Court of Queen's Bench of Alberta

Citation: R v Mohamed, 2019 ABQB 499

Date: 20190704
Docket: 180065187S1
Registry: Edmonton

Between:

Her Majesty the Queen

Respondent

- and -

Illay Mohamed

Appellant

Reasons for Judgment
of the
Honourable Mr. Justice V.O. Ouellette

Summary Conviction Appeal
From the Oral Reasons for Judgment by
The Honourable Judge S.R. Creagh
Delivered on January 17, 2019

I. Introduction

[1] At 1:30 a.m. on January 16, 2018, the police were on proactive patrol in southeast Edmonton, a high property crime area. Part of the proactive patrol was the detection of stolen vehicles and in particular, Ford trucks were targeted. Further, the proactive stops were done in order to ensure that the vehicles were not in fact stolen without the owner's knowledge. If the

police officer saw such a truck, his policy was to query the license plate. If the query revealed that the registered owner was of a different gender than the driver, he would stop the truck to see if the driver had the consent of the registered owner to drive the vehicle. Mr. Mohamed was stopped while driving a Ford F150 truck, which was registered to a female. He was detained, arrested and eventually charged with driving while disqualified and a breach of probation, both offences under the *Criminal Code of Canada*. He was convicted of those offences at trial and this is his appeal of those convictions.

II. Ground of Appeal/Issue

[2] The Appellant's ground of appeal is that: "The trial judge erred in [the] legal test employed in determining that the police conduct did not breach the accused's [*Canadian Charter of Rights and Freedoms*] rights."

[3] Based on written and oral submissions on appeal, I have reframed the core issue as: Can an otherwise authorized legal stop and detention of the driver of a motor vehicle, for the purposes of administration and enforcement of the *Traffic Safety Act*, RSA 2000, c T-6 become an unauthorized arbitrary detention, if the other stated purpose for the stop is the investigation and discovery of criminal activity?

III. Standard of Review

[4] In order to determine the standard of review applicable to this appeal, the recent comments of the majority of the Supreme Court of Canada, in ***R v Le***, 2019 SCC 34 at paras 23-24, are pertinent.

[5] The Court stated, *inter alia*:

> [23] ...Questions of law on an appeal attract a standard of correctness (*R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527, at para. 18). Questions of fact attract a palpable and overriding error standard (para. 18). The application of the law to a given factual matrix, that is, whether a legal standard is met, amounts to a question of law and attracts a correctness standard (*Shepherd*, at para. 20; [*R v Grant*, 2009 SCC 32, [2009] 2 SCR 353], at para. 43).
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> [24] In this judgment, we have respected, and used, the trial judge's findings of fact to assess whether the lower courts were correct in their assessment of when a detention occurred. [...] An appeals court is entitled to have a different view of the impact that police conduct would have on a reasonable person in the shoes of the accused.
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> [*Emphasis added*].

[6] In the present appeal, and as identified earlier, the issue involved is whether an authorized legal stop and detention can morph into an unauthorized arbitrary detention in the context of the *Traffic Safety Act* and the *Charter*. That question invites an "application of the law to a given factual matrix, that is, whether a legal standard is met," and as such amounts to a question of law.

[7] Consequently, I conclude that the applicable standard in this appeal is correctness: ***R v Le*** at paras 23-24; ***Housen v Nikolaisen***, 2002 SCC 33, [2002] 2 SCR 235.

IV. Overview of Facts

[8] Although the trial judge never made any particular findings of facts, nor did she state that she was accepting the entirety of the police officer's testimony, it is reasonable to conclude that she in fact accepted the entirety of the police officer's testimony as becomes clear from the Reasons for Judgment. With that in mind, I will review the facts as testified to by the police officer.

[9] On January 16, 2018, the police officer was conducting proactive patrol at approximately 1:30 a.m. (Trial Transcript [TT], July 26, 2018, at 2/36). The purpose of the proactive patrol was to ensure that vehicles were not stolen without the owner's knowledge (TT at 17/30-31). The police officer observed a Ford F150 truck, which is commonly on their list for stolen vehicles (TT at 3/13). The police officer then queried the license plate on this vehicle and found that the registered owner was listed as a female – and he observed that a male driver was operating the truck (TT at 2/39-40). He went on to state that it is his particular practice to query license plates, and if there is a mismatch – that is, a male driver is operating the vehicle and the truck is registered to a female, he will conduct a traffic stop in order to ensure that the male driver has all of his documents in proper order and whether he is wanted on any outstanding warrants, or that the driver is abiding by any release conditions (TT at 2/41; 3/1, 30-39; 8/7-8).

[10] The police officer went on to state that there is a lot of property crime in his southeast division and in particular, Ford trucks are commonly stolen. He further went on to state that the Ford truck is "kind of a hot target vehicle that we target" (TT at 4/ 13-16).

[11] In the report that the police officer created in relation to this stop, it stated that the reason for conducting the traffic stop was simply that the registered owner was a female and the driver was a male (TT at 9/18-19; 10/31-33). He went on to state that he has a standard policy that in any case where the gender of the driver does not match the gender of the registered owner, he will conduct a vehicle stop (TT at 10/8-11). His standard policy also is applied if there is a significant age differential between the driver and registered owner (TT at 10/11-14).

[12] The officer further went on to state that, whether it be a gender mismatch or age difference, the reason for the stop was in order to ensure that the registered owner was in fact operating the motor vehicle (TT at 10/14-15). And that the reason he needed to identify the driver was to ensure that he had all the proper documentation and whether or not he was wanted on any outstanding warrants (TT at 10/19-20).

[13] When questioned on whether there was any requirement that the registered owner be the one operating the motor vehicle, he agreed there was no such requirement; however, the officer added that he has the authority to conduct a traffic stop for a variety of reasons (TT at 10/24-27; 11/24-31). The stop was to determine whether or not the vehicle may have been stolen without the registered owner's knowledge at the time (TT at 11/26-31). Additionally, that the policy of conducting such a vehicle stop is to then check the documents of the driver and also determine if there is a revelation that the driver has warrants or is bound by conditions. That is, the reason why he conducted this stop was "in order to possibly gain that information" (TT at 10/35-40).

[14] As a result of the police officer's policy, he stopped Mr. Mohamed and upon conducting a search of information that was provided, including a Canadian Police Information Centre system (CPIC) query, he determined that Mr. Mohamed was a criminally prohibited driver and on probation, and charged him accordingly.

V. Provincial Court Decision

[15] The Provincial Court rendered its decision on January 17, 2019. The trial judge found that the stop was authorized by provincial statute (and in particular s 166 of the *Traffic Safety Act*) and was therefore authorized by law. As a result, the detention was not arbitrary.

[16] The trial judge adopted the reasons of another Provincial Court Judge in the case of ***R v Ng***, 2014 ABPC 62, 2014 CarswellAlta 598, which was very similar to the circumstances and facts leading to the stop in this case. The trial judge went on to state that, as in ***Ng***, the police officer targeted the vehicle in question because the particulars of the registered owner obtained after running the license plate did not appear to match that of the driver. Further, the type of vehicle being driven was commonly a stolen type in the area being patrolled by the police officer.

[17] In ***Ng***, the Provincial Court Judge found that the police officer stopped the vehicle on the basis that the driver was clearly not the registered owner, that:

> The driver was a young male, a demographic cohort that is frequently involved in stealing motor vehicles, and although the vehicle was not reported stolen, owners are often not aware of such theft for a period of time. (para 19)

[18] As in this case, the police officer in the ***Ng*** case testified that the stop of the vehicle was to determine if the driver had the registered owner's consent to drive the vehicle. In the ***Ng*** case, the police officer described the enquiry as "two-fold" (para 19):

> First, it went to checking if the vehicle was stolen as in, does this driver have permission of the registered owner to be operating this motor vehicle?
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> Second, it went to whether this driver was legally permitted to drive under provincial legislation, as in, does the driver have a valid driver's license?

[19] Ultimately, the Provincial Court Judge followed ***Ng*** and stated that the vehicle stop was authorized under the *Traffic Safety Act* and it made no difference that the police officer was also effecting the traffic stop to investigate potential criminal activity.

VI. Law

[20] Section 9 of the *Canadian Charter of Rights and Freedoms* guarantees freedom from arbitrary detention.

[21] A detention that is authorized by law is not arbitrary unless the law itself is arbitrary. In ***R v Grant***, 2009 SCC 32 at para 54, [2009] 2 SCR 353, the Supreme Court stated:

> The s. 9 guarantee against arbitrary detention is a manifestation of the general principle, enunciated in s. 7, that a person's liberty is not to be curtailed except in accordance with the principles of fundamental justice. As this Court has stated: "This guarantee expresses one of the most fundamental norms of the rule of law. The state may not detain arbitrarily, but only in accordance with the law" (*Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at para. 88). Section 9 serves to protect individual liberty against unlawful state interference. A lawful detention is not arbitrary within the meaning of s. 9 ([*R v Mann*, 2004 SCC 52] at para. 20), unless the law authorizing the

> detention is itself arbitrary. Conversely, a detention not authorized by law is arbitrary and violates s. 9.

[22] The Supreme Court had also observed earlier in ***R v Mann***, 2004 SCC 52 at para 20, [2004] 3 SCR 59, that:

> A detention for investigative purposes is, like any other detention, subject to *Charter* scrutiny Section 9 of the *Charter*, for example, provides that everyone has the right "not to be arbitrarily detained". It is well recognized that a lawful detention is not "arbitrary" within the meaning of that provision. Consequently, an investigative detention that is carried out in accordance with the common law power recognized in this case will not infringe the detainee's rights under s. 9 of the *Charter*.

[23] The Alberta Court of Appeal in ***R v Dhuna***, 2009 ABCA 103 at paras 22-25, 448 AR 296, had this to say about the scope of *Traffic Safety Act* check-stop and detention:

> [22] In [*R v Orbanski*, 2005 SCC 37, [2005] 2 SCR 3], the Supreme Court noted that the authority of police officers to check the sobriety of drivers is based on powers that are necessarily implicit in the general statutory vehicle stop provision of highway safety legislation and on their duty to enforce the impaired driving provisions of the *Criminal Code*. Similarly, in our view, the officer in the present case was acting under dual authority when he detained the appellant – under the *TSA* to check for registration and ownership of the vehicle, and under his duty to enforce the *Criminal Code* provisions against theft of a motor vehicle.
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> [23] In these circumstances, there is no error in the trial judge's conclusion that the appellant was being stopped pursuant to ss. 166 and 167 of the *TSA* to check vehicle registration on the basis of suspicious and evasive driving activity observed by the police. The detention was lawful and not arbitrary.
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> [24] The appellant also suggests that the circumstances here do not fit within the provisions of the *Act* because the power to request information is conjunctive with directing the driver to stop a motor vehicle and here the vehicle was already stopped. In other words, if the driver is no longer driving, the *TSA* does not apply. However, s. 167 allows an officer to request documentation, including registration, from a "person driving or otherwise having care or control" of the vehicle. Because the appellant met this requirement, the submission is without merit.
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> [25] The second issue is whether the trial judge considered whether the *Mann* test was also met. Inferentially he did when, in para. 53, he found the detention was not arbitrary under s. 9 ... Here the officer had a reasonable and specific concern that the vehicle may have been recently stolen. That, coupled with the evasive driving which seemed aimed at avoiding the police and the officer's general mandate as a member of the CPS HEAT Unit to search for stolen vehicles, provided sufficient reasonable grounds for the detention.

[24] On the same issue, the Supreme Court in ***R v Nolet***, 2010 SCC 24 at paras 22, 25 reiterated:

> [22] The appeal also engages s. 9 of the *Charter* ("the right not to be arbitrarily detained or imprisoned"). A random vehicle stop on the highway is, by definition, an arbitrary detention: *Dedman v. The Queen*, [1985] 2 S.C.R. 2; *R. v. Hufsky*, [1988] 1 S.C.R. 621; *R. v. Ladouceur*, [1990] 1 S.C.R. 1257 (hereinafter "*Ladouceur (Ont.)*"); [*R v Mellenthin*, [1992] 3 SCR 615, 135 AR 1]; and *R. v. Harris*, 2007 ONCA 574, 87 O.R. (3d) 214. The detention will only be justified under s. 1 of the *Charter* (*Hufsky*, at p. 637) if the police act within the limited highway-related purposes for which the powers were conferred (*Ladouceur (Ont.)*, per Cory J., at p. 1287).
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> [...]
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> [25] The Court has ruled on a number of occasions that pursuant to statutory authority, the police officers can randomly stop persons for "reasons related to driving a car such as checking the driver's licence and insurance, the sobriety of the driver and the mechanical fitness of the vehicle": [*R v Ladouceur*, [1990] 1 SCR 1257, 40 OAC 1] *Ladouceur (Ont.)*, at p. 1287. See also *R. v. Orbanski*, 2005 SCC 37, [2005] 2 S.C.R. 3, at para. 41; *Mellenthin*, at p. 624. The courts below held that the appellants' truck was stopped for the valid purpose of carrying out an *H&TA* document check, and this issue is no longer seriously in dispute. The stop was valid. On this basis, the case is readily distinguishable from our Court's recent ruling in *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, where the accused had been pulled over for no valid purpose. The police equally exceed their powers in the Saskatchewan case of *R. v. Ladouceur*, 2002 SKCA 73, 165 C.C.C. (3d) 321 (hereinafter "*Ladouceur (Sask.)*"), where the officers set up a random stop program called "Operation Recovery" specifically to detect not only highway infractions but to "locate contraband being transported on our highways" (para. 69). For that purpose the Saskatchewan checkpoint was staffed not only with police, but on occasion customs and immigration officials, "tobacco people", wildlife officials and sniffer dogs (para. 44). The random stop program in *Ladouceur (Sask.)* was designed as a "comprehensive check for criminal activity" (para. 43) and was therefore fatally flawed from the outset.
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> [*Emphasis added*].

[25] In ***Ladouceur Sask*** – which as indicated earlier was endorsed by the Supreme Court of Canada in ***Nolet*** at para 25 – Bayda CJS (as he then was), writing concurring reasons of the majority of the Saskatchewan Court of Appeal commented (at paras 64-66):

> [64] It is well settled that a check stop that has highway safety as its aim ("to check for sobriety, licences, ownership, insurance and mechanical fitness of cars" – to use the words of Cory J. in *R. v. Mellenthin*, [1992] 3 S.C.R. 615 at 624) is lawful. It is also well settled – and was conceded by the Crown in this case – that a motor vehicle check-stop that has as its aim not highway safety, but the general detection of crime or the indiscriminate identification of criminals using the highway (an "unfounded general inquisition" to use Cory J.'s phrase in *Mellenthin* at p. 624) is unlawful.

[65] The question then arises: If both of these aims are combined in one check-stop, does the "highway safety" aim (lawful) cleanse the "general detection" aim (unlawful) to make the check-stop lawful or does the latter contaminate the former to make the check-stop unlawful? Or can both aims operate and co-exist independently, rendering that part of the check-stop with the lawful aim as lawful and that part with the unlawful aim as unlawful? In my respectful view, the combination of the two aims I have described produces an unlawful check-stop. The two aims cannot co-exist in a lawful check-stop. My reasons for reaching those conclusions are these: As noted, the lawfulness of a check-stop whose aim is highway safety stems not from the non-breach of an individual right but from a s.1 cleansing of a s. 9 breach. That cleansing effect goes only so far. It is rooted in the need for "reducing the terrible toll of death and injury so often occasioned by impaired drivers and dangerous vehicles" to use Cory J.'s words in *Mellenthin* (p. 624). The cleansing effect does not go so far as to encompass a general detection of crime and indiscriminate identification of criminals. Our society is not the kind where in the interests of reducing criminal activity generally or a particular genus of criminal activity, we authorize our police to detain citizens arbitrarily or indiscriminately on the highway or the street or wherever with a view to identifying former or potential criminals in the hope of detecting some criminal activity on their part should it happen to be then taking place. While it is true that the members of our society desire security they also desire freedom. (See: *Brown v. Durham Regional Police Force* (1998), 131 C.C.C. (3d) 1 (para 79). [Ont CA]). The force of this societal value is so great that it outweighs the lawfulness generated by a highway safety aim. To put it in other words, the arbitrary detention that creates a s. 9 breach in these cases persists.

[66] Why cannot the two aims co-exist? The notion that in conducting a check-stop a police officer can neatly compartmentalize the lawful aim separately from the unlawful one and not be influenced or affected by the latter is, in my respectful view, stretching reality to a breaking point. (This case amply illustrates this point.) Furthermore it is important not to encourage the establishment of check-stops where a nominally lawful aim is but a plausible facade for an unlawful aim. [*Emphasis added*].

[26] In ***R v Le*** at para 127, majority of the Supreme Court of Canada held:

[127] More fundamentally, in entering the backyard, the police also had what Sopinka J. in [*R v Evans*, [1996] 1 SCR 8, 131 DLR (4th) 654] referred to as a "subsidiary purpose", which exceeds the authorizing limits of the implied licence doctrine (para. 16). In *Evans*, the subsidiary purpose that vitiated any "implied licence" was the hope of securing evidence against the home's occupants (by sniffing for marijuana). Here, the subsidiary purpose was, in our view, correctly identified by Lauwers J.A. (at para. 107): "the police entry was no better than a speculative criminal investigation, or a 'fishing expedition'". It has to be recalled here that the police had no information linking any of the backyard's occupants whose identities were unknown to them to any criminal conduct or suspected criminal conduct. The doctrine of implied licence was never intended to protect this sort of intrusive police conduct.

VII. Parties' Submissions (on Appeal)

[27] The Appellant, Mr. Mohamed, argues that the trial judge erred in law when she found that there was no breach of s 9 of the *Charter* on these facts. Relying on the Supreme Court decision in ***R v Harrison***, 2009 SCC 34, [2009] 2 SCR 494, he argues that the simple fact that a person is operating a motor vehicle does not give police blanket authority to stop the vehicle and detain the person and justify this under s 1 of the *Charter*. That each vehicle stop must be considered on its own facts.

[28] He argues that the totality of the police officer's evidence shows that the officer had a policy of targeting drivers who look different from the registered owners in order to go on a fishing expedition hoping to find stolen vehicles or people with release conditions or outstanding warrants, none of which are valid purposes under the *Traffic Safety Act* or proper grounds under common law to stop an individual.

[29] He further argues that the circumstances in this case constitute a breach of s 9 *Charter* rights in that the stated purpose or aim of the stop was not for the purpose of the administration and enforcement of the *Traffic Safety Act*, but in fact a search for criminal activity, and therefore the recourse available as authorized by the *Traffic Safety Act* does not apply in this case. Additionally, that upon finding of a s 9 *Charter* breach, that the evidence flowing from the traffic stop should be excluded pursuant to s 24(2) of the *Charter*. Consequently, the Appellant requests that his conviction should be quashed and an acquittal substituted.

[30] The Respondent Crown argues that the trial judge properly found that this stop was authorized by law, namely the *Traffic Safety Act*, and since the law itself has been determined by the Supreme Court of Canada not to be arbitrary, the stop and detention of the Appellant was therefore also not arbitrary.

[31] The Crown, however, conceded that the authority to detain pursuant to the *Traffic Safety Act* does not extend beyond enforcement and administration of that law. The Crown stated the following at para 11 of their Brief:

> The Courts have made it equally clear that this authority exists only within the limited purposes set out in the authorizing Act. This does not preclude police from investigating criminal offences while enforcing traffic laws; however the authority to detain pursuant to traffic legislation does not extend beyond enforcing traffic laws.

VIII. Analysis

[32] The law in Canada is clear that police officers can randomly stop individuals for reasons related to the administration and enforcement of the traffic safety legislation. I agree with the Crown's argument that the courts have made it abundantly clear that this authority for random police stops for traffic safety purpose exists only within the limited purposes set out in the authorizing act. And that the police is not precluded from investigating criminal offences *while* enforcing traffic laws. That said, it is critical to reiterate that this authority to detain, pursuant to traffic safety legislation does *not* extend beyond enforcing traffic laws. In effect, reasonable ground is required for detention relating to criminal investigation.

[33] Based on the facts of this case, one of the reasons provided by the police officer to stop this vehicle was to check for proper driving documentation. That reason is for the purposes of

administering and enforcing the *Traffic Safety Act* and the police officer was authorized by law to detain the driver for that purpose.

[34] However, the facts of this case also disclose that this was not truly a random stop and as confirmed by the police officer, was in fact a targeted stop. The police officer further confirmed that the targeted stop was to determine if the driver of the vehicle was operating it with the registered owner's consent, whether or not the motor vehicle was stolen, and whether or not the driver may have outstanding warrants or be bound by court conditions.

[35] On the assumption that checking for "ownership" is within the scope of enforcement of traffic safety laws, for the verification of this vehicle ownership to be legitimate, it must be done in the context of a random or "arbitrary" traffic safety stop; and not through a targeted approach conducted for the purpose of a generalized and speculative criminal investigation that informed the relevant "proactive patrol." There is no provision in the *Traffic Safety Act* that requires the driver of a motor vehicle to have consent of the registered owner or for the police to investigate criminal activity such as theft of motor vehicle or driving without the owner's consent (s 335 of the *Criminal Code of Canada*), or to establish if there are any outstanding warrants for the driver. These identified purposes or aims of the police officer are not for the purpose of ensuring the administration and enforcement of the *Traffic Safety Act*, as has been identified by the Supreme Court of Canada in ***Mellenthin***, ***Ladouceur*** and ***Nolet***. As stated by the Crown, the authority to detain pursuant to traffic legislation does not extend beyond enforcing the traffic legislation.

[36] The facts of this case further lead to the conclusion that one of the purposes or aim of this traffic stop was the investigation of possible criminal activity. The evidence is that the stop was targeted and not random. In this case on appeal, the sequence of events prior to the officer's stopping of the Appellant are inconsistent with a truly random stop, which the Supreme Court of Canada confirmed in ***R v Nolet*** at para 22 is "is, by definition, an arbitrary detention," albeit justifiable. Further, as testified to by the police officer, the purpose of doing a query on the license plate was to determine the identity of the registered owner, which would then lead to whether or not the driver appeared to match the registered owner. The officer further testified that in the event of a mismatch between the registered owner and the driver, that the purpose of the stop was to determine if the driver had the consent of the registered owner to operate the vehicle and in essence, to determine whether or not the vehicle was yet an unreported stolen vehicle. Lastly and in addition, the officer testified that he was trying to gain information as to whether or not the driver had any outstanding warrants or release conditions that he may be breaching. None of these purposes or aims have anything to do with the administration and enforcement of the *Traffic Safety Act*.

[37] Effectively, the "proactive patrol" which was presumably designed to address crime and disorder – and in this case, involved a preliminary query of the subject vehicle's licence plate on CPIC – is distinctive from a *random* stop program with a direct and legitimate traffic safety purpose.

[38] Based on the record before me in this appeal, the subject "proactive" patrol under appeal had a combination of two aims or objectives: (i) "to determine [who] is in possession of the motor vehicle [because] sometimes vehicles are stolen without the registered owner's knowledge" or "whether or not they are wanted on any outstanding warrants" (criminal investigation related objectives - (TT at 10/19-20; 11/26-31)); and (ii) "the need to identify the

driver in order to ensure that they have proper documentation" (traffic safety related objective - (TT at 10/19-20)).

[39] As stated in ***Ladouceur Sask***, although this targeted stop had a nominally lawful aim (i.e. *Traffic Safety Act)*, it effectively was a plausible façade for an unlawful aim (investigating speculative criminal activity). Further, as stated in ***Ladouceur Sask***, the two aims cannot coexist and the lawful traffic safety aim cannot cleanse a general detection of crime aim, which is unlawful, to make a check stop lawful.

[40] I adopt the concurring reasons of Bayda CJS (as he then was) of the Saskatchewan Court of Appeal in ***Ladouceur Sask*** at paras 64-66, as enunciated earlier in the section dealing with the applicable laws in this judgment. The s 1 of the *Charter* cleansing of a s 9 *Charter* breach does not go so far as to encompass the detection of criminal activity or the *indiscriminate* identification of criminals.

[41] Apart from the unlawfulness of a dual purpose check-stop, a "subsidiary purpose," which amounts to "a speculative criminal investigation, or a 'fishing expedition'" would vitiate the lawfulness of an authorized traffic safety enforcement and administration check-stop: ***R v Le*** at para 127.

[42] The facts of this case confirm that this was merely a speculative criminal investigation or fishing expedition, in that Mr. Mohamed was not charged with stealing the truck (s 234, *Criminal Code*), possession of stolen property (s 354, *Criminal Code*) or taking a motor vehicle without the consent of the registered owner (s 335, *Criminal Code*) or had any outstanding warrants (Part XVI, *Criminal Code*).

[43] Ironically, if the proper, limited purpose for the stop was the enforcement of the *Traffic Safety Act*, and more particularly the check for documentation of a valid driver's license, it in itself would have revealed that Mr. Mohamed was disqualified from operating a motor vehicle, and in that situation, there would *not* have been any s 9 *Charter* breach: ***R v Zolmer***, 2019 ABCA 93 at paras 6-9, 83 Alta LR (6th) 1; ***R v Dhuna*** at paras 22-25.

[44] As a result of this unlawful subsidiary purpose, the lawfulness of an authorized traffic safety enforcement and administration stop is vitiated.

[45] The lawfulness generated by the *Traffic Safety Act* is exceeded where the aim of the stop is combined with a purpose that encapsulates general detection of criminal activity or speculative criminal investigation, or a "fishing expedition."

[46] As a result, the detention of the Appellant was arbitrary and constituted a breach of s 9 of the *Charter*. Consequently, in the total circumstances of this case, Mr. Mohamed's detention was unlawful and was arbitrary.

IX. *Grant* Analysis

[47] Since I have come to a conclusion that there was on the facts a s 9 *Charter* breach, the options are to either direct that the convictions be quashed and order a new trial, or that I proceed with a s 24(2) of the *Charter* analysis to determine whether the evidence should be excluded. I am satisfied that I should proceed with the ***Grant*** analysis because Mr. Mohamed has in fact served his entire jail sentence, and further, since the trial judge did not do such an analysis, no deference is owed.

[48] The detention in this case was arbitrary and unlawful. At the time that Mr. Mohamed was detained, the police had not developed reasonable grounds to suspect that he had committed any crime, a prerequisite to a lawful investigative detention. This resulted in a breach of his s 9 *Charter* rights.

[49] As a result of the s 9 *Charter* breach, Mr. Mohamed seeks to have all of the evidence flowing from the traffic stop excluded, pursuant to s 24(2) of the *Charter*.

[50] In ***R v Le***, the Supreme Court of Canada recently reiterated the purpose and application of s 24(2) of the *Charter* at paras 139-140:

> [139] Section 24(2) of the *Charter* provides that, where evidence was obtained in a manner that infringed a *Charter* right or freedom, that evidence *shall* be excluded if it is established that, having regard to all the circumstances, its admission *would bring the administration of justice into disrepute*. While the judicial inquiry under s. 24(2) is often rhetorically cast as asking whether evidence should be excluded, that is not the question to be decided. Rather, it is whether the administration of justice would be brought into disrepute by its admission (*R. v. Taylor*, 2014 SCC 50, [2014] 2 S.C.R. 495, at para. 42). If so, there is nothing left to decide about exclusion: our *Charter* directs that such evidence *must* be excluded, *not* to punish police or compensate for a rights infringement, but because it is necessary to do so to maintain the "integrity of, and public confidence in, the justice system" (*Grant*, at paras. 68-70).
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> [140] Where the state seeks to benefit from the evidentiary fruits of *Charter*-offending conduct, our focus must be directed not to the impact of state misconduct upon *the criminal trial*, but upon *the administration of justice*. Courts must also bear in mind that the fact of a *Charter* breach signifies, in and of itself, injustice, and a consequent diminishment of administration of justice. What courts are mandated by s. 24(2) to consider is whether the admission of evidence risks doing further damage by diminishing *the reputation* of the administration of justice — such that, for example, reasonable members of Canadian society might wonder whether courts take individual rights and freedoms from police misconduct seriously. We endorse this Court's caution in *Grant*, at para. 68, that, while the exclusion of evidence "may provoke immediate criticism", our focus is on "the overall repute of the justice system, viewed in the long term" by a reasonable person, informed of all relevant circumstances and of the importance of *Charter* rights.
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> [*Emphasis in Original*].

[51] The ***Grant*** decision sets out three questions, which should be asked in guiding the consideration of whether the admission of the evidence tainted by the *Charter* breach would bring the administration of justice into disrepute. Those three questions probe: 1) the seriousness of the *Charter* infringing conduct; 2) the impact of the *Charter* protected interest of the accused; and 3) society's interest in the adjudication of the case on its merits: ***R v Le*** at para 141.

[52] This was a serious *Charter* infringing conduct by the police. The purpose of s 9 is to prohibit arbitrary detention for the purpose of protecting individual liberty against unjustified state interference. The circumstances of this case make it clear that the authority to detain an

individual in a random traffic stop is authorized by law when the stop is for the purpose of administering and enforcing the *Traffic Safety Act*. The law is clearly settled on the issue of the authority to detain pursuant to the authorizing traffic legislation and is limited to the enforcement of that particular legislation. This in fact was conceded and confirmed by the Crown (para 11 of the Crown's Brief) and clear from the cases of ***Mellenthin*** and ***Ladouceur*** (Sask.) as approved in the most recent Supreme Court decision of ***Nolet*** (2010).

[53] However, notwithstanding that settled position of the law on traffic safety enforcement, and the evidence at trial demonstrating that the police officer "fully understood the limitations upon [his] ability" to enforce the *Traffic Safety Act*, the police officer nevertheless exceeded the enforcement limit permitted by the legislation and conducted speculative criminal investigation or "fishing expedition" through the relevant "proactive patrol" that resulted in the unlawful detention of the Appellant: ***R v Le*** at para 148. Moreover, the evidence reveals that, in the circumstances of this case, there were no reasonable grounds to stop the Appellant for criminal investigation; and ultimately, that the vehicle being driven by the Appellant was neither a stolen vehicle nor one reported stolen.

[54] The second question assesses the impact on the *Charter* protected interest of the Appellant in this case. This second line of inquiry considers whether the admission of the evidence obtained through the *Charter* breach would bring the administration of justice into disrepute by asking, "whether and to what extent, in the totality of the circumstances, the *Charter* breach 'actually undermined the interests protected by the right infringed'": ***R v Le*** at para 151, citing ***Grant*** at para 76.

[55] In ***Grant*** at para 20, the Supreme Court stated that the purpose of s 9 broadly put, is to "protect individual liberty from unjustified state interference." This definition was expanded by the Court in ***R v Le*** at para 152 as follows:

> Underlying this purpose is an uncontroversial principle that is inherent to a free society founded upon the rule of law: "government cannot interfere with individual liberty absent lawful authority to the contrary" (J. Stribopoulos, "The Forgotten Right: Section 9 of the *Charter* , Its Purpose and Meaning" (2008), 40 *S.C.L.R.* (2d) 211, at p. 231). Absent compelling state justification that bears the imprimatur of constitutionality by conforming to the principles of fundamental justice (*Grant*, at para. 19), Mr. Le, like any other member of Canadian society, is entitled to live his life free of police intrusion.

[56] Although it is difficult to determine from the facts, the length of Mr. Mohamed's detention, it is reasonable to infer that it was not lengthy. However, as stated in ***R v Le***, it is not necessarily the length of the detention which will make the detention unreasonable. The Court stated the following at para 155:

> Even trivial or fleeting detentions must be weighed against the evidence of any reasonable basis for justification and when weighed against the absence of justification to investigate the young men at all, the impact of this police misconduct is heightened considerably.

[57] In this case, the breach is serious and would bring the administration of justice into disrepute because the true reason for stopping Mr. Mohamed was because he was targeted after the police determined that he was not likely the registered owner of the vehicle he was driving;

and further, that he may well be operating a yet unreported stolen vehicle. The true purpose of the stop, especially given the characterization of the police mission as "proactive patrol," was an unsubstantiated hunch or speculation or "fishing expedition" of potential criminal activity.

[58] It is true that the evidence against Mr. Mohamed of driving while disqualified and breaching a term of his probation was discoverable in any event. That is to say, he could have been randomly stopped by the police for the purposes of the enforcement of the *Traffic Safety Act* and this would have been authorized by law. However, the discovery of that information was as a result of an unconstitutional detention. This is clear from the facts. The police are not required to provide any reasons to stop any motor vehicle under s 166 of the *Traffic Safety Act*. However, that is not what occurred in this case. The police did not immediately stop the vehicle when it was first observed. The police took the time to query the license plate in what can only be said as an effort to hopefully gain information to bolster their suspicion of criminal activity, mainly that the driver appeared to be a mismatch from the registered owner and as a result, the truck might be stolen (but not yet reported).

[59] This was a serious breach because the stated purpose of the detention was unfounded and not authorized by law. Therefore, this favours a finding that the admission of the evidence in this case would bring the administration of justice into disrepute.

[60] The third question is a consideration of society's interest in the adjudication of cases on its merits. In that regard, the guidance of what is required in making that determination is provided in ***R v Le*** at para 158, which reads as follows:

> While we have observed that the third line of inquiry under *Grant* typically pulls towards inclusion of the evidence on the basis that its admission would not bring the administration of justice into disrepute, not all considerations will pull in this direction. While this inquiry is concerned with the societal interest in "an adjudication on the merits" (*Grant*, at para. 85), the focus, as we have already explained, must be upon the impact of state misconduct upon the reputation of the administration of justice. While disrepute may result from the exclusion of relevant and reliable evidence (*Grant*, at para. 81), so too might it result from admitting evidence that deprives the accused of a fair hearing or that amounts to "judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies" (*Collins*, at p. 281). An "adjudication on the merits", in a rule of law state, presupposes an adjudication grounded in legality and respect for longstanding constitutional norms.

[61] The charges against Mr. Mohamed are relatively minor when compared to the serious offences that Mr. Le faced. This is further confirmed by the sentence that was imposed upon Mr. Mohamed being 30 days' jail and that the Crown proceeded by summary conviction. As a result, this question does not provide support for admitting the evidence for the purposes of having adjudication of the case on its merits.

[62] Therefore, after considering all three lines of inquiry, as outlined in ***Grant***, I conclude that in the circumstances of this matter on appeal, the admission of the evidence would bring the administration of justice into disrepute. And as stated by the Supreme Court of Canada, "the end does not justify the means": ***R v Mack***, [1988] 2 SCR 903 at 961, 37 CRR 277, cited in ***R v Le*** at para 160.

[63] The appropriate remedy, accordingly, is the exclusion of all the evidence flowing from the check stop.

X. Disposition

[64] Having found a s 9 *Charter* breach and concluding the appropriate remedy under s 24(2) of the *Charter* is excluding the evidence from the traffic stop, Mr. Mohamed's appeal is allowed, his conviction is quashed and an acquittal is entered.

Heard on the 13th day of June 2019.
Dated at the City of Edmonton, Alberta this 4th day of July 2019.

V.O. Ouellette
J.C.Q.B.A.

Appearances:

Graham Johnson
Dawson, Ducket, Garcia & Johnson
for the Appellant

Ryan Abrams
Alberta Justice
for the Respondent