applied.

[38] Since the decision delivered on December 20, 2017 was not intended to include the trial judge's full analysis of the *Charter* issues, it is relatively brief. I will set it out in its entirety:

THE COURT: Thank you. So the decision on the **Charter** applications. The Court has heard a **Charter** application on December 7th and 8th in relation to the charges of possession for the purposes and related charges in relation to Anthony Roberts and Jasmin Demirovic.

Both counsel argued on behalf of their clients that their Section 9 **Charter** rights were violated and that they were unlawfully arrested. They also argued that because the arrest was unlawful, the search and seizure was also unlawful, and therefore the drugs that were seized should be excluded.

The Crown argued that the officers in this matter had reasonable and probable grounds to arrest the three individuals, and that included Mr. Richards, and therefore the arrest without a warrant was allowed under Section 495 of the **Code**.

The Crown further argued that any **Garofoli** or **Debot** analysis that the arrests were reasonable because of the source information that was relied upon was compelling, credible, and corroborated.

The Defence argued that there were no grounds specific to their clients and that they were arrested just because they were in the vehicle.

The questions I believe for this Court are:

> - Did the information that the police received from confidential informants in this case meet the **Debot/Garofoli** analysis as being compelling, credible, and corroborated?
>
> - And based on that information and their observations, did the officers have reasonable and probable grounds to arrest these individuals, and were their grounds objectively reasonable?
>
> - If there were reasonable grounds to arrest Mr. Richards but less or no grounds for Mr. Roberts and Mr. Demirovic, was their arrest arbitrary?
>
> - If their arrest was arbitrary but Mr. Richards' arrest was lawful, was the search of the vehicle unlawful?

It is my intention to give an overview of my decision today. I'll give my full decision later along with the trial decision. For today's purposes, it is my finding that D/Csts. Baird and Carter had information that meets the **Garofoli/Debot** test, and that the analysis is an appropriate one in this case given the arrest without a warrant.

I further find that they believed that they had reasonable and probable grounds, so they had the subjective belief. And that from their objective ... from the objective point of view that a reasonable person standing in their shoes with their experience would have reached the same conclusion.

I find that the grounds related to Mr. Roberts and to a lesser effect ... or sorry, Mr. Richards and to a lesser effect Mr. Roberts, but that the grounds did not specify a connection to Mr. Demirovic.

> I ask myself the question whether an arrest of the driver of a vehicle could in every case automatically mean that anyone in the vehicle is arrestable as the officers seem to indicate. The answer in my view is it depends. It depends on the circumstances of the case and the offence that the police suspect is being committed.
>
> In this case, the evidence is that a high-risk takedown occurred when Mr. Richards ... Roberts and Demirovic were arrested. I did not hear specific evidence around why this was the form of arrest. But I did hear that guns were drawn and persons were required to have their hands up. And that once Detective Stanley saw this, the arrest was then carried out in a non-aggressive and safe ... and was safe to continue.
>
> It's my view that in this type of situation, it would not seem possible for one person to be arrested and the others not secured in some way. A detention of everyone would be necessary in this type of case, and in my view would not be arbitrary.
>
> The case of **R. v. Brown** from our appeal division which was cited in the case of **R. v. Clark** from this Court in 2010 said that an unlawful arrest is not necessarily arbitrary. It's my view that this is such a case.
>
> And I found that the arrest of Mr. Demirovic and Mr. Roberts was an arbitrary one. But still a question would have been raised in terms of whether if Mr. Richards' arrest was lawful, the search incident to his arrest was also lawful. In my view, there was a search incident to the arrest of Mr. Richards which ... with the search of the trunk of the car that he was driving, and therefore that search was lawful.
>
> I will give a more detailed decision after the trial. But as for today's purposes, the **Charter** application is dismissed.

[39] Mr. Demirovic argues that these reasons are insufficient to permit appellate review, and this should result in his conviction being set aside and a new trial ordered. The principles governing this ground of appeal were summarized by this Court in *R. v. J.M.S.*, 2020 NSCA 71:

> [41] The Supreme Court of Canada has articulated the principles that govern a challenge of insufficient reasons.
>
> [42] In *R. v. Gagnon*, [2006] 1 S.C.R. 621, Justices Bastarache and Abella for the Court said:
>
> > 13 Eight years later, in *Sheppard* [*R. v. Sheppard*, [2002] 1 S.C.R. 869], a case in which the trial judge's reasons were virtually nonexistent, this Court explained that reasons are required from a trial judge to demonstrate the basis for an acquittal or conviction. Finding an error of law due to insufficient reasons requires two stages of analysis: (1) are the reasons inadequate; (2) if so, do they prevent appellate review? In other

words, the Court concluded that even if the reasons are objectively inadequate, they sometimes do not prevent appellate review because the basis for the verdict is obvious on the face of the record. But if the reasons are both inadequate and inscrutable, a new trial is required.

[43] In *R. v. Vuradin*, *supra*, Justice Karakatsanis for the Court said:

> [4] The trial judge's reasons are sparse and do not directly address the appellant's evidence. For the reasons that follow, however, I agree with the majority in the Court of Appeal that the trial judge's reasons were sufficient and that the trial judge did not err in his application of the burden of proof.
>
> …
>
> [10] An appellate court tasked with determining whether a trial judge gave sufficient reasons must follow a functional approach: [citation omitted]. An appeal based on insufficient reasons "will only be allowed where the trial judge's reasons are so deficient that they foreclose meaningful appellate review": [citing *R. v. Dinardo*, [2008] 1 S.C.R. 788]
>
> [11] Here, the key issue at trial was credibility. Credibility determinations by a trial judge attract a high degree of deference. In *Dinardo*, Charron J. explained:
>
> > Where a case turns largely on determinations of credibility, the sufficiency of reasons should be considered in light of the deference afforded to trial judges on credibility findings. Rarely will the deficiencies in the trial judge's credibility analysis, as expressed in the reasons for judgment, merit intervention on appeal. Nevertheless, a failure to sufficiently articulate how credibility concerns were resolved may constitute reversible error [citing *R. v. Braich*, [2002] 1 S.C.R. 903, para. 23]]. As this Court noted in *R. v. Gagnon* [citation omitted], the accused is entitled to know "why the trial judge is left with no reasonable doubt" …. [para. 26].
>
> [12] Ultimately, appellate courts considering the sufficiency of reasons "should read them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered": [citing *R. v. R.E.M.*, [2008] 3 S.C.R. 3, para. 16]. These purposes "are fulfilled if the reasons, read in context, show why the judge decided as he or she did" (para. 17).
>
> [13] In *R.E.M.*, this Court also explained that a trial judge's failure to explain why he rejected an accused's plausible denial of the charges does not mean the reasons are deficient as long as the reasons generally demonstrate that, where the complainant's evidence and the accused's evidence conflicted, the trial judge accepted the complainant's evidence. No further explanation for rejecting the accused's evidence is required as

> the convictions themselves raise a reasonable inference that the accused's denial failed to raise a reasonable doubt (see para. 66).
>
> …
>
> [15] The core question in determining whether the trial judge's reasons are sufficient is the following: Do the reasons, read in context, show why the trial judge decided as he did on the counts relating to the complainant? In this case, the trial judge's reasons satisfy this threshold.

[40] The primary issue raised by counsel in argument, and acknowledged by the trial judge in her brief reasons, was whether the arrest of the occupants of the Audi was lawful. If it was, then counsel agreed the subsequent search was also lawful. To determine the lawfulness of the arrest, the police officer's grounds must be examined through the lens of the *Garofoli* and *Debot* approach. This requires consideration of the entire circumstances including the source information. With respect to that evidence, the trial judge was required to ask herself the following questions:

1. Was the information suggesting the occupants of the Audi were engaged in drug trafficking compelling?
2. Were the confidential sources of this information reliable?
3. Was the information which was obtained from the confidential sources corroborated by police investigation prior to the decision to arrest the occupants of the Audi?

[41] Not only must the trial judge consider these questions, she must assess the weight to be given to the answers. As illustrated in *Debot*, if one of the factors is weak, this could be offset by a corresponding increase in strength of one or both of the other factors.

[42] The trial judge's decision does not tell us whether she went through the required analysis or how she assessed and weighed the factors. She referred to the "*Garofoli*/*Debot* test" but simply stated her conclusion that the grounds required to arrest the individuals existed.

[43] A review of the *voir dire* evidence suggests there are real concerns about the sufficiency of the evidence relied upon to justify the decision to arrest. The source information concerning Great Buys and Mr. Richards was general in nature and not corroborated by police investigation prior to the arrest. There is no indication how the informant knew of Mr. Richard's prior involvement in drug trafficking and whether it was based upon personal observation or second-hand knowledge.

[44] Aside from the informant information, Det. Cst. Baird's opinion that placing a dealer plate on the Mercedes and driving it off the lot was suspicious seems weak given the likelihood of individuals test driving vehicles at a car dealership. The sudden lane change and exit from Sackville Drive by the Mercedes and the U-turn by the female associate are equally capable of benign explanation.

[45] The information relied upon by Det. Cst. Baird is far from compelling, and it was incumbent on the trial judge to explain how this is outweighed by other circumstances so that the decision to arrest was objectively reasonable. No doubt, the trial judge intended to provide this explanation in her subsequent decision, but she never did so.

[46] Without the benefit of the trial judge's analysis, I am unable to determine whether she properly applied the principles to the circumstances before her.

[47] To the extent that some aspects of her reasoning might be discerned from her brief decision, I am troubled by her reliance on the decisions in *R. v. Brown* and *R. v. Clark* (reported at 1987 Canlii 136 and 2010 NSPC 93) for the proposition that an unlawful arrest is not necessarily arbitrary. In both of those decisions the arrest was found to be lawful. However, in *obiter* the Courts said that if the arrests had been unlawful, they would not have been "arbitrary" as that word is used in s. 9 of the *Charter*.

[48] To the extent that these *obiter* comments imply that an unlawful arrest might not violate the *Charter*, such a suggestion was expressly rejected by the Supreme Court of Canada in *R. v. Grant*:

> [54] The s. 9 guarantee against arbitrary detention is a manifestation of the general principle, enunciated in s. 7, that a person's liberty is not to be curtailed except in accordance with the principles of fundamental justice. As this Court has stated: 'This guarantee expresses one of the most fundamental norms of the rule of law. The state may not detain arbitrarily, but only in accordance with the law' (*Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC9, [2007] 1 S.C.R. 350, at para. 88). Section 9 serves to protect individual liberty against unlawful state interference. 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**.
>
> [emphasis added]

[49] The Supreme Court of Canada repeated this view earlier this year in *R. v. Tim*, 2022 SCC 12:

> [22] Consistent with this purpose, a lawful arrest or detention is not arbitrary, and does not infringe s. 9 of the *Charter*, unless the law authorizing the arrest or detention is itself arbitrary (see *Grant*, at para. 54; *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, at para. 20). **Conversely, an unlawful arrest or detention is necessarily arbitrary and infringes s. 9 of the *Charter* (see *Grant*, para. 54; *R. v. Loewen*, 2011 SCC 21, [2011] 2 S.C.R. 167, at para. 3)**.
>
> [emphasis added]

[50] In addition to inadequately explaining her conclusion that the police had sufficient grounds to arrest the occupants of the vehicle, the trial judge appears to have applied an incorrect legal principle.

[51] On appeal, the Crown submitted that even if the arrest and search were unlawful, a proper application of the factors in *R. v. Grant* would not result in exclusion of the evidence of cocaine pursuant to s. 24(2) of the *Charter*. They asked this Court to conduct its own s. 24(2) analysis as an alternative to sending the matter back for a new trial and *voir dire*. An appellate court may be able to engage in a s. 24(2) analysis when there are appropriate factual findings contained in the trial record.

[52] In this case, the trial judge never considered s.24(2) because she found the search was lawful. She stated her conclusion without making any evidentiary findings. I do not find it appropriate to engage in a s. 24(2) analysis because of the absence of an adequate factual basis for consideration of the *Grant* factors.

Conclusion

[53] For the reasons noted above, I conclude that the trial judge's *voir dire* decision given on December 20, 2017 is inadequate to permit meaningful appellate review and incorporates incorrect legal principles. The result of the *voir dire* decision was to admit into evidence the cocaine obtained from the search of the Audi. Without that evidence the convictions cannot be sustained. I would allow the appeal, set aside the convictions, and remit the matter to the Provincial Court for a new trial.

Wood, C.J.N.S.

Concurred in:

Beveridge, J.A.

Bryson, J.A.