SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Cain*, 2019 NSSC 398

Date: 20190917
Docket: CRH No. 487250
Registry: Halifax

Between:

Her Majesty the Queen

v.

Percy Lewis Cain

VOIR DIRE DECISION

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	September 9, 10 and 11, 2019, in Halifax, Nova Scotia
Oral Decision on *Voir Dire*:	September 17, 2019
Counsel:	Katrina Trask, for the Crown Jeremiah Raining Bird, for the Defence

Mr. Cain was charged with break and enter with intent to commit an indictable offence therein, contrary to s. 348(1)(a) of the Criminal Code. A blended voir dire was held, to determine whether his rights pursuant to the Canadian Charter of Rights and Freedoms (s. 8 – right to be secure against unreasonable search or seizure and s. 9 – right to be secure against arbitrary detention or imprisonment) were infringed. If a violation was found, he sought to have the evidence seized excluded under s. 24(a) of the Charter. What follows is the decision rendered on September 17, 2019.

By the Court (orally):

Factual Background

[1] On January 10, 2019, RCMP Constables Jeremy Boehner and Remy Chiasson were dispatched to 72 Taranaki Drive, in Cole Harbour, Nova Scotia, at about 7:36 p.m. Dispatch had received a call shortly before that about a home security alarm having gone off.

[2] When they arrived at 7:43 p.m., they were met outside by Kathy Kerr-Miller, one of the home owners and residents. She explained that she had been out shopping while her husband was attending a Halifax Mooseheads game. She had been only minutes away when she was notified by her security company that the alarm had activated.

[3] When she returned home, all was quiet and eerie. She did not go inside because something did not feel right.

[4] The officers went to check the door – it was unlocked. Ms. Kerr-Miller said it had been locked when she left. In the back, the patio door had been smashed in. The tempered glass in the door had been shattered, and some of its decorative grill was twisted. Another portion of the grill was lying on the deck. Most of the shattered glass was inside, in the kitchen.

[5] The officer entered the premises and "cleared" it – a process by which the officers satisfied themselves that the building was completely empty.

[6] Prior to this this, a K-9 unit had been requested to attend. Upon attendance at the scene, the dog (with the assistance of his handler Constable Cook), was unable to obtain a viable scent.

[7] Cst. Boehner testified that Cst. Cook, upon viewing the scene, said that the method of entry and the other surrounding circumstances reminded him of another break and enter on the same street, one with which they were both familiar. This had occurred six or seven months prior. Neither officer could recall the name of the person charged in relation to that earlier offence.

[8] Dispatch was again contacted. Cst. Boehner was advised that the person arrested and charged in the earlier break and enter was a 63 year old man, "Lewis Percy Cain". (The accused is Percy Lewis Cain, but is sometimes referred to with his first two names in inverted order.)

[9] Dispatch also advised that Mr. Cain, the accused in this case, was currently on house arrest. Exhibit "A", a Recognizance dated August 22, 2018, reveals that this was the case.

[10] Mr. Cain had been placed on the Recognizance in question while facing the following charges:

1. Break and enter and commit (cc. 348(1)(b)) on May 30, 2018, in Cole Harbour, Nova Scotia;
2. Break and enter with intent (cc. 348(1)(a)) on June 6, 2018, in Cole Harbour, Nova Scotia;
3. Possession of break-in instruments (cc. 351(1)) on June 6, 2018, in Cole Harbour, Nova Scotia;
4. Possession under (cc. 355(b)) on June 6, 2018, in Cole Harbour, Nova Scotia;
5. Mischief (cc. 430(4)) on June 6, 2018, in Cole Harbour, Nova Scotia;
6. Resists/obstructs peace officer (cc. 129(a)) between August 9 and 16, 2018 in Dartmouth, Nova Scotia; and
7. Fail to comply with Recognizance or Undertaking (cc. 145(3)) between August 9 - 16, 2018 in Dartmouth, Nova Scotia (x3).

[11] A considerable amount of jewellery, among other things, had been taken from Ms. Kerr-Miller's residence on this occasion. Also missing was a pillowcase which had been removed from one of the pillows on her bed.

[12] Four officers in two separate unmarked vehicles from the Halifax Regional Police East Quick Response Unit (a plain clothes unit) attended Mr. Cain's

residence at 14 Jackson Road, Dartmouth, Nova Scotia. This was in response to a broadcast which immediately went out over the air (they share radio broadcasts with Cole Harbour RCMP detachment). The broadcast said that Mr. Cain was a suspect in a break and enter on Taranaki Drive. They knew that Mr. Cain was on house arrest at the time, because each of the officers had, on more than one occasion in the past, gone to 14 Jackson Road to do compliance checks on him.

[13] The radio transmission naming Mr. Cain as a suspect in the break and enter had only mentioned the location where the offence had occurred, that he was a suspect, and that "jewellery" had been stolen. No specifics of any of the stolen items were provided.

[14] The vehicle containing both HRMP Constables Fiander and Hill arrived at 14 Jackson Road. Both officers knew Mr. Cain by sight. Cst. Hill had done between five to ten compliance checks on Mr. Cain in the past. Cst. Fiander had also had occasion to do so more than once.

[15] They knocked on the door to his apartment for between five to ten minutes and received no answer. They then checked the perimeter of the property but did not observe anyone. So they went back to their unmarked car which was parked in proximity to the front door of the apartment building, and waited to see if the accused showed up.

[16] Meanwhile, HRMP Constables Latreille and Anderson arrived at the building. They had also heard the radio transmission, and had gone to conduct their own compliance check on Mr. Cain. They parked around back of the building at 8:22 p.m., and waited. Cst. Anderson had testified that either Cst. Fiander or Cst. Hill had notified them via radio that Mr. Cain did not appear to be home, and that he was arrestable for breach of his house arrest conditions if located outside.

[17] At 9:22 p.m., Mr. Cain was observed walking down a path that led from the adjacent apartment building at 113 Albro Lake Road. Cst. Anderson, who had performed compliance checks on Mr. Cain approximately five times in the past, said, "that's Mr. Cain". His partner, Cst. Latreille, who had been sitting in the passenger seat of their unmarked vehicle (which at the time was about 20 feet from the rear door of Mr. Cain's apartment building) jumped out and arrested Mr. Cain for breach of his Recognizance, specifically the house arrest provisions.

[18] When arrested, Mr. Cain was clutching a pillowcase. He became argumentative and uncooperative. He was pushed face first against the car. He refused to let the bag go.

[19] Cst. Hill testified that he and Cst. Fiander came around to the back of the building (in response to a call for assistance) at this juncture. He and Cst. Latreille say that Cst. Hill removed the pillowcase from Mr. Cain's grasp. Cst. Anderson said he was the one to remove it from Mr. Cain and gave it to Cst. Hill.

[20] Once he was in handcuffs, Cst. Anderson searched him. A cell phone, lighter, several gold rings and three cards, including a People's Jewellery Card with the name "Kathy Miller" on it were located on his person, in his front right pocket. From the front left pocket a small satchel bag purse was located that contained a bracelet. Anderson testified that the search was done "incident to arrest". He was not asked to elaborate further either on cross or direct.

[21] It bears mentioning that all officers involved knew that there were some exceptions to the house arrest built into Mr. Cain's Recognizance. None of them had read it.

[22] During the struggle to place Mr. Cain in handcuffs, another civilian appeared on scene, one Mr. Ross. It appeared to Cst. Hill that Mr. Cain had attempted to hand off the pillowcase to Mr. Ross during the struggle with the officers. Mr. Ross left the scene after one to two minutes had elapsed, and only after being told by the officers that he would be arrested if he did not leave.

[23] As indicated, after the bag was in Cst. Hill's possession, Mr. Cain was handcuffed. Cst. Hill then looked inside. When asked, he too testified that he did so "incident to arrest". He was not asked on cross-examination for any further explanation. He observed some loose jewellery and jewellery boxes. He did not open the boxes or inventory the bag. Approximately two minutes later, Mr. Cain was arrested for the break and enter with which we are dealing here.

[24] The bag itself was given to RCMP Constables Chiasson and LeRoux, who inventoried it and photographed it in the early morning hours of January 11, 2019.

[25] Mr. Cain argues that the search of his person could not have been properly incidental to his arrest, because his arrest for the breach of Recognizance was invalid. He contends that he was arrested without the officers having first checked to see if there was an exception to his house arrest which would have excused his

absence from the four corners of the property of 14 Jackson Road at the time. Even though all officers admitted that they knew that he had exceptions built into his Recognizance (he continues) and even though they did not have a computer in their car, they didn't bother contacting dispatch and having the terms of the Recognizance read to them over the radio.

[26] Moreover, even if the arrest had been valid, Mr. Cain argues that the officers merely testified that the search of his person was done "incident to arrest", without elaboration. He contends that it is the officer's onus to explain the search, and that this does not suffice.

[27] Then there is the bag. Mr. Cain argues that after the bag was removed from his grasp, and he was handcuffed and arrested for breach of Recognizance, what is the need to search that bag for any of the reasons subsumed under the rubric of "incident to arrest" anyway? He is handcuffed by that time and, for example, is unable to compromise officer safety any longer.

[28] Because of these shortcomings, the accused contends that there was no valid search and seizure conducted, his Charter rights were violated, and that the evidence must be excluded under s. 24(2) of the *Canadian Charter of Rights and Freedoms* ("the *Charter*").

Issues

(A) Was there a valid arrest, ie. one authorized by law?

(B) If yes, were the searches of Mr. Cain's (a) person and (b) the pillowcase, incidental to that arrest?

(C) If no, what is the appropriate remedy under s. 24(2) of the *Canadian Charter of Rights and Freedoms*?

Analysis

[29] Let me begin by outlining, in general, a bit of the applicable law. This was a warrantless search. There is a presumption that a warrantless search is unreasonable. The Crown bears the burden of rebutting that presumption by showing that the search was reasonable and justified in the circumstances. It must do so on the balance of probabilities.

[30] From *R. v. Collins*, [1987] 1 SCR 265, at p. 278, we note that a search will be reasonable if it is authorized by law, and if the manner in which the arrest is carried out is reasonable.

[31] The common law has long recognized a police officer's right to search incidental to arrest. However, for a search to be truly incidental to arrest, the first question that must be asked is whether the arrest itself was justified by law.

[32] With those general principles in mind, we may now turn to consider the issues.

(A) Was there a valid arrest, ie, one authorized by law?

[33] Section 495(1) states that:

> 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.
>
> [Emphasis added]

[34] In *R. v. Storrey*, [1990] 1 SCR 241, Cory J. elaborated at pp. 250-251:

> 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.
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> [Emphasis added]

[35] There is another important point to be made. We find it in *R. v. STP*, 2009 NSCA 86, where MacDonald, CJNS (as he then was) explained:

> 17. Now in this case no marijuana was ever found, nor were any of the young men so charged. So the amount involved, whether 30 grams or less, would be

purely hypothetical. Taking the appellant's argument at its strongest, I will assume, without deciding the issue, that the summary conviction regime under s. 495(1)(b) applies. Thus, to be lawful, the police would have to "find" S.T.P committing the contemplated offence, namely possession of marijuana.

18. At first blush, this may appear to be a challenge considering the fact that no marijuana was ever found. However that does not end the matter. It was still open to the judge to conclude that s. 495(1)(b) had been complied with in these circumstances. I say this because courts in this country have consistently interpreted the reference to "finds committing" in s. 495(1)(b) to mean apparently finds committing. For example, in *R. v. Janvier*, 2007 SKCA 147, the Saskatchewan Court of Appeal summarized the two leading Supreme Court of Canada decisions on this issue: *R. v. Biron*, [1976] 2 S.C.R. 56, 1975 CanLII 13, and *Roberge v. R.*, [1983] 1 S.C.R. 312, 1983 CanLII 120:

> [19] Oddly enough, there is little authority in Canada as to what is meant by "finds" a person "committing a criminal offence" in s. 495(1)(b). The two Supreme Court of Canada decisions that construe s. 495(1)(b) do so not in the context faced here, where it is necessary to determine powers of arrest to delineate a search power, but in the context of assessing police comportment for other purposes.
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> [20] In *R. v. Biron* the issue was whether a person could be found guilty of resisting arrest for a summary conviction offence if the officer had no authority to make the arrest because he did not "find" the accused "committing a criminal offence." There were several reasons given for sustaining the conviction for resisting arrest, even though the accused had been acquitted of the charge for which he had been arrested. One reason related to the construction of s. 495(1)(b).
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> [21] Martland J., writing for the majority in *Biron*, concluded that a police officer may arrest a person he or she finds "apparently committing" any offence. Notwithstanding this seeming expansion of s. 495(1)(b), he wrote:
>
> > Paragraph (b) applies in relation to any criminal offence and it deals with the situation in which the peace officer himself finds an offence being committed. His power to arrest is based upon his own observation. Because it is based on his own discovery of an offence actually being committed there is no reason to refer to a belief based upon reasonable and probable grounds.
>
> [Emphasis added]

[36] The court then references *R. v. Biron*, [1976] 2 SCR 56, per Martland, J.:

> If the reasoning in the *Pritchard* [(1961), 130 C.C.C. 61] case is sound, the validity of an arrest under s. 450(1)(b) can only be determined after the trial of the person arrested and after the determination of any subsequent appeals. My view is that the validity of an arrest under this paragraph must be determined in relation to the circumstances which were apparent to the peace officer at the time the arrest was made.
>
> ...
>
> ... In my opinion the wording used in para. (b), which is oversimplified, means that the power to arrest without a warrant is given where the peace officer himself finds a situation in which a person is apparently committing an offence.
>
> [Emphasis added]

[37] Next, we examine what information was available to Cst. Latreille before he arrested Mr. Cain for the breach of his Recognizance:

1. He knew Mr. Cain was subject to house arrest (albeit with some exceptions) pursuant to a Recognizance.
2. He knew that Mr. Cain was now considered a suspect in a break and enter which had occurred a couple of hours earlier and in which some unspecified jewellery was taken.
3. He knew from information supplied by Cst. Fiander over the air that Mr. Cain was arrestable for breach of the conditions in his Recognizance, specifically the house arrest condition. Fiander himself was the one who had knocked at his door and received no response.
4. He observed Mr. Cain walking up the path from 113 Albro Lake Road toward his residence at 14 Jackson Road at 9:22 p.m. the evening of January 10, 2019, clutching a pillowcase in his hand.

[38] When I view the constellation of circumstances that preceded Mr. Cain's apprehension, this was a valid arrest. It follows that there was no unreasonable search or seizure, or arbitrary detention or imprisonment of the accused pursuant to ss. 8 and 9 of the *Charter*. I will explain.

i) S. 495(1)(a) – reasonable grounds to believe indictable offence had been committed or was about to be committed

[39] It is certainly clear that Cst. Latrielle had been told over the air by Cst. Fiander (incidentally, one of the officers who had attended Mr. Cain's apartment, knocked for five to ten minutes, received no response, and walked around the perimeter of 14 Jackson Road and saw nobody, let alone Mr. Cain) that Mr. Cain was arrestable for breach of his Recognizance. He knew that Mr. Cain was subject to house arrest conditions, and, moreover, saw him outside, walking to 14 Jackson Road via the path leading from 113 Albro Lake Road.

[40] Those are reasonable and probable grounds, viewed objectively. Subjectively, having heard Cst.'s Latreille, Anderson, Hill and Fiander testify, I am satisfied that they had all formed the requisite subjective belief that Mr. Cain was arrestable for this reason.

ii) S. 495(1)(b) – "finds committing" (apparently)

[41] Even if the "apparently finds committing" standard (in other words "the summary conviction regime") is applicable, Mr. Cain was observed outside of the perimeter of 14 Jackson Road, therefore, apparently committing an offence when picked up. While in some circumstances, an officer may choose to do so, it was not necessary that these officers, who all knew that Mr. Cain had some exceptions to his house arrest conditions, actually review the Recognizance first, then investigate as to whether he had indeed been off of the premises for one of the reasons specified in the Recognizance, prior to arresting him.

[42] Such an onus would often amount to an unworkable impediment. In this case, it would effectively cast the officers in the role of judges, requiring them to determine whether Mr. Cain had a "reasonable excuse" for being apparently outside of the perimeter of 14 Jackson Road at 9:22 p.m. at night.

[43] Moreover, in this case, it would also incorrectly conflate "reasonable excuse" with "defence". Consider the provisions of s. 145(3):

> Every person who is at large on an undertaking or recognizance given to or entered into before a justice or judge and is bound to comply with a condition of that undertaking or recognizance, and every person who is bound to comply with a direction under subsection 515(12) or 522(2.1) or an order under subsection 516(2), and who fails, without lawful excuse, to comply with the condition, direction or order is guilty of

> (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
>
> (b) an offence punishable on summary conviction.
>
> [Emphasis added]

[44] Had Mr. Cain actually been charged with the offence for which he was initially arrested (breach of Recognizance), the Crown would merely have had to prove beyond a reasonable doubt that the accused was bound by a condition of his Recognizance on the date in question to be on the property of 14 Jackson Road, and that he was discovered off of it. It would not have to disprove the existence of a "lawful excuse" at the time. Rather, the onus would then shift to the accused to provide that lawful excuse. The fact that he was in compliance with one of the exceptions to his house arrest condition at the time that he was arrested (if the accused were able to establish that) would be a "lawful excuse" which the court would recognize at his trial, if the matter were to proceed that far.

[45] In actual practice, where a subsequent police or Crown investigation later revealed that he had been off of the property because of a valid exception to the house arrest condition, it would likely mean that the Crown would not proceed with the charge. But this would not affect the antecedent validity of the arrest, where, as in this case, the officer had the requisite subjective belief either that an offence under s. 145(3) had been committed (s. 495(1)(a)), or (if the summary conviction standard was applicable) that Mr. Cain was in the process of "apparently committing" (s. 495(1)(b)) the offence.

(B) If yes, were the searches of Mr. Cain's (a) person and (b) the pillowcase, incidental to that lawful arrest?

[46] Section 8 of the *Charter* tells us that Mr. Cain has the right to be secure against unreasonable search or seizure. If the search is shown to be incidental to arrest, it would not be unreasonable.

[47] When the case law on the subject is boiled down, we find that the police have the ability at common law to conduct a search of an accused incident to a lawful arrest and to seize anything in his possession, if done for the purposes of ensuring the safety of the police and the accused, to prevent his escape, or to provide evidence against him.

[48] There is no need for the existence of reasonable and probable grounds to believe that the accused is in possession of weapons or evidence as a prerequisite

to such a search, provided that the search is not done abusively or done with constraints that are disproportionate to the contextual circumstances. (See for example, *Cloutier v. Langlois*, [1990] 1 SCR 158)

[49] The accused cites *R. v. Caslake*, [1998] 1 SCR 51 as authority for the proposition that the "…searches [subsequent to arrest] of the Defendant, bag and person were unreasonable as the searching police officers provided no reason as to why the searches were necessary other than that they were "incidental to arrest" (*Defence brief, pp. 6 – 7*).

[50] *Caslake* dealt with a situation where an RCMP officer, several hours after arresting the accused for possession of narcotics, conducted an inventory search of the accused's impounded car and found cash and two individual packages of cocaine.

[51] The court explained at para. 15:

> Since search incident to arrest is a common-law power, there are no readily ascertainable limits on its scope. It is therefore the courts' responsibility to set boundaries which allow the state to pursue its legitimate interests, while vigorously protecting individuals' right to privacy. The scope of search incident to arrest can refer to many different aspects of the search. It can refer to the items seized during the search. In Stillman, Cory J. for a majority of this Court held, at para. 42, that bodily samples could not be taken as incident to arrest, as a search so invasive is an "affront to human dignity". It can also refer to the place to be searched. The appellant argues that the power of search incident to arrest does not extend to automobiles. I would reject this position. Automobiles are legitimately the objects of search incident to arrest, as they attract no heightened expectation of privacy that would justify an exemption from the usual common law principles referred to above.
>
> [Emphasis added]

[52] It continued at paras. 16 – 17:

> 16. Scope can also refer to temporal limits on the power of search, which are at the core of the case at bar. The appellant suggests that the delay between the search and the arrest (six hours in this case) was too long to make the search "incident" to the arrest. In my opinion, the Court should be reluctant to set a strict limit on the amount of time that can elapse between the time of search and the time of arrest.
>
> 17. In my view, all of the limits on search incident to arrest are derived from the justification for the common law power itself: searches which derive their legal

> authority from the fact of arrest must be truly incidental to the arrest in question. The authority for the search does not arise as a result of a reduced expectation of privacy of the arrested individual. Rather, it arises out of a need for the law enforcement authorities to gain control of things or information which outweighs the individual's interest in privacy. See the Law Reform Commission of Canada, Report 24, Search and Seizure (1984), at p. 36. (For a more in-depth discussion, also see Working Paper 30, Police Powers -- Search and Seizure in Criminal Law Enforcement (1983), at p. 160.) This means, simply put, that the search is only justifiable if the purpose of the search is related to the purpose of the arrest.
>
> [Emphasis added]

[53] At para. 25, CJ Lamer (as he then was) summarized the authorities thus:

> 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. Delay and distance do not automatically preclude a search from being incidental to arrest, but they may cause the court to draw a negative inference. However, that inference may be rebutted by a proper explanation.

[54] He continues:

> 26. The police arrested the appellant because they believed that he was either buying or selling the nine-pound bag of marijuana which Natural Resource Officer Kamann found. In this case, the appellant was arrested in his car, which had been observed at the place where the marijuana was discovered. Had Constable Boyle searched the car, even hours later, for the purpose of finding evidence which could be used at the appellant's trial on the charge of possessing marijuana for purpose of trafficking, this would have been well within the scope of the search incident to arrest power, as there was clearly sufficient circumstantial evidence to justify a search of the vehicle. However, by his own testimony, this is not why he searched. Rather, the sole reason for the search was to comply with an RCMP policy requiring that the contents of an impounded car be inventoried. This is not within the bounds of the legitimate purposes of search incident to arrest.
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> 27. Naturally, the police cannot rely on the fact that, objectively, a legitimate purpose for the search existed when that is not the purpose for which they

> searched. The *Charter* requires that agents of the state act in accordance with the rule of law. This means that they must not only objectively search within the permissible scope, but that they must turn their mind to this scope before searching. The subjective part of the test forces the police officer to satisfy him or herself that there is a valid purpose for the search incident to arrest before the search is carried out. This accords with the ultimate purpose of s. 8, which, as Dickson J. stated in *Hunter, supra*, is to prevent unreasonable searches before they occur.
>
> [Emphasis added]

[55] Finally, at para. 29, His Lordship concludes the issue with the observation:

> The fact that this search was not, in the mind of the searching party, consistent with the proper purposes of search incident to arrest means that it falls outside the scope of this power. As a result, the search cannot be said to have been authorized by the common law rule permitting search incident to arrest.
>
> [Emphasis added]

[56] In this case, the stated reason for the search was "incident to arrest". This response is broad enough to encompass the three legitimate possible objectives of such a search. At no time did the accused, through his counsel, ask either peace officer to "fine tune" the response, or explain whether it was one, two, or all three of these objectives which were in play.

[57] In this case, the officer's response was that the search was done "incident to arrest" – the response is consistent with three legitimate possible objectives to which such a search could aspire. At no time did counsel elicit any information from the police officer which was inconsistent either objectively, or in the mind of the police officer, with one or more of these objectives.

[58] Recall that the problem in *Caslake* was that the officer said the search of the trailer was done because of "police policy" – which is not consistent with it having been done incident to arrest, as it could not possibly encompass any of the three legitimate objectives of such a search. In contrast, the search of Mr. Cain's person, and of the pillowcase that he was clutching, clearly were.

[59] For example, one legitimate reason for the search would be protection of the police officers or the accused. The officers were attempting to arrest the accused for breach of Recognizance. He was also known to be a suspect in a break and enter that had only just occurred. He also is known to be on a Recognizance as a result of one that occurred six to seven months earlier. These include crimes of

violence – it is certainly reasonable for the police to determine whether he has a weapon on his person.

[60] What about the bag then? Recall, the accused argues that once he was handcuffed and the bag was being held by Cst. Hill, no issue of police safety remained at that point. Hence, there was no need to search it.

[61] With respect, I disagree. He was arrested while clutching it. It was in plain view. He would not let it go without a struggle and it interfered with police attempts to handcuff him.

[62] Having taken the bag, the police clearly cannot give it back to Mr. Cain after he is handcuffed - he is being arrested. What are they to do with it? They must maintain possession of it. What if it contains a loaded weapon which could injure Cst. Hill or one of his colleagues if mishandled? Clearly they had to know what was inside of it.

[63] Moreover, the searches were done in an appropriate manner. Mr. Cain was not subjected to a search that was intrusive, or unreasonable. Cst. Hill merely opened the pillowcase – there is no evidence that it had been stapled, taped or clamped shut. He did no more than take a look, only long enough to see that there was some jewellery and jewellery boxes therein.

(C) If no, what is the appropriate remedy under s. 24(2) of the *Canadian Charter of Rights and Freedoms*?

[64] The foregoing is sufficient to dispose of the application. That said, even if I had concluded that Mr. Cain's rights had been infringed in the circumstances of this case, I would not have granted relief under s. 24(2) of the *Charter*, which states:

> (2) 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 the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[65] *R. v. Grant*, 2009 SCC 32, instructs us that in the event of a breach of an accused's *Charter* protected right(s), we are to weigh three competing principles, to determine whether to grant the relief sought, and/or whether any other relief is warranted:

1. the seriousness of the breach;
2. the impact on the accused's *Charter* protected rights; and
3. society's interest on the adjudication of the case on its merits.

[66] To deal with the first factor, "the seriousness of the breach", the Supreme Court of Canada said in *R. v. Paterson*, [2017] 1 SCR 202 at para. 43:

> The court's task in considering the seriousness of *Charter*-infringing state conduct is to situate that conduct on a scale of culpability. As this Court explained in *Grant* 2009 (at para. 74), "admission of evidence obtained through inadvertent [page228] or minor violations ... may minimally undermine public confidence in the rule of law", while "admitting evidence obtained through a wilful or reckless disregard of *Charter* rights will inevitably have a negative effect on the public confidence in the rule of law". The Crown's submissions implicitly invoke this distinction, arguing that "the police intended to enter the apartment solely to seize the marihuana, with no 'ulterior purpose'".

[67] Here, the police clearly proceeded in good faith. There was no flagrant disregard for Mr. Cain's rights. The officers' actions were not random or abusive. They clearly believed that he was arrestable for the breach, and that he was also a suspect in a violent crime, for which he was also facing related charges from an incident seven to eight months before. They acted throughout with integrity, and for the purposes clearly related to the arrest which they felt that they were undertaking lawfully. This favours inclusion.

[68] Although the second factor often favours exclusion ("impact on his *Charter* protected rights") it is of lesser importance in this case. It was merely his pockets and the pillowcase which were searched. This has a lesser impact on his bodily integrity and hence his *Charter* protected rights.

[69] The third, both individually and in concert with the first, much more strongly favours inclusion. The fruits of the search provided crucial, real evidence of a serious crime.

[70] Such crimes strike at the very essential need of every member of our society to feel secure personally, and to feel that their possessions are secure in the supposed safety of their homes. Additionally, the more that crimes such as this occur, the greater the chance that a vulnerable person may be at home at the time of the break-in, even if this had not been the perpetrator's intent.

Conclusion

[71] The balancing of factors under a *Grant* analysis would clearly favour inclusion, even if I had concluded that a breach occurred. As a consequence, the accused's motion under s. 24(2) to exclude the evidence would have been dismissed, even if I had concluded that a breach of his *Charter* protected rights had occurred.

[72] Mr. Cain's application is dismissed.

Gabriel, J.