IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Lively, 2007 NSSC 301

Date: 20071022
Docket: CR. No. 274575
Registry: Halifax

Between:

Her Majesty the Queen

-and-

Gordon Allison Lively

Decision

Judge: The Honourable Justice Robert W. Wright

Heard: October 9 and 10, 2007 in Halifax, Nova Scotia

Oral Decision: October 22, 2007

Written Decision: October 22, 2007

Counsel: Crown - Tim McLaughlin
Defence - Warren Zimmer

Wright J. (Orally)

INTRODUCTION

[1] The accused Gordon Lively is charged with three counts of unlawful possession of a controlled substance for purposes of trafficking, contrary to s. 5(2) of the **Controlled Drugs and Substances Act**. He is further charged in the same indictment with two counts of resisting a peace officer while engaged in the lawful execution of his duties by failing to comply with instruction or orders given by him, contrary to s. 129(a) of the Criminal Code.

[2] The trial commenced with a Charter application in the nature of a voir dire with respect to the admissibility of certain evidence, namely, the three different controlled substances obtained by the police from the accused as the result of a search and seizure which took place on July 29, 2005. In essence, the argument on behalf of the accused is that his right to be secure against unreasonable search and seizure under s. 8 of the Charter was violated by a warrantless police search of his person which in turn flowed from an unlawful arrest, or alternatively an arbitrary detention, in violation of his rights guaranteed by s. 9 of the Charter.

[3] The accused submits that his purported arrest was unlawful because the arresting officers did not have reasonable and probable grounds to make it. At most, says the accused, there was in effect an investigative detention made, pursuant to which the police officers exceeded the permissible limits of a search incident thereto. Accordingly, the accused seeks to have the subject evidence excluded under s. 24(2) of the Charter.

FACTS

[4] The facts underlying this application are fairly straightforward. I will recite them by giving a combined summary of the evidence of the two arresting officers, Csts. Jeffries and Matthews.

[5] These two officers began their night shift together at 6 p.m. on July 28th and were assigned to general police duties in plainclothes in the downtown area of Halifax. They were particularly on the lookout for perpetrators of graffiti and other kinds of property damage. At the start of the shift, as usual Cst. Jeffries accessed by computer and reviewed pictures of various persons on the outstanding arrest warrant list. The list is updated daily.

[6] While out on foot patrol at the corner of Barrington and Sackville Streets in downtown Halifax at approximately 2:35 a.m. (on July 29th), Cst. Jeffries observed the accused walking down Sackville Street about 15-20 feet away towards a bar establishment known as Reflections. When the accused arrived at the entrance of the bar a few steps further, he stopped to talk to a couple of other persons milling around the doorway. Although it was night-time, the officers could make him out quite easily with the artificial lighting existing in that area.

[7] The accused was not known to Cst. Jeffries (nor Cst. Matthews) but Cst. Jeffries observed that the accused struck a resemblance to one of the persons he had seen on the computer screen earlier that night as being subject to an outstanding arrest warrant. He passed on that observation to Cst. Matthews whereupon they decided to approach the accused and ask him for his identification. They wanted to run his name to see if he was indeed subject to such a warrant.

[8] As the officers approached the accused, it appeared as though he was about to enter the bar. Constable Jeffries then called out “HEY” or something to that effect to get the accused’s attention before he went inside the bar. The accused stopped at the front entrance and looked at them.

[9] As the officers came up to the accused, Cst. Matthews said, in a normal tone of voice, that they were with Halifax Regional Police and wanted to talk to him for a moment. Constable Matthews thereupon lifted the hoodie he was wearing, thereby showing his police badge which was mounted on his belt. Constable Jeffries also identified himself to the accused as a police officer.

[10] After the accused’s eyes dropped to the badge and came back up again for a moment, he suddenly bolted at full speed across Sackville Street towards the Granville Street intersection. Constable Jeffries immediately ran after him in hot pursuit and within perhaps five seconds was able to grab the accused by his jacket from behind. Constable Jeffries swung him around and repeated that he was a police officer. The accused nonetheless struggled and tried to free himself from the officer’s grip. When Cst. Matthews arrived momentarily to help restrain the accused, the two officers took him to the ground and told him again that they were police officers and that he was under arrest as a suspect under an outstanding arrest warrant.

[11] As the police officers held the accused to the ground, they repeatedly told him to give them his hands to bring him under control. The accused did not

comply. Rather, he continued to resist and his hands kept reaching towards his front pockets. Even when the officers got one arm under control, the accused appeared to still be trying to reach for his front pockets with his free hand. These actions on the part of the accused raised the concern with both officers about the possibility of a weapon in one of his pockets.

[12] Eventually, the officers with some difficulty were able to get both of the accused's hands behind him and handcuffed him. They then carried out a pat-down search of his pockets and belt area while he was on the ground. During that search, the officers felt a bulge in the accused's right front pocket and decided to reach in to see what it was. It turned out to be a large wad of folded cash and coins (later determined to be in the sum of approximately $1,014) which was returned to the accused's pocket. Constable Matthews also patted down the accused's left front pocket and felt a lump which he described as something soft with rigid things in it. Constable Matthews reached into the pocket and found a plastic bag containing 15 small individual packets of powdered cocaine and 19 tablets of ecstasy (as later determined). The accused was thereupon arrested for drug offences under the **Controlled Drugs and Substances Act** and was read his Charter rights and caution. He was later charged as recited above.

[13] Constables Jeffries and Matthews also testified that when they stood the accused up from the ground, they then noticed that he displayed signs of intoxication, namely, glassy eyes, a strong odor of alcohol and some unsteadiness on his feet. The officers also considered his behaviour of suddenly running from them, after they had identified themselves as police officers, as consistent with

someone under the influence of alcohol. The officers therefore informed the accused that he was also under arrest for public intoxication under the **Nova Scotia Liquor Control Act**. Both officers acknowledged that in their observations of the accused prior to this point, neither had seen any signs of intoxication or disruption of any sort to the public peace.

[14] Both officers testified that when the accused suddenly bolted away from them across the street, after they had identified themselves as police officers, their belief that he was the subject of an outstanding arrest warrant was thereby reinforced or solidified. Both also testified that there was no opportunity in the circumstances for them to have informed the accused why they wanted to talk to him because the succession of events happened too quickly to allow them to do that. As it turned out in the end, it was an admitted fact through counsel that the accused was not the subject of an outstanding arrest warrant at the time.

[15] The defence called one witness on the voir dire, namely, Russell Baker. Mr. Baker was a patron at the bar that evening and happened to be standing outside in the entrance way for a cigarette when he met the accused. Mr. Baker said “Hi” to the accused where he has known him for some four or five years but did not otherwise speak with him. He said he then heard someone yell “Hey you, come here; I want to talk to you” or words to that effect. He said he then heard the accused say in reply, “I don’t know you” or words to that effect. When the other person repeated his command, he said the accused ran down the street and that two guys chased him and tackled him to the ground. He said that it was only then that the two persons identified themselves as police officers and that he did not hear

them do so at any time before that. That was the main thrust of his evidence.

[16] I find as a fact that Csts. Jeffries and Matthews did identify themselves as police officers to the accused when they first approached him and that Cst. Matthews showed the accused the badge he was wearing on his belt. The evidence of both officers was given in a consistent straightforward manner with their memories being refreshed on the details as necessary by reference to their police notes contemporaneously made.

[17] Mr. Baker, on the other hand, was positioned behind the side wall of the entrance alcove just outside the bar door when the officers first approached the accused. Not only were there other persons present in the entrance way, one of whom was talking to the accused, but there was also music in the bar playing at the time. All of this would have created a certain level of background noise which would have interfered with his hearing. I also observe that Mr. Baker by that time had consumed two or three bottles of beer. He may also have an interest in the outcome of this case where he acknowledged that he was there in court to support a friend. Furthermore, his memory is based on his recollection of events which took place over two years ago without the benefit of having any notes as the police did to refresh memory.

[18] It may very well be that Mr. Baker did not actually hear Csts. Jeffries and Matthews identify themselves as police officers when they first approached the

accused, but his evidence that they did not do so is not reliable for the foregoing reasons. I therefore accept in its entirety the evidence of the two police officers summarized above as the factual basis for this Charter application.

ISSUES

[19] • Was there a lawful arrest or detention of the accused?

• Was there a lawful search and seizure of the accused?

• If the Charter rights of the accused were violated, should the subject evidence be excluded under the s.24(2) remedy analysis?

FIRST ISSUE - Legality of Arrest or Detention of the Accused

[20] The first issue for determination is whether there was a lawful arrest or, alternatively, a lawful investigative detention of the accused by Csts. Jeffries and Matthews.

[21] The submission of defence counsel is that the police were never really in a position to arrest the accused with respect to the outstanding warrant without first knowing his identity. Defence counsel argues that the police purported to arrest Mr. Lively only for suspicion of being the subject of the outstanding warrant which had the effect of being, at most, an investigative detention as the only form of restraint then available to them. Indeed, defence counsel does not concede that the police had reasonable grounds even for an investigative detention of the accused in the circumstances.

[22] The power of arrest without warrant by a peace officer is set out in s. 495 of the Criminal Code. Of particular note in this case is s. 495(1)(c) which reads as

follows:

> A peace officer may arrest without warrant...
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> > (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.

[23] In the leading decision of *R. v. Storrey* (1990) 53 C.C.C. (3d) 316, the Supreme Court of Canada interpreted the provisions of s.495 (formerly s.450 but substantively the same). Justice Cory summed up the power of arrest without warrant by a peace officer as follows (at p. 324):

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

[24] Turning to the facts of the present case, when Cst. Jeffries first observed the accused outside the bar, all he knew was that the accused struck a resemblance to the picture of a person he had seen a few hours earlier on the outstanding arrest warrant list. The only identification particulars he was able to relate in his evidence was that the accused, like the subject of the warrant, was a Caucasian male with a shaved haircut but he was nonetheless satisfied that the resemblance was there. Constable Matthews relied on what he was then told by Cst. Jeffries as they decided to approach the accused to learn his identity. After identifying themselves as police officers, Cst. Matthews informed the accused that they wanted to talk to him for a moment.

[25] Up to that point, there were clearly no reasonable and probable grounds for arrest. Indeed, in my view the accused was not yet even under detention within the meaning of the Charter where all that had happened was that the officers told the accused they wanted to talk to him for a moment after identifying themselves. As Iacobucci J. said in the seminal case of *R. v. Mann* [2004] S.C.J. No. 49 at para. 19:

> "Detention" has been held to cover, in Canada, a broad range of encounters between police officers and members of the public. Even so, the police cannot be said to "detain", within the meaning of ss. 9 and 10 of the Charter, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed", or "kept waiting". But the constitutional rights recognized by ss. 9 and 10 of the Charter are not engaged by delays that involve no significant physical or psychological restraint.

[26] The complexion of the situation then suddenly changed. The accused abruptly bolted across the street at full speed. This sudden reaction reinforced the officers' belief that the accused was subject to an outstanding arrest warrant and they ran after him in hot pursuit. They yelled at him to stop but he did not do so before Cst. Jeffries caught up with him and took him to the ground after he tried to break free of the officer's grip. It was only then, as the accused continued to struggle in resistance, that the officers placed him under arrest as a suspect under an outstanding warrant.

[27] Both officers testified that the accused's sudden flight in the present circumstances reinforced their belief that the accused was wanted on an outstanding arrest warrant. I accept that evidence and accordingly find that they

subjectively had reasonable and probable grounds on which to base the arrest.

[28] It is argued by the Crown that the accused's reaction of sudden flight also satisfies the requirement that those reasonable and probable grounds on which to base the arrest must, in addition, be justifiable from an objective point of view. I agree with that submission that from an objective viewpoint, a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds then existed to make the arrest.

[29] In short, the officers' initial suspicion of the accused with respect to an outstanding arrest warrant (which by itself did not justify an arrest) was sufficiently heightened by the accused's abrupt flight from them, after they said they would like to talk to him, so as to elevate that suspicion to reasonable and probable grounds on which to base the arrest. I therefore find that the arrest of the accused was lawfully made under s.495 of the Criminal Code.

SECOND ISSUE - Legality of Search Incident to Arrest

[30] The scope of the common law power of search incident to arrest was recently reviewed by the Ontario Court of Appeal in *R. v. Alkins* (2007) ONCA 264. The crux of the appeal in that case was the determination of whether the search of a car trunk was truly incidental to the arrest made, but Justice MacPherson began his reasons for judgment with the following summary of the law:

> 26. Section 8 of the *Charter* protects against unreasonable search and seizure. Searches conducted incident to arrest have been recognized as an exception to the rule that warrantless searches are *prima facie* unreasonable: see *R v. Golden*, [2001] 3 S.C.R. 679 at para. 23. A search

> incident to arrest must still be reasonable within the meaning of s. 8, as set out in *Collins, supra*. The search will be reasonable only if it is authorized by law, the law is reasonable, and the search is conducted in a reasonable manner. A search conducted incident to arrest will be authorized by law if it meets the requirements set out in *R. v. Stillman* (1997), 113 C.C.C. (3d) 321 (S.C.C.). First, the arrest must be lawful. Second, the search must be truly incidental to arrest. Third, the manner in which the search is conducted must be reasonable.
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> 28. The starting point for the legal analysis of this question is the decision of the Supreme Court of Canada in *Cloutier v. Langlois* (1990), 53 C.C.C. (3d) 257. Justice L'Heureux-Dubé, writing for a unanimous court, surveyed the English and American common law and stated at p. 274:
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> > [I]t seems beyond question that the common law as recognized and developed in Canada holds that the police have a power to search a lawfully arrested person and to seize anything in his or her possession or immediate surroundings to guarantee the safety of the police and the accused, prevent the prisoner's escape or provide evidence against him.

29. The court justified the power to search incident to arrest as necessary to attain the "ultimate purpose of criminal proceedings ... to convict those found guilty beyond a reasonable doubt" (p. 275). While the court held that reasonable and probable grounds are not required in order for the police to conduct a search incident to arrest, the power does have restrictions. Specifically, the court set out the following three principles that apply to searches incident to arrest at p. 278:

> 1. This power does not impose a duty. The police have some discretion in conducting the search. Where they are satisfied that the law can be effectively and safely applied without a search, the police may see fit not to conduct a search. They must be in a position to assess the circumstances of each case so as to determine whether a search meets the underlying objectives.
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> 2. The search must be for a valid objective in pursuit of the ends of criminal justice, such as the discovery of an object that may be a threat to the safety of the police, the accused or the public, or that may facilitate escape or act as evidence against the accused. The purpose of the search must not be unrelated to the objectives of the proper administration of justice, which would be the case, for example, if the purpose of the search was to intimidate, ridicule or pressure the

> accused in order to obtain admissions.
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> 3. The search must not be conducted in an abusive fashion and, in particular, the use of physical or psychological constraint should be proportionate to the objectives sought and the other circumstances of the situation.
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> 30. Ultimately, the court concluded that the frisk search in question in that case was justified. The officers had carried out the search for the valid purpose of ensuring officer safety.

[31] Justice MacPherson then went on to review the leading case of *R. v. Caslake* [1998] S.C.J. No. 3 in which the Supreme Court of Canada took the opportunity to clarify and expound upon some of the principles earlier set out in *Cloutier v. Langlois*.

[32] In writing the reasons for judgment of the majority in *Caslake*, Chief Justice Lamer set out the following principles:

> 19. As L'Heureux-Dubé J. stated in Cloutier, the three main purposes of search incident to arrest are ensuring the safety of the police and public, the protection of evidence from destruction at the hands of the arrestee or others, and the discovery of evidence which can be used at the arrestee's trial. The restriction that the search must be "truly incidental" to the arrest means that the police must be attempting to achieve some valid purpose connected to the arrest. Whether such an objective exists will depend on what the police were looking for and why. There are both subjective and objective aspects to this issue. In my view, the police must have one of the purposes for a valid search incident to arrest in mind when the search is conducted. Further, the officer's belief that this purpose will be served by the search must be a reasonable one.
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> 20. To be clear, this is not a standard of reasonable and probable grounds, the normal threshold that must be surpassed before a search can be conducted. Here, the only requirement is that there be some reasonable basis for doing what the police officer did. To give an example, a reasonable and probable grounds standard would require a police officer to demonstrate a reasonable belief that an arrested person was armed with a particular weapon before searching the person. By contrast, under the

> standard that applies here, the police would be entitled to search an arrested person for a weapon if under the circumstances it seemed reasonable to check whether the person might be armed. Obviously, there is a significant difference in the two standards. The police have considerable leeway in the circumstances of an arrest which they do not have in other situations. At the same time, in keeping with the criteria in Cloutier, there must be a "valid objective" served by the search. An objective cannot be valid if it is not reasonable to pursue it in the circumstances of the arrest.
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> 25. In summary, searches must be authorized by law. If the law on which the Crown is relying for authorization is the common law doctrine of search incident to arrest, then the limits of this doctrine must be respected. The most important of these limits is that the search must be truly incidental to the arrest. This means that the police must be able to explain, within the purposes articulated in Cloutier, supra (protecting the police, protecting the evidence, discovering evidence), or by reference to some other valid purpose, why they searched. They do not need reasonable and probable grounds. However, they must have had some reason related to the arrest for conducting the search at the time the search was carried out, and that reason must be objectively reasonable.

[33] The court also affirmed (at para. 11) that once the accused has demonstrated that the search was warrantless, the Crown has the burden of showing that the search was, on a balance of probabilities, reasonable.

[34] Bearing these principles in mind, I have no difficulty in concluding that on the facts of the present case, it was reasonable for the police officers to search the accused following his arrest for the purpose of ensuring officer safety. Both officers testified as to their subjective belief or concern that the accused may have had a weapon in one of his pants pockets and I am satisfied that there was a legitimate objective basis for that concern because the accused continued to reach for his pockets while resisting the arrest, despite the officers' commands that he give them his hands. The more difficult question is whether the officers exceeded

the permissible search limits by emptying the accused's pants pockets following the pat-down search made when he was handcuffed on the ground.

[35] I am mindful of the principles set out by the Supreme Court of Canada in *R. v. Mann* which dealt with the limits of the common law power of search incident to an investigative detention. The essential question remains in either situation, however, whether the search made was reasonably necessary in the circumstances. In other words, was there a reasonable basis on the facts of this case for the police officers doing all that they did in the name of officer safety?

[36] There is a myriad of fact situations which come before the courts involving a broad range of encounters between police officers and members of the public in which this essential question of reasonableness must be determined. Some fact situations, of which this is one, present a grey area of the permissible scope or limits of the common law power of search incident to arrest or investigative detention. The court is left to grapple with such cases by scrutinizing the individual facts of the case in making its determination of whether both the subjective and objective components of the reasonableness test have been established.

[37] The key factual element in the case before me, which distinguishes it from others such as *Mann*, is that once taken to the ground by the arresting officers, the accused refused to comply with their commands that he stop resisting and that he give them his hands. Rather, he continued to struggle against them on the ground

and kept reaching his hands towards his pants pockets. Even when the officers were able to control one of his arms, the accused kept reaching towards his pockets with his unrestrained arm. Both officers were therefore subjectively concerned that the accused might be carrying a weapon. Their evidence was that even once the accused was handcuffed, they still thought it was reasonably necessary to check for weapons before transporting him to the police station for purposes of officer and public safety. Constable Jeffries also testified that he has seen handcuffed people access their pockets during transport after getting their hands back in front by shimmying them through their feet.

[38] In light of these specific facts, I conclude that there was a reasonable basis for doing what the police officers did in searching inside the pockets of the accused, namely, their legitimate concern that he might be carrying a weapon. On balance, I also conclude that their concern for officer safety was objectively reasonable, notwithstanding that the accused was handcuffed when his pockets were searched and that the preceding pat-down search had yielded nothing more than a suspicion that the accused might be carrying some type of small concealed weapon. It was the combative actions of the accused which ultimately lead to the search of the contents of his pockets and I think it is fair to say that when a person resists arresting police officers in a manner such as we have here, there becomes a diminished expectation of privacy in the contents of one's pockets.

[39] In the result, I find that the actions of the police did not violate the accused's rights against unreasonable search and seizure under s. 8 of the Charter.

[40] Given this finding, it is not strictly necessary for me to consider the legality of the second arrest of the accused by Cst. Jeffries for public intoxication under s. 87 of the **Liquor Control Act**. However, I will briefly do so for the sake of completeness.

[41] The **Liquor Control Act** does not define the term "intoxicated". I am therefore urged by defence counsel to follow the interpretative approach taken by the Alberta Court of Queen's Bench in *R. v. Lyall* [2003] A.J. No. 588. In that case, the court looked to the Alberta equivalent of our s. 87(6) for assistance in determining the meaning of the word. That section provides that a person so taken into custody may be released at any time if that person has recovered sufficient capacity that if released, he is unlikely to cause injury to himself or be a danger, nuisance or a disturbance to others.

[42] In *Lyall*, there was no evidence that anyone was disturbed by the accused nor any evidence that he was likely to injure himself or was likely a danger, nuisance or disturbance to others. Furthermore, there was no evidence that the accused in that case was unable to care for himself. The court therefore concluded that even though the arresting officer had acted in good faith based upon his subjective belief, there was insufficient evidence viewed objectively to support the arrest on reasonable and probable grounds. The arrest was therefore found to have been arbitrary.

[43] I am persuaded that the same analysis should apply to the facts of the present case. True, there was evidence given by the police officers that the accused had

consumed alcohol. However, that does not necessarily equate to intoxication. As in *Lyall*, I find here that the police observations of the accused, after they stood him up on the sidewalk, smelling of alcohol and having glassy eyes is insufficient, viewed objectively, to support the arrest on reasonable and probable grounds. Both officers acknowledged in their evidence that prior to his arrest, they did not observe any signs of impairment or intoxication on the part of the accused while they were watching him outside the bar. Even if the arresting officers later formed the subjective belief in good faith of the accused's intoxication, the objective component of the reasonable and probable grounds test has not been established by the Crown. The subsequent arrest of the accused under s. 87 of the **Liquor Control Act** was therefore arbitrary.

[44] Had the arresting officers searched the pockets of the accused pursuant to that second arrest, the validity of the search would have fallen with the invalidity of the arrest (see *Caslake* at para. 13). However, in this case, by the time the accused was subsequently arrested for public intoxication, the search of his pockets had already been made while he was on the ground as an incident to his arrest with respect to the outstanding warrant. As I have already found, that initial arrest and the search incident thereto was lawfully carried out by the police with the result that the evidence sought to be excluded by the defence will be admitted into evidence at this trial.

THIRD ISSUE (PROVISIONAL) - Section 24(2) Considerations

[45] Again, it is not strictly necessary for me to undertake a s. 24(2) remedy analysis where I have found that the accused's rights against unreasonable search

and seizure under s. 8 of the Charter were not violated. However, even if I am wrong in making that finding, I would nonetheless have refused to exclude the subject evidence under the requisite s. 24(2) analysis.

[46] The purpose of s. 24(2) is not to remedy police misconduct, but to prevent having the administration of justice brought into disrepute by the admission of the evidence in the proceedings. The onus is on the applicant to establish on the balance of probabilities that admission of the evidence would bring the administration of justice into disrepute (see *R. v. Collins* [1987] 1 S.C.R. 265).

[47] In *Collins*, the Supreme Court of Canada established the framework for determining whether evidence obtained in breach of a Charter right should be excluded. Trial judges are under an obligation to consider three main factors, namely, the effect on the fairness of the trial, the seriousness of the breach and the effects on the administration of justice.

[48] The Supreme Court of Canada later affirmed in *R. v. Stillman* [1997] 1 S.C.R. 607 that the trial fairness factor involved in an admissibility determination under s. 24(2) is principally concerned with conscription, and the unfairness which results if an accused is compelled to participate in the creation or discovery of evidence. Such is not the case here. The physical evidence of the cocaine and ecstasy pills obtained from the search of the accused is both real and reliable and was of independent existence. In my view, its admission would not offend the fundamental principle of trial fairness.

[49] I next turn to a consideration of the seriousness of the breach if one were found to exist, contrary to my earlier finding.

[50] If the arresting officers did go too far in going beyond a pat-down search and emptying the accused's pockets, such a breach in my view was not overly serious considering the factual context at play. I recognize that a person clearly has a reasonable expectation of privacy in the contents of one's pocket, as stated in *Hunter v. Southam Inc.* [1984] 2 S.C.R. 145, but I reiterate that such an expectation of privacy is diminished in a situation where a person bolts from police officers when asked to talk to them and, in the course of being arrested, vigorously resists the commands of the arresting officers by continuing to struggle and reaching towards his pockets.

[51] Moreover, there is no evidence from which it can be inferred that the arresting officers were acting in bad faith in what they did. In their threat assessment, they believed that it was reasonably necessary to check the contents of the accused's pockets for the possibility of a weapon. They did so in the heat of the moment and even if, for the sake of argument, the accused's s. 8 Charter rights were violated, I am satisfied that the arresting officers did not deliberately flout those rights in obtaining the physical evidence from the accused's pockets. As observed in *R. v. Belnavis* (1997) 118 C.C.C. (3d) 405 (S.C.C.), where the violation is the product of inadvertence, good faith or a technical error, the gravity of the breach will be mitigated.

[52] I would add the observation that if the arresting officers had not gone

beyond a pat-down search at the time of the accused's arrest, in all likelihood his pockets would have been emptied after being transported to the police station and before he was placed in a holding cell. The presence of the drugs would then likely have been discovered in any event.

[53] Lastly, I turn to the factor of what effect the admission of the subject evidence would have on the repute of the administration of justice. For consideration here is whether the administration of justice would be brought into disrepute in the eyes of a reasonable person, who is dispassionate and fully apprised of all of the relevant circumstances.

[54] In the case at bar, it is important to note that the physical evidence in question is absolutely essential to the prosecution. Coupled with that is the seriousness of the charges in the indictment which are possession, for purposes of trafficking, of substances included in Schedules I and III of the *Controlled Drugs and Substances Act*. As many courts have stated before, the distribution of such hard drugs is a menace to our society both in and of itself and in terms of the spinoff crime which it generates. In my view, where a Charter breach is of a less serious nature, and exclusion of the evidence would result in an acquittal for serious offences, exclusion may well have a more negative effect on the repute of the justice system than would its admission.

[55] After weighing all these factors, if there was a breach of the accused's Charter rights against unreasonable search and seizure thereby requiring a s. 24(2) analysis, I would find that the accused has not discharged the onus upon him to

establish on a balance of probabilities that admission of the subject evidence at trial would bring the administration of justice into disrepute.

CONCLUSION

[56] I am satisfied that the rights of the accused under sections 8 and 9 of the Charter were not violated by the actions of the police officers in their arrest of the accused and the resulting search of his pockets. Even if the opposite conclusion were to have been reached, the subject evidence ought not to be excluded under the s. 24(2) Charter analysis. I find, therefore, that all of the evidence tendered at the voir dire is admissible at the trial of this proceeding.

J.