

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Poole*, 2020 NSPC 42

Date: 20200106

Docket: 8155910, 8155911, 8175396, 8226172 to 8226175

Registry: Halifax, Nova Scotia

Between:

Her Majesty the Queen

v.

Aaron Matthew Poole

DECISION ON CHARTER APPLICATION

Judge: The Honourable Judge Marc C. Chisholm

Heard: December 18, 2019 in Halifax, Nova Scotia

Decision: January 6, 2020

Charges Sections 4(1) and 5(2) *CDSA*; 145(5) and 129 (a) *CC*

Counsel: Timothy McLaughlin, for the Crown
Quy Linh, for the Defence

By the Court:

[1] Let me begin by expressing my gratitude to counsel for the briefs that were filed in relation to the *Charter* motions before the court, and let me indicate that over the last couple of weeks since we were in court last on this matter, I have been in the

process of writing four decisions and sitting in court. So, it has been a hectic time period and, therefore, there is no written decision to hand out to you today, and I will not commit to filing a written decision but I will express my conclusions and include citations so that counsel can check them.

[2] Mr. Poole is charged with a number of offences in relation to the *Controlled Drugs and Substances Act* and the *Criminal Code* dating back to the 18th day of September of 2017, and there is before the court a third information with a separate charge under section 145.

[3] With respect to the matters arising from the 18th of September of 2017 at Upper Tantallon, Nova Scotia, the accused tendered pleas of not guilty and the matter proceeded to trial. In advance of the trial, counsel for Mr. Poole gave notice of a *Charter* motion. At the outset of the trial, counsel agreed that the matter ought to proceed by way of a blended *voir dire* as the procedure for the court hearing the evidence to rule on the *Charter* motion, and should the court rule the evidence admissible, that evidence would form evidence on the trial without the necessity of re-presenting that evidence.

[4] At the outset of the trial, there was also an indication that the Crown did not intend to pursue count #5 on the *CDSA* information.

[5] There was an admission of identity of the accused, Mr. Poole, and there was an admission by the accused, Mr. Poole, that, with respect to count #3, if at the trial, possession of the substance was proven, there would be no argument raised that the purpose of possession was not for trafficking.

[6] The defence brief alleged violations of sections 8 and 9 of the *Charter of Rights and Freedoms*.

[7] The argument with respect to the alleged breach of section 8, unreasonable search and seizure, arose as a result of the police opening a door of the vehicle in which Mr. Poole was situate, entering that vehicle and removing the keys from the possession of Mr. Poole.

[8] Defence argued that the police did not have legal authority to do so. Therefore, their actions constituted a breach of the accused's section 8 *Charter* right.

[9] The defence also urged the court to find that there had been an arbitrary detention of Mr. Poole arising from that action of opening the door and seizing the keys, thereby detaining Mr. Poole.

[10] While there had been a submission with respect to an earlier detention, based upon the blocking of the vehicle operated by Mr. Poole, the defence did not, in submissions, pursue a remedy with respect to that, if the court found that there was, in fact, a detention as a result of that police action.

[11] The defence urged the court to find that there had been a breach of both sections 8 and 9 of the *Charter* and urged the court to rule that all items found subsequent to those violations ought to be excluded from evidence at trial, pursuant to section 24 of the *Charter of Rights and Freedoms*.

[12] I will now turn to the evidence which the court heard on the application, and I propose to go through the evidence in some detail as the factual circumstances are very important to the application of the law to the facts in this case.

[13] The court heard from two witnesses, Staff Sergeant Warnica and Constable Warnica, the staff sergeant indicating 28 years' experience as an officer with a substantial part of that involved in traffic, and Constable Warnica having 13 years' experience as a peace officer with approximately 10 years of that involved in traffic.

[14] The court found the evidence of the two officers very consistent with each other on the vast majority of points in their evidence.

[15] On September 18th of 2017, the two officers were on traffic duty in Halifax County, Nova Scotia. They met, each operating a separate police vehicle, on the side of the Hammonds Plains Road to discuss traffic enforcement activities for the afternoon. It was then lunch hour.

[16] At approximately 12:45 p.m. a man stopped his vehicle at their vehicles and provided information to them that there was a man passed out in a grey Honda motor vehicle parked in front of the Subway restaurant at the mall at 3600 Hammonds Plains Road, about two kilometres away.

[17] The staff sergeant indicated in his testimony that a report of this type was not common and usually involved an impaired person.

[18] The officers went to investigate, each expressing that they had a duty to investigate. The report of the citizen raised a concern that the man in the vehicle may have a medical problem, may be impaired, or may just be sleeping.

[19] Staff Sergeant Warnica in his testimony indicated that this could be a criminal investigation. This could be a matter where he would carry out, in essence, a police stop of a vehicle, asking for papers for the operator of the vehicle.

[20] The two officers proceeded separately to the area of the shopping centre where the Subway restaurant was located.

[21] Staff Sergeant Warnica was the first to arrive. He stated that he parked his police vehicle behind the accused's vehicle, about 10 feet behind the accused's vehicle, leaving space for traffic to proceed between his vehicle and the accused's vehicle.

[22] Later, in his testimony, Constable Warnica testified that Staff Sergeant Warnica's vehicle was behind and blocking the accused's vehicle. He did not specify how close, but that was his perception and that is why he parked beside the other officer's vehicle. I will return to that point later in my comments.

[23] At that location, the police observed a grey Honda motor vehicle parked inward to the sidewalk in front of the Subway restaurant. There was only a sidewalk between the front of the vehicle and the front door to the Subway restaurant.

[24] According to both police witnesses, there were people in the area of the Subway restaurant using the sidewalk at that lunch hour.

[25] Staff Sergeant Warnica testified that he exited his vehicle and went to the driver's door of the accused's vehicle. He observed one person inside the vehicle, a

man, seated in the driver's seat. The driver's seat was reclined about halfway. He said the man appeared to be asleep.

[26] He observed on the passenger front seat cash money in the form of bills and change and a half-eaten sub sandwich.

[27] Staff Sergeant Warnica stated that he banged on the driver's window several times and there was no response from the man inside. He testified that his thought at that time was that the man was either in a very deep sleep or impaired by alcohol or drug.

[28] He waited for Constable Warnica before banging again on the window, even harder. He said the man sat up and "appeared really groggy. He didn't look toward me." He tried to put the key in the ignition. He observed Constable Warnica open the passenger door, reach across and grab the keys from the man's hand.

[29] To explain why he opened the driver's door, Staff Sergeant Warnica indicated: the receipt of information about a man passed out in the motor vehicle in front of the Subway restaurant, in a grey Honda, was confirmed, the only issue being whether he was passed out or asleep or had a medical problem. The officer clearly believed this was the man described, based upon the information that was provided.

[30] He also considered the time of day, approximately 1:00 in the afternoon at that time. He considered the half-eaten sandwich and money laid out in a “dishevelled” way, was I believe his word, on the passenger front seat.

[31] He indicated the man seemed extremely groggy. The man didn’t look toward him, even though he had been banging on the man’s window before he came to. His phrase was, “He did not pay attention to me, half sat up and reached immediately to put the keys in the ignition.”

[32] The staff sergeant testified that when the man in the vehicle woke up and immediately moved to put the key in the ignition, it then crystalized a risk to the public and he needed to gain control.

[33] Once the driver’s door was opened and the keys removed by Constable Warnica, the staff sergeant asked the accused questions. He asked for the usual papers, license, registration and insurance. He then remained standing in the open doorway to communicate with the accused.

[34] In addition to the observation of the accused appearing extremely groggy, he described the accused’s movements as slow. He said it took the accused seconds to appear to understand. He described eye movements, the hand movements and the

answers of the accused to indicate he appeared confused; “very confused” was his language.

[35] The officer said he asked the accused if he knew where he was and that the accused replied, “Dartmouth.” The staff sergeant testified that he said, “No, you’re in Tantallon.”

[36] The officer testified that he asked the accused if he knew what time it was and received an answer, “9 a.m.,” to which the officer replied, “No, it’s 1:00 p.m.”

[37] The staff sergeant continued to note that the accused seemed very confused, slow in his movements and thoughts. He testified that he believed the accused’s ability to operate a motor vehicle was impaired by alcohol. Although he did not smell any alcohol, he thought the accused may have consumed vodka. He described it being difficult to detect the odour of vodka.

[38] He said that the accused eventually produced his driver’s license. He did not recall him ever producing insurance or registration papers. He immediately handed the license to Constable Warnica to have him check it on the police system while he continued to speak with Mr. Poole.

[39] Shortly, Constable Warnica returned and advised him that the accused had been recently charged with pointing a firearm. This caused him a heightened safety concern.

[40] The staff sergeant testified that he turned back to face the accused, having looked away to speak with Constable Warnica, and then noticed that the accused had a knife between his legs that he had not seen there before.

[41] The staff sergeant indicated that he reached down, took possession of the knife, removing it from between the accused's legs and placing it on top of the accused's vehicle, indicating to the accused, "You ought not have weapons in your possession when you're dealing with the police," or words to that effect.

[42] Constable Warnica advised Staff Sergeant Warnica that, from where he stood behind the staff sergeant, towards the rear of the accused's vehicle, he could see what he believed to be a can of pepper spray in the pocket of the driver's door.

[43] The staff sergeant, upon receipt of that information, looked to the driver's door and saw the top of a can which he testified he believed to be pepper spray, a prohibited weapon. He immediately seized the object, and in doing so examined it.

He testified that it had writing on it to the effect, “For law enforcement or military only, 10 percent pepper spray.”

[44] Based upon that information, he believed the accused was in possession of a prohibited weapon. He asked the accused to step out of the vehicle, which the accused did. He then indicated to the accused that he was under arrest for possession of a prohibited weapon, turned him and handcuffed him.

[45] The officer noted, upon removal of the pepper spray, that there was also a yellow pill and two pink pills in the pocket of the driver’s door of that motor vehicle.

[46] Staff Sergeant Warnica further testified that he began to search the accused incident to arrest to secure evidence and for purpose of officer safety. With respect to officer safety, he noted that there had been a knife in the accused’s possession between his knees in the driver’s seat, there had been a seizure of pepper spray, there had been information with respect to a recent charge of the accused pointing a firearm.

[47] Staff Sergeant Warnica testified that in the accused’s front right pants pocket, describing the pants as sweat pants, he found and seized a package containing what

he believed to be cannabis marijuana, and in that same pocket found and seized a package which he believed contained cannabis resin.

[48] Upon finding those items, Staff Sergeant Warnica testified that he advised the accused that he was under arrest for possession of a controlled substance. The staff sergeant then continued the search.

[49] He testified that he felt a hard, round object between the accused's legs. He testified in his experience, "A lot of people hide weapons there." The staff sergeant testified that he tried to separate the accused's legs but the accused clenched his legs together. The staff sergeant testified that he told the accused repeatedly to spread his legs and the accused did not comply.

[50] He testified that the accused began yelling things like, "You're touching my bag." He said that this continued for about 30 seconds until he determined that he was unable to complete the search at that time. He stopped the search, moved the accused to the back of the police car where Constable Warnica was present.

[51] He said that he then re-advised the accused that he was under arrest, advised him of his *Charter* rights, told him that he was going to search him. He said the

accused continued to yell and although he was handcuffed, pushed himself onto the police car and tried to jump off and kick at the officers.

[52] Staff Sergeant Warnica said this went on for some 30 to 60 seconds, during which time he tried to reason with the accused, telling him that he was going to carry out a search of him before putting him in the police car. The accused did not comply.

[53] Staff Sergeant Warnica testified that he then forced the accused onto the ground and held him on the ground, and at his request Constable Warnica searched the accused's groin area, separating his legs to be able to put his hand there.

[54] Constable Warnica testified to withdrawing a number of bags from the groin area of the accused, which have been marked as Exhibits 6 through 10; in particular, Exhibit 7, a bag containing 42.6 grams of cocaine.

[55] The evidence was that the search of the groin area of the accused took less than 30 seconds, that the accused's pants were not removed or taken down, that the accused's privates were not exposed during the search.

[56] Constable Warnica testified that, on the day in question, arriving in the area of the Subway after the arrival of Staff Sergeant Warnica, that it was a busy mall

parking lot, there was a man in a vehicle who appeared passed out. He, like Staff Sergeant Warnica, believed this may be a medical problem or an impaired driver.

[57] He testified that, at that time, on that day, there was a lot of noise in the mall parking area; that when he parked, Staff Sergeant Warnica was already at the vehicle and was knocking on the driver's window as he approached. He went to the passenger side window.

[58] Upon arrival at the passenger side window he noted a male in the driver's seat. He testified that the male seemed to be just awakening, and he looked completely out of it, that he seemed to be "trying to put it together," and that he had very slow movements. The man had a key in his right hand and was trying to put the key in the ignition but he lacked muscle control to do so. He was fumbling.

[59] On cross-examination Constable Warnica was asked if he recalled Staff Sergeant Warnica directing the accused to open his window of the vehicle. He said he did not recall that being asked by the staff sergeant.

[60] He said his immediate thought, upon arriving at the passenger side window and seeing what he described, was that this person was in no condition to operate a

motor vehicle, for some reason, and he feared that the individual may drive into the Subway restaurant or back into the police car. He said, "It happened so fast."

[61] He acknowledged on cross-examination he had no prior contact with this individual. He had subsequent contact.

[62] He testified to opening the passenger door, being pleasantly surprised when he tried the handle to find that it was unlocked. He reached in, grabbed the key from the accused's hand, closed the passenger door, and went around to the driver's side.

[63] He said he watched the staff sergeant interact with the accused at the open driver's door and shortly thereafter received from the staff sergeant the driver's license which had been provided by the accused.

[64] He testified that at that time he was still not certain what they were dealing with. He went to the police car to check with the accused's driver's license on the history of his interactions with the police, which may indicate illness, drug use, what have you.

[65] He said he made that check on the system and received information that the accused had recently been charged with pointing a firearm. His initial thought was there could be a firearm in the vehicle and he needed to warn the staff sergeant.

[66] He testified that he went to advise Staff Sergeant Warnica and did so as he approached the car from the driver's side rear. After warning the staff sergeant, he said, from that vantage point, he could see the top of a can in the pocket of the driver's door, which he believed was pepper spray based on the colour, shape, size, lid and nozzle, which he described as distinctive and exactly what is used by the police. He advised the staff sergeant of what he observed.

[67] He testified to hearing the staff sergeant ask the accused to step out of the vehicle after seizing what was believed to be pepper spray. The accused stepped out. He observed the staff sergeant arrest and handcuff the accused.

[68] The item believed to be pepper spray was marked on this hearing as Exhibit 1.

[69] He said that the staff sergeant was then engaged in searching the accused. His attention at that time was to conduct a search of the accused's vehicle incident to arrest, and described what he found, including a set of scales and two pipes.

[70] He said that he became aware that there was an issue with respect to the staff sergeant's search of the accused. He said that the accused wouldn't spread his feet and began yelling.

[71] He testified that the staff sergeant was unable to search the groin area of the accused. He testified that in his experience people often hide drugs or weapons in the groin area.

[72] He testified to observing the staff sergeant move the accused to the police vehicle, heard the staff sergeant tell the accused that he had felt something in the accused's groin area and they were going to search him.

[73] He said the accused was uncooperative, tried to pull away, was fighting with them, and that it was necessary for the accused to be put on the ground in order to conduct the search.

[74] He said once Staff Sergeant Warnica had the accused on the ground, he searched the accused's groin area, wearing gloves for that purpose. He found a number of items there, which have been marked and identified by him as Exhibits 6 through 10.

[75] He testified that from the time of arrest until the completion of the search, it was no more than a couple of minutes.

[76] The evidence of each of the two witnesses, in the court's view, was clear, consistent, logical, unaffected by cross-examination. The court found the evidence of both witnesses credible and reliable.

[77] On the one point of disagreement in their testimony, where the staff sergeant indicated he parked some 10 feet behind the accused's vehicle, and Constable Warnica described the staff sergeant's vehicle as blocking the accused's vehicle, I find that the positioning of the staff sergeant's vehicle likely, at least partially, blocked the ability of the accused to exit from that parking space without making some manoeuvring action to do so.

[78] That disagreement on their evidence did not affect the court's overall view of their credibility and reliability.

[79] The court found the evidence of both officers entirely credible and reliable and the court accepts their evidence.

[80] I will turn now to the applicable law to be applied to the circumstances as found by the court, beginning with the general statement in *R. v. Golub*, [1997] 34 ONR (3d), 743, ONCA, at page 750. Justice Doherty for the court speaking in the context of police power to arrest stated:

Often, the officer's decision to arrest must be made quickly in volatile and rapidly changing situations.

And further:

The officer must make his or her decision based upon available information which is often less than exact or complete.

[81] This contextual consideration is equally applicable to an officer's actions during an investigative detention.

[82] The two officers approached the accused's vehicle in response to the citizen's provision of information regarding a criminal offence in progress, that is, impaired care and control of a motor vehicle. That report necessitated an investigation by the officers.

[83] I accept their evidence that, as they approached, they were open-minded, believing that this could be an impaired driver, it could also be a person experiencing a medical difficulty, or simply a person asleep. The fact that there could be multiple possibilities does not, in the court's view, alter the authority of the officers to pursue that investigation.

[84] The law permits a detention for the purpose of a highway safety check, pursuant to the provincial legislation.

[85] An officer may detain a citizen and demand license, registration and insurance, and ask questions regarding the fitness of the vehicle and the fitness of the person operating the motor vehicle.

[86] Detention for such a purpose is a reasonable limit on the accused's section 9 *Charter* right and such a detention is not a breach of that right. (*R. v. Hufsky*, [1998] 1 SCR 621)

[87] Alternatively, police officers who suspect a citizen is involved in a crime have the right to detain the person for investigative purposes. There must be reasonable grounds for the officer's suspicion. It must be more than a hunch.

[88] An officer who conducts an investigative detention has the authority to carry out a search for officer protection, described in *R. v. Mann*, [2004] 3 SCR 59 as a "pat-down search."

[89] In *R. v. White*, [2007] 47 CR (6th) 271, the Ontario Court of Appeal held that an officer conducting an investigative detention has a limited power to make a seizure. There must be reasonable grounds to believe the seizure is necessary to avert a risk to officer safety or the potential loss of evidence.

[90] The facts in the *White* case involved officers approaching a suspected drug trafficker. The suspect pulled out his cell phone as the officers approached and was heard saying, “Yeah, they’re here now.” The officer seized the cell phone.

[91] The seizure was found to be lawful pursuant to the investigative detention of the accused as the phone may have been used to alert an accomplice to destroy evidence or to send for backup.

[92] In *R. v. Batzer*, [2005] 200 CCC (3d) 330, the Ontario Court of Appeal found that such a power existed only where there were exigent circumstances and the seizure was for protective purposes.

[93] The search for the purpose of officer safety pursuant to an investigative detention has been found not to be limited to the person of the accused.

[94] In *R. v. Plummer*, [2011] 272 CCC (3d) 172, the Ontario Court of Appeal held that, if reasonable, the authority may allow for other kinds of searches. In *Plummer* the search was of a bag in the possession of the accused where there was a belief that the accused was in possession of a gun which was not on his person.

[95] In *R. v. Lee*, [2017] 351 CCC (3d) 187, (Ontario Court of Appeal), the search was of a motor vehicle trunk where a 911 call had advised of a man in a car with a

gun and no gun was found on the individual or in the passenger compartment of the car.

[96] Turning to the circumstances of the present case, I find the entry to the accused's motor vehicle by the officers was not for the purpose of securing evidence. It was for a protective purpose, for the safety of the officers, citizens in the vicinity, and the accused.

[97] I find the two officers acted in concert as the circumstances quickly changed when the accused awoke and attempted to put the car key in the car ignition.

[98] I accept the evidence of both officers that they each believed the prospect of the accused starting and moving the vehicle posed a real risk to public safety, including their own safety.

[99] The action of each officer opening a door of the accused's motor vehicle constituted a continuation of the investigative detention which had begun at the time the officers blocked the exit path of the accused's vehicle. At that time, I am satisfied that they were conducting an investigation in relation to a possible impaired driving, and also conducting what may have been a simple motor vehicle check. The

authority of the police is not limited to one option or the other if the circumstances warrant.

[100] At that time, I find each officer suspected the accused was in care and control of a motor vehicle while his ability to operate the motor vehicle was impaired by alcohol. That was not the only possible outcome from their investigation but it authorized them to detain the accused to further investigate that possible offence.

[101] As to the reasonableness of the officers' belief, each had been given information from a citizen of a man in a motor vehicle at the Subway, passed out. Their investigation appeared to confirm many of the details obtained from that passing citizen.

[102] Further, they had had great difficulty awakening the accused. In that respect, this case is factually distinguishable from the *R. v. Lee* case referred to by defence counsel where Mr. Lee, when awakened, indicated he was fine and appeared fine.

[103] The officers described the scene as a very busy and noisy parking lot at approximately 1:00 in the afternoon with cars and pedestrians in the area. Upon the accused awakening or "coming to," Staff Sergeant Warnica described him as extremely groggy, "not paying attention to me," and moving quickly to put the key

in the ignition. Constable Warnica describing the accused as looking completely out of it, attempting to put the key in the ignition but lacking muscle control, and fumbling and incapable of operating a motor vehicle.

[104] Those observations were considered by the court in relation to the officers' actions. I find the belief of each of these two experienced officers was objectively reasonable and that each held that subjective belief.

[105] I find it was objectively reasonable for them to believe that the accused was attempting to put the key in the ignition of the motor vehicle. I find it was objectively reasonable for the officers to believe the accused may put the vehicle in motion. And further, I find that it was objectively reasonable to believe that if the accused put the vehicle in motion, it would endanger the public and the officers and the accused.

[106] The fact that the accused later passed a drug impairment test does not invalidate the officers' belief at that time.

[107] Constable Warnica's entry into the accused's motor vehicle and the taking of the accused's car keys constituted a search and seizure in the course of the investigative detention. The burden of demonstrating that the action was lawful rests upon the Crown.

[108] I find that this seizure was for the purpose of safety of the officers, of the public, and of the accused. I find the entry into the accused's vehicle was necessary to effect the seizure of the keys for the safety purpose described.

[109] I find that the risk of the accused's putting the vehicle in motion presented exigent circumstances justifying Constable Warnica's immediate action.

[110] I find the entry and seizure was authorized by law, pursuant to the investigative detention of the accused, and was carried out in a reasonable manner.

[111] I find that Staff Sergeant Warnica's entry into the accused's motor vehicle for the same reason as Constable Warnica's, that is, safety in exigent circumstances, was also justified and lawful.

[112] The staff sergeant remained in the open driver's door after the keys were seized. He engaged in conversation with the accused, asking for the accused's papers, asking questions to ascertain the accused's mental state, questions as previously indicated, whether the accused knew the time, where he was and so on. These questions confirm, in the mind of the court, that the officer was still attempting to ascertain the accused's mental state to determine whether or not this was a criminal matter or a medical matter, and these questions are consistent with there

being some issue with respect to the accused's mental functioning, for whatever reason.

[113] This ongoing interaction with the accused in the course of this investigative detention, in the court's view, could not reasonably have continued had the driver's door been reclosed after the keys were seized with the window of that door up.

[114] I therefore find the actions of Staff Sergeant Warnica to have been reasonable and necessary to continue his interaction with the accused during this investigative detention of the accused.

[115] I am not persuaded that this action resulted in a breach of the accused's *Charter* rights.

[116] Moments later, the accused was seen to have a knife between his thighs. That knife was seized by Staff Sergeant Warnica. I find that that again was done for safety purposes of the officer and was authorized and justified in the circumstances.

[117] With the driver's door open, Constable Warnica and then Staff Sergeant Warnica were able to see what they each believed to be a container of pepper spray in the pocket of the driver's door. With the driver's door open, I find this object was in plain view of the officers, and I find the officers were lawfully positioned to see

the pepper spray in plain view, (*R. v. Jones*, [2011] 278 CCC (3d) 157, Ontario Court of Appeal).

[118] The seizure of the pepper spray by Staff Sergeant Warnica, upon seeing it in the pocket of the door, was also justified for officer safety. The staff sergeant believed the object he saw there was pepper spray. That belief was based upon information provided to him by Constable Warnica, and the similarity of the top of the object to police-issued pepper spray with which both officers described their familiarity, and the wording of the object seized by the officer as he took possession of it, “For police and military only, 10 percent pepper spray.” I find that the officer’s belief was objectively reasonable.

[119] Staff Sergeant Warnica then asked the accused to step out of the vehicle. The accused complied. Staff Sergeant Warnica arrested the accused for possession of the prohibited weapon. Section 495 of the *Criminal Code* empowers a police officer to arrest without warrant where he finds a person committing a criminal offence, which fits the circumstances confronting Staff Sergeant Warnica.

[120] On the evidence, I am satisfied that it was necessary and lawful to arrest the accused in those circumstances in order to be able to search him for possible

evidence and other weapons for purposes of officer safety, given the finding of the pepper spray, the knife in the possession of the accused, and the information that he had recently been charged with pointing a firearm.

[121] For those reasons, I find the arrest of the accused was lawful.

[122] I find that the detention of the accused thereafter was not arbitrary as it was pursuant to a lawful arrest, (*R. v. Storrey*, [1990] 1 SCR 241).

[123] The accused and his vehicle were thereafter searched. I accept the officers' evidence why the accused and the vehicle were searched. Based upon the spatial and temporal connection to the alleged offence and the accused's occupation of the motor vehicle where the pepper spray had been found, it was reasonable and appropriate for the officers to search the vehicle which had been in the control of the accused.

[124] The search of the accused for the purpose of securing possible evidence and officer safety, I find was incident to arrest, reasonable and necessary, and I find was carried out in a reasonable manner.

[125] The use of force was only that which was necessary to carry out the search.

[126] On the whole of the evidence, I find no violation of the accused's section 8 or section 9 rights has been proven.

[127] I have reviewed a number of cases which have considered violations and gone on to consider section 24. I will say, briefly, that in these circumstances, had I found that there had been an overreach of the authority of the officers – “overreach” the term used by defence counsel – in the circumstances of this case, given the court's findings with respect to the officers acting in good faith, their beliefs at the time, the potential risk to the public, the speed of which the events were occurring, the nature of the impact of their actions on the accused's *Charter* rights, the seriousness of the charges, the importance of the evidence found, the public interest in the charges of possession for the purpose of trafficking of a hard drug, this court would have ruled that the evidence seized would not have been excluded from evidence as the court would not have been satisfied that the admission of such evidence in these circumstances would have brought the administration of justice into disrepute.

[128] For those reasons, the court finds there to have been no violation and the evidence admissible at trial.

Dated at Halifax, Nova Scotia on the 25th day of September, 2020.

Marc. C. Chisholm

Judge of the Provincial Court