

**IN THE PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** R. v. Massiah, 2013 NSPC 43

**Date:** 06052013

**Docket:** 2458099, 2458100, 2458101

**Registry:** Sydney

**Between:**

Her Majesty the Queen

Plaintiff

-and-

Natasha Lynn Massiah

Defendant

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**DECISION on *Charter S. 8***

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**Judge:** The Honourable Judge Jean M. Whalen, J.P.C.

**Heard:** April 22, 2013

**Decision:** May 6, 2013

**Charges:** 5(2) x 3 *Controlled Drugs and Substances Act*

**Counsel:** Christa MacKinnon, for the Crown  
Alan Stanwick, for the Defence

## **Introduction**

[1.] On April 29, 2012 Constable Alan Shaw obtained a search warrant from Justice of the Peace S.K. Mont to search the defendant's "dwelling/apartment unit, out-buildings, vehicles (specifically a 2005 Dodge Ram)... situate at 123 Rockdale Avenue, Sydney, NS."

[2.] Prior to executing the search warrant the police located Ms. Massiah-Covin on Bentinck Street and placed her under arrest. Upon searching the defendant "incident to arrest" they discovered a pill bottle containing (21) 100 mg morphine pills and a second bottle containing (20) Ritalin pills.

[3.] The police officer got the keys to the defendant's home out of her purse and they went to her home and executed the warrant. They seized 10 oxycodone 5 mg pills there.

## **Issue(s):**

(1.) Was the defendant's arrest unlawful thus breaching the defendant's Section 8 *Charter* right?

(2.) Should the evidence obtained be excluded pursuant to Section 24(2) of the *Charter*?

### **Review of the Evidence:**

[4.] Mr. Stanwick did not call any evidence. However, he did cross-examine Constable Shaw, submitted a written memo and made oral submissions.

[5.] The Crown called Constable Shaw, submitted a written memo and made oral submissions.

[6.] Constable Shaw testified he has been a member of the Cape Breton Regional Police Service for 13 years and is currently assigned to the “Street Crime Drug Unit”.

[7.] As a result of source information regarding the defendant, Constable Shaw prepared an Information to Obtain and sought a search warrant (which was granted by Justice Mont). The warrant was authorized for execution until 11:59 PM April 20, 2012 (pursuant to s. 487.1(5) of the *Criminal Code*.)

[8.] As part of the “Drug Unit’s” plan to execute the search warrant, surveillance was done on the defendant’s home to determine if she was inside the apartment. The police “always ensure the target is in the dwelling” for several reasons:

- (1.) To prove it is the defendant’s residence;

(2.) To preserve evidence, i.e. to ensure the target does not get rid of the evidence.

[9.] Police surveillance concluded that Ms. Massiah-Covin was not home. Police “patrolled the area to locate her” and found her walking on Bentinck Street.

[10.] Constable Shaw exited his vehicle and arrested the defendant. She was given her “*Charter* and caution.”

[11.] Constable Shaw testified that he advised the defendant there was going to be a search of her residence. He testified that Ms. Massiah-Covin indicated the “keys” were in her purse.

[12.] When the police officer retrieved the keys out of the defendant’s purse he saw two bottles and a pill crusher. Constable Shaw said there are a number of reasons a person is searched incident to arrest, eg. “officer safety”.

[13.] He also stated a female officer conducted a search of the defendant later at lockup. He testified “we would have searched the defendant’s purse regardless.”

[14.] On cross-examination Constable Shaw testified he did not see the defendant selling drugs, nor had he received any information the defendant was selling drugs on Bentinck Street prior to her arrest.

[15.] He did state he was speaking to his “source” up to the day he obtained the search warrant.

[16.] He stated he did not consider detaining the defendant. He stated “I had reasonable and probable grounds to believe the defendant was selling and arrested her.... If we have reasonable and probable grounds as to what we were searching for – we arrest.”

[17.] There were no exhibits entered on the *voir dire*. A copy of the search warrant referred to was included with the Crown’s written memo. The defendant is not challenging the validity of the search warrant or it’s execution.

## **The Law**

[18.] Section 495 of the *Criminal Code* sets out the basis for an arrest without warrant:

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.

Marginal note: Limitation

(2) A peace officer shall not arrest a person without warrant for

(a) an indictable offence mentioned in section 553,

(b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, or

(c) an offence punishable on summary conviction,

in any case where

(d) he believes on reasonable grounds that the public interest, having regard to all the circumstances including the need to

- (i) establish the identity of the person,
- (ii) secure or preserve evidence of or relating to the offence, or
- (iii) prevent the continuation or repetition of the offence or the [commission](#) of another offence,

may be satisfied without so arresting the person, and

(e) he has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend court in order to be dealt with according to law.

Marginal note: Consequences of arrest without warrant

(3) Notwithstanding subsection (2), a peace officer acting under subsection (1) is deemed to be acting lawfully and in the execution of his duty for the purposes of

(a) any proceedings under this or any other Act of Parliament; and

(b) any other proceedings, unless in any such proceedings it is alleged and established by the person making the allegation that the peace officer did not comply with the requirements of subsection (2).

R.S., 1985, c. C-46, s. 495; R.S., 1985, c. 27 (1st Supp.), s. 75.

[19.] In **R. v. Backhouse**, 194 C.C.C. (3d) 1 (Ont.C.A.), Rosenberg, J., at para. 63

states:

For an arrest to be valid, the police officer must have reasonable grounds to believe that the suspect committed the indictable offence. The officer must have both objective and subjective grounds. See **R. v. Storrey**, [1990] 1 S.C.R. 241, 53 C.C.C. (3d) 316 (S.C.C.) at 324.

[20.] Later at para. 65:

In considering whether a warrantless search is valid, it is important to bear in mind the fact that the context surrounding such a search will be quite different than the context in which a search is undertaken pursuant to a warrant.

[21.] Later at para. 67 Rosenberg, J., cites the Supreme Court of Canada in

**Cartier v. Quebec (Attorney General)** (1979), 48 C.C.C. (2d) 34, (S.C.C.) where

the court explained the duty of a police officer:

The appellant rightly relies upon what the Supreme Court said in **Chartier v. Quebec (Attorney General)**, [1979] 2 S.C.R. 474, 48 C.C.C. (2d) 34 (S.C.C.) at 56, where the court explained the duty on a police officer in these terms:

For a peace officer to have reasonable and probable grounds for believing in someone's guilt, his belief must take into account all the information available to him.

[22.] And at para. 69:

In *Storrey* at pp. 323-24, the court discussed the grounds for making a warrantless arrest. The court pointed out that on the one hand, the police do not have to have anything like a prima facie case against a suspect in order to lawfully arrest him, but on the other hand they are not entitled to shut their eyes to the obvious.

[23.] Lastly, at paras. 140 and 141:

...a valid search incident to arrest must meet three requirements:

- (1) The arrest must be lawful.
- (2) The search must have been conducted as an "incident" to the lawful arrest.
- (3) The manner in which the search is carried out must be reasonable.

[24.] Rosenberg, J. cites Cory, J. in **R. v. Stillman**, who cites **R. v. Paul** (1994),

C.C.C. (3d) 266 (N.B.C.A.) at p. 271:

Searches made incidentally to an arrest are justified so that the arresting officer can be assured that the person arrested is not armed or dangerous and seizures are justified to preserve evidence that may go out of existence or be otherwise lost.

[25.] In **R. v. LeBlanc**, 2009 N.S.S.C. 99, Beveridge, J., states at paras. 37 and 38:

**37** The law has long recognized the power of the police to search for evidence and weapons incidental to a lawful arrest. (See *R. v. Rao* (1984), 12 C.C.C. (3d) 97 (Ont.C.A.); *R. v. Caslake* (1998), 121 C.C.C. (3d) 97 (S.C.C.)



**38** As noted by Smith J.A. in *R.v. Parchment*, [2007] B.C.J. No. 1281 (C.A.):

[19] For an arrest to be found lawful, it must be demonstrated that the arresting officer subjectively had reasonable and probable grounds on which to base the arrest and that the grounds were objectively justifiable, that is, that a reasonable person placed in the position of the arresting officer must be able to conclude that there were reasonable and probable grounds for the arrest: *R. v. Storrey*, [1990] 1 S.C.R. 241 at 250-51, 53 C.C.C. (3d) 316.

[26.] Later at para. 41:

**41** The power of the police to arrest without warrant was discussed by Cory J. in *R. v. Storrey*, [1990] 1 S.C.R. 241, as follows:

[14] Section 450(1) makes it clear that the police were required to have reasonable and probable grounds that the appellant had committed the offence of aggravated assault before they could arrest him. Without such an important protection, even the most democratic society could all too easily fall prey to the abuses and excesses of a police state. In order to safeguard the liberty of citizens, the Criminal Code requires the police, when attempting to obtain a warrant for an arrest, to demonstrate to a judicial officer that they have reasonable and probable grounds to believe that the person to be arrested has committed the offence. **In the case of an arrest made without a warrant, it is even more important for the police to demonstrate that they have those same reasonable and probable grounds upon which they base the arrest.**

[15] The importance of this requirement to citizens of a democracy is self-evident. Yet society also needs protection from crime. This need requires that there be a reasonable balance achieved between the individual's right to liberty and the need [page250] for society to be protected from crime. Thus the police need not establish more than reasonable and

probable grounds for an arrest. The vital importance of the requirement that the police have reasonable and probable grounds for making an arrest and the need to limit its scope was well expressed in *Dumbell v. Roberts*, [1944] 1 All E.R. 326 (C.A.), wherein Scott L.J. stated at p. 329:

The power possessed by constables to arrest without warrant, whether at common law for suspicion of felony, or under statutes for suspicion of various misdemeanours, provided always they have reasonable grounds for their suspicion, is a valuable protection to the community; but the power may easily be abused and become a danger to the community instead of a protection. The protection of the public is safeguarded by the requirement, alike of the common law and, so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police are not called on before acting to have anything like a *prima facie* case for conviction; but the duty of making such inquiry as the circumstances of the case ought to indicate to a sensible man is, without difficulty, presently practicable, does rest on them; for to shut your eyes to the obvious is not to act reasonably.

[16] There is an additional safeguard against arbitrary arrest. It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. **Rather, it must be objectively established that those reasonable and probable grounds did in fact exist. That is to say a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest.** See *R. v. Brown* (1987), 33 C.C.C. (3d) 54 (N.S.C.A.), at p. 66; *Liversidge v. Anderson*, [1942] A.C. 206 (H.L.), at p. 228.

### Analysis

[27.] Mr. Stanwick argues on behalf of the defendant that the arrest by Constable Shaw was unlawful because there were no reasonable and probable grounds for the

arrest of the defendant, and thus the search of her purse was invalid, “an unreasonable search” which breaches s. 8 of the *Charter*.

[28.] The search warrant the police obtained was for the defendant’s residence and vehicle, and this did not give them reasonable and probable grounds to arrest the defendant prior to executing the search warrant of her residence.

[29.] As a result any evidence found should be excluded pursuant to s. 24(2) because it would bring the administration of justice into disrepute.

[30.] The Crown argues that after obtaining the search warrant, they located their target, the defendant, on Bentinck Street and arrested her for “possession for the purpose of trafficking in morphine pills.” They advised the defendant they would be executing a search warrant at her residence. They searched the defendant and her purse and found drugs. The police then went to the defendant’s home and executed the search warrant. They seized drugs and a score sheet.

[31.] The Crown says the defendant is not challenging the validity of the search warrant executed on April 20, 2012, or that the police did anything inappropriate when they searched her purse incident to arrest. The Crown argues the arrest of the defendant was lawful. The search was reasonable as it was incidental to a lawful arrest and the evidence seized should not be excluded.

[32.] The burden of proof lies with the applicant to satisfy the court on a balance of probabilities that there has been a *Charter* infringement. If the search and seizure of the defendant is found to be as a result of an unlawful arrest, the Crown would then bear the burden of establishing on a balance of probabilities that the search and seizure was not unreasonable. The Crown contends the search was reasonable because it was incidental to a lawful arrest.

[33.] Has the defendant proven on a balance of probabilities that it was an unlawful arrest?

[34.] What reasonable and probable grounds did Constable Shaw have at the time of the defendant's arrest? I find:

- (1.) The police officer did not see the defendant selling drugs at any time prior to her arrest.
- (2.) The police officer did not have any information of the defendant selling drugs on Bentinck Street.
- (3.) The police officer was speaking with a source up to the day he got the warrant. What was said? What was observed?

- (4.) The police officer obtained a search warrant for the defendant's home and vehicle. What information was given to the Justice of the Peace to obtain the warrant? A presumption of reliability exists with respect to a search warrant and the Information to Obtain supporting the warrant, however;
- (5.) The search warrant which was attached to the Crown's memo does not contain any specific information about the defendant or her activities; it was to search her home and car; and
- (6.) The Information to Obtain was not entered as an exhibit by either party.
- (7.) Constable Shaw did not testify to relying on any observations of the defendant when arriving on scene or prior to arriving on Bentinck Street.
- (8.) His sole purpose was to arrest the defendant as she was the target of the search warrant. There was no consideration of detaining the defendant.
- (9.) When surveillance determined the defendant was not at her residence, police immediately set out to locate Ms. Massiah-Covin.

[35.] In assessing the objective criteria available to Constable Shaw the criteria must not be assessed in isolation, but considered together, including what

reasonable inferences were open to be drawn by a reasonable person standing in the shoes of Constable Shaw. It is an error to consider each fact/observation in isolation.

[36.] I find the problem here is that there are no facts articulated by Constable Shaw, save and accept: “I had reasonable and probable grounds the defendant was selling and I arrested her” that would warrant the arrest of the defendant.

[37.] Some information must be known to a reasonable person standing in the shoes of Constable Shaw when the arrest occurred. Being in possession of a search warrant is not sufficient for the court to draw an inference. The court does not know what information was contained in the Information to Obtain.

[38.] It is well known that third party information from a confidential source or otherwise can be relied on by the police to provide reasonable and probable grounds. However, no specifics were testified to by Constable Shaw on the *voir dire*.

[39.] In **R. v. Debot**, [1989] 2 S.C.R. 1140, Wilson, J., identified three areas of concern that have to be addressed in weighing evidence relied on by police to justify an arrest and warrantless search:

- (1.) Was the information predicting the commission of a criminal offence;

- (2.) where information is based on a tip originating from a source outside the police, was the source credible; and
- (3.) was the information corroborated by police investigation prior to making the decision to carry out a search.

[40.] The court cannot answer any of those questions because there was no evidence adduced. Constable Shaw obtained a search warrant for the home of the defendant and her car, went looking for her, found her, arrested her and searched her person and purse.

[41.] Constable Shaw made a conclusory statement on the *voir dire*: “I had reasonable and probable grounds the defendant was selling and I arrested her.” Without more information the court cannot determine if the information relied on by the police office was worthy enough to support the arrest and subsequent search.

[42.] No other police officers involved in the surveillance of the defendant’s home or the arrest and search were called to testify.

[43.] Based on the evidence, or lack thereof, I find Constable Shaw did not have reasonable and probable grounds to arrest the defendant without a warrant. The

arrest was unlawful. Therefore, the search of the defendant and her purse was an unreasonable search and seizure and a breach of her Section 8 *Charter* rights.

[44.] In a paper written by D. Mahoney, dated November 21, 2008, at page 9, he states:

“Justice Binnie (*Kang-Brown*) and majority rejected the notion that individuals have no reasonable expectation to privacy when they are in possession of illegal contraband on their person, in their luggage, in their motor vehicles, or in their homes. The court confirmed that the focus is not on the legal status of the concealed item, but on where the search takes place, the purpose of the search and the impact on the person who is subject to the search...

The Supreme Court has reaffirmed the legal principle that privacy is an interest that belongs to everyone, and the focus is on the right of an individual to be free from unreasonable search and seizure in schools, and public transport facilities not on the right of drug smugglers to be free of interference.”

[45.] The court must balance the seriousness of the risk to the public or individual safety with the liberty interests of members of the public. In **R. v. Grant**, 2009 S.C.J. 32, at para. 59 the court states:

“When must evidence obtained in violation of a person’s *Charter* rights be excluded? Section 24(2) of the *Charter* provides the following answer:

Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having



regard to all of the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.”

[46.] At para. 68 of the same case, Justice MacLauchlin states:

“The phrase ‘bring the administration of justice into disrepute’ must be understood in the long-term sense of maintaining the integrity of, and public confidence in, the justice system. Exclusion of evidence resulting in an acquittal may provoke immediate criticism. But s. 24(2) does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute.”

[47.] And further at para. 70 the court goes on to state:

“...s. 24(2)'s focus is societal. Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns. The s. 24(2) focus is on the broad impact of admission of the evidence on the long-term repute of the justice system.”

[48.] And Further at para. 71:

“...a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct... (2) the impact of the breach on the *Charter*-protected interests of the accused,... and (3) society's interest in the adjudication of the case on its merits.”

[49.] When evaluating the first line of inquiry, the court must consider the seriousness of the state conduct. Was this a minor violation or something much

more egregious? Did the police act in good faith, or were they negligent or wilfully blind?

[50.] With respect to the second line of inquiry, the court must consider the extent to which the breach actually undermined the interests protected by the right infringed. What are those interests? Here it is one of privacy, searching the defendant's person and purse.

[51.] And lastly the third line of inquiry requires the court to consider not only the negative impact of the admission, but also the impact of failing to admit the evidence. At para. 82 of **Grant** (*supra*) states:

“The fact that the evidence obtained in breach of the *Charter* may facilitate the discovery of the truth and the adjudication of a case on its merits must therefore be weighed against factors pointing to exclusion, in order to "balance the interests of truth with the integrity of the justice system": *Mann*, at para. 57, *per* Iacobucci J. The court must ask "whether the vindication of the specific Charter violation through the exclusion of evidence extracts too great a toll on the truth-seeking goal of the criminal trial": *R. v. Kitaitchik* (2002), 166 C.C.C. (3d) 14 (Ont. C.A.), at para. 47, *per* Doherty J.A.

[52.] The first line of inquiry: the seriousness of the *Charter* infringing state conduct.

[53.] Regarding the case before the court, I find:

- (1.) The Defendant was arrested on a public street;

- (2.) The defendant's person and purse were searched;
- (3.) The defendant was transported to lockup where a further search took place;
- (4.) There were no articulated reasonable and probable grounds for arrest.

[54.] The second line of inquiry: Impact on the Charter protected interests of the accused. What interests are we concerned with? It is a Section 8 violation which protects a person's reasonable expectation of privacy. It does not protect property.

Justice MacLauchlin at para. 78, in **Grant**, (*supra*) states:

“...an unreasonable search contrary to s.8 of the Charter may impact on the protected interests of privacy, and more broadly, human dignity. An unreasonable search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy, or that demeans his or her dignity, is more serious than one that does not.”

[55.] I find:

- (1.) This was a warrantless search;
- (2.) There were no articulated reasonable and probable grounds;
- (3.) There was a conclusory statement to justify the arrest;
- (4.) There was no evidence that the search of the defendant was for officer safety, exigent circumstances, or to prevent destruction of evidence.

[56.] The third line of inquiry: Society's adjudication on the merits. The question to be asked is:

“...whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its

exclusion. This inquiry reflects society's 'collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law': *R. v. Askov*, [1990] 2 S.C.R. 1199, at pp. 1219-20." **Grant**, *supra* at para. 79

[57.] The evidence seized was real evidence. Unreliable evidence would go to the defendant's interest in a fair trial and public interest in uncovering the truth. The evidence already existed.

[58.] The defendant is charge with three counts of possession of (oxycodone, morphine and "Ritalin") for the purpose of trafficking:

"...while the seriousness of the alleged offence may be a valid consideration, it has the potential to cut both ways. Failure to effectively prosecute a serious charge due to excluded evidence may have an immediate impact on how people view the justice system. Yet, as discussed, it is the long-term repute of the justice system that is s. 24(2)'s focus. As pointed out in *Burlingham*, the goals furthered by s. 24(2) 'operate independently of the type of crime for which the individual stands accused' (para. 51). And as Lamer J. observed in *Collins*, '[t]he *Charter* is designed to protect the accused from the majority, so the enforcement of the *Charter* must not be left to that majority' (p. 282). The short-term public clamour for a conviction in a particular case must not deafen the s. 24(2) judge to the longer-term repute of the administration of justice. Moreover, while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high." **Grant** (*supra*) para. 84

[59.] The long term safety and concern for our children and the community regarding exposure to dealers and drugs cannot be achieved by police officers violating a citizen's right at every turn.

[60.] The sole purpose of the police is to investigate crime. Part of this investigation was knowledge based. That is the court has evidence of the police obtaining a search warrant for the defendant's home and vehicle and seizing drugs from the home.

[61.] But the same cannot be said for the arrest and search of the defendant. In my opinion, Constable Shaw may have believed he had the necessary grounds to arrest the defendant. However, based on the evidence or lack thereof before the court, I cannot agree. I do not think his actions were based on a reckless disregard for the defendant's rights. He had a valid search warrant for the home and car, but reasonable and probable grounds for a search warrant does not equate with reasonable and probable grounds for arrest without a warrant pursuant to Section 495 of the *Criminal Code*.

[62.] I do not think there was bad faith on the part of the police or a deliberate "plan to violate the defendant's rights." Perhaps Constable Shaw was motivated

by the “policy” he referred to regarding “securing a target.” However, that is not reasonable and probable grounds for arrest without a warrant.

[63.] In **R. v. Caselake**, 121 C.C.C. (3d) 97 at para. 25:

“...searches must be authorized by law.... the limits of this doctrine must be respected.”

[64.] Having considered all three lines of inquiry which cause the court to consider all of the circumstances, I must now determine whether on balance, admission of the evidence obtained by the *Charter* breach would bring the administration of justice into disrepute.

[65.] Section 24(2) does not confer discretion on the judge, but a duty to admit or exclude evidence as a result of his or her finding.

[66.] **R. v. Harrison, 2009 S.C.J. No. 34**, para. 36 states:

“The balancing exercise mandated by s. 24(2) is a qualitative one, not capable of mathematical precision. It is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case. The evidence on each line of inquiry must be weighed in the balance, to determine whether, having regard to all the circumstances, admission of the evidence would bring the administration of justice into disrepute. Dissociation of the justice system from police misconduct does not always trump the truth-seeking interests of the criminal justice system. Nor is the converse true. In all cases, it is the long-term repute of the administration of justice that must be assessed.”

[67.] With respect, I find on a balance of probabilities that the Crown has not proven that the exclusion of this evidence in all of the circumstances would bring the administration of justice into disrepute and therefore I am not prepared to admit the evidence on the trial proper.

[68.] That is the evidence found when searching the defendant and her purse. The evidence found when executing the search warrant was not in issue.

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**The Honourable Judge Jean M. Whalen, J.P.C.**