IN THE PROVINCIAL COURT OF NOVA SCOTIA

Cite as: R. v. Clarke, 2010 NSPC 93

Date: November 8, 2010
Docket: 2097768
Registry: Halifax

Between:

Her Majesty the Queen

v.

Kimberly Anne Marie Clarke

Judge:	The Honourable Judge Marc C. Chisholm
Heard:	September 28, 2010
Voir Dire Decision:	November 8, 2010
Charge:	CDSA 4(1)
Counsel:	Rachel Furey, for the Crown Roger Burrill, for the Defence

By the Court:

Introduction:

[2] The accused seeks to have excluded from evidence, pursuant to section 24(2) of the Charter, property found on her person when she was searched incident to arrest by the police on September 29, 2009. The accused submits that the arresting officer did not have authority to arrest her under section 495(1)(a) or (b) of the Criminal Code and, hence, the arrest and search incident to arrest were unlawful.

[3] The application proceeded by way of a voir dire.

The Evidence:

[4] **Cst. David Lane** was called to give evidence regarding continuity of the item seized from the accused and to introduce the Certificate of Analyst regarding the substance. As the accused made an admission that the substance seized from her was cocaine I needn't detail Cst. Lane's evidence.

[5] **Cst Dionne Townsend** was the arresting officer.

[6] Prior to September 29, 2009, the day of the arrest of the accused, Cst. Townsend had served as a peace officer in Halifax for about two years. The first 18 months of her service was as a foot patrol officer in the Gottingen St.

area of the city of Halifax. That area includes Creighton Street, a residential street, where this incident occurred.

[7] Cst. Townsend described the Creighton Street area as a well known drug area, i.e. an area where there were a high number of illegal drug transactions, mostly cocaine and marijuana. Cst. Townsend testified that 2441 Creighton Street was a "drug house". She testified that this was a location at which a number of illegal drug transactions had been known to occur. Cst. Townsend's view was based on information received from other officers and her own observations while doing surveillance of 2441 Creighton Street on approximately every second shift during the 18 months she worked the area.

[8] Cst. Townsend testified to having had contact with the accused on a number of occasions prior to September 29, 2009. She knew the accused to have previously been a cocaine user. She had seen the accused at the methadone program, Direction 180, on Barrington Street. She had also seen the accused a number of times when doing a compliance check on the accused's boyfriend. Cst. Townsend had not seen the accused high on drugs during any of those contacts. Cst. Townsend acknowledged that as of September 29, 2009 she had no reason to believe the accused was a user of illegal drugs.

[9] In June/July 2009 Cst Townsend was re-assigned to another area of the city of Halifax. After that time she worked a handful of shifts on the Gottingen Street beat prior to September 29, 2009.

[10] Cst Townsend testified that on the late afternoon of September 29, 2009, while still daylight hours, she and her partner, Cst. Gibson took up position to do surveillance of 2441 Creighton Street. This was a regular task they performed when not responding to any other need. She testified that she saw the accused and a white male walking on the sidewalk of Creighton Street in the direction of 2441 Creighton Street. The accused was carrying a green package, about 18 inches square, believed to contain pampers. She testified that, near the driveway of 2441 Creighton Street, a black male in a black hoodie, with the hood covering his head, came from 2441 Creighton Street and approached the accused. The accused handed the hooded man the box of pampers. That man took the pampers and went back to the house at 2441 Creighton Street.

[11] The accused and her male companion waited in the driveway of 2441 Creighton Street for a short time. Then a second black man in a grey hoodie, with the hood covering his head, came out of 2441 Creighton Street and approached the accused. That man put his hand out towards the accused.

Cst. Townsend testified that she saw something in his hand. The accused reached out to the man's hand. Cst. Townsend testified that the man handed the accused an item which the accused immediately placed in the left front pocket of her jacket. Cst. Townsend couldn't say if there was any conversation between the accused and the man in the grey hoodie. The accused and her companion then left the area.

[12] Cst. Townsend did not mention the presence of any other person while this event was transpiring. She said that neither the accused nor her companion or either of the hooded men were looking around during the incident.

[13] After observing this event Cst. Townsend and her partner called for a police car to attend. When a police car arrived they got in and located the accused and her companion a few streets away at Bauer and Cunard streets. Cst. Townsend gave evidence that she advised the accused that she was under arrest for "possession of drugs". She acknowledged the item received by the accused could've been marijuana. She then searched the accused incident to arrest and in the accused's front left jacket pocket found a small piece of tin foil containing what she believed to be cocaine. The search consisted of checking the accused's pockets. The accused was taken to the police station, processed and released.

[14] Cst. Townsend testified that she arrested the accused because she believed she had reasonable grounds to believe she'd witnessed a drug transaction involving the accused giving the package of pampers to the first male and receiving a narcotic from the second male which the accused immediately put into her pocket. She testified that the location of the incident was definitely a factor in her thinking. She said the fact that it was Ms. Clarke was not a factor. She said she'd never before witnessed a package of pampers being used for a drug transaction. She gave no explanation why she believed that, on this occasion, the package of pampers was payment for narcotics. Cst. Townsend did not refer to the fact that there were two men involved, both wearing hoods which concealed their faces as a basis of her conclusion.

[15] Cst Townsend testified that she had been told by other officers earlier that day that members of the Safer Communities group were conducting surveillance of 2441 Creighton Street that day. She had no contact with any members of that group nor did she see any of them in the Creighton Street area. On cross she said that she couldn't describe the item that was given to the accused. She said it was small and concealed in the man's hand. She didn't see anything shiny, like tin foil. She said it could have been coins or a

rolled up ten dollar bill. She didn't consider that it could have been money in payment for the pampers.

[16] **Cst. Curtis Gibson** was with Cst. Townsend on September 29, 2009.

[17] Much of Cst. Gibson's evidence mirrored the evidence of Cst. Townsend. I accept the evidence of the two officers on all points where there evidence was consistent with the other.

[18] Let me turn to the differences between the evidence of the two officers.

[19] Cst. Gibson testified that the man in a grey hoodie displayed the item in his hand to the accused before giving it to her. He said that he had a clear view of the item. He initially said that he couldn't describe the item as to it's color or texture. On further questioning he said the item was silver, like tin foil, a piece not a ball. He said the item was small. He acknowledged that this was important information which he had not recorded in his notes of the event.

[20] Cst. Gibson testified that another man was present at the time of this transaction. Cst. Gibson recognized the man as Vincent Ross, a known drug user. Cst. Gibson stated that the man in the grey hoodie gave Mr. Ross an item within seconds of giving the accused an item. Mr. Ross put the item he

received into his mouth, under his lip, and then quickly left the area on his bicycle. Cst. Gibson did not record this information in his notes.

[21] Cst Gibson testified that, on September 29, 2009, he and Cst. Townsend went to 2441 Creighton Street in response to a call about illegal drug activities being observed in that area. He acknowledged that his notes contained no reference to such a phone call.

[22] Cst Gibson testified that the accused was arrested for suspicion of illegal possession of a drug. He said he felt that the odds were about 50:50 that she had an illegal drug in her possession.

[23] The defense chose not to call evidence on the voir dire.

Findings of Fact:

[24] As previously indicated I accept the evidence of Cst. Townsend and Cst. Gibson on all points on which their evidence was consistent.

[25] I accept the officers evidence that they saw something in the hand of the man in a grey hoodie. I'm not persuaded that either officer had a clear view of the item. Cst. Townsend couldn't describe the item she said she saw. Cst. Gibson initially stated that he couldn't describe the item, then said it was small and shiny, like tin foil, not a ball but a piece. I believe that Cst.

Gibson's evidence/recall was affected by the subsequent discovery of the piece of tin foil in the accused's pocket.

[26] Had I not been persuaded that Cst. Townsend saw an item in the hand of the man in the grey hoodie, I would have no doubt that she believed that an item was handed to the accused. Such a conclusion was reasonable, given the hand to hand action she observed and the fact that the accused waited in the driveway after giving the first hooded man the package of pampers. Also, given that the accused put her hand in her pocket after the hand to hand action, I am persuaded that the accused received an item from the man in the grey hoodie.

[27] I am not persuaded that the man in the grey hoodie " displayed" the item in his hand to the accused. If that happened Cst. Townsend should have seen it. She didn't indicate there was such an action. As previously stated, I'm not certain either officer has a clear view of the item.

[28] Cst. Gibson gave evidence as to the presence of another man, Vincent Ross, at the time of this incident. The presence of Mr. Ross, a known drug user, receiving an item from the man in the grey hoodie within seconds of the accused being seen engaging in a hand to hand transaction with that same man would be highly relevant. Cst. Gibson did not record this information

in his police notes. His explanation was, basically, he was too busy. I found his explanation lacking.

[29] Cst. Gibson did provide numerous details of his observations of Mr. Ross' actions and appeared to be recalling the event from memory. In her evidence Cst. Townsend did not indicate that any other person was present when the accused interacted with the man in the grey hoodie. She wasn't asked whether anyone else was present. While I don't reject Cst. Gibson's evidence on this point, on the evidence in its totality on the voir dire, I'm not persuaded that Vincent Ross was present and engaged in a hand to hand transaction with the man in the grey hoodie within seconds of the accused doing so.

[30] Cst. Townsend did not rely on the presence of another person, a known drug user, at the time of the incident as a factor in her decision to arrest the accused.

[31] Cst. Gibson testified that he and Cst. Townsend responded to a call to go to 2441 Creighton Street prompted by surveillance of that address on that day by members of the Safer Communities group. Cst. Townsend stated that they went to 2441 Creighton Street to do surveillance as they were not then busy with other duties. Cst. Townsend was aware of the surveillance being

conducted by the Safer Communities group at that location, that day. Again, while I don't reject the evidence of Cst. Gibson I am not persuaded that the officers went to 2441 Creighton Street in response to a call from another officer.

[32] Cst. Townsend did not rely on information received from another person regarding the activities of persons observed at or near 2441 Creighton Street earlier that day as a factor in her decision to arrest the accused.

[33] The relevant facts, known to the arresting officer, may be summarized as follows:

> Shortly before 6:00 pm, while still daylight, on September 29, 2009, the accused gave a package of pampers to a hooded man on the sidewalk near 2441 Creighton Street, a location where numerous drug transactions have been known to occur. The man took the package into 2441 Creighton Street. The accused waited in the driveway of 2441 Creighton Street for a short time. A second hooded man came out of 2441 Creighton Street and handed her something small which she put into her left front jacket pocket and left the area.

[34] I found that:

1. The arresting officer honestly believed that she had observed a drug transaction between the accused and the men from 2441 Creighton Street, that the accused was then in possession of an illegal drug, and she had lawful authority to arrest the accused; and

2. That Cst. Townsend's stated grounds for arresting the accused were:

The location where the incident occurred; and

Her observation of a hand to hand transaction between the accused and the second man from 2441 Creighton Street after she gave a package of pampers to another man from that house.

Comments on the Facts:

[35] The arresting officer did actually observe an event in which she believed the accused may have taken possession of a narcotic.

[36] Cst. Townsend concluded that the package of pampers given by the accused to the first hooded man was an item of value used as payment for a narcotic. She provided no explanation why she so concluded. There was no evidence whether or not Cst. Townsend had ever seen someone with a baby at 2441 Creighton Street. Cst. Townsend didn't consider that the pampers could have been exchanged by the accused for cash. Cst. Townsend should've considered that possibility. Even though there was another possible explanation for the involvement of the pampers, this does not eliminate from consideration, in assessing the authority of the officer to arrest, the fact that

the accused gave a package of pampers to the first hooded man from the drug house.

[37] Both of the men in hoodies had the hood up covering their head and preventing their faces from being seen by the police. Cst. Townsend didn't indicate whether or not she viewed that action as suspicious. While this action, may have been related to the temperature or a fashion/style trend or something else, it may subjectively and objectively have been viewed as a relevant consideration in assessing whether the officer had authority to arrest the accused.

[38] There was no evidence of the accused, her companion or either of the hooded men looking around or acting nervously.

[39] Because their hoods were up, the two men from 2441 Creighton Street were unable to be identified. There was, therefore, no evidence that either of the two hooded men resided at or had ever been seen in the area of 2441 Creighton Street before. There was no evidence that either of the two hooded men had ever been charged, convicted or suspected of illegal drug activity in the past.

[40] The accused was known, by the arresting officer, to have been a user of narcotics, but not for two years prior to September 29, 2009.

[41] There was no reliable evidence that either officer saw packaging material consistent with the item handed to the accused being a narcotic.

[42] The accused made no action, such as putting the item received to her mouth (as in *R v. Fraser*, [1996] O.J. No. 473), which may have been viewed as consistent with the item being a narcotic. I am not persuaded that another man, Vincent Ross, received an item from the second hooded man within seconds of the accused doing so, and that he put the item he received into his mouth.

[43] The arresting officer knew that 2441 Creighton Street was under surveillance that day by other officers but she had no information from them regarding earlier drug sales or suspicious activity.

General Charter Principles:

[44] The accused seeks to have evidence excluded on the basis that it was obtained in contravention of her sections 8 and 9 rights under the Charter. The accused bears the burden of establishing a breach of her Charter rights.

[45] In relation to the accused's section 8 Charter right, once the accused has established that there was a warrantless search the burden shifts to the Crown to show, on a balance of probabilities, that the search was reasonable

(*Hunter v Southam* (1984), 14 C.C.C. (3d) 97 (SCC)). A search will be reasonable if it is authorized by law, the law authorizing the search is reasonable, and the search is carried out in a reasonable manner (*R v. Collins* (1987), 33 C.C.C. (3d) 1 (SCC)).

[46] In relation to her section 9 Charter right the accused must establish that she was detained and that the detention was arbitrary. Not every unlawful arrest will amount to a violation of the guarantee of protection against arbitrary detention in s.9 of the Charter.

> "It cannot be that every unlawful arrest necessarily falls within the words 'arbitrarily detained'. The grounds upon which an arrest was made may fall 'just short' of constituting reasonable and probable cause. The person making the arrest may honestly, though mistakenly, believe that reasonable and probable grounds for the arrest exist and there may be some basis for that belief. In those circumstances the arrest, though subsequently found to be unlawful, could not be said to be capricious or arbitrary. On the other hand, the entire absence of reasonable and probable grounds for the arrest could support an inference that no reasonable person could have genuinely believed that such grounds existed. In such cases, the conclusion would be that the person arrested was arbitrarily detained. Between these two ends of the spectrum, shading from white to grey to black, the issue of whether an accused was arbitrarily detained will depend, basically, on two considerations: first, the particular facts of the case, and secondly, the view taken by the court with respect to the extent of the departure from the standard of reasonable and probable grounds and the honesty of the belief and basis for the belief in the existence of reasonable and probable grounds on the part of the person making the arrest." **R v Duguay** (1985), 18 C.C.C. (3d) 289 **(**Ont. C.A.); **R v Brown** (1987), 33 C.C.C. (3d) 54 (N.S.S.C.A.D.)

Arrest Provisions

[47] Section 495(1) of the Criminal Code states:

> 495.(1) A peace officer may arrest without warrant
>
> (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence; or
>
> (b) a person who he finds committing a criminal offence; or

The Jurisprudence:

[48] The Test for an Arrest under Section 495(1)(a)

> The leading case dealing with "reasonable grounds" to arrest under section 495(1)(a) is R v Storey, [1990] S.C.R. 241. In Storey the Supreme Court of Canada held that for an arrest to be valid under s. 495(1)(a) it must be shown that the arresting officer subjectively believed that he had reasonable grounds and that a reasonable person, standing in the shoes of the officer, would have believed that reasonable grounds existed to make the arrest. The officer need not establish a prima facie case (**R v Storey**, supra). The officer must have more than a "suspicion" or "hunch" (**R v Mann**,[2004] 3 S.C.R. 49)

[49] The Test for an Arrest under Section 495(1)(b)

[50] The Nova Scotia Court of Appeal considered the authority to arrest under s.495(1)(b) in R v Stevens (1976), 33 C.C.C. (2d) 429 (N.S.S.C.A.D) The Court stated, at para. 24:

> "In order to arrest a person without a warrant for a summary conviction offence it is not sufficient for the arresting officer to show that he had reasonable and probable grounds to believe such offence had been, or was about to be, committed; rather, he must go further and show that he found a situation in which a person was apparently committing an offence."

[51] In *R v Sewell*, [2003] SKCA 52 the Saskatchewan Court of Appeal ruled that the smell of raw, un-burned marijuana could provide a peace officer grounds to arrest a person. The officer needn't see the marijuana to "find the person committing" the offence. In *R v Janvier*, [2007] SKCA 147 the same Court ruled that the smell of burned marijuana, **alone**, was not an observation of current possession of additional, un-smoked marijuana, nor was it objectively reasonable to conclude that more, un-smoked marijuana was present (my bolding).

[52] In S.T.P. v Canada (Director of Public Prosecutions), [2009] N.S.J. No. 378 (NSCA) the Nova Scotia Court of Appeal revisited the authority to arrest under section 495(1)(b).

[53] In S.T.P. the arresting officer noted three men in a motor vehicle. The backseat passenger, the accused, who had been looking out the back of the vehicle, quickly turned back around in the backseat when he saw the police vehicle. The vehicle turned off the street at the first opportunity, into a fast food outlet. A police check of the vehicle's license plate revealed that it was associated to two bail violations, one on April 3rd of that year and the other on June 18th, just two days before. The police decided to check the vehicle. At the vehicle the arresting officer noted the smell of burned marijuana emanating from the interior of the car. All three occupants of the vehicle were arrested and searched. No cannabis marijuana was found and the three denied smoking any that evening. A piece of cocaine was found on the accused.

[54] At trial, the defense sought to have the cocaine excluded from evidence. The defense argued that the officer did not have authority to arrest under s.495(1)(b) of the Code as he had not found the accused committing an offence. After reviewing the facts, the trial judge stated at para 54:

> "That context supports the reasonableness of the conclusion of one who, though without special olfactory gifts or training has a normal sense of smell and not the altogether unusual ability to at least recognize the smell of burned marijuana. Had the smell of marijuana been the sole foundation of the grounds for arrest, the

officer would have to show something beyond those rather unremarkable abilities. Where, as here, the smell is part of a larger supporting context, and with that context forms **a practically coherent and logically consistent basis for a reasonable conclusion that marijuana may be present,** there is not requirement for special training or ability." (My bolding).

[55] In upholding the trial judge's decision the Court of Appeal stated at para 20:"...

[I]n my view an arresting officer must establish three things in order to meet the finds committing standard. Firstly, the police officer's knowledge must be contemporaneous to the event. Thus he or she must be present while the apparent offence is taking place. In other words, unlike the reasonable and probable grounds standard, it is not enough to believe that an offence has taken place in the past or is about to take place.

Secondly, the officer must actually observe or detect the commission of the offence. Most often this is achieved by actually seeing and/or hearing the offence being committed. However, I would not limit it to those two senses. In fact, as in this case, the sense of smell may suffice. For example, see **R v Sewell**, [2003] SKCA 52, [2003] S.J. No. 391, where Bayda, C.J.S. observed:

[36] The question arises whether it is fair to conclude that the officer had, for the purposes of s.495(1)(b), "found" the appellant committing the offence at the time of the arrest given that the officer had only smelled the marijuana but had not seen it. In my respectful view, it is fair to so conclude. In order for a person to know or believe that there is marijuana in the immediate vicinity he or she would have to rely on one or mre of his or her five senses..."

Thirdly, there must be an objective basis for the officer's conclusion that an offence is being committed. In other words, as the Supreme Court noted in **Roberge**, supra, "it must be apparent to a reasonable person placed in the circumstances of the arresting officer at the time".

[56] The Court of Appeal's decision confirms that there is a subjective and objective element to the test under s.495(1)(b). The subjective, second element involves an assessment by the Court of whether the officer believed she was observing the apparent commission of an offence, i.e. that the accused may then be in possession of marijuana. The third, objective element requires the court to assess, whether on all of the circumstances known to the arresting officer, it would have been apparent to a reasonable person that the accused may be committing an offence.

[57] In S.T.P., *supra*, the arresting officer did not observe or detect the present presence of marijuana. The detection of a smell of smoked marijuana in the circumstances of that case, as previously described, resulted in a finding by the trial judge that the arresting officer honestly believed that the accused may, presently, be in possession of marijuana, and such a conclusion was objectively reasonable.

[58] It follows that, in a case such as this, the arresting officer need not actually see the item in question nor be able to identify it as a narcotic. The officer must observe an event which causes her to reasonably conclude that the accused may, presently, be committing an offence.

Can s.495(1)(a) and (b) be Argued in the Alternative?

[59] The Crown submitted that, where the narcotic involved is not known to the officer, the Crown may argue alternative bases for the officer having authority to arrest. The defense position was that where, as in this case, the officer acknowledged that the item may have been marijuana, the Crown can only rely on s.495(1)(b) as authority for the officer to arrest.

[60] The Crown relied on **R v Loewan**, [2010] ABCA 255 and **R v Fraser**, [1996] O.J. No. 473.

[61] In the **Loewan** decision, the Alberta Court of Appeal was referring to the possession of a drug for the purpose of trafficking. Pursuant to section 5(2) of the CDSA such an offence is indictable regardless of what drug is involved. In that context the court stated, at para 24:

> "A lawful arrest can be made generally for possession of a controlled substance, and a search incidental to arrest can be conducted for any and all controlled substances, as they are all caught by the same charging provision of the statute."

[62] For the offence of possession of a prohibited substance, section 4 of the CDSA provides that possession of a schedule I, II, or III substance is a

hybrid offence, i.e. one that may proceed summarily or by indictment. Section 34(1) of the **Interpretation Act** R.S.C. 1985 c.I-21, provides:

> "(a) the offence is deemed to be an indictable offence if the enactment provides that the offender may be prosecuted for the offence by indictment;"

[63] Section 4(5) provides that, in relation to Schedule II substances, where the amount is less than that set out in Schedule VIII, the offence is summary.

[64] At para 33, the Court in **Loewan** found that there were grounds to arrest under either 495(1)(a) or (b). This statement supports the Crown position, in part. I interpret this statement as a finding that either 495(1)(a) and/or (b) may provide authority to arrest for an indictable offence.

[65] In **Fraser**, *supra*, the officer did not know what narcotic was involved at the time of arrest. The accused was found to be in possession of cocaine. The Court analysis of the officer's authority to arrest proceeded under s.495(1)(a) without any apparent argument regarding whether that section or s.495(1)(b) applied or both applied. While providing an example of where s.495(1)(a) was found to apply there is no explanation for this court to consider.

[66] The defense position is that, where the narcotic, believed to be in the accused's possession is unknown and may be marijuana, the only authority to arrest is s. 495(1)(b). I don't agree. As in **Loewan**, *supra,* I see no reason in law why the Crown cannot argue both 495(1)(b) and (a) as authority to arrest. Neither basis of arrest requires certainty on the officer's part on any element of the offence or even a prima facie case. The facts in any case may support a finding that the officer had grounds to arrest under either or both of the two bases of authority.

The Unknown Drug Situation

[67] In **R v Loewan**, *supra*, the Alberta Court of Appeal ruled that the arresting officer need not know the specific drug where the arrest was under s.5(2) of the CDSA because all offences thereunder, regardless of the drug, were indictable offences and authority to arrest existed under s.495(1)(a) of the Code. The Court also held that authority to arrest for an indictable offence may exist under section 495(1)(b) if the "found committing" requirements were met. It follows from this decision that when an officer makes an arrest for possession of a narcotic under the authority of s.495(1)(b) the officer need not know what narcotic the accused possesses as authority to arrest

exists for any schedule I, II or III drug. I agree with this conclusion. As I see it, whenever an officer finds a person committing an offence, reasonable grounds to arrest will exist.

[68] Contrarily, in my view, where an officer purports to exercise authority to arrest under s. 495(1)(a) for possession of a narcotic, the officer must establish reasonable grounds to believe that the narcotic was a Schedule I or II substance (or, if a Schedule II substance that the amount exceeds that prescribed in Schedule VIII).

Application of the Law to the Facts:

[69] Was there authority to arrest under s.495(1)(b)?

[70] On the first aspect of the test set out in S.T.P. , in determining the validity of an arrest under s.495(1)(b) the Court must ask: Was the police officer's knowledge contemporaneous to the event? Was she present while the apparent offence was taking place?

[71] I answer these questions in the affirmative. Cst. Townsend was conducting visual surveillance of the area in front of 2441 Creighton Street when the offence apparently took place, ie. the accused apparently took possession of an illegal drug.

[72] The second aspect of the test in S.T.P. requires that the officer believe that she is actually observing or detecting the apparent commission of an offence.

[73] Cst. Townsend's evidence was that she believed that she had grounds to believe that she'd witnessed a drug transaction. The use of the word "grounds" by the arresting officer does not, in my view, imply that she was applying the wrong test of her authority to arrest because the test under s.495(1)(b) requires the arresting officer to consider the overall circumstances in drawing a conclusion whether they are witnessing the apparent commission of an offence.

[74] I accept that Cst. Townsend honestly believed that an illegal drug may have been handed to the accused by the man in the grey hoodie, outside of the known drug house, such that the accused may then have been in possession of an illegal substance. I am persuaded that Cst. Townsend honestly believed that she was finding the accused committing an offence. I find that the Crown has established the second element of the test in S.T.P., *supra*.

[75] On the third element of the test under s.495(1)(b) the Crown must establish that it would be apparent to a reasonable person that the accused was apparently committing an offence. This requires the Court to consider all of

the circumstances known to arresting officer at the time of the incident leading to the arrest.

[76] I have previously set out the circumstances in detail and won't repeat them.

[77] The factors that support the officers conclusion are: the location of the incident, i.e. outside of a known drug house; that the accused interacted with two men who came from the known drug house; that both of those men had hoods up concealing their face from the police; and, that the accused exchanged something of value in return for something small from one of the men from the drug house.

[78] I find that, in relation to an alleged narcotic transaction, the location of the incident may be a relevant consideration which may affect the conclusions of the arresting officer in regard to what they are observing or detecting and the reasonableness of such conclusions. In this case the location is part of the context referred to in S.T.P., *supra*. In my view location alone is insufficient to support a reasonable conclusion that there is authority to arrest. Not every hand to hand transaction outside of a known drug house will give an officer authority to arrest.

[79] The fact that both of the men, who came out of the drug house and interacted with the accused, had a hood covering their head and concealing their face

was relevant to the court's assessment of the objective reasonableness of the arrest.

[80] The fact that there was an exchange between the two hooded men and the accused outside of the drug house is relevant to the court's assessment of the objective reasonableness of the arrest. The fact that there is a possible innocent interpretation of that transaction must be considered by the court. In my view, a reasonable person would have considered that possibility, but, having done so, may still have concluded that it was reasonable to conclude that the accused may have taken possession of a narcotic.

[81] The burden of proof rests upon the Crown to establish, on a balance of probabilities, that the officer had the lawful authority to arrest. Taking all of the circumstances in this case into account, I am just persuaded that it would be apparent to a reasonable person that the accused may have taken possession of a narcotic.

[82] I find that the factual context forms a practically coherent and logically consistent basis for a reasonable conclusion that a narcotic may be in the accused's possession.

[83] I find that it has been proven, on a balance of probabilities, that the officer had lawful authority to arrest under s.495(1)(b) of the Code. Having so

concluded I needn't consider whether the officer had authority to arrest under s.495(1)(a).

Conclusions:

[84] I find that the arrest of the accused was authorized by section 495(1)(b) of the Code. Consequently, I find the arrest to have been lawful.

Charter s.8

[85] The accused was searched incidental to arrest. Under the common law, police officers have the authority to search a person as an incident to a lawful arrest (**Cloutier v Langlois**, [1990] 1 S.C.R. 158). As I have found the arrest of the accused to have been lawful I find that Cst. Townsend had the authority to search the accused incident to arrest. I find that the accused's section 8 right to be secure against unreasonable search or seizure was not violated.

Charter s. 9

[86] The accused was detained by the police. The detention was based upon the officer's lawful authority to arrest the accused and was, therefore, not

arbitrary. Had I found the arrest unlawful, given my view of the facts there would not necessarily have been a finding that the detention was arbitrary as per **R v. Brown**, *supra*. I find that there was not a violation of the accused's section 9 Charter right.

[87] Had I concluded that there had been a violation of the accused's section 8 Charter right I would not have been persuaded that the evidence ought to be excluded under s.24(2). In brief, my reasons for this conclusion are as follows.

Application of Section 24(2) of the Charter

Nature of the Police Conduct

[88] I found that the arresting officer honestly believed that the accused may be in possession of an illegal substance and that she had the authority to arrest the accused. If the basis of arrest of the accused was not objectively reasonable, it was just marginally so.

[89] The law, at the time was clear that more than a mere suspicion or hunch was needed to arrest a person, however, in my view, there was a lack of clarity in

the law regarding what it meant to “apparently find someone committing” an offence. The S.T.P. decision subsequently provided guidance on this issue.

[90] In my view this case is distinguishable from **R v Borden**, [2010] N.S.J. No. 267 where the trial judge concluded that the arresting officer had not turned his mind to what authority he had to arrest the accused. In this case I’m satisfied that the arresting officer turned her mind to her authority to arrest and honestly believed she had the authority to arrest.

[91] In the present case, I find that the arresting officer acted in good faith and the officer’s conduct, if a violation of the accused’s section 8 Charter right, fell at the low end of the continuum of police conduct that violates an accused’s rights.

Impact on the Charter Protected Interest

[92] The actions of the police impacted the accused’s rights to privacy and liberty. The accused was arrested and detained for several hours. The accused was searched.

[93] The search of the accused, was carried out in a reasonable manner and was minimally intrusive. I have found that the detention of the accused was not

arbitrary. In these circumstances I would view the impact on the accused's protected right as moderate.

Society's Interest in the Adjudication of the Case on its Merits

[94] Society has an interest in seeing cases tried on their merits. The more serious the charge the stronger the societal interest in seeing the case decided on its merits. The more significant and reliable the evidence the more likely it will favor its inclusion in the evidence.

[95] The charge before the court is the unlawful possession of cocaine. Cocaine is a highly addictive and dangerous drug which has contributed to serious problems in this jurisdiction. On the evidence on this voir dire the street level buying and selling of narcotics is an ongoing concern. Possession of cocaine is markedly more serious than possession of marijuana or other "soft" drugs.

[96] The evidence in question is a small piece of crack cocaine wrapped in tin foil. The impugned evidence is reliable and vital to the Crown's case.

Balancing of Factors

[97] If the Court found a violation of the accused's section 8 Charter right the balancing of the factors in the present case would cause me to conclude that the exclusion of the evidence would bring the administration of justice into disrepute. The admission into evidence would not bring the administration of justice into disrepute.

Decision:

[98] The motion to exclude the evidence seized by the police from the accused is denied. The evidence will be admitted at trial.