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THE ONTARIO COURT OF JUSTICE

6

HER MAJESTY THE QUEEN

v.

11

M [REDACTED] M [REDACTED]

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16

REASONS FOR JUDGEMENT

BEFORE THE HONOURABLE MR. JUSTICE S. NAKATSURU

On December 5, 2014, at Toronto, Ontario

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A P P E A R A N C E S :

Counsel for the Crown  
Counsel for Mr. Marong

Mr. E. Gilman  
Ms. A. Page

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COURTROOM 128

OLD CITY HALL

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## NAKATSURU, J., Reasons for Judgement

1 December 5, 2014

NAKATSURU, J.

Orally:

6 These charges arise out of a late night encounter  
one summer night between Mr. M [REDACTED] the accused,  
and two community response police officers on  
bicycles. Mr. M [REDACTED] was a passenger in a car  
parked the wrong way on Wellington Street. When  
the police investigated the vehicle, crack cocaine  
was found on the front passenger seat that Mr.  
11 [REDACTED] occupied and some money, allegedly proceeds  
of drug trafficking, was found on his person and  
near his seat.

16 Mr. [REDACTED] brings a Charter Application to exclude  
the crack cocaine and the money, alleging he was  
arbitrarily arrested and subjected to an  
unreasonable search.

21 Before turning to this issue, it is agreed that no  
evidence related to the charge of failing to  
comply with his recognizance was led at trial,  
therefore, Mr. [REDACTED] will be acquitted of this  
charge and this charge will be dismissed.

26 The first issue, to begin with, is that the Crown  
submitted that Mr. [REDACTED] has no standing to  
challenge the search of the vehicle. I disagree.  
To obtain relief under s.24.2, it must be Mr.  
M [REDACTED]'s right that is violated. Further, to

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1 claim relief for a s.8 violation, Mr. M [REDACTED] must  
have a reasonable expectation of privacy on the  
basis of the totality of the circumstances.

6 Firstly, Mr. M [REDACTED] alleges he was subject to an  
unlawful arrest and therefore, his rights under  
s.9 of the Charter is a personal one. The search  
conducted of the motor vehicle was a search  
incident to the arrest. Most of the proceeds were  
found on his person and the crack cocaine was only  
11 visible when Mr. M [REDACTED] was pulled from his seat  
in the car when arrested.

16 Furthermore, on the totality of the circumstances,  
I find that Mr. M [REDACTED] had a reasonable  
expectation of privacy in the monies in his pocket  
and the immediate area of the seat he occupied. I  
appreciate that there is no evidence of legal  
ownership of the car, that Mr. M [REDACTED] was not the  
driver and there is a diminished expectation of  
21 privacy in a motor vehicle. That said, passengers  
do have a reasonable expectation of privacy, even  
while seated in a motor vehicle.

26 In this case, the items in question were  
immediately adjacent to him, the \$50 and the baggy  
of cocaine was beneath him. Given that Mr. M [REDACTED]  
was essentially sitting on the bag of cocaine to  
keep it out of sight of others, the conclusion

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1 that he had a reasonable expectation of privacy in  
the bag and its contents is inescapable.

6 Turning to the merits of the Charter argument, the  
key issue that needs to be resolved is a factual  
one. Sergeant Bernardo testified that he and his  
partner, PC Salerno-Panque, observed the car in  
which Mr. [REDACTED] was in parked on Wellington,  
facing the wrong way with its headlights on, and  
engine running. They decided to investigate.

11 While his escort rode his bike around to the  
driver's side to speak to the driver, Sergeant  
Bernardo rode his bike by the passenger side. As  
he did so, in the one or two second period of time  
16 he passed, he saw Mr. M [REDACTED] with his seatbelt on,  
head down towards his lap with a \$20 bill and some  
other denominations on his lap. In his hands Mr.  
M [REDACTED] emed to be untying a white golfball sized  
plastic bag.

21 The Sergeant made it to the bumper side of the  
vehicle, he told his escort to attend the driver's  
side. He turned around and went immediately back  
to the passenger side. Sergeant Bernardo  
26 recognized Mr. M [REDACTED] with whom he had past  
dealings and with whom he was present for a search  
warrant executed three years ago when Mr. M [REDACTED]  
was arrested on the charge of possession of crack  
cocaine.

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1 Sergeant Bernardo believed that Mr. M [REDACTED] was a  
crack dealer in the Parkdale area. He was not  
aware of what occurred to those charges laid in  
the past. When he spoke to Mr. M [REDACTED] the white  
6 bag was no longer visible at this time. The money  
on his lap near his crotch was pushed to the side,  
to the left there was a \$20 bill and a \$10 bill  
near the centre console where his belt buckle was,  
partially visible, but also slid down in between  
the seat and console.

11 Sergeant Bernardo saw on the seat a small piece of  
plastic between Mr. M [REDACTED]'s legs, near his left  
leg. Sergeant [REDACTED] testified that he believed  
he had reasonable probable grounds to arrest Mr.  
16 [REDACTED]. He had recognized Mr. M [REDACTED] saw another  
drug dealer, a Mr. DaSilva(ph) in the backseat  
with whom he was familiar, along with another  
female.

21 Based on the entirety of the circumstances,  
Sergeant Bernardo decided to arrest Mr. M [REDACTED] for  
possession of cocaine for the purpose of  
trafficking. He motioned his escort to come over.  
Sergeant Bernardo asked Mr. M [REDACTED] to undo his  
26 seatbelt. The door was opened. The officer then  
took Mr. M [REDACTED] out and arrested him. He passed  
Mr. M [REDACTED] to his escort and he found the bag  
of crack cocaine on the seat where Mr. M [REDACTED]

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1 left leg was, a loose piece of plastic on the seat  
and the money in the console area.

6 The credibility and reliability of this testimony  
is a key issue in this case. Ms. Page has  
strongly challenged it. Mr. Gilman, on behalf of  
the Crown, succinctly submitted that the Charter  
issue turned on this factual finding.

11 With respect to Sergeant Bernardo's observations  
that he testified he made of Mr. M [REDACTED] while he  
rode by on his bike, I am unable to accept that  
evidence for the following reasons. One, I do not  
find that testimony to be plausible. The ability  
to observe at that time was poor. I accept P.C.  
16 Salermo-Panque's testimony that the lighting was  
poor and the area of the car was dimly lit.

21 Given the foliage of the surrounding trees, the  
streetlights were obscured. It was late at night.  
This officer was more frank about the lighting  
than Sergeant Bernardo and I prefer his evidence.  
In such lighting, it would be difficult to make  
observations into a car with its windows closed.

26 This difficulty would be made worse by the fact  
that Sergeant Bernardo rode towards the car with  
its headlights on. Just using common sense and  
experience, riding into lights and then past

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1 lights would make observations into a car even  
more difficult.

6 I also note that Sergeant Bernardo testified that  
when he was investigating Mr. M [REDACTED] at the side  
of the car, he used a flashlight to make  
observations of the interior, rather than trying  
to rely on his unaided vision.

11 Further, even on Sergeant Bernardo's testimony, he  
had even a very brief time to make these  
observations. Initially, he agreed in cross-  
examination it would have been one second. He  
later expanded that to perhaps two seconds.  
16 Regardless, it would have been extremely brief  
given that he was just riding past. Even if he  
did so slowly, it would have been a very short  
time to make these observations.

21 P.C. Salerno-Panque testified that they, the  
officers, were riding side by side essentially in  
the middle of the road, given the lack of traffic  
as they approached the car. It would not be easy  
to make the kind of observations Sergeant Bernardo  
claimed he did from that vantage point, even if it  
26 was during daylight hours.

Finally, the level of detailed observations  
claimed to have been made by Sergeant Bernardo is  
simply implausible given all the circumstances.

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1 It is not credible to me that Sergeant Bernardo  
could make out a \$20 bill with other denominations  
in the area of the lap. It is not credible to me  
that he could make out the size of the bag, the  
shape and the fact that it was tied in a knot at  
6 the top and that the accused was untying the knot  
with his two hands, like he demonstrated in cross-  
examination.

11 His testimony and the details he claimed to have  
seen are more readily explained by the knowledge  
he gained about these items after he found them on  
his search than in the one or two second  
observation he claimed to have made while on his  
bicycle riding past a dimly lit car.

16 In addition to the implausibility of his  
observations, the fact he never advised his  
partner before he went to investigate the driver  
21 that Sergeant Bernardo believed he saw a drug deal  
is not plausible to me unless, of course, he did  
not see what he testified to have seen.

26 Sergeant Bernardo testified that he directed his  
escort to the driver's side. Given the Sergeant's  
experience, if he had seen a drug deal going down  
in the car, he would have told his partner of  
that, given all the attendant dangers of drug  
dealing, including the fact that at times, that



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1 some drug dealers are armed. I do not accept his  
evidence that he did not have a chance to tell his  
partner. If he had a chance to direct his partner  
to the driver's side, he would have had the  
opportunity to tell him of his observations.

6 Further, in this case, there were four occupants  
in the car that was running. There was a real  
potential danger from a confrontation and a  
potential flight from the scene. Yet, if I accept  
11 the Sergeant's evidence, he would have let his  
escort investigate the driver on a very different  
scenario; that is of a parking infraction or at  
worse, an impaired driver.

16 I don't accept his testimony he was more focussed  
on getting to the vehicle. His partner's safety  
was obviously important. Furthermore, the  
Sergeant testified that he spoke to Mr. M [REDACTED] and  
questioned him about potential drug trafficking  
21 activities, in part to try and alert his partner  
that he had seen a drug deal.

26 I note that P.C. Salerno-Panque heard nothing of  
this conversation and it makes no sense to me that  
Sergeant Bernardo would not have taken a more  
direct approach than this roundabout way of trying  
to alert his partner, unless of course he never  
saw what he claimed to have seen in the first  
place.

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6  
11  
Although Sergeant Bernardo testified in a steadfast and experienced manner, in the main, there was a point in the cross-examination on how he could have seen what he did given the lighting, where he testified how he could have done so given the light on his bike, the streetlight and the dashboard lighting. At this point, it seemed to me he was struggling to find an answer to the line of cross, even to the point where he suggested that the light from the bicycle headlamp could shine downwards into the accused's lap area. This did not lend itself to a finding of credibility.

16  
21  
Therefore, in my factual finding, I do find that Sergeant Bernardo did not see Mr. M [REDACTED] with a white golfball sized bag in his hands unknottting it and with money in his lap. At best, what he saw as he passed the car was Mr. M [REDACTED] looking downwards into his lap. When he returned to the car, he recognized Mr. M [REDACTED] and the male in the back as individuals who had connections with drug dealing.

26  
I accept he shined his flashlight into the car and at that point he saw the money and even perhaps a portion of the white plastic. It is at this point, given his observations, what he knew of the two men and the circumstances of the vehicle, he signalled his partner to come over.

1 In my view, Sergeant Bernardo had only a suspicion  
that there were drugs in the car and that drug  
dealing was going on. It was a good suspicion and  
one that turned out to be very accurate, however,  
this was all there was.

6 Given my rejection of his testimony, I find the  
officer did not have the subjective belief that he  
had reasonable probable grounds to effect an  
arrest. Further, on an objective basis, there was  
11 no reasonable probable grounds to believe an  
offence had been committed based upon all the  
circumstances that existed at the time. There was  
suspicion and no more, given the officer did not  
observe any of what he claimed to have observed as  
16 he approached and rode past the car on the  
bicycle.

21 Instead of investigating further, the officer  
decided to effect an arrest which then gave him  
the authority to conduct the search incident to  
arrest. He was not entitled to do this based on  
the whole of the circumstances that existed at the  
time.

26 As a result, I find there was an arbitrary arrest  
and an illegal search of the person and the car.  
There, therefore, has been proven to be a s.8 and  
a s.9 violation.

1 The s.24.2 analysis:

**A) The Seriousness of the Charter Infringing State  
Conduct:**

6 I have found two Charter violations in this  
case. They are both serious. In my opinion, they  
stem from police officers not acting within the  
limits of their authority while engaged in their  
duties patrolling our neighbourhoods.

11 I fully appreciate that these encounters are  
dynamic and fluid, however Sergeant Bernardo did  
not act in good faith.

16 The test of reasonable probable grounds is well  
known. The officer knew he was simply acting on  
suspicion. The facts known to him fell short of  
the established grounds to make an arrest and a  
search.

21 Further, given my findings, I can only conclude  
that the officer acted in the fashion that he did  
without regard for the constitutional rights of  
the accused because he believed that if he did,  
his suspicion would prove correct, given his prior  
26 knowledge of Mr. M██████'s charges and the fact  
that Mr. DaSilva was in the car as well.

Their background of actual and alleged criminal  
behaviour may have made them more worthy of

1           investigative attention, but it did not lessen  
          their right to the constitutional protections that  
          everyone, including those with criminal pasts,  
          enjoy. I find therefore, that the violations were  
          wilful and flagrant.

6  
  
11           I am further troubled by the attitude and  
          behaviour of the police during this encounter.  
          Sergeant Bernardo, in questioning the accused,  
          after he testified he believed that he had the  
          grounds to the arrest, said he knew he had  
          detained the accused and chose not to advise him  
          for what and not to give him his right to counsel  
          and decided to question the accused about his  
          beliefs.

16  
  
21           When cross-examined on this, he seemed to feel  
          that even though such line of questioning would  
          lead to the statements being inadmissible, it was  
          still nonetheless worth pursuing for investigative  
          purposes. Such an attitude is wrong. Such an  
          attitude would effectively eviscerate the  
          protections of the Charter and resurrect the  
          discredited maxim that the ends justify the means.

26           In addition, the treatment of the driver and other  
          passengers reflect a similar attitude. There is a  
          conflict whether they were arrested or detained.  
          PC Salerno-Panque testified that he arrested the  
          driver, cuffed him and searched him. Sergeant

1 Bernardo testified that they were not arrested but  
placed in investigative detention. If Sergeant  
Bernardo's characterization is accepted, then he  
failed to provide the right to counsel to these  
6 individuals and went further in his search of them  
than is permitted.

11 I am fully aware that Mr. [REDACTED] has no right to  
assert the constitutional rights of others on this  
Application. I only refer to this evidence as it  
seems to me to be consistent with the attitude  
that prevailed at the time when Mr. M [REDACTED] was  
initially arrested and searched.

16 I also take into account the nature of the  
evidence given by Sergeant Bernardo. See  
**R.v. Harrison, [2009]2 S.C.R. 494** and more  
recently **R. v. Cote, [2011] 3 S.C.R. 215**. This  
too, makes the violation more serious.

21 Looking at this factor, in my opinion, there is a  
strong need to disassociate the court from this  
type of conduct in order to preserve public  
confidence in and ensure state adherence to the  
rule of law.

26 **B) The Impact of the Charter Protected Rights of  
the Accused:**

The impact on the reasonable expectation of  
privacy afforded by s.8 is diminished because the

1 drugs and some monies were found in a car which  
has a lessened expectation of privacy. The same  
cannot be said, of course, of the search of Mr.  
M [REDACTED]'s person. This is more intrusive in  
nature.

6  
With respect to the s.9 violation, there is a  
significant interference with the accused's  
liberty. He was forcibly removed from the car and  
handcuffed. As a result, there was a significant  
11 impact upon his Charter protected interests.

Let me quote from another decision of mine which  
shares some similarities with this case. At  
paragraph 41 of R. v. Assieu, (2012) 263 C.R.R.  
16 2<sup>nd</sup>, 194:

21 "Again, assessing the impact of these  
violations on the accused's protected  
interests, they are serious in that citizens  
should be free to go about their business in  
the public streets and not be subject to  
improper police conduct towards them.

26 Certainly, the police can and should engage  
with the citizenry in order to ensure public  
safety and acquire knowledge that can assist  
in their duties. The limits of that  
authority must be respected. When it is not  
and the evidence is admitted resulting from  
such conduct, I have little doubt that in the

1 long-term this would breed public cynicism  
and bring the administration of justice into  
disrepute."

6 **C) Society's Interest in an Adjudication on the  
Merits:**

Consideration of this factor favours admission of  
the evidence. The evidence is reliable and  
fundamentally important to the prosecution.  
11 Consideration of this factor therefore favours  
admission.

**D) Conclusion:**

16 After addressing these lines of inquiry, I find  
that the admission of the drugs and monies into  
evidence would bring the administration of justice  
into disrepute. The violations and the impact on  
the accused's interests are serious and multiple.  
There is a need to disassociate the court from the  
21 police conduct.

26 Some of the impacts upon the Charter protected  
rights are significant. While the evidence is  
reliable and its exclusion would adversely impact  
the truth-finding process, the long-term impact of  
admitting the evidence in this case would result  
in a significant erosion of rights and this would  
bring the administration of justice into  
disrepute.



1 For these reasons, the Application is allowed.  
The evidence of the drugs and monies are excluded.  
As a result, Mr. M [REDACTED] will be acquitted of the  
remaining two counts. All right.

MS. PAGE: Thank you, Your Honour.

6 THE COURT: Thank you, counsel.

MS. PAGE: Thank you. Did I see Your Honour pass  
a copy of your judgement up to the reporter and is  
it available? Or no, it's in your hand.

THE COURT: All oral.

11 MS. PAGE: Ah.

THE COURT: All right.


MS. PAGE: Thank you.

THE COURT: Thank you.

16 ... MATTER COMPLETED ...

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21 This is to certify that  
the foregoing is a true  
and accurate transcript  
of my recordings to the  
best of my skill and  
ability.

26   
\_\_\_\_\_  
Janice Young,  
Official Court Reporter