IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Scott , 2004 NSSC 11

Date: 2004/01/19
Docket: S.K. Cr. 200210
Registry: Kentville

Her Majesty the Queen

v.

Jennifer Madeline Scott

DECISION

Judge:	The Honourable Justice A. David MacAdam
Heard:	November 25, 26, 27, 28, 2003 and December 1, 2, 3, 4 and 5, 2003, in Kentville , Nova Scotia
Written Decision:	January 19, 2004
Counsel:	Shane G. Parker, for the Crown Brian V. Vardigans for the Defence

By the Court:

[1] In the early minutes of January 18, 2003 the Needs Convenience Store in New Minas, Nova Scotia was robbed. Nicole Regan, the clerk on duty, was pricing items when she heard the door open. She turned to see a person wearing a full ski mask, with the eyes and mouth cut out. The person appeared to have a 3-4 inch knife and said, "No fuss, just the money". Ms. Regan gave the person money from the till, totalling less than $100.00 in bills and change, in a plastic Needs grocery bag. The robber left the store turning to the right.

[2] Ms. Regan described to police the robber as having a female voice, small build, wearing clothing, such as a black kind of tight pants, a winter jacket and ski mask.

[3] While the robber was leaving the store a customer, Amanda Benedict, was entering. She provided to police a description, that included thin faced, small framed, boney hips, her own height or shorter, an approximately 35-40 year old female. Ms. Benedict also indicated the robber left on foot, leaving the store in the direction of Commercial Street.

[4] Following the departure of the robber, the New Minas Detachment of the RCMP was advised. Cst. Candow arrived on the scene, with Cst. Byrne and Cst. Babstock arriving shortly thereafter. A number of other officers, including some who were having coffee at the Coldbrook Tim Hortons, responded to the police broadcast of the robbery and attended at the Needs Store. Two of the responding officers, Cst. Huett and Cst. de la Mothe stopped a taxi with two female passengers while on their way to the Needs Store. The two occupants of the taxi were checked at 12:23 a.m. with negative results.

[5] Cpl. Bushey was called at home at 12:14 a.m. and arrived at the Store by 12:21 a.m. with Police dog Tim. Cpl. Bushey and Tim, with Cst. Branch as back up, began to track footprints in the snow from the west side of the Needs Store, northerly to the parking lot behind an apartment building at 2001 Alders Ave. As they reached the parking lot they observed a red car, believed to be a Grand Am or Grand Pre, moving and quickly leaving the parking lot. Cst. Branch says from the noise of the vehicle he concluded it turned left, being westerly, on Alders Ave. in the direction of Crescent Ave. Cpl. Bushey asked Cst. Branch to radio a request to have the vehicle stopped.

[6] At 12:25 a.m. Cst. Huett and Cst. de la Mothe were checking a male pedestrian, wearing a ski mask, when they heard the broadcast by Cst. Branch asking that a red vehicle, possibly a Grand Pre or Grand Am, be stopped. They left proceeding easterly on Commercial Street.

[7] Cst. Bushey testified the footprints he followed led to the back entrance of the apartment building. He said there were other prints leading from the back door to where he had first observed the red car in motion. He said, in his view, the red car had left more quickly than the conditions at the time warranted.

[8] Cst. Huett and Cst. de la Mothe proceeding easterly on Commercial Street, turned left onto Crescent. They came across a red car driving towards Commercial Street. They turned around and followed the red car.

[9] Meanwhile Cst. Mugford, who also had been at the Coldbrook Tim Horton's on a break, had responded to the Needs Stor. After being apprised of what was then known, he left to patrol the area looking for a female that matched the description given of the robber. He returned to the Needs Store and was asked by Cst. Babstock to take a statement from Ms. Benedict who, he understood, had apparently arrived at the Store as the robber was leaving. He had begun to speak to Ms. Benedict when he heard the broadcast by Cst. Branch to stop a red car that had left the parking lot behind the apartment building on Alders Ave. After the witness agreed to remain in the police vehicle, he left proceeding westerly on Commercial Street.

[10] As Cst. Mugford approached the intersection of Commercial Street with Crescent a red car entered Commercial and turned into the Shell Station on Commercial Street. He followed it, but concerned for his passengers safety, parked approximately 30 feet from where the red car had stopped by a gas pump. Cst. Huett and Cst. de la Mothe followed Cst. Mugford into the Shell Station. Cst. Byrne arrived, in his police vehicle, a few minutes later.

[11] When Cst. Mugford exited his police car, the two occupants of the red car were in the process of leaving the red car. The driver was a female and the passenger a male. Cst. Mugford advised the occupants that they were investigating an armed robbery. He conducted a search of the male passenger, identified as a Mr. Halliday, and Cst. de la Mothe did a pat search of the female, identified as the accused, Ms. Scott. Each said the searches were conducted out of concern for officer safety. No evidence was seized by the police at the Shell Station from either occupant of the red car, nor, apparently, from the red car itself.

[12] The evidence at this point is seemingly contradictory. One of the former occupants of the red car pumped gas, one apparently paid for the gas, one purchased cigarettes and one appears to have used the washroom. Some police witnesses at the Shell Station say that Ms. Scott and Mr. Halliday carried out these activities without being followed by any police officer while others suggest a police officer remained close by when the occupants either went to the washroom, paid for the gas, or purchased the cigarettes. Ms. Scott said, at all times, she was closely followed by a police officer, and identified Cst. de la Mothe as the police officer who had most often followed her as she went into the Shell store, and on the 5 to 6 occasions she went outside, in the cold, to smoke a cigarette.

[13] Cst. Mugford conducted a computer check of Mr. Halliday and learned he was on parole and had a record. Cst. de la Mothe carried out a similar check of Ms. Scott, with negative results.

[14] The police officers, particularly Cst. Huett, said they were in contact with other officers who were investigating at the Needs Store. Cst. Byrne, indicated at the Shell Station, he was to keep an eye on the two occupants. He said apart from when one was in the washroom, they were always in sight and, on cross, said to Defence counsel that if one had left their line of vision, one of the officers would have followed.

[15] Other officers at the Shell Station said they were free to go, but acknowledged no one told Ms. Scott or Mr. Halliday they could leave. Cst. de la Mothe testified she asked them if they minded waiting and that they agreed to wait. She said she didn't tell Ms. Scott she had to stay. Ms. Scott, she said, never indicated she wanted to leave. Ms. Scott stated she asked when they could leave and was told the police were still investigating.

[16] Cst. Huett said they were on Crescent Street when they met a wine-coloured Grand Am. They turned around and called in advising the other cars in the area. With respect to the weather, he said it was very cold and snowing a bit. He testified they asked Mr. Halliday and Ms. Scott to stay because of Cpl. Bushey having said he tracked a person from the Needs Store to the back of the apartment building, where he observed a car leaving and that possibly the person or persons in the car were involved in the robbery. Ms. Scott was closest in the physical description, they had been given of the robber, although he agreed her clothing did not match the description of the clothing worn by the robber.

[17] Cst. Huett, as noted, was in touch with the members at the Needs Store. At 1:05 a.m. Cst. Babstock and Cst. Doyle viewed the Needs Convenience

Store surveillance tape showing the robbery. At 1:10 a.m. Cst. Doyle advised Cst. Huett to arrest and bring them in. At 1:10 to 1:15 a.m., from speaking with Cst. Doyle and from what he observed at the Shell Station, including the description of the robber, and the physical appearance of Ms. Scott, Cst. Huett said he and Cst. Doyle decided to arrest both occupants and take them to the office for further questioning. He said they were concerned that otherwise evidence would be destroyed before Ms. Scott's apartment was searched. Cst. Huett said at 1:15 he arrested both occupants. Cst. de la Mothe said she was told to detain and bring Ms. Scott to the office, but was not told to arrest her. This apparent inconsistency may, or may not, be explained by the fact it was Cst. Huett who arrested Ms. Scott while Cst. de la Mothe's role was to bring her to the office.

[18] At 1:14 to 1:18a.m. Cst. de la Mothe advised Ms. Scott she was being detained for the robbery at the Needs Convenience Store and read her the police cautions and her *Charter* rights. On the way to the detachment Ms. Scott asked to stop at her apartment to get her 11 year old daughter. Cst. de la Mothe replied that they were going directly to the detachment office.

[19] Ms. Scott, at the detachment, asked to speak to legal counsel. Cst. de la Mothe facilitated access and at 1:43 a.m. she spoke to a lawyer for the first time. By 1:48 to 1:51 a.m. there was a brief conversation between Cst. de la Mothe and the accused. Cst. de la Mothe asked if she would be agreeable to a consent search of her apartment. The accused said, "I'm not talking about anything until I see my daughter". Cst. de la Mothe did not respond. She left the room and talked with Cst. Doyle. On instructions from Cst. Doyle, at about 2:00 a.m., Cst. de La Mothe, Cst. Huett and Ms. Scott drove to Ms. Scott's apartment at 2001 Alders Ave. to pick up her daughter.

[20] At about 2:30 a.m. Cst. Doyle and Cst. Huett spoke to Ms. Scott about her consenting to a search of her apartment. After Cst. Doyle read to Ms. Scott the consent search form, that included a statement that she was a suspect in the robbery under investigation, and was entitled to contact legal counsel, she asked to speak to counsel. At approximately 2:45 a.m. Ms. Scott spoke with a lawyer for the second time. Following talking to the lawyer she signed the consent to the search of her apartment.

[21] At 3:00 a.m. Cst. de la Mothe, Cst. Huett, Cst. Mugford, Cst. Byrne with Ms. Scott and her daughter attended at 2001 Alders Ave. A number of items were seized at the apartment, including from a storage closest in or near the dinning room, a balaclava with holes cut out and a jacket with pink sleeves. Shortly after 5:00 a.m. Cst. Babstock interviewed Mr. Halliday, who

implicated Ms. Scott and told him about Ms. Scott saying she intended to rob the Needs Store and her coming back to the apartment to change, and to leave the bag with the money. Later on in the morning he advised where her clothes used in the robbery could be found.

[22] Ms. Scott testified she and Mr. Halliday had decided to go to the Shell Station to get gas and cigarettes and from there intended to go to a Tim Horton's for coffee. When they pulled into the pump and exited their car, a police officer came over and said there had been a robbery, and they wanted to check things out. On cross she said she was told they were investigating a robbery, but only after been asked to put her hands on her car. She said okay. She said Cst. de la Mothe did a pat down search of her. After the search she said she asked if she could pump gas and received an affirmative reply. She said she did not know what she was permitted to do. She said she was nervous. She asked if she could pay for the gas and again received an affirmative response. Cst. de la Mothe went in the Store with her. She provided the officers with identification. She said the farthest she was from any officer was 2 to 3 feet. Cst. de la Mothe went in the Store when she went in. She said it was freezing and apart from when she went out to smoke she stayed in the Store. On re examination she said she smoked more than normal because she was nervous, and during the approximately 40 minutes at the Shell Station she had 5 to 6 cigarettes. When she went out to smoke Cst. de la Mothe would follow her.

[23] She said she never went anywhere alone that night. She said she didn't feel free to go, and she was never told she was free to go.

[24] She testified she asked Cst. Byrne how long it was going to take. She said she wanted to go home. He replied that they were checking things out and it should only be a few minutes. On cross she said she asked this 3 to 5 times and received a similar answer each time. She said they were not asking her questions, but they were keeping an eye on her.

[25] She agreed she was not put in handcuffs until after she was arrested. She also agreed on cross that she never, at any time, asked to leave.

PART II- Points in Issue

1. Did the police have grounds to intercept the vehicle driven by Ms. Scott?

2. Was Ms. Scott detained at any time prior to her arrest and being taken to the detachment shortly after 1:00 a.m.?

3. If Ms. Scott was detained, was it “arbitrary” or did the Police have "articulable cause"?
4. Because of the failure to proivde Ms. Scott with the police caution or her *Charter* rights, prior to the arrest, is there any evidence that should be excluded.
5. Was the consent to search lawfully obtained and should evidence of the search and the items found be excluded?

Part III

1. Did the police have grounds to intercept the vehicle driven by Ms. Scott?

[26] As the Crown submits in its written submission, the police have a general duty to investigate and prevent crime *(R v. Stenning*, [1970] S.C.R. 631; *Moore v. The Queen*, [1979] 1 S.C.R. 195), and this is the fundamental basic starting premise for the lawful detainment of citizens.

[27] In its’ pre-hearing written submission the Defence suggested the stopping of Ms. Scott was illegal. During his oral submission Defence Counsel did not appear to take issue with the initial interception of Ms. Scott, but focussed on the fact that, after providing identification, Ms. Scott was not told she was free to go. Nevertheless, having raised, at least initially, the validity of the initial interception, I believe the law and circumstances surrounding the stopping of her vehicle should be considered.

[28] A.C.J. MacDonald, in *R. v. Bowles* [2001] N.S.J. No. 405, considered an allegation of arbitrary detention contrary to Section 9 of the *Charter*, where the motivating factor for the interception of the motor vehicle in question was also, as here, not for reasons of highway safety. As noted by the Associate Chief Justice, where highway safety is not the motivating factor, the right to detain motorists is limited. He then, at paragraph 20, and following , references the decision of the Ontario Court of Appeal in *R. v. Simpson* [1993] O.J. No. 308, where the Court also considered the issue of a police officer stopping a motorist for reasons other than highway safety. The Associate Chief Justice then continues:

> ... In that particular case a police officer stopped a motorist simply because he had exited a suspected "crack house". The motivation, as in the case at bar, was therefore to investigate a drug-related offence.

Without a highway safety basis, any police authority would therefore be limited to the common law. Beginning at page 9, Doherty J.A. assesses police authority in this context:

> Once, as in this case, road safety concerns are removed as a basis for the stop, then powers associated with and predicated upon those particular concerns cannot be relied on to legitimize the stop. Where the stop and the detention are unrelated to the operation of the vehicle or other road safety matters, the fact that the target of the detention is in an automobile cannot enhance the police power to detain that individual.
>
> The search for a legal authority for this stop and detention must go beyond s. 216(1) of the Highway Traffic Act.
>
> The law imposes broad general duties on the police but it provides them with only limited powers to perform those duties. Police duties and their authority to act in the performance of those duties are not co-extensive. Police conduct is not rendered lawful merely because it assisted in the performance of the duties assigned to the police. Where police conduct interferes with the liberty or freedom of the individual, that conduct will be lawful only if it is authorized by law. That law may be a specific statutory power or it may be the common law. As I have rejected the only statutory authority put forward to support this detention (s. 216(1) of the Highway Traffic Act), I will now consider whether the common law authorized this detention.

Following an exhaustive review of the Canadian and the so-called American "articulable cause" jurisprudence on this issue, Doherty J.A. at page 15, formulated the following objective test:

> These cases require a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation. The requirement that the facts must meet an objectively discernible standard is recognized in connection with the arrest power: R. v. Storrey, [1990] 1 S.C.R. 241 at p.

> 251, 53 C.C.C. (3d) 316 at p. 324, and serves to avoid indiscriminate and discriminatory exercises of the police power. A "hunch" based entirely on intuition gained by experience cannot suffice, no matter how accurate that "hunch" might prove to be. Such subjectively based assessments can too easily mask discriminatory conduct based on such irrelevant factors as the detainee's sex, colour, age, ethnic origin or sexual orientation. Equally, without objective criteria detentions could be based on mere speculation. A guess which proves accurate becomes in hindsight a "hunch". In this regard, I must disagree with R. v. Nelson (1987), 35 C.C.C. (3d) 347, 29 C.R.R. 80 (Man. C.A.), at p. 355 C.C.C., p. 87 C.R.R. where it is said that detention may be justified if the officer "intuitively senses that his intervention may be required in the public interest". Rather, I agree with Professor Young in "All Along the Watch Tower", *supra* at p. 375:
>
> In order to avoid an attribution of arbitrary conduct, the state official must be operating under a set of criteria that at minimum, bears some relationship to a reasonable suspicion of crime but not necessarily to a credibly-based probability of crime.

[29] This passage has been approved by the Supreme Court of Canada in *R. v. Jacques*, [1996] 3 S.C.R. 312.

[30] In the present circumstances there were a number of objectively discernable facts known to the police at the time they intercepted the motor vehicle being operated by the accused:

1. At or shortly after midnight of January 17th, 2003, the Needs Convenience Store at New Minas was the subject of an armed robbery.
2. The perpetrator of the robbery was identified by the Clerk in the Store as being a female of small stature.
3. The information provided to the first police on the scene was that the perpetrator left the premises and turned to the right.
4. Within minutes following the robbery, a police dogmaster with a dog and a backup Constable located tracks leading from the side of the Needs

Convenience Store in a northerly direction towards the parking lot of an apartment building located at 2001 Alders Avenue, New Minas.

5. The police dog followed the tracks, which were also observable to the dogmaster. Upon reaching the parking lot, both the dogmaster and the backup Constable noticed a motor vehicle "quickly" leaving the parking lot.

6. The dogmaster and the backup Constable identified the vehicle as coloured red and either a Grand Am or Grand Prix and immediately called in a radio broadcast to other police officers asking that the vehicle be stopped.

[31] Having regard to these circumstances, it is clear the stopping of the car by the officers was warranted, and in fact, a legitimate exercise of police investigative discretion. The officers were entitled to have the vehicle checked, in order to determine whether or not the occupants were involved, in any way, with the armed robbery that had just occurred. There was nothing in how the vehicle was stopped that was inappropriate, and, indeed, the vehicle pulled into the Shell Service Station located on Commercial Street, New Minas, and stopped by one of the pumps and was followed in by the police vehicles. The stop was a perfectly legitimate exercise of police discretion, and there was no infringement of Section 9 by the stopping of the red automobile operated by the accused.

2. Was Ms. Scott detained at any time prior to her arrest and being taken to the detachment shortly after 1:00 a.m.?

[32] Steel, J.A. in delivering the judgment of the Manitoba Court of Appeal in *R v. C.R.H.*, [2003] M.J. No. 90 (C.A.) carried out a review as to what constitutes a detention. She concluded it is a contextual analysis taking into account all the words and conduct of the participants so that the relationship between police and the individual is fully appreciated.

[33] After noting that the leading case in this area is *R. v. Therens et al*, [1985] 1 S.C.R. 613 she observes that there must be a finding of detention before a right to counsel is engaged, and there must be a finding of detention, before the question of arbitrariness is determined under s. 9 of the *Charter*. She also comments that the mere fact of conversation, between a citizen and a police officer, does not raise a presumption of detention. At paras 18-19 she says:

> The use of word "detention" necessarily connotes some form of compulsory restraint. It involves the act of holding or keeping

> someone against his will for a period of indeterminate length. Conversation does not necessary result in a detention within the meaning of the Charter. There must be something more. There must be a deprivation of liberty.
>
> The Therens case set out the test for determining whether a detention had occurred. A detention under the Charter can arise in one of three situations. Most obviously, someone is detained when they are deprived of their liberty by physical constraint. Second, there is a detention when a police officer or other agent of the state assumes control over the movement of a person by a demand or direction which prevents or impedes access to counsel and failure to comply with the demand may have significant legal consequences.

[34] Justice Steel at paras 20-23, 25-28 and 30 further observes:

> The third situation described in Therens has come to be referred to as psychological detention and is described by **Le Dain J.** (at p. 644):
>
> > Although it is not strictly necessary for purposes of this case, I would go further. In my opinion, it is not realistic, as a general rule, to regard compliance with a demand or direction by a police officer as truly voluntary, in the sense that the citizen feels that he or she has the choice to obey or not, even where there is in fact a lack of statutory or common law authority for the demand or direction and therefore an absence of criminal liability for failure to comply with it. Most citizens are not aware of the precise legal limits of police authority. Rather than risk the application of physical force or prosecution for wilful obstruction, the reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand. The element of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary. Detention may be effected without the application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist.

The elements of a police demand or direction, coupled with a voluntary compliance that results in a deprivation of liberty, are essential to the existence of a psychological detention. These elements assure that a common thread - control over the movements of the individual - runs through all three types of detention identified in the *Therens* test. Without some control over an individual's movements, there is no detention - not even psychological detention. The only distinction is one of degree. In the third category of detention, the control emanates from the accused, who submits to a police demand or direction by restraining their own freedom of movement in the reasonable belief that they have no other choice.

Although the Therens test has evolved over the years [citation omitted], those two fundamental elements, a demand coupled with a reasonable belief that there is no other option but to comply with that demand, still form the basic skeleton of the concept.

. . .

When investigating an offence or investigating whether one has been committed, police are entitled to question anyone whom they believe may have some useful information, although they have no power to compel an answer.

. . .

In the above cases, police officers had been investigating the commission of a specific offence, but even if the encounter between the police officer and the individual is completely random, no psychological detention will arise without the presence of the two elements of the *Therens* test.

. . .

A review of the cases reveals that there is no easy test or single determining factor that will lead to a conclusion that a psychological detention took place. Rather, there are a number of factors that must be weighed:

> Whether it can be said that a person has been detained on any given occasion depends on the circumstances at that time. There is no simple test. The criteria to which courts have referred include demand or direction as opposed to request, language used and tone of voice, compulsion including psychological compulsion and, it seems to me, place of contact.

> [Grafe, at p. 272, per Krever J.A.]
>
> To the above factors must be added the subjective believe of the accused. The personal circumstances of the accused, such as age, intelligence and level of sophistication, may be considered in determining whether an accused had a subjective belief that he was detained. However, a subjective belief is not determinative. The test has an objective component. The belief must be a reasonable one. In summary, it is a contextual analysis. All of the words and conduct of all the participants, as well as the environment in which the questioning took place, should be examined. The court should look at the entire relationship between the questioner and the person being questioned. See R. v. Johns (M.) (1998), 106 O.A.C. 291 at para 28.

[35] The Crown says the accused only became detained at 1:14 a.m. when Ms. Scott was arrested, and informed she was being taken to the RCMP detachment. At this time Cst. de la Mothe read her the *Charter* rights under s.10 and the police caution. The accused was placed in a police car for transport to the detachment. Crown says Ms. Scott was then a suspect.

[36] In Crown's submission up until 1:14 a.m. the accused was not detained as defined in *R. v. C.R.H., supra*. The accused and Mr. Halliday were free to pump gas, pay for the gas, purchase cigarettes, use the bathroom, and voluntarily agreed to wait while the police investigated a robbery. The accused was not cuffed, restrained, or placed in the police car. Under the definition derived through case law, the accused was not detained.

[37] The Defence says the detention occurred and continued from when Ms. Scott's vehicle was stopped by the police. The presence of three police vehicles and four police officers at the New Minas Shell indicated both subjectively to the accused, and objectively to any reasonable observer that she was not free to leave.

[38] There is no magic in the phrase " you are detained". Detention is a question of fact, not dependent, on whether some police officer has said a person is detained, or used some similar phrase. Cst. de la Mothe stated she asked Ms. Scott if she minded staying while the police continued with their investigation, and Ms. Scott assented. In *R. v. Hawkins*, [1993] 2 S.C.R. 157 an accused voluntarily attended at the police station, after a police officer telephoned him requesting an interview and stating it could be at his home, place of business, or at police headquarters. Although he was given the standard police warning he was not informed of his right to counsel under

Section 10 (b) of the *Charter*. The police officer testified he did not do so because he was of the view the accused was not detained at the time. His inculpatory statement was admitted by the trial judge. The Newfoundland Court of Appeal ruled he was subject to a psychological detention, and his rights under s. 10(b) had been triggered. Justice Cory, in delivering the reasons of the Supreme Court of Canada, stated, on the facts, the accused was not detained and therefore there was no infringement of the accused's s. 10(b) rights.

[39] I am satisfied Ms. Scott was in fact detained shortly after she exited her vehicle. Notwithstanding the evidence of some of the police officers that she was free to go, they gave every indication to the contrary. Although their evidence as to the sequence of events, during the approximately half hour they spent at the new Minas Shell is not consistent, the message to Ms. Scott appears quite clear. She could go about her business at the Shell Station, including possibly going to the washroom, but it would be a different story if she tried to leave. Cst. Byrne said as much, his role was to keep her in view and if she was to leave his line of vision, one of the police officers would follow her. In fact there was evidence, although not by Cst. de la Mothe, that when Ms. Scott went to the washroom, Cst. de la Mothe also moved in the direction of the washroom.

[40] There is the evidence of Cst. de la Mothe that when Ms. Scott asked when she could leave, she responded the investigation was still ongoing. She did not tell Ms. Scott she was free to go. Also Cst. Byrne said he was asked to stay with the individuals until a course of action was decided. He testified one of them asked what was going on. He told them they were at preliminary stage of an investigation, and he would give them more as soon as he could. He said they were curious about what was going on, 3 - 4 times. He told them he would let them know as soon as he could. If indeed Ms. Scott was free to go, it was a well kept secret from her.

[41] Perhaps clearest of all is the evidence of Cst. Huett. On cross examination he agreed the focus of the investigation, while at the Shell Station, never shifted from Ms. Scott. Although earlier testifying that Ms. Scott could have walked away, the following exchange with Defence Counsel reflects the status of Ms. Scott, as well as Mr. Halliday, while at the Shell Station.

> "Q. And to be held by three officers and two police cars for up to 40 minutes before you're arrested, you would call that detention, would you not?
>
> A. A detention?

> Q. Were these two people not detained?
> A. I would say they were being detained in regards to the on-going investigation, yes."

3. Was the detention of Ms. Scott "arbitrary" or did the Police have "articulable cause"?

[42] In *R v. Simpson* (1993), 79 CCC (3d) 482, at p. 500, (Ont. C.A.) Doherty J.A.**,** on behalf of the Court**,** stated:

> In my opinion, where an individual is detained by the police in the course of efforts to determine whether that individual is involved in criminal activity being investigated by the police, that detention can only be justified if the detaining officer has some "articulable cause" for the detention.

[43] Clearly the police are not permitted to "arbitrarily" detain a person, while investigating their possible involvement in criminal activity. They are, however, permitted to continue their investigation after a person has been placed under arrest.

[44] In the Crown's submission, *R. v. Simpson,* supra, is authority for the proposition that once the police have made a lawful arrest under section 495 of the *Criminal Code*, the detention of the accused does not become unlawful, merely because the police are continuing with the investigation. At p. 503, Justice Doherty, refers to finding support for the fixing of limits to police interference with an individual's right to move to instances where the police can demonstrate articulable cause. He refers to Justice Lamer, as he then was, in *R. v. Mack* (1988), 44 C.C.C. (3d 513, [1988] 2 S.C.R. 903, and then says:

> I should not be taken as holding that the presence of an articulable cause renders any detention for investigative purposes a justifiable exercise of a police officer's common law powers. The inquiry into the existence of an articulable cause is only the first step in the determination of whether the detention was justified in the totality of the circumstances and consequently a lawful exercise of the officer's common law powers as described in Waterfield, supra, and approved in Dedman, supra. Without articulable cause, no detention to investigate the detainee for possible criminal activity could be viewed as a proper exercise of the common law power. If articulable cause exists, the detention may or may not be justified. For example, a

> reasonably based suspicion that a person committed some property-related offence at a distant point in the past, while an articulable cause, would not, standing alone, justify the detention of that person on a public street to question him or her about that offence. On the other hand, a reasonable suspicion that a person has just committed a violent crime and was in flight from the scene of that crime could well justify some detention of that individual in an effort to quickly confirm or refute the suspicion. Similarly, the existence of an articulable cause that justified a brief detention, perhaps to ask the person detained for identification, would not necessarily justify a more intrusive detention complete with physical restraint and a more extensive interrogation.

[45] While at the Shell Station, neither Ms. Scott nor Mr. Halliday, although detained, were arrested until approximately 1:15 a.m.. At issue, is the extent to which the police were permitted to detain them while carrying out their further investigations. As noted by Justice Doherty, at p. 502 of *R. v. Simpson,* supra, the requirements necessary to support an arrest are not necessarily required at the detention stage.

[46] Similarly, the "articulable cause" necessary to detain a person while further investigations are carried out, although more than required to effect a stop would be less than required to make an arrest.

[47] In it's written submission, the Crown submits, as analogous to the present case are the circumstances and conclusion in *R. v. Hunt*, [2003] B.C.J. No. 2005 (Q.L.) (B.C. C.A.) wherein the Court held that the police had articulable grounds on the following facts:

> ... On March 30, 2001, the Bank of Montreal in Saanich was robbed by a single person. The robbery took place at approximately 3:20 p.m. The police attended moments after the robbery had taken place. The description that was given to the police was as of follows. The person was a white male in his early 20s with either dirty brown or sandy blonde hair. He was wearing a light blue or a bright blue jacket along with a baseball cap. He was seen to be running westbound on Pear Street immediately after the robbery. There is a golf course which is situated west of the bank. The appellant was arrested in the northwest side of that golf course some 15 to 20 minutes after the robbery had taken place. According to the police, he matched the general description of the person who robbed the bank. It was there

> that the police searched him. They said they did so on the grounds that they believed that the person who robbed the bank had a weapon. That information had been conveyed to them by the persons in the banks. While they were conducting that search they found the 30 $100 bills.
> ...
> When the appellant was detained he was walking in a westbound direction on the golf course at the northwest section of the course. According to the police he was looking over his shoulder, and was looking from side to side. He did that a number of times. He was 1.5 kilometres from the bank.

[48] The Crown says like in *Hunt* the police in the present case had a general description matching the suspect upon her detainment.

[49] In addition to the known circumstances at the time of the radio broadcast to intercept the red vehicle, the police, during the detention at the New Minas Shell, became aware:

1. The physical description of Ms. Scott matched the general description of the robber, although her clothes did not.
2. The male passenger had just completed a term of parole and had a criminal record, including for property offences.

[50] There were, in the circumstances, "articulable cause" for detaining Ms. Scott, while the police further continued their investigation as to whether she was involved in the robbery. It is also clear, however, that Ms. Scott received neither the police caution, nor her *Charter* rights during this period of her detention.

4. Because Ms. Scott was not given the police caution or Charter rights prior to her arrest, is there any evidence that should be excluded?

[51] It is clear that at or about 1:15 a.m. when Ms. Scott was arrested by Cst. Huett, Cst. de la Mothe gave her the police caution and her *Charter* rights. It is also evident that prior to agreeing to a consent search of her apartment, she had contact with a lawyer on two occasions. The first occasion was after she was taken to the detachment, and the second after she was asked

whether she was prepared to sign the consent. Crown says there was nothing incriminating found on Ms. Scott during the search at the New Minas Shell, nor was there any incriminating evidence provided by Ms. Scott prior to her being transported to the detachment. On the evidence there were no conversations between the police and Ms. Scott about the robbery while at the Shell Station. There is, therefore, no evidence to be presented as to statements or actions by Ms. Scott relative to the offences with which she has been charged.

[52] Since there is no evidence of statements or incriminatory conduct by Ms. Scott during the time at the Shell Station, there is no need to consider whether any such evidence should be excluded under s. 24(2) of the *Charter*.

5. Was the consent to search lawfully obtained and should evidence of the search and the items found be excluded?

[53] Other than in the context of unlawful detention and unlawful arrest, no issue is taken by the Defence in respect to the consent search.

[54] As Crown suggests, in *R. v. Wills* (1992), 70 CCC (3d) 529 (Ont. C.A.) Doherty J.A., states in respect to a consented search, the Crown must, on the balance of probabilities, establish:

> (i) there was consent, expressed or implied;
> (ii) the giver of the consent had the authority to give the consent in question;
> (iii) the consent was voluntary in the sense that that word used in *Goldman*, [(1979), 51 CCC (2d) 1 (S.C.C.)] and was not the product of police oppression, coercion, or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;
> (iv) the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;
> (v) the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and
> (vi) the giver of the consent was aware of the potential consequences of giving the consent.
>
> Does the accused, suspect or target "understand *in a general way* the nature of the charge or potential charge which he or she may face?" (Page 14 of 19 of Q.L. format).

[55] As noted, other than seeking exclusion of the evidence obtained on the search, because it arose from an unlawful arrest, no issue is taken by the Defence with the consent to the search. I am satisfied, all of the factors outlined by Justice Doherty are here present.

(A) The Arrest

[56] It would appear the arrest of Ms. Scott at 1:15 a.m. was without reasonable and probable grounds and therefore unlawful. Having in mind the police required reasonable and probable grounds, both subjectively as well as "from an objective point of view", it is apparent they lacked the latter. I am satisfied on the evidence of Cst. Doyle and Cst. Huett, they believed they had sufficient cause. Nevertheless there was little, if anything beyond her physical appearance and location in a car that left a parking lot, sometime after the robbery, and to which the police had been drawn, to connect Ms. Scott to any crime. There was sufficient to warrant further investigation but not necessarily to arrest her.

[57] In *R. v. Storrey*, supra, there was the accused's possession and ownership of a 1973 blue Thunderbird vehicle that was the same type of vehicle used in the offence and which was stated by the court as being a "relatively unusual and uncommon car", the fact the accused had been stopped on several occasions driving the car, the fact two of the victims picked out the picture of an individual who bore a remarkable resemblance to the accused, and his past record of violence. The crown's submission that the circumstances in *R.v. Storrey* are analogous to the present case cannot be supported. The identification of the accused with the crime is substantially stronger in *R. v. Storrey* than in the present.

[58] Effectively, Defence counsel says, that concludes the application in favor of the accused, and the subsequently obtained evidence must be excluded. As part of it's submission, Counsel observes that any evidence obtained from Mr. Halliday would not have been available to the police had they not unlawfully first detained, and later arrested Ms. Scott. In counsel's submission the only basis for arresting Mr. Halliday was the fact he happened to be in the car with Ms. Scott. Apart from that fact, he says, there was no basis for arresting Mr. Halliday. In Counsel's submission there is no s. 24(2) examination because, first, the detention and then the arrest were unlawful. In a post hearing written submission Counsel refers to the Supreme Court of Canada decisions in *Burlington v. The Queen*, (1995) 97 C.C.C. (3d) 385 and *Regina v. Goldhart*, (1996) 107 C.C.C. (34d) 481.

Neither authority, in my view, supports his premise that any evidence obtained by the Crown, following an unlawful arrest, is to be excluded without regard to any examination on whether pursuant to s. 24(2) it ought to be excluded.

[59] In *R. v. Goldhart*, supra, the accused was successful in challenging the admissibility of marijuana plants found in a search. The Crown called another accused, who had pled guilty to the offence , notwithstanding having been advised the evidence found on the search was being questioned, and could be excluded under s. 24(2), of the *Charter*. There was a *voir dire* on whether this witness's evidence should be excluded under s. 24(2) on the ground it had been derived from the unreasonable search and seizure. The trial judge permitted the evidence on the basis it's admission would not adversely affect trial fairness. The Crown successfully appealed from the decision of a majority of the Ontario Court of Appeal allowing an appeal from the trial judge's decision. Justice Sopinka, for the majority, found the nexus between the impugned evidence and the *Charter* breach was remote and the evidence was not obtained in a manner that infringed or denied a *Charter* right or freedom. S. 24(2) was therefore not engaged and not available to exclude the evidence, which was properly admitted at trial.

[60] In *R. v. Burlington*, supra, the accused was charged with first degree murder. Justice Iacobucci, on behalf of the majority, found the accused's right to counsel was violated by the police in three respects. The Court held derivative evidence, including evidence concerning the finding the gun, the identification of the gun, and the accused's statement to his girlfriend the following day, should be excluded. It was held that the admission of evidence that could not have been found, without the improper conduct by the police, was likely to affect trial fairness and, thus, should ordinarily be excluded under s. 24(2).

[61] On two occasions Ms. Scott was provided with her police caution, and right to counsel, and on two occasions had access to legal counsel before she signed the consent to search her apartment. Although there were not sufficient grounds to arrest Ms. Scott at 1:15 a.m., the police had sufficient "articulable cause" to detain her while continuing their investigation. As such, and in view of the fact she was given the police caution and her rights to counsel, the police were in a position to obtain the consent to search without having to violate any of her rights. Additionally, the evidence obtained from Mr. Halliday, and which would clearly have supported a search warrant of Ms. Scott's residence, is, like the evidence in *R. v.*

Goldhart, only tenuously connected to the arrest of Ms. Scott. On the evidence, Mr. Halliday volunteered the information about Ms. Scott while being interviewed about any involvement he had in the robbery.

(B) The Evidence

[62] To the extent the evidence arises out of any unlawful arrest of Ms. Scott this would trigger a s.24(2) review to determine if the impugned evidence should be excluded. As observed by Cacchione J. in *R. v. Kane* (D.), (1998), 174 N.S.R. (2d) 40, at p. 48, paras. 29 & 30:

> In *R. v. Collins*, [1987] 1 S.C.R. 265; 74 N.R. 276; 56 C.R. (3d) 193; [1987] 3 W.W.R. 699; 38 D.L.R. (4th) 508; 33 C.C.C. (3d) 1; 13 B.C.L.R. (2d) 1; 28 C.R.R. 122, the Supreme Court of Canada outlined the factors to be considered under s. 24(2) of the Charter as being:
>
> 1. factors which relate to the fairness of the trial;
> 2. the seriousness of the violation and;
> 3. the effect of the exclusion of evidence on the repute of the administration of justice.

1. Trial Fairness

[63] Cory, J. in *R. v. Stillman* supra, at para. 119, observing that trial Judges may approach the trial fairness factor by dividing the analysis into two steps, summarized as follows:

> 119 The summary itself can be reduced to this short form:
> 1.Classify the evidence as conscriptive or non-conscriptive based upon the manner in which the evidence was obtained. If the evidence is *non*-conscriptive, its admission will not render the trial unfair and the court will proceed to consider the seriousness of the breach and the effect of exclusion on the repute of the administration of justice.
> 2. If the evidence is conscriptive and the Crown fails to demonstrate on a balance of probabilities that the evidence would have been discovered by alternative non-conscriptive means, then its admission will render the trial unfair. The Court, as a general rule, will exclude the evidence without considering the seriousness of the breach or the effect of exclusion on the repute of the administration of justice. This

> must be the result since an unfair trial would necessarily bring the administration of justice into disrepute.
>
> 3. If the evidence is found to be conscriptive and the Crown demonstrates on a balance of probabilities that it would have been discovered by alternative non-conscriptive means, then its admission will generally not render the trial unfair. However, the seriousness of the Charter breach and the effect of exclusion on the repute of the administration of justice will have to be considered.

[64] To the extent the evidence obtained during the search may be regarded as conscriptive, in that it was discovered during a search consented to by the accused, it is evident, the police would have discovered the same evidence following their interview with Mr. Halliday and providing the evidence had not been relocated or destroyed in the meantime. In this regard, relevant is the conclusion of Cacchione J. in *Kane*, at pp. 49-50, para. 38:

> I now turn to the question of whether this information was discoverable through a non-conscription means or whether it was inevitable that this information would have been discovered. As noted above, the Crown has the onus of establishing discoverability on a balance of probabilities. The Crown has not discharged its onus in this regard. There is simply no evidence before me which establishes that the evidence would have been discovered irrespective of the **Charter** breach. It is therefore not necessary to proceed to the next stage in the **Collins** analysis. I find that the use of this conscripted evidence would render the trial unfair and therefore this evidence is excluded pursuant to s. 24(2).

[65] Here, as noted to the contrary, it is clear from the information later provided by Mr. Halliday, the police would have discovered the evidence, or at least, been provided with information as to where the evidence had been stored at the time.

2. The Seriousness of the Breach

[66] As suggested by the Crown, the seriousness of the breach is reduced if there was no ongoing disregard for the accused's *Charter* right and the police acted in good faith. *(R. v. Belnavis* (1997), 118 CCC (3d) 405 (S.C.C.).

Further, Crown says, the seriousness is reduced if the breach was inadvertent *(R. v. Caslake*).

[67] The Crown submits the police acted in good faith in securing Ms. Scott's written consent and afforded her counsel on two separate occasions.. The Crown, citing *R. v. Daley* (2001), 156 CCC (3d) 225 (Alta. C.A.), submits that if the accused gives permission to search, even if the consent is not valid, this will favour the admission of the evidence under 24(2) of the *Charter*.

[68] The violation is clearly not serious, in that the police could have detained Ms. Scott although, in my view, lacking the objective evidence to constitute reasonable and probable grounds to arrest her. Although she was only given her police caution and *Charter* rights 30 to 40 minutes after she was detained, the consent to search, resulting in the impugned evidence, occurred after she was provided both her police caution and *Charter* rights.

3. The effect of the admission of the evidence on the repute of the administration of justice

[69] Crown says the evidence is essential for the success of the prosecution, and that this should favour the reception of the evidence, as would the good faith of the police, citing *R. v. Caslake* (1998), 121 CCC (3d) 97 (S.C.C.), at page 113 and *R. v. Lauda* (1999), 136 CCC (3d) 358 (Ont. C.A.). Crown references *R v. Lauda* as also holding that the severity of the offence will favour the admission of the evidence.

[70] Crown says the physical items located during the search match those worn by the robber, and as such are highly probative, and as well notes the seriousness of these offences.

[71] In all the circumstances, the exclusion of this evidence, would have a serious adverse effect on the administration of justice. In fact, there is in the circumstances, no legal justification to exclude the evidence obtained during the consent search.

(C) Conclusion on the Consent Search

[72] I am satisfied there is nothing in the evidence at this hearing that would bring into question the validity of the consent search, and notwithstanding the unlawfulness of the arrest, the evidence of the search and the items found, are not to be excluded having regard to s. 24(2)of the *Charter.*

[73] The application to exclude the evidence of the search of Ms. Scott's apartment and the items therein found, is therefore denied.

J.