

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

FRANKLIN OWUSU

Before Justice Faith M. Finnestad
Heard on January 20 & 21, 2020
Reasons for Judgment released on May 27, 2020

B. Moreira for the Crown
D. Sarikaya for Franklin Owusu

F.M. Finnestad J.:

[1] Mr. Owusu has brought an application to exclude evidence of a handgun, located in a bag removed from his car at an accident scene. The Crown concedes that he was subject to an unlawful search in violation of s 8 of the *Charter*. The issue remaining is whether the evidence thus obtained should be excluded pursuant to s 24(2) of the *Canadian Charter of Rights and Freedoms*.

FACTS

[2] Franklin Owusu was one of three drivers involved in a collision on Highway 401 on the afternoon of November 1, 2018. OPP Constable McNamee happened on the scene and pulled over to assist. She spoke to the drivers, directing them to the Collision Reporting Centre. She was joined by OPP Detective Constable Cho, who also happened to be passing and stayed to assist her.

[3] Upon learning that Mr. Owusu was experiencing back pain, PC McNamee called for an ambulance. While he was being examined in the ambulance events transpired that aroused the suspicions of the two officers and led to the search in question.

[4] A grey Honda pulled up in front of the accident scene and a man got out and approached the tow truck, whose driver was hooking up Mr. Owusu's car. The two men greeted each other in a manner that suggested they had met before and the tow truck driver

later told officers they had gone to high school together. The tow truck driver then removed a white plastic bag from the passenger side of Mr. Owusu's car and held it out to the driver of the Honda. On making eye contact with PC McNamee, the Honda driver gestured "no" with his hands down low, and refused to take the bag. The tow truck driver then placed the bag on the seat of his truck. Throughout this there was no evidence that the bag was opened or its contents disturbed. The officers approached to speak to the Honda driver who told them that he was here because his friend had been involved in an accident. PC McNamee advised that his friend was in the ambulance and he replied that in that case he would just leave. When she told him the injuries were minor and he was welcome to see his friend in the ambulance he walked partway there, then turned back to his car and left the scene.

[5] The officers were struck by the following oddities:

- that another person would pull over into an active accident scene;
- that a tow truck driver would remove property from a car he was towing;
- that the new arrival would decline to take the bag offered to him, upon making eye contact with police; and
- that the man who said he was there because his friend had been in an accident would leave the scene without stopping to check on his friend.

[6] DC Cho testified that he was concerned about a possible theft. He asked the tow truck driver to open his passenger door and PC McNamee confirmed that the bag on the seat was the same one she saw the tow truck driver remove from Mr. Owusu's car and attempt to give to the Honda driver. DC Cho opened the bag and found a number of T-shirts and a fanny pack. He unzipped the fanny pack and found a handgun. Mr. Owusu was arrested.

[7] PC McNamee described the reason for the search as being "to see what was taken from Mr. Owusu's vehicle" and whether it was something of value or importance. She agreed in cross-examination that she did not have grounds to detain or arrest anyone at that point.

[8] DC Cho described his motivation for the search as uncertainty as to the relationship among Mr. Owusu, the Honda driver and the tow truck driver, and wanting to follow up on the plastic bag and to find out what was in it. He wanted to know why the male showed up and asked for the bag. Before turning it over to Mr. Owusu he wanted "to count everything in the bag to keep integrity of the investigation", to "ensure protection of property" and that he "wanted to confirm the contents of the bag before turning it over to Mr. Owusu".

[9] In summary, the officers were suspicious that something improper was going on, whether an attempted theft or something else, and ultimately they were simply curious to know what was in the bag.

ISSUES

[10] As the Crown has conceded a breach of Mr. Owusu’s section 8 rights against unreasonable search and seizure, the issue to be decided is whether that violation is such that to admit evidence of the gun found as a result would bring the administration of justice into disrepute. The factors set out by the Supreme Court of Canada in *R v Grant*, 2009 SCC 32, must be considered in determining whether the gun should be excluded from evidence on the basis of section 24(2) of the *Canadian Charter of Rights and Freedoms*.

ANALYSIS

A. Position of the Parties

[11] The defence position is that the evidence should be excluded under s 24(2) because the search was brazen, not in good faith, and the fanny pack inside the bag carried with it a high expectation of privacy. The Crown took the position that officers were acting in good faith, that the breach was technical and minor, and that the evidence is real, reliable, highly probative evidence crucial to the Crown’s case and the truth-seeking function of the court. The Crown argued the seriousness of gun crimes in Toronto as weighing in favour of admission.

B Overview of s 24(2) of the *Charter*

[12] Section 24(2)m was analyzed in detail in *R v Grant*, which noted that the purpose of s. 24(2) is to maintain the good repute of the administration of justice. Where the admission of evidence would bring the administration of justice into disrepute, the evidence must be excluded in order to maintain the long-term integrity of, and public confidence in, the justice system.

[13] The Court in *Grant* noted that a decision about admissibility of evidence pursuant to this section of the *Charter* engages three avenues of inquiry, each rooted in the public interested engaged by s. 24(2). They are

1. The seriousness of the Charter-infringing state conduct
2. the impact of the breach on the Charter-protected interests of the accused and
3. Society’s interest in the adjudication of the case on its merits.

1. *Seriousness of the Charter-infringing conduct*

[14] *Grant* makes clear that the Court is to consider whether the admission of evidence would bring the administration of justice into disrepute by sending a message to the public that the courts effectively condone state deviation from the rule of law, by failing to disassociate themselves from the fruits of that unlawful conduct: *Grant*, para 72. Such conduct falls along a spectrum ranging from inadvertent or minor breaches to wilful or reckless disregard of *Charter* rights. Factors such as the need to preserve evidence, or the good faith of the officers, may reduce the seriousness of the breach.

[15] P.C McNamee and DC Cho testified to an awareness of a lack of reasonable and probable grounds to believe an offence was being, or had been, committed leading up to the discovery of the firearm. Both agreed they had no grounds to arrest or detain any person at the scene. DC Cho testified that he knew that a warrant is required to search an item of personal property. In the absence of these, the search of Mr. Owusu's bag was based solely on the officers' suspicions and curiosity.

[16] In *R v Harrison*, 2009 SCC 34 at para 20 Chief Justice McLachlin noted
while an officer's "hunch" is a valuable investigative tool - indeed, here it proved highly accurate - it is no substitute for proper Charter standards when interfering with a suspect's liberty.

[17] The Crown sought to rely on the officers' suspicions about a possible theft in support of the good faith of their actions. He referred to their wanting to check the bag to see if there was anything of value inside, and to ensure that the contents of the bag were accounted for, protected and returned to Mr. Owusu. However, no follow-up was done to determine if in fact the property was moved without consent, nor was anyone charged with theft. The officers cannot rely on a good faith actions in investigating a theft when they did nothing in furtherance of such an investigation apart from searching the bag, and where both conceded that it was unnecessary to examine the contents of the bag in order to preserve Mr. Owusu's property or determine if it had been stolen.

[18] A warrantless search, which officers knowingly carry out without reasonable grounds and based solely on suspicion and curiosity, is a serious breach of section 8.

2. *Impact on Charter protected interests of the accused.*

[19] The Crown argues that there is a decreased expectation of privacy in a motor vehicle, and that the search was minimally intrusive as it did not involve a search of the entire car or of Mr. Owusu's person.

[20] While there is a decreased privacy interest in the contents of a motor vehicle, that does not equate to *no* privacy interest. Here Mr. Owusu was the owner of the vehicle and presumed to control the contents of his car. The gun discovered was not only in a plastic bag, but inside a fanny pack therein, and which was zipped closed. A fanny pack for men is not unlike a purse for women, and DC Cho conceded that such a bag was likely to contain personal, and potentially private, property of its owner. In fact it did. There is an expectation of privacy in a closed personal bag of this nature, and even more so when it is placed inside another bag and not open to view. I am satisfied that Mr. Owusu had a direct interest in the fanny pack, that he had a subjective expectation of privacy in it and that this expectation was objectively reasonable.

3. *Society's interest in an adjudication on the merits.*

[21] I agree with the Crown submission that society has a strong interest in adjudication of a case such as this. The evidence is real, reliable, highly probative and essential to the prosecution. Handguns are a scourge on society in Toronto and have led to countless

deaths. There is a valid societal interest in having such matters tried on their merits. This favours admissibility of the evidence.

C. Conclusion

[22] In conclusion, I would characterize DC Cho’s *Charter*-infringing conduct as serious, being based on suspicion and curiosity, and conducted despite an understanding of what the law requires before a legal search can be conducted.

[23] I conclude that the privacy interest in the closed fanny pack containing personal items is relatively high, notwithstanding that it was kept in a clothing bag in Mr. Owusu’s car.

[24] I conclude that there is a valid societal interest in having this serious charge tried on the merits. However, the seriousness of the offence has the potential to cut both ways, as noted in *Grant*. “While the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high”: para 85. In this case, where the first and second inquiries taken together make a strong case for exclusion, the third inquiry does not tip the balance in favour of its admissibility.

[25] A reasonable member of the public, informed of all the relevant circumstances and the importance of *Charter* rights, would be surprised to learn that police had searched through a personal item belonging to someone who was present at the scene and who was not under investigation by police, on the basis of curiosity or concern that a theft from them had been attempted.

[26] The evidence must be excluded in order to maintain the long-term integrity of, and public confidence in, the justice system and the application under s 24(2) is granted.

Released: May 27, 2020

Signed: “Justice Faith M. Finnestad