SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Carvery*, 2024 NSSC 105

Date: 20240412
Docket: CRH No. 516757
Registry: Halifax

Between:

His Majesty the King

v.

Eben Antonio Carvery

DECISION
***Voir Dire* / Trial**

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	February 28, 2024, in Halifax, Nova Scotia
Written Decision:	April 12, 2024
Counsel:	Maile Graham-Laidlaw for the Federal Crown Patrick MacEwen for Eben Antonio Carvery

By the Court:

1 - Introduction

[1] Mr. Carvery is charged:

> that on or about the 15th day of July 2021 at or near Halifax, Nova Scotia, he did unlawfully have in his possession for the purpose of trafficking, Cocaine, a substance included in Schedule 1 of the Controlled Drugs and Substances Act SC 1996 C. 19, ["CDSA"] and did thereby commit an offence contrary to section 5(2) of the said Act.

[2] That day he was found to be the driver of a rented Mitsubishi RVR, in the front-seat centre console of which police found 49g of crack cocaine. Jared Thompson was in the passenger seat beside him.

[3] Both he and Mr. Thompson were arrested for the above-noted offence[1].

[4] Mr. Carvery has made an application requesting that this Court exclude evidence (specifically the 49g of crack cocaine found in the vehicle) as inadmissible pursuant to s. 24(2) of the *Charter of Rights and Freedoms* ["*Charter*"], "based upon the violation of his s. 8 and s. 9 Charter rights".

[5] Alternatively, if this Court does <u>not</u> exclude that evidence, Mr. Carvery argues there remains a reasonable doubt about whether he is guilty of the offence[2].

[6] I will first address the *voir dire* issues.

2 - *Voir Dire* issues

[7] As Justice Hunt succinctly put it in *R. v. Butterfield*, 2023 NSSC 406:

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[1] The charge against Mr. Thompson was withdrawn on January 25, 2022.

[2] Mr. Carvery's counsel agreed: to the Crown not presenting its expert witness regarding indicia of possession of cocaine for the purpose of trafficking, which I infer the expert would have concluded there was, in the circumstances of the case here - that the material seized was cocaine and that quantity of crack cocaine <u>on its own</u> is sufficient to satisfy the requirement for proof beyond a reasonable doubt that the possession of that cocaine was for the purpose of trafficking. All other elements of the offence are live issues. An Agreed Statement of Facts was also filed pursuant to s. 655 of the *Criminal Code*.

> 42 As to the applicable burdens, the Applicant must satisfy the Court on a balance of probabilities there has been an infringement of his *Charter of Rights and Freedoms* rights such that a remedy is required under s. 24(2): See *R. v. Collins*, [1987] 1 SCR 265.
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> 43 The Crown carries the burden of establishing grounds for lawful arrest, on both subjective and objective grounds. Once this is demonstrated, the burden shifts to the Defendant to establish, on a balance of probabilities, the existence of a s. 8 *Charter of Rights and Freedoms* violation stemming from any search connected to the detention or arrest: See *R. v. Besharah*, 2010 SKCA 2. A finding of lawful grounds for arrest would address any s. 9 unreasonable detention issue: See *R. v. Storrey*, [1990] 1 SCR 241.
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> 44 If any violation of a Charter protected right is found to exist, the analysis next moves to a consideration of s. 24(2) of the *Charter of Rights and Freedoms*, under which the exclusion of evidence is weighed. Under this provision, the Applicant must satisfy the Court, on a balance of probabilities, that the admission of the evidence would bring the administration of justice into disrepute: See *R. v. Grant*, 2009 SCC 15.

[8] In summary:

1. I find Sgt. Stevens was entitled to arrest Mr. Carvery and search the front seat centre console in the vehicle pursuant to the July 15, 2021 Warrant of Apprehension issued by Mr. Carvery's parole authorities;
2. I also find that Sgt. Stevens was entitled to arrest Mr. Carvery and search the front seat centre console in the vehicle, as a lawful search incident to Mr. Carvery's arrest pursuant to s. 495(1)(a) of the *Criminal Code* ("*CC*") for possession for the purpose of trafficking cocaine.

[9] Therefore, I find that Sgt. Stevens did not breach Mr. Carvery's s. 8 or s. 9 *Charter* rights.

[10] Alternatively, even accepting a breach of his s. 8 *Charter* right, I find the evidence ought not to be excluded pursuant to s. 24(2) *Charter*.

[11] Consequently, I am entitled to consider that evidence in relation to whether the Crown has proved beyond a reasonable doubt the elements of the s. 5(2) *CDSA* offence.

[12] I am satisfied that the Crown has proved those elements beyond a reasonable doubt, and I find Mr. Carvery guilty of having the possession of cocaine for the purposes of trafficking contrary to s. 5(2) *CDSA*.

[13] Let me explain these conclusions in greater detail.

A - Section 9 *Charter of Rights and Freedoms*

[14] Section 9 reads: “Everyone has the right not to be arbitrarily detained or imprisoned.”

[15] The upshot of the jurisprudence is that the prohibition on arbitrary detention, which includes physical and “psychological” detention, is meant to protect individual liberty by limiting the State’s ability to detain persons without adequate justification[3].

[16] It must be borne in mind that the “detention” of an individual is notionally an earlier step in the process which could lead to an arrest.

[17] Thus, a detention can be lawfully effected by satisfying a lower legal threshold than the threshold required to “arrest” an individual.

[18] If, in the totality of circumstances, there are reasonable grounds for suspicion of a sufficient nexus between the individual and a recent or still unfolding crime, then a peace officer is permitted to detain them for investigative purposes (e.g. *R. v. Le*, para. 131).

[19] I am very satisfied that Sgt. Stevens had reasonable grounds for suspicion that Mr. Carvery was in possession of, and trafficking in, cocaine[4].

[20] Moreover, Sgt. Stevens was entitled to concurrently arrest (detain) him pursuant to the Warrant of Apprehension.

[21] Therefore, there was a lawful detention of Mr. Carvery and no breach of s. 9 of the *Charter*.

[22] Presuming for the moment that there is no basis for the vehicle-console search pursuant to the Warrant of Apprehension-based arrest, then, whether Mr. Carvery’s vehicle was lawfully subject to search incident to arrest in relation to the alleged s.

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[3] See for example in the jurisprudence: *R. v. Le*, 2019 SCC 34; *R. v. Ladouceur*, [1990] 1 SCR 1257; *R. v. Mann*, [2004] 3 SCR 59; *R. v. Grant*, [2009] 2 SCR 353 et al.

[4] The definitions of "sell" and "traffic" include a broad range of conduct -see s. 2 *CDSA*. "Possession" is also defined in s. 2 *CDSA* - see also *R. v. Pham*, 2006 SCC 26, cited in *R. v. Chiasson*, 2024 NSCA 11, at para. 50, per Bourgeois, JA.

5(2) *CDSA* offence, turns on whether Sgt. Stevens had s. 495 *CC* grounds for the arrest of Mr. Carvery.

[23] The Crown also bears that evidentiary and legal burden.

[24] I will address that issue in my analysis of s. 8 of the *Charter*.

B - Section 8 *Charter of Rights and Freedoms*

[25] Section 8 reads: "Everyone has the right to be secure against unreasonable search or seizure."

[26] Counsel agreed that, generally speaking, Sgt. Stevens had to have reasonable grounds to arrest Mr. Carvery, pursuant to s. 495(1)(a) *CC*, for possession of cocaine for the purpose of trafficking before he would have been entitled to search the console of Mr. Carvery's vehicle.

[27] As it was a warrantless search, the Crown accepts that it has the evidentiary and legal burden to demonstrate the search of the console area was lawful[5].

[28] Earlier on July 15, 2021, the lead investigator, Detective Constable (now Sgt.) Greg Stevens, Halifax Regional Police ("HRP") had been informed by Parole Officer Christine MacKenzie that her office had issued a Warrant of Apprehension for Mr. Carvery's arrest, and he was to be arrested as soon as possible (but preferably not at the location where the parolees were attending for their programming - i.e. the MacDonald building).

[29] Parole Officer MacKenzie has 40 years' related experience. I am satisfied that she conducted herself in a conscientious and professional manner throughout her relevant dealings in relation to Mr. Carvery's parole suspension.

[30] As a witness, I was impressed by her candour, sincerity and reliability. I have no hesitation finding her to have been a credible witness.

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[5] See for example, general jurisprudence such as *Cloutier v. Langlois*, [1990]1 SCR 158 and *R. v. Reeves*, 2018 SCC 56 (para 14). More specifically, see *R. v. Stairs*, 2022 SCC 11 (which involved a search of a home without warrant, and can be summarized as: The common law standard <u>permits the police to search a lawfully arrested person and to seize anything in their possession or the surrounding area</u> of the arrest <u>to</u> guarantee the safety of the police and the arrested person, prevent the person's escape, or <u>provide evidence against them</u>. Specifically, <u>it permits a search of</u> the person arrested and <u>the surrounding area</u> of the arrest <u>when</u> (1) <u>the arrest is lawful</u>; (2) the search is incidental to the arrest, such that <u>there is some reasonable basis for the search connected to the arrest and the search is for a valid law enforcement purpose</u>, including safety, <u>evidence preservation, or evidence discovery</u>; and (3) the nature and <u>extent of the search are reasonable</u>.

[31] I similarly found Sgt. Stevens to have been a credible witness.

[32] I note here that whenever I refer to a witness as "credible" - I intend to mean that they are both truthful and reliable unless I state otherwise - bearing in mind the reasons in *R. v. Perrone*, 2015 SCC 8 affirming 2014 MBCA 74.

[33] Mr. Carvery does not dispute that Sgt. Stevens was entitled to arrest him on the Warrant of Apprehension and search his person.

[34] However, he argues that Sgt. Stevens was not entitled to arrest him under s. 495 *CC* for possession of cocaine for the purpose of trafficking.

[35] Consequently, he says that Sgt. Stevens was not entitled to search the interior of the vehicle, and specifically the centre console, where the "crack" cocaine was found.

[36] In my opinion, there are two viable sources of Sgt. Stevens' lawful authority to search the console area of the car:

1. the Warrant of Apprehension (which necessarily includes the right to arrest Mr. Carvery and, in my opinion, therefore, includes the right to search incidental thereto); and
2. if Sgt. Stevens had reasonable grounds to arrest Mr. Carvery per s. 495(1)(a) *CC* (which includes the right to search incidental thereto)[6].

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[6] As an aside, I note that Section 11(7) *CDSA* also provides authority to search without a warrant where "by reason of exigent circumstances it would be impracticable to obtain one". While no expressed attention was placed in oral argument on this authority to search the centre console, I am satisfied that had there been, the written argument objections of earlier counsel Mr. McKillop (para. 35 Brief) would have remained valid regarding whether there were "exigent circumstances", particularly in light of the reasons in *R. v. Paterson*, 2017 SCC 15. The vehicle could have been seized and then a warrant obtained to conduct a search. See also the court's reasons from *R. v. Grant*, [1993] 3 S.C.R. 223 regarding the predecessor to s. 11(7) *CDSA*, namely s. 10 of the *Narcotic Control Act*: "To sum up on this point, s. 10 may validly authorize a search or seizure without warrant in exigent circumstances which render it impracticable to obtain a warrant. Exigent circumstances will generally be held to exist if there is an imminent danger of the loss, removal, destruction or disappearance of the evidence if the search or seizure is delayed. While the fact that the evidence sought is believed to be present on a motor vehicle, water vessel, aircraft or other fast moving vehicle will often create exigent circumstances, no blanket exception exists for such conveyances. …The constitutional questions are answered as follows: 1. Is s. 10 of the *Narcotic Control Act*, R.S.C., 1985, c. N-1, to the extent that it authorizes a search without a warrant of any place other than a dwelling house, inconsistent with the right to be secure against unreasonable search or seizure as guaranteed by s. 8 of the *Canadian Charter of Rights and Freedoms* and, to that extent, inoperative and of no force and effect? Answer: Yes, to the extent that it authorizes such searches in circumstances other than in exigent circumstances where it would be impracticable to obtain a warrant. 2. Is s. 10 of the *Narcotic Control Act*, R.S.C., 1985, c. N-1, to the extent that it may authorize the perimeter search of a dwelling house without a warrant inconsistent with the right to be secure against unreasonable search or seizure as guaranteed by s. 8 of the *Canadian Charter of Rights and Freedoms* and, to that extent, inoperative and of no force and effect?

[37] Before I consider the issue in relationship to the possession for the purpose of trafficking offence, I note that I am satisfied that Sgt. Stevens had "reasonable grounds to believe that" Mr. Carvery had a controlled substance on his person and/or in his immediate surroundings while in the vehicle.

i - A lawful arrest and search pursuant to the Warrant of Suspension and Apprehension

[38] On July 15, 2021, while Mr. Carvery was on statutory release arising from a sentence in a federal institution, police were alerted that his parole was being suspended and he was subject to arrest on a Warrant of Apprehension.

[39] The relevant sections of the *Corrections and Conditional Release Act*, S.C. 1992 c. 20 ("*CCRA*") read:

> Definition of releasing authority
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> 133 (1) In this section, releasing authority means
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> (a) the Board, in respect of
>
> (i) parole,
>
> (ii) statutory release, or
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> (iii) unescorted temporary absences authorized by the Board under subsection 116(1);
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> (b) the Commissioner, in respect of unescorted temporary absences authorized by the Commissioner under subsection 116(2); or
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> (c) the institutional head, in respect of unescorted temporary absences authorized by the institutional head under subsection 116(2).
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> Conditions of release
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> (2) Subject to subsection (6), every offender released on parole, statutory release or unescorted temporary absence is subject to the conditions prescribed by the regulations.
>
> Conditions set by releasing authority
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> (3) **The releasing authority may impose any conditions on the parole, statutory release or unescorted temporary absence of an offender that it considers reasonable and necessary in order to protect society and to facilitate the offender's successful reintegration into society. For greater certainty, the**

Answer: Yes, to the extent that it authorizes such searches in circumstances other than in exigent circumstances where it would be impracticable to obtain a warrant."

conditions may include any condition regarding the offender's use of drugs or alcohol, including in cases when that use has been identified as a risk factor in the offender's criminal behaviour.

Instructions to released offenders

134 (1) **An offender who has been released on parole, statutory release** or unescorted temporary absence **shall comply with any instructions given** by a member of the Board or a person designated, by name or by position, by the Chairperson of the Board or the Commissioner, or given by the institutional head or **by the offender's parole supervisor, respecting any conditions of parole, statutory release** or unescorted temporary absence **in order to prevent a breach of any condition or to protect society.**

Suspension, Termination, Revocation and Inoperativeness of Parole, Statutory Release or Long-Term Supervision

Suspension of parole or statutory release

135 (1) A member of the Board or a person, designated by name or by position, by the Chairperson of the Board or by the Commissioner, when an offender breaches a condition of parole or statutory release or **when the member or person is satisfied that it is necessary and reasonable to suspend the parole or statutory release in order to prevent a breach of any condition thereof or to protect society, may, by warrant,**

(a) suspend the parole or statutory release;

(b) authorize the apprehension of the offender; and

(c) authorize the recommitment of the offender to custody until the suspension is cancelled, the parole or statutory release is terminated or revoked or the sentence of the offender has expired according to law.

…

Execution of warrant

137 (1) **A warrant of apprehension issued under section 11.1**, 18, 118, **135**, 135.1 or 136 or by a provincial parole board, or an electronically transmitted copy of such a warrant, **shall be executed by any peace officer to whom it is given in any place in Canada as if it had been originally issued** or subsequently endorsed by a justice or other lawful authority having jurisdiction in that place.

Arrest without warrant

(2) A peace officer who believes on reasonable grounds that a warrant is in force under this Part or under the authority of a provincial parole board for the apprehension of a person may arrest the person without warrant and remand the person in custody.

Where arrest made

(3) Where a person has been arrested pursuant to subsection (2), the warrant of apprehension, or an electronically transmitted copy thereof, shall be executed within forty-eight hours after the arrest is made, failing which the person shall be released.

Arrest without warrant - breach of conditions

137.1 A peace officer may arrest without warrant an offender who has committed a breach of a condition of their parole, statutory release or unescorted temporary absence, or whom the peace officer finds committing such a breach, unless the peace officer

(a) believes on reasonable grounds that the public interest may be satisfied without arresting the person, having regard to all the circumstances including the need to

(i) establish the identity of the person, or

(ii) prevent the continuation or repetition of the breach; and

(b) does not believe on reasonable grounds that the person will fail to report to their parole supervisor in order to be dealt with according to law if the peace officer does not arrest the person.

[My bolding added]

[40] To reiterate: a Warrant of Apprehension cannot be issued by the parole authorities unless they are satisfied "that it is necessary and reasonable to suspend the parole or statutory release in order to prevent a breach of any condition thereof or to protect society" (s. 135(1) *CCRA*)[7].

[41] While not a warrant for the arrest of Mr. Carvery pursuant to s. 495 *CC*, nevertheless, it is generally appropriate to apply the existing rationale and principles in the jurisprudence regarding the search of a person and their immediate surroundings (for example, a residence or vehicle), that arise as a result of an arrest based on reasonable grounds per s. 495(1)(a) *CC*, to cases such as this one, where police execute a Warrant of Apprehension.

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[7] I accept that Parole Officer MacKenzie and the Senior Parole Officer supervising her were satisfied, and reasonably so, that these criteria had been met in Mr. Carvery's case. Ms. MacKenzie emphasized that "we take seriously" the issuance of a Warrant of Apprehension, since it deprives an offender of their liberty to be at large in, and interrupts an offender's rehabilitation and reintegration into, the community. Notably, Sgt. Stevens testified that he had an ongoing and positive relationship with Parole Officer MacKenzie regarding the exchange of information, in relation to individuals who were on parole, or otherwise relevant to his job as a police officer or her job as a parole officer. I took from his evidence that he considered the information received from her as truthful and reliable, and I find that it was reasonable for him to do so in this case.

[42] When individuals are lawfully arrested pursuant to s. 495 *CC*, the arresting officer is entitled to search the person incident to the arrest, and their immediate surroundings (a vehicle or residence) and seize relevant items on several bases.

[43] As indicated in *R. v. Stairs*, 2022 SCC 11, in summary:

- The common law standard permits the police to search a lawfully arrested person and to seize anything in their possession or the surrounding area of the arrest to guarantee the safety of the police and the arrested person, prevent the person's escape, or provide evidence against them. Specifically, it permits a search of the person arrested and the surrounding area of the arrest when (1) the arrest is lawful; (2) the search is incidental to the arrest, such that there is some reasonable basis for the search connected to the arrest and the search is for a valid law enforcement purpose, including safety, evidence preservation, or evidence discovery; and (3) the nature and extent of the search are reasonable.

[44] In my opinion, solely on the basis of the authority of the Warrant of Apprehension, Sgt. Stevens was entitled to search the front seat centre console in the rented vehicle operated by Mr. Carvery on July 15, 2021, for evidence of him having simple possession of cocaine or possession of cocaine for the purpose of trafficking.

[45] This is so in this case, because, *inter alia*,

(a) thereunder Sgt. Stevens was entitled to arrest Mr. Carvery on sight, which necessarily entitled him, incidental thereto, to search Mr. Carvery's person and his immediate surroundings (for safety, and evidence discovery or preservation); and

(b) I find that Sgt. Stevens had reasonable grounds to believe that Mr. Carvery would be the driver of the Mitsubishi RVR at the relevant times (he knew, through his earlier conversation that day with Parole Officer MacKenzie, that Mr. Carvery had been provided that rental car to use as his own while on parole and that Mr. Carvery was required to attend programming at the MacDonald building

three times per week, and specifically on July 15, 2021), and he personally observed Mr. Carvery operating the motor vehicle[8];

(c) I find that Sgt. Stevens had reasonable grounds (when I speak of "reasonable grounds", unless I state otherwise, I mean the required "reasonable and probable" grounds) to believe that Mr. Carvery was in possession of cocaine at the relevant times, as a result of the credible information provided by the parole authorities (which was buttressed by Sgt. Stevens' own experience with Mr. Carvery, direct and indirect knowledge, which included that there was "a lot of information that [Mr. Carvery] had trafficked [Cocaine] over many years", and that cocaine had always been his preferred drug of choice) - including that on July 7, 14 (and on July 15 which Sgt. Stevens himself observed), Mr. Carvery had "suspicious meets" of short duration with individuals, which Sgt. Stevens reasonably considered consistent with cocaine trafficking transactions;

(d) I find that Mr. Carvery was seated immediately beside the front seat centre console while operating the vehicle, and he became aware of the police presence before he exited the vehicle (which presented a realistic opportunity for him to have deposited any illegal drugs he had on his person into the centre console);

(e) in all the circumstances, I am satisfied that the material aspects of the conduct of the police during the arrest and search of Mr. Carvery and the vehicle were carried out lawfully and reasonably.

[46] Parole Officer MacKenzie testified that she advised Sgt. Stevens that Mr. Carvery's parole had been suspended and the Warrant of Apprehension had been issued "to prevent a breach" by Mr. Carvery of his parole conditions.

[47] She elaborated in her testimony that his parole conditions included (summarized in my own words):

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[8] Sgt. Stevens testified, and I accept that he could properly consider as part of his "reasonable grounds" in these circumstances, that in his experience it was common for drug traffickers to use rental vehicles so that if caught, it was not their personal vehicle that might be ordered forfeited upon their conviction, and I infer also to avoid easy detection by police based on the registered owner status available from the publicly displayed license plates. He also thought it was "odd" that Mr. Carvery had the use of a rental vehicle when he did not need it for employment or other obvious purposes, and Sgt. Stevens questioned why he would need his own vehicle, since there is a readily accessible public transport network from his home address in Dartmouth to downtown Halifax where the MacDonald building is located.

- abstain from consumption or possession of controlled drugs and substances;
- no association with persons with criminal records (*Criminal Code* or *Controlled Drugs and Substances Act*) except when at programming specifically permitted by his parole authorities;
- not commit any criminal offences;
- maintain attendance at rehabilitation programs and take all steps recommended by parole authorities to remain drug-free (including taking all necessary steps to obtain available funding for and prescriptions/ authorizations for - and ingest as directed - Suboxone. She noted that she was aware he had not made the prerequisite arrangements to have the Suboxone medication available for his use, and this among other "red flags"[9], suggested he did not appear to have a sincere interest in remaining drug-free).

[48] She testified that she had probably told Sgt. Stevens more than she recalled when giving her testimony but could not specifically recall everything she told him on July 15, 2021.

[49] Her testimony satisfies me that, *inter alia*, she told Sgt. Stevens: "we suspected [Mr. Carvery] was involved in drug trafficking again" and gave specific reasons why they concluded this. I find that the parole authorities were properly satisfied they had lawful grounds for issuing the Warrant of Apprehension.

[50] I accept Sgt. Stevens' testimony about what Parole Officer MacKenzie told him, and his own experience with Mr. Carvery, directly and indirectly through other sources, human and otherwise, and the observations he made and information he had received, which caused him to conclude that over time, Mr. Carvery's drug of choice was consistently cocaine, and that on July 15, 2021, he believed he had reasonable grounds to believe that Mr. Carvery was in possession of cocaine, and furthermore, that it was for the purpose of trafficking. His belief in that respect was also reasonable.

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[9] Parole Officer MacKenzie testified that the "red flags" and risk indications that she identified as realistic concerns regarding Mr. Carvery's relapse in July 2021, included that: Mr. Carvery was in breach of his conditions not to associate with persons with criminal records outside of programming (she knew he was doing so particularly with Mr. Jared Thompson who she also supervised); that he had shown no serious interest in recovering from his use and possession of illegal drugs; and there was reliable evidence that in July 2021 he had repeatedly engaged in conduct which strongly suggested he had re-involved himself with the use and possession of illegal drugs.

[51] He indicated that Parole Officer MacKenzie called him initially around 10 a.m. on July 15, 2021, to advise they were looking at suspending Mr. Carvery's parole, and that she told him about a number of recent incidents to explain why that was the case.

[52] Sgt. Stevens, with 21 years' experience with Halifax Regional Police, was personally familiar with Mr. Carvery as a police officer since approximately 2008. He asked Parole Officer MacKenzie to call him if Mr. Carvery's parole was suspended. She did so just before noon and faxed him a copy of the Warrant of Suspension and Apprehension.

[53] Sgt. Stevens conducted further inquiries on his end about Mr. Carvery's present circumstances and the status of the rental vehicle[10].

[54] Specifically, pursuant to the Warrant of Apprehension, Sgt. Stevens was entitled to search the front centre console of the rental vehicle that was provided to, and operated by, Mr. Carvery on July 15, 2021, in pursuit of evidence <u>relevant to the investigation being conducted by the parole authorities</u> into whether Mr. Carvery had breached his parole conditions, by him being "involved in drug trafficking again", including whether he was merely in simple possession of cocaine.

ii - Sgt. Stevens lawfully arrested Mr. Carvery and searched the console of the vehicle regarding the s. 5(2) *CDSA* offence

[55] Sgt. Stevens knew that Mr. Carvery's parole had been suspended as a result of a series of incidents between July 7 and July 15, which satisfied Christine MacKenzie (his supervising parole officer) and the Senior Parole Officer in her office that it was "<u>necessary and reasonable</u> to suspend the parole or statutory release in order <u>to prevent a breach of any condition thereof or to protect society</u>", and that specifically their concern was that Mr. Carvery was engaged in ongoing illegal drug purchases and sales.

[56] Sgt. Stevens himself had additional information bases from: his extensive, specific knowledge of, and experience with, drug trafficking in the Uniacke

[10] I consider only as trial evidence the following: The Mitsubishi RVR was found to have been rented in the name of one Brian States, although Mr. Carvery represented to his parole officer that "his sister" had rented the car for him because hers was "in the shop", and he needed to get back and forth from Dartmouth to downtown Halifax in order to attend programming at the MacDonald building three times a week. Parole Officer MacKenzie specifically called Mr. Carvery's sister to confirm she rented the car, and she did confirm that to be the case. Parole Officer MacKenzie was unaware, that Mr. Carvery's sister was not the person who had formally rented the vehicle for his use and was unfamiliar with the purported renter of the vehicle - Brian States.

Square/Gottingen Street area, and Halifax Regional Municipality generally; and from his direct and indirect knowledge of Mr. Carvery's past criminal conduct and circumstances; bearing in mind he knew that the Warrant of Apprehension was issued in order to prevent what to two senior Parole Officers had concluded would be an imminent breach by Mr. Carvery of his parole conditions, namely by possession and/or consumption of *CDSA* substances; and specifically, Sgt. Stevens was also aware of his long-standing association with, and preference for, cocaine.[11]

[57] As I concluded above, Sgt. Stevens was entitled pursuant to the Warrant of Apprehension to search Mr. Carvery's rental vehicle front centre-console for evidence that he was in simple possession of cocaine, or, in possession for the purpose of trafficking, as either of those are contrary to Mr. Carvery's parole conditions.

[58] Presuming for the moment, however, that Sgt. Stevens was not entitled to search the front seat centre console pursuant to the Warrant of Suspension and Apprehension, Sgt. Stevens would then have been restricted to reliance on the provisions of s. 495 *CC* as a basis for his warrantless arrest of Mr. Carvery on July 15, 2021, and search of the console area.

[59] Section 495(1) *CC*, as an independent basis for a warrantless arrest, on the basis that a person is trafficking in cocaine contrary to s. 5(2) *CDSA*, demands more criteria be satisfied than for the arrest of an individual who is in simple possession of cocaine contrary to s. 4 *CDSA* or than under the Warrant of Apprehension.

[60] Section 5(2) *CDSA* is what is called a "straight indictable" offence.

[61] Section 495 *CC* reads, in part:

Arrest without warrant by peace officer

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[11] The evidence presented for trial (rather than exclusively *voir dire*) purposes satisfied me that at the times relevant hereto: Mr. Carvery was required by his parole conditions to live with his sister in the Highfield Park Drive area of Dartmouth; that he was driving the red Mitsubishi RVR not long before July 15, 2021 when he met his parole officer, Christine MacKenzie, and he informed her that his sister had rented it for him because her own car, which he had previously been using, was "in the shop". The Mitsubishi vehicle was rented for 8 days from Enterprise car rentals in the name of Robin States, a male individual from Cole Harbour, Halifax Regional Municipality. Jared Thompson testified that beforehand and on July 15, 2021, Mr. Carvery picked him up in Bedford, where he lived, so that they could go to a program for parolees at the MacDonald building in downtown Halifax that day. Parole Officer MacKenzie confirmed that she was supervising both of them, and they were required to attend three days a week at the program at that time, but strictly speaking, they were not to otherwise associate with each other, other than incidentally at programming, and she testified that she had told them both that. The MacDonald building is in close proximity to the Uniacke Square housing complex/Gottingen Street, Halifax.

> 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**;
>
> (b) a person whom he finds committing a criminal offence; or
>
> (c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

[62] The material issue is whether Sgt. Stevens had s. 495(1)(a) *CC* reasonable grounds to arrest Mr. Carvery for possession of cocaine for the purpose of trafficking[12].

[63] Let me examine that issue next.

[64] Did Sgt. Stevens have "reasonable grounds" to arrest Mr. Carvery for possession of cocaine for the purpose of trafficking?

[65] Appreciating what is the legal ambit of "reasonable grounds" is necessary to answer this question.

[66] As the majority (Rowe and O'Bonsawin, JJ, with Côté, J concurring) agreed in *R. v. Zacharias*, 2023 SCC 30:

> 27 In *R. v. Storrey*, [1990] 1 S.C.R. 241, this Court explained that in order to safeguard the liberty of Canadians, the *Criminal Code*, R.S.C. 1985, c. C-46, sets out strict standards for when police may exercise powers of arrest. In order to obtain a warrant for arrest, the police must demonstrate that they have reasonable and probable grounds to believe that the person they are seeking to arrest has committed an offence. Section 507 of the *Code* provides for a review mechanism whereby a justice, upon receipt of an information, determines whether the requisite grounds for arrest have been made out.
>
> 28 The same standard of reasonable and probable grounds applies where the police arrest an individual without a warrant (*Storrey*, at p. 249). **Section 495(1)(a) of the Code grants police the power to arrest individuals without judicial authorization if, on reasonable grounds, the police believe the person has committed or is about to commit an indictable offence. The test for whether the police were acting within their authority to conduct a warrantless arrest**

[12] This is the basis for Sgt. Stevens arrest pursuant to s. 5(2) *CDSA*, which he announced to Mr. Carvery when arresting him, and the basis on which at that time he believed he was authorized to do so.

> **has both a subjective and an objective component (pp. 250-51). Subjectively, the arresting officer must honestly believe that the suspect committed the offence in question. In addition, those subjective grounds must be justifiable from an objective point of view. In evaluating whether the officer had reasonable and probable grounds for arrest, the court must conduct the analysis from the perspective of a reasonable person standing in the shoes of the arresting officer** (*R. v. Beaver*, 2022 SCC 54, at para. 72).
>
> [My bolding added]

[67] Let me then focus on whether "from the perspective of a reasonable person standing in the shoes of the arresting officer", Sgt. Stevens honestly held subjective grounds, were justifiable from an objective point of view?

[68] This requires an examination of what information Sgt. Stevens had upon which he formed his subjective grounds.

[69] I find helpful Justice Broads' summary in his reasons in *R. v. Watson*, 2024 ONSC 596:

> 29 In the recent case of *R. v. Beaver*, 2022 SCC 54 the Supreme Court of Canada confirmed that the essential legal principles governing warrantless arrests are settled. At para. 72, the Court summarized those principles as follows (case authorities and citations omitted for brevity):
>
> > 1. A warrantless arrest requires subjective and objective grounds to arrest. The arresting officer must subjectively have reasonable and probable grounds for the arrest, and those grounds must be justifiable from an objective viewpoint.
> >
> > 2. In assessing the subjective grounds for arrest, the question is whether the arresting officer honestly believed that the suspect committed the offence. Subjective grounds for arrest are often established through the police officer's testimony. This requires the trial judge to evaluate the officer's credibility, a finding that attracts particular deference on appeal.
> >
> > 3. The arresting officer's subjective grounds for arrest must be justifiable from an objective viewpoint. **This objective assessment is based on the totality of the circumstances known to the officer at the time of the arrest, including the dynamics of the situation, as seen from the perspective of a reasonable person with comparable knowledge, training, and experience as the arresting officer**.
> >
> > 4. Evidence based on the arresting officer's training and experience should not be uncritically accepted, but neither should it be approached with "undue scepticism." Although the analysis is conducted from the perspective of a reasonable person "standing in the shoes of the [arresting]

officer", deference is not necessarily owed to their view of the circumstances because of their training or experience. The arresting officer's grounds for arrest must be more than a "hunch or intuition".

5. In evaluating the objective grounds to arrest, courts must recognize that, often, the officer's decision to arrest must be made quickly in volatile and rapidly changing situations. Judicial reflection is not a luxury the officer can afford. The officer must make his or her decision based on available information which is often less than exact or complete. Courts must also remember that determining whether sufficient grounds exist to justify an exercise of police powers is not a scientific or metaphysical exercise, but one that calls for the application of common sense, flexibility, and practical everyday experience.

6. "**Reasonable and probable grounds" is a higher standard than "reasonable suspicion". Reasonable suspicion requires a reasonable possibility of crime, while reasonable and probable grounds, requires a reasonable probability of crime. At the same time, police do not require a prima facie case for conviction before making an arrest. Nor do the police need to establish that the offence was committed on a balance of probabilities**. Instead, the reasonable and probable grounds standard requires a reasonable belief that an individual is connected to the offence. **A reasonable belief exists when there is an objective basis for the belief which is based on compelling and credible information**. The police are also not required to undertake further investigation to seek exculpatory facts or to rule out possible innocent explanations for the events before making an arrest.

7. The police cannot rely on evidence discovered after the arrest to justify the subjective or objective grounds for arrest.

8. When a police officer orders another officer to make an arrest, the police officer who directed the arrest must have had reasonable and probable grounds. It is immaterial whether the officer who makes the arrest personally had reasonable and probable grounds.

…

37 I am satisfied that Officer Birnie subjectively believed that he had the required grounds to make an arrest of the occupant of the black Hyundai. As noted previously, the question is whether the grounds were justifiable from an objective viewpoint based on the totality of the circumstances known to Officer Birnie, as seen from the perspective of a reasonable person with comparable knowledge, training, and experience.

38 Officer Birnie observed one interaction which he believed was a hand-to-hand drug transaction. **It is not disputed that a single such incident can provide objective reasonable grounds for an arrest** as in *R. v. Phan* (1997), 99 B.C.A.C. 6 (B.C.C.A.) See also *R. v. Gill*, 2015 BCSC 310 at para. 37.

39 As noted, Officer Birnie stated that he relied upon his own experience in forming his belief that he had observed a hand-to-hand drug transaction. However, he had at the time relatively limited experience with the Unit. He offered no evidence of how many hand-to-hand drug transactions he had witnessed during his time with the Unit, nor did he describe the characteristics of the transactions that he did witness which led him to conclude that what he was observing on the day in question was similar.

40 As noted previously, evidence based on the arresting officer's training and experience should not be viewed with undue scepticism. At the same time, it is important that it not be uncritically accepted. In *Gill* at para. 47, Schultes, J. made the following observation which I adopt:

> As to the interpretation offered by an officer's past experience, I think the danger to be avoided is that that officer will simply assert that certain behaviour is consistent with drug trafficking, without being able to ground that assertion in objective experience or to link in a transparent way what was observed to that experience, in a way that the court can assess.

[My bolding added]

[70] In summary, I am satisfied that the evidence herein established that Sgt. Stevens had reasonable and probable grounds to arrest Mr. Carvery for possession of cocaine for the purpose of trafficking, and therefore to search his person, and his immediate surroundings, including the console in the vehicle.[13]

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[13] For clarity I add here that, generally speaking, there is a qualitative and significant difference between information received from persons who are <u>not</u> "informers", and those who are properly characterized as "informers" where warrantless arrests are concerned. To the extent that Sgt. Stevens was relying upon information received from parole authorities, and specifically from Parole Officer MacKenzie, to form his grounds for arrest for the included (by operation of law) offence of simple possession, and possession for the purpose of trafficking, although they are not in the category of "informers", and the information from parole authorities need not be so further assessed, I conclude that the higher threshold, whether <u>overall in the totality of circumstances</u>, reliance on that information meets the standard of "<u>reasonableness</u>", <u>including whether upon further consideration that information was compelling, credible, and corroborated,</u> is met here. The general test a judge will apply on examination of the purported reasonable and probable grounds, is whether they are satisfied that at the time of an arrest/search, the police officer honestly believed the grounds existed, and that belief was reasonable in all the circumstances. I am satisfied there were reasonable and probable grounds here. In any event, I also am satisfied that the information received from parole authorities in present circumstances was compelling, credible and corroborated. (On July 15, 2021, Sgt. Stevens observed a "meet" he reasonably considered was consistent with a drug transaction between Mr. Carvery and an individual.) In *R. v. Demirovic*, 2022 NSCA 56, the Court considered whether police had sufficient grounds for the arrest of the occupants of a motor vehicle, in which police ultimately found 1 kg of cocaine. Chief Justice Wood's reasons between paragraphs 20 and 27 address the reasonableness of the information/authority police officers relied upon to arrest without a warrant pursuant to s. 495(1) *CC*, when a "tip" from a confidential informer is a portion of the information relied upon for the arrest. He cites *R. v. Debot*, [1989] 2 SCR 1140 and *R. v. Garofoli*, [1990] 2 SCR 1421. Therein, the Supreme Court of Canada identified [p. 1168] "at least three <u>concerns to be addressed in weighing evidence [at trial] relied on by the police to justify a warrantless search</u>. First, was the information predicting the commission of a criminal offences compelling? Second, where that information was based on a 'tip' originating from a source outside the police, was that source credible? Finally, was the information corroborated by police investigation prior to making the

[71] I am so satisfied because there is a reliable, robust constellation of indicia to support a finding that there was a reasonable basis for Sgt. Stevens' honestly held belief, arising in the evidence, *inter alia* from:

- Sgt. Stevens' conversation with Parole Officer MacKenzie (including having received a copy of the Warrant of Suspension);
- the fact of the issuance of the Warrant of Suspension - and the underlying reasons therefor - including instances on July 7 and July 14 that are consistent with Mr. Carvery being in possession of and transferring or receiving *CDSA* substances;
- his past experience with him, and from his acquired knowledge of Mr. Carvery's circumstances, including his past criminal record [Sgt. Stevens testified that Mr. Carvery had three times been convicted of possession of cocaine for the purpose of trafficking, the last instance he was charged in 2013 and convicted in 2015, and I infer served a sentence thereafter - and on July 15, 2021 he was on parole for firearms offences] including intra-police information - confidential and not - about Mr. Carvery's criminal associations and activities;
- his ongoing historical and present-day reliable knowledge of the drug trafficking scene in Halifax, and in particular the Gottingen Street and surrounding area;
- where and how Mr. Carvery was observed to be driving and stopped that day;
- Sgt. Stevens' personal observations of Mr. Carvery getting out of his vehicle on July 15, 2021(2:25 p.m.), where he saw him in a brief meeting with an individual behind, what I find was a reference by Sgt. Stevens to, the Gordon B. Isnor building on Creighton Street near Nora Bernard Street (renamed in 2023 from its earlier "Cornwallis Street");
- that given the length of time that police were following him, Mr. Carvery likely became aware of their presence and, if not already in

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decision to conduct the search? I do not suggest that each of these factors forms a separate test. Rather I concur with Martin JA's view that the 'totality of the circumstances' must meet the standard of reasonableness. Weaknesses in one area may, to some extent, be compensated by strengths in the other two." Chief Justice Wood further noted that: "As this passage indicates, the assessment of whether police have reasonable grounds is fact specific and varies depending upon the quality of the information known to them." [My underlining added]

> the console, he would have had sufficient time to place the 49g of crack cocaine in the centre console beside him.

[72] I conclude that Sgt Stevens subjectively, honestly, and in my opinion, reasonably, believed that he had grounds to arrest Mr. Carvery per s. 495(1)(a) *CC* - as "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*" - namely: possession of cocaine for the purpose of trafficking.

[73] I note that simple possession of cocaine per s. 4(1) and (3) *CDSA*, which is a hybrid offence, is "deemed to be an indictable offence" per s. 34(1)(a) of the *Interpretation Act*, RSC 1985, c. I-21.

[74] Consequently, I am satisfied that Sgt. Stevens was also lawfully entitled to arrest Mr. Carvery for simple possession of cocaine, since the grounds for arrest therefor did not require consideration of the purpose for which Mr. Carvery possessed the cocaine.

[75] Thus, the arrest of Mr. Carvery pursuant to ss. 495(1)(a) CC and 5(2) *CDSA* was lawful, and as incidental thereto, the search of the vehicle console was also lawful, given the jurisprudence I cite and my reasons elsewhere, in the totality of these circumstances, *inter alia*, that the console was in Mr. Carvery's immediate surroundings, the vehicle was rented, and there is generally a lower expectation of privacy in vehicles, the operation of which are highly regulated - see paras. 59-66 in *R. v. Singh*, 2024 ONCA 66 albeit in distinguishable circumstances; and *R. v. White*, 2022 NSCA 61 at paras. 35-38 per Bryson JA.

iii - Even if there was a breach of Mr. Carvery's s. 8 *Charter* rights, the evidence should not be excluded pursuant to s. 24(2) of the *Charter*

[76] Alternatively, let me examine the legal implications had I found a breach of s. 8 of the *Charter*.

[77] For this exercise, I will presume that Sgt. Stevens did not have a sufficient basis to have had reasonable and probable grounds that Mr. Carvery had committed a s. 5(2) *CDSA* offence, (but I note that I remain satisfied, in any event, he did have

such grounds that Mr. Carvery committed a s. 4 *CDSA*-indictable simple possession-offence)[14].

[78] I specifically rely on the reasons of Justice Bryson in *White*.

[79] In that case, the concurrent lawful detention of the accused regarding a traffic collision mitigated the impact of the s. 9 *Charter* unlawful arrest (for possession of firearms) to some extent.

[80] In the present case there are reasonable and probable grounds that, at the very least, Mr. Carvery had simple possession of cocaine, and in any event, he was also concurrently lawfully arrested pursuant to the Warrant of Apprehension.

[81] In *R. v. Tim*, 2022 SCC 12, a warrantless arrest regarding a *CDSA* offence was preceded by a mistake of law by the officer resulting in a s. 9 *Charter* violation, namely whether Mr. Tim was in possession of a substance that was illegal under the *CDSA*.

[82] The sole occupant of the vehicle was searched as an incident to that arrest.

[83] The facts in summary reveal why the evidence found pursuant to the search of the car, incidental to arrest, was ruled admissible:

- The accused hit a roadside sign on a busy road and kept driving until his car stopped about a kilometre away. When a police officer arrived at the scene, he asked the accused for his driver's licence, vehicle registration, and proof of insurance. When the accused opened his car's door to get the documents, the officer saw him try to hide a small Ziplock bag containing a single yellow pill. **The officer correctly recognized the pill as gabapentin, which he mistakenly believed was a controlled substance under the *Controlled Drugs and Substances Act*. The officer immediately arrested the accused for possession of a controlled substance**.
- **After the accused was arrested, the police conducted four searches**. Initially, they conducted both a pat down search of the

[14] I appreciate that in cases in which clear uncertainty exists about the legality of police conduct, generally speaking, police should act with more, rather than less, restraint – *R. v. McColman*, 2023 SCC 8 at paras 60 and 65. I note that in that case, the evidence was not excluded. Moreover, this is not a case where unlawfully obtained information/evidence was relied upon by the police to establish their reasonable grounds for arrest, such as in *R. v. Zacharias*, 2023 SCC 30.

accused and **a search of his car incident to arrest, through which they found fentanyl, other illegal drugs, and ammunition**. Then, when the accused was being taken to the patrol car, the officer saw bullets falling from his pants. A second pat down search was then conducted, during which a loaded handgun fell from the accused's pants. Finally, the accused was strip searched at the police station, but no more contraband was found.

[84] A summary of the reasons of 6 of the 7 Justices for not excluding the evidence obtained after the *Charter* violation is as follows:

- **The police breached s. 9 of the *Charter* by arresting the accused based on a mistake of law** about the legal status of gabapentin. In addition, **they breached s. 8 of the *Charter* by searching his person and car incident to the unlawful arrest**. All of the impugned evidence was obtained in a manner that breached the *Charter* so as to trigger s. 24(2). **However, the evidence should not be excluded under s. 24(2) because its admission would not bring the administration of justice into disrepute**.
- In the instant case, **the arrest of the accused was unlawful and arbitrary, contrary to s. 9 of the *Charter*. While the arresting officer subjectively believed that he had reasonable and probable grounds to arrest the accused for possession of a controlled substance under the *CDSA,* his subjective belief was based on a mistake of law**, given that, even though he correctly identified the pill as gabapentin, he was mistaken about its legal status. **His subjective belief thus was not - and could not be - objectively reasonable**.
- A warrantless search is *prima facie* unreasonable, and thus contrary to the s. 8 *Charter* right to be secure against unreasonable search or seizure. **A search is reasonable, and thus complies with s. 8 of the *Charter*, if: (1) the search is authorized by law; (2) the law authorizing the search is reasonable; and (3) the search is conducted in a reasonable manner. The police have a common law power to search incident to investigative detention under certain circumstances. In the present case, the initial pat down search of the accused's person and the search of his car, which were purportedly conducted incident to arrest, infringed his s. 8 *Charter* right because the accused's arrest was unlawful.**

However, the second pat down search and the strip search did not infringe s. 8. The second pat down search of the accused's person was a lawful search incident to investigative detention relating to the traffic collision investigation. The arresting officer had reasonable grounds to believe that his safety or the safety of others was at risk. He expressed subjective concerns about safety, even if only implicitly, and those concerns were objectively reasonable in the circumstances. Moreover, the search was conducted reasonably. As for the strip search at the police station, given that the accused was lawfully arrested for the weapons offences after the ammunition and handgun fell from his pants, it was incident to this arrest, and it was conducted reasonably.

- **Section 24(2) of the *Charter* is triggered where evidence is obtained in a manner that violates an accused's *Charter* rights**. To determine whether evidence is so obtained, the courts take a purposive and generous approach. **The entire chain of events should be examined, and evidence will be tainted if the breach and the discovery are part of the same transaction or course of conduct. The connection between the *Charter* breach and the impugned evidence can be temporal, contextual, causal, or a combination of the three**. A remote or tenuous connection between the *Charter* breach and the impugned evidence will not suffice to trigger s. 24(2). When evidence is obtained in breach of the *Charter*, **the s. 24(2) inquiry then examines the impact of admitting this evidence on public confidence in the justice system over the long term, based on three lines of inquiry**: (1) the seriousness of the *Charter* infringing state conduct; (2) the impact of the breach on the accused's *Charter* protected interests; and (3) society's interest in the adjudication of the case on the merits. **The final step of the s. 24(2) analysis involves balancing the factors under the three lines of inquiry to assess the impact of admission or exclusion of the evidence on the long-term repute of the administration of justice**.

- **In the instant case, all the evidence seized was obtained in a manner that breached the accused's *Charter* rights**. With respect to the ammunition and illegal drugs seized during the first and second searches, this was the case because the accused's arrest for possession of a controlled substance and the searches of his person and car incident to arrest infringed ss. 8 and 9. …

- **Under the first line of inquiry, the seriousness of the *Charter* infringing state conduct is situated at the less serious end of the scale of culpability and weakly favours exclusion. The conduct underlying the accused's arrest and the searches incident to arrest was inadvertent, not deliberate**, and reflected an honest mistake about whether gabapentin was listed under the *CDSA*; **the arresting officer tried to respect the accused's *Charter* rights throughout and at no time did the police conduct display wilful blindness or a flagrant disregard for those rights**; and the facts disclose human error by a single, relatively inexperienced police officer with no evidence of a systemic problem or lack of training in the police force that contributed to the mistake. **As to the second line of inquiry, the *Charter* breaches arising from the unlawful arrest and the first two searches had a moderate impact on the accused's *Charter*-protected interests, such that this line of inquiry pulls moderately toward exclusion**. *When the accused was unlawfully arrested, his liberty interests were lawfully restricted for the traffic collision investigation, which mitigates the impact of his arbitrary arrest to some extent*. **With regard to the impact of the s. 8 *Charter* breaches, the searches were minimally intrusive. Finally, as to the third line of inquiry – society's interest in the adjudication of the case on the merits - the evidence seized was reliable and relevant to the Crown's prosecution of serious offences and its admission would better serve the truth-seeking function of the criminal trial process than its exclusion. This line of inquiry pulls strongly toward admission**. The final balancing does not call for exclusion of the evidence to protect the long-term repute of the justice system. **Excluding the evidence would damage, rather than vindicate, the long-term repute of the criminal justice system**.

[My bolding and italicization added]

[85] The reasoning in *Tim* is generally applicable to the present circumstances.

[86] Moreover, presuming there were not reasonable grounds to arrest Mr. Carvery for a s. 5(2) *CDSA* offence, I am nevertheless satisfied that:

- Sgt. Stevens was entitled to arrest Mr. Carvery pursuant to the Warrant of Apprehension and entitled incidental thereto to search the centre console;

- Sgt. Stevens was entitled to arrest Mr. Carvery pursuant to s. 495 *CC* as he had reasonable and probable grounds to believe Mr. Carvery had committed the indictable offence of simple possession of cocaine.

[87] In my opinion, in relation to both these bases of arrest, Sgt. Stevens was entitled to search Mr. Carvery's person and his immediate surroundings.

[88] I also bear in mind that, in relation to the reliable grounds to arrest for possession of cocaine for the purpose of trafficking:

- Sgt. Stevens knew that the Mitsubishi RVR had been rented to allow Mr. Carvery to operate it;
- Mr. Carvery was reasonably expected to be in ongoing custody, care and control of the vehicle;
- he was seen to be operating the vehicle immediately prior to his arrest;
- the centre console was part of Mr. Carvery's "immediate surroundings" within the vehicle.

[89] I make the further following findings in relation to the circumstances of this case.

Ground One - The seriousness of the *Charter*-infringing State conduct (admission of tainted evidence may convey the impression that the justice system condones serious State misconduct)

[90] Presuming that Sgt. Stevens did not objectively have reasonable and probable grounds to <u>arrest</u> Mr. Carvery <u>for possession of cocaine for the purpose of trafficking,</u> all other things being equal, Sgt. Stevens would not have had the right to search Mr. Carvery or his immediate surroundings as an incident to <u>that arrest</u> (and have discovered the cocaine in the console).

[91] However, I conclude that:

- Sgt. Stevens honestly believed that he had reasonable and probable grounds to arrest Mr. Carvery, and if the grounds for arrest on the trafficking offence were objectively insufficient, he did not act flagrantly, in wilful disregard to, or recklessly regarding, Mr. Carvery's *Charter* rights;

- he nevertheless did have reasonable grounds to suspect Mr. Carvery was in possession of cocaine for the purpose of trafficking (and simple possession of cocaine), and therefore was entitled to detain Mr. Carvery for investigative purposes.

[92] Is he entitled to search pursuant to the detention?

[93] The presumed misconduct is at the lower end of "serious" *Charter*-infringing State conduct.[15]

Ground Two - The impact of the breach on the *Charter*-protected interests of the accused (admission of the evidence may signal that individual rights count for little)[16]

[94] As Justice Bryson stated in *White*:

> [35] This inquiry is concerned with whether the breach "actually undermined the interests protected by the right infringed" (*Grant* at 76; *R. v. Le*, 2019 SCC 34 at 151; *R. v. Tim*, 2022 SCC 12 at 90).

[95] As noted in *Tim*, in determining whether the evidence is tainted or "obtained in a manner" as contemplated by s. 24(2), the Court should take a purposive and generous approach and examine the entire chain of events.

[96] If the breach of the *Charter* right(s) and the discovery of the evidence *are part of the same course of conduct by police* (when considered from the following perspectives: *temporally, contextually or causally, or by some combination of all three)* then s. 24(2) is triggered.

[97] Mr. Carvery argues that Sgt. Stevens did not have reasonable and probable grounds to arrest him for possession of cocaine for the purpose of trafficking, and therefore Sgt. Stevens was not entitled to search incidental to the arrest, Mr. Carvery or his immediate surroundings, which search revealed the 49g of crack cocaine (which I note is real evidence and in that respect to be considered at the third stage, regarding society's interest in an adjudication on the merits - *R. v. Grant*, [2009] 2 SCR 353).

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[15] See also the more recent reasons in *McColman*, 2023 SCC 8 at paras. 57-65 and elsewhere.

[16] The words in parentheses in Ground 1 and 2 titles are derived from Justice David Watts' *Manual of Criminal Evidence*, 2023, Thomson Reuters Canada Limited, at page 834.

[98] The impact of the s. 5(2) *CDSA*-based arrest, itself being presumed to have been unlawful, was negligible, since Mr. Carvery was concurrently lawfully arrested pursuant to the Warrant of Apprehension, and:

- I have found that grounds existed such that Mr. Carvery could also have been lawfully detained for simple possession of cocaine, and
- arrested (and his person and immediate surroundings could lawfully have been searched incident to arrest) for the indictable offence of simple possession of cocaine per s. 4 *CDSA*,
- Mr. Carvery could have been lawfully detained for possession of cocaine for the purpose of trafficking.

[99] Therefore, I find that the impact on Mr. Carvery's *Charter*-protected interests (to be free from arbitrary detention and unlawful search) was negligible.

Ground Three - The societal interest in having criminal matters adjudicated on the merits

[100] In *R. v. White*, 2020 NSCA 33 at paras 74-82, Justice Saunders set out the sentencing jurisprudence in relation to cocaine trafficking.

[101] Suffice it to say, that trafficking in cocaine has manifold and very negative consequences on the communities and persons where this offence proliferates.

[102] Justice Saunders stated:

> 81 While the above commentary from *Lacasse* deals with impaired driving rather than drug offences, the Supreme Court has also identified drug trafficking as a serious offence meriting denunciation and deterrence. In *R. v. Kang-Brown*, 2008 SCC 18, Justice LeBel stated at para184:
>
> > [184] The objective being pursued by the police was an important one, because trafficking in illegal drugs is a serious criminal offence. As has already been mentioned, the offence in issue in this case carries a maximum punishment of life imprisonment. Drug trafficking leads to other crimes. Illegal hard drugs such as cocaine are widely recognized to be a serious problem in our society. Their use not only fuels organized crime but can also destroy lives. ...

[103] There is a correspondingly strong societal interest in having such offences adjudicated on the merits[17].

Balancing the s. 24 Factors

[104] As Justice Bryson put it in *White*:

> [31] The balancing of principles and their relation to the standard of review in the s. 24(2) application are aptly described by the Ontario Court of Appeal in *R. v. McGuffie*, 2016 ONCA 365:
>
> > [60] Section 24(2) recognizes that the admission of constitutionally tainted evidence and the use of that evidence to convict persons may bring the administration of justice into disrepute. As observed in *Grant*, at paras. 67-71, s. 24(2) is premised on the assumption ***that there must be a long-term negative impact on the administration of justice if criminal courts routinely accept and use evidence gathered in violation of the legal rights enshrined in the Charter***. At the same time, however, ***s. 24(2) accepts that the exclusion of evidence can also bring the administration of justice into disrepute***. In *Grant*, the Supreme Court provided the framework for differentiating between those cases in which the exclusion of the evidence would promote the proper administration of justice and those cases in which the proper administration of justice would be further harmed by the exclusion of otherwise relevant and probative evidence.
> >
> > [61] After *Grant*, at paras. 71-86, the admissibility of evidence under s. 24(2) is approached by examining
> >
> > -- the seriousness of the *Charter*-infringing state conduct;
> >
> > -- the impact of the breach on the *Charter*-protected interests of the accused; and
> >
> > -- society's interest in an adjudication on the merits.
> >
> > [62] The first two inquiries work in tandem in the sense that both pull toward exclusion of the evidence. ***The more serious the state-infringing conduct and the greater the impact on the Charter-protected interests, the stronger the pull for exclusion***. The strength of the claim for exclusion under s. 24(2) equals the sum of the first two inquiries identified in *Grant*. The third inquiry, ***society's interests in an adjudication on the merits, pulls in the opposite direction toward the inclusion of evidence. That pull is particularly strong where the evidence is reliable and critical to the Crown's case***: see *R. v. Harrison* (2009), 97 O.R. (3d) 560, [2009] 2 S.C.R. 494, [2009] S.C.J. No. 34, 2009 SCC 34, at paras. 33-34.

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[17] See also *McColman*, 2023 SCC 8, paras 69-73.

> [63] In practical terms, the third inquiry becomes important when one, but not both, of the first two inquiries pushes strongly toward the exclusion of the evidence: see, e.g., *Harrison*, at paras. 35-42; *Spencer*, at paras. 75-80; *R. v. Jones* (2011), 107 O.R. (3d) 241, [2011] O.J. No. 4388, 2011 ONCA 632, at paras. 75-103; *Aucoin*, at paras. 45-55. If the first and second inquiries make a strong case for exclusion, the third inquiry will seldom, if ever, tip the balance in favour of admissibility: see, e.g., *R. v. Côté*, [2011] 3 S.C.R. 215, [2011] S.C.J. No. 46, 2011 SCC 46, at paras. 81-89; *R. v. Morelli*, [2010] 1 S.C.R. 253, [2010] S.C.J. No. 8, 2010 SCC 8, at paras. 98-112. Similarly, ***if both of the first two inquiries provide weaker support for exclusion of the evidence, the third inquiry will almost certainly confirm the admissibility of the evidence***: see, e.g., *Grant*, at para. 140.

…

> [91] Balancing the s. 24(2) factors is not a mathematical exercise. If the first two lines of inquiry favour exclusion, it is rare that the third would tip the balance in favour of inclusion of the evidence. Likewise, if the first two lines of inquiry support including the evidence, the third will generally confirm it.
>
> [92] Balancing is prospective and seeks to avoid further damage to the reputation of the justice system from a *Charter* breach. Balancing is focused on systemic concerns (*Grant* at 69-70; *Le* at 139; *Tim* at 98).
>
> [My bolding added]

[105] While arrests based on insufficient grounds are generally considered to be serious breaches of an individual's *Charter* interests, it is important to assess the facts of each case contextually, before concluding where on the spectrum of seriousness the circumstances of this case lie.

[106] In present circumstances, the seriousness of this breach (the argued insufficient grounds to arrest) lies at the lesser end of the spectrum, nevertheless, this factor, at most, mildly supports exclusion of any related evidence.

[107] As noted above, the impact of the breach was negligible, therefore this factor tends to be neutral regarding the exclusion of the evidence.

[108] The societal interest in having this matter adjudicated on the merits strongly favours inclusion of the evidence.

[109] With a prospective view, I find that, in the long term, admission of the evidence will not further damage the reputation of the justice system.

[110] I conclude that the evidence is admissible.

[111] Next, I will examine whether the Crown has proved the offences beyond a reasonable doubt.

3. Why I conclude Mr. Carvery is guilty beyond a reasonable doubt, of having possession of the 49 grams of cocaine for the purpose of trafficking.

[112] I am satisfied beyond a reasonable doubt that, *inter alia*:

1. the location and date are proved, as is Mr. Carvery's identity; as well as
2. that the relevant material found in a baggie in the centre console of the RVR Mitsubishi vehicle is "cocaine", and specifically, 49g of "crack" cocaine;
3. which amount in all the circumstances supports a finding beyond a reasonable doubt that its possession was for the purpose of trafficking.[18]

[113] The focus of the arguments made was about whether Mr. Carvery was in possession of the cocaine in the centre console.

A - Why I conclude beyond a reasonable doubt that Mr. Carvery was in possession of the cocaine.

[114] Firstly, let me address Mr. Carvery's argument that Mr. Thompson is a so-called *Vetrovec* witness, and absent corroboration, his testimony by itself should not permit me to conclude beyond a reasonable doubt that Mr. Carvery had possession of the cocaine.

[115] Thereafter, I will assess the evidence relevant to whether Mr. Carvery was in possession of the cocaine.

[116] Mr. Thompson was subpoenaed as a Crown witness.

[117] He was born in November 1997, and testified that he was living in Bedford in the summer of 2021.

[18] Mr. Carvery conceded that the foregoing points were proved beyond a reasonable doubt, and the admissibility of photographs (as further elaborated upon by Sgt Stevens). An Agreed Statement of Facts per s. 655 *Criminal Code* was tendered at trial. Item 6 (was not tendered at trial): "Nature of Substance - a Health Canada Certificate of Analyst that will be tendered as a consent exhibit at trial is a true and accurate confirmation of the chemical nature of the substance tested." Subsequently counsel agreed that the Certificate confirming the substance was cocaine, and in the vernacular, "crack cocaine", was to be considered as "tendered" at trial, upon delivery of the original to the court before the verdict is rendered. Such was delivered on April 11, 2024 to the Court and will be formally recorded as an Exhibit in this trial.

[118] Like Mr. Carvery, Mr. Thompson was on parole on July 15, 2021, and he was also required to attend the same rehabilitative programming sessions at the MacDonald building.

[119] Both were supervised by Parole Officer Christine MacKenzie.

[120] While on parole, their conditions permitted them to be in contact with each other, but only incidentally for the purpose of, and attending at, rehabilitative programming.

[121] I accept that Parole Officer MacKenzie's testimony that she had advised both of them of this condition, such that they would have known this throughout the month of July 2021.

[122] Both Mr. Thompson and Mr. Carvery agreed that Mr. Carvery had picked him up in a motor vehicle and driven him to the programming session on July 15, 2021, and he had done so on some earlier occasions.

[123] But for these interactions, there is no evidence to suggest that Mr. Carvery and Mr. Thompson were criminally involved together, otherwise previously known to one another, or socially connected.

[124] As I understood his testimony, Mr. Thompson was in the vehicle with Mr. Carvery on July 15, 2021, unknowingly in the presence of the 49g of crack cocaine, was concurrently arrested that day, was breached by parole authorities, and remained in custody until he had served the full two-thirds of his prior sentence.[19]

[125] He was charged on that date on a joint Information with Mr. Carvery. The original Information indicates that on July 16, 2021, he was in custody, **but was released on bail at that time, and remained on bail until the charge was withdrawn by the Crown on January 25, 2022**.

[126] Thus, Mr. Thompson was notionally released on bail on the charge long before he signed the affidavit.

[127] Mr. Thompson acknowledged that he had provided the Crown with a sworn affidavit (which was not entered into evidence at trial), wherein he stated, as I understand it, that he was unaware of the presence of the cocaine in the centre

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[19] He was not asked specifically on what date he was released from his prior sentence's parole, but he agreed it was a couple of months after he signed the affidavit.

console of Mr. Carvery's car and that he understood he would be subpoenaed to testify for the Crown at Mr. Carvery's trial.

[128] He was not asked specifically on what date he provided that affidavit, however he provided it before January 25, 2022, when the trafficking charge against him was withdrawn by the federal Crown.

[129] The fact that the s. 5(2) *CDSA* charge was withdrawn against Mr. Thompson <u>after</u> he provided the Crown an affidavit, and that he was a subpoenaed witness at the trial, suggest that he may have been motivated by self-interest in providing the affidavit.

[130] I am not finding that he was so motivated, but rather, that it is possible that he was so motivated, for purposes of my *Vetrovec* analysis.

[131] During cross-examination Mr. MacEwen elicited the extent of his criminal record. Mr. Thompson admitted the particulars of his criminal record as put to him by both counsel.

[132] Mr. MacEwen argued that Mr. Thompson's evidence should be treated with the utmost caution and care because he has a criminal record, and he was a co-accused whose charges were dropped after he provided the affidavit the Crown requested in furtherance of the prosecution against Mr. Carvery.

[133] I understood Mr. MacEwen to further suggest that, although Mr. Thompson was the passenger, there is a reasonable possibility that the drugs were his alone, and that at some point Mr. Thompson was in the car alone, and if he had the drugs on his person or in his backpack he could have placed them in the centre console, either hoping they would not be found at all by police or that they would tend to implicate only Mr. Carvery.

[134] In summary, initially Mr. Thompson testified that: he was on parole for "firearms offences" which had been dealt with in 2020 - he must have received a federal sentence; and in 2019 he received a conditional discharge for a "mischief charge" (I infer under s. 430 *Criminal Code)*; and further in 2019, he agreed when it was suggested to him that he had received a conditional discharge for "an impaired driving charge".

[135] Mr. Thompson testified at trial that, although he was seated in the passenger seat that day, he was unaware of the presence of the cocaine.[20]

[136] The nature of *Vetrovec* witnesses was addressed by Justice Derrick in *R. v. Ritch and Sparks,* 2022 NSCA 52 at paras. 87 - 124.

[137] In particular, it is important to appreciate the purpose of a *Vetrovec* caution. As Justice Derrick stated:

> [88] A Vetrovec caution – "a clear and sharp warning to attract the attention of juror[s] to the risks of adopting, without more, the evidence of the witness"[37] will be merited for witnesses who are "unsavoury", "untrustworthy", "unreliable", or "tainted".[38] This will include,
>
> > …all witnesses who, because of their amoral character, criminal lifestyle, past dishonesty or interest in the outcome of the trial, cannot be trusted to tell the truth-even when they have expressly undertaken by oath or affirmation to do so.[39]
>
> [89] The caution warns a jury "of the danger of relying on the impugned witness's testimony without being comforted, by some other evidence, that the witness is telling the truth about the accused's involvement in the crime".[40] The instruction to the jury should also point to "the type of evidence capable of providing such comfort".[41]

[138] Footnote 40 is a reference to *R. v. Smith and James*, 2009 SCC 5. The Court upheld the convictions for first-degree murder based on the evidence of two accomplices who testified against Messrs. Smith and James.

[139] The Court found the trial judge's instruction to be without error.

[140] In part, the instruction is referenced at para. 11[21]:

> [11] The trial judge then reviewed particular evidence the jury might consider in determining whether the testimony of Potts and Derry was confirmed by other evidence. He concluded the Vetrovec warning by stating:
>
> > In this trial we heard evidence about Mr. Derry and Ms. Potts. **As a matter of law, I can tell you that both of them are looked upon as accomplices and it is a rule of law that the evidence of one accomplice cannot confirm or support the evidence of another**. You should not consider their evidence to see if they do, in fact, support one another. I have not

[20] I bear in mind that he was subpoenaed, so he had no choice in the matter.

[21] See also generally the reasons in *R. v. Khela*, 2009 SCC 4.

> pointed out all the evidence that might be capable of supporting the evidence of these two witnesses. **In the end you should ask yourselves whether enough of the important parts of their testimony have been confirmed to persuade you that their story is true and that it is safe for you to rely on it. I must tell you that you are not legally required to find such support before you can rely on their evidence. You may rely on it without finding support if you are convinced beyond a reasonable doubt that it is true. However, it is dangerous for you to accept the evidence of Ms. Potts and Mr. Derry unless you find some support for it in the other evidence**. [Appellant's Record, No. 31980, at pp. 53-54]
>
> [My bolding added]

[141] Mr. Thompson was jointly charged with Mr. Carvery, does have a material criminal record, and in all the circumstances, I conclude it prudent to *Vetrovec* caution myself as required regarding his evidence.

[142] When I consider the risks of accepting Mr. Thompson's evidence "without more" and look for evidence that might be capable of supporting Mr. Thompson's testimony including that he was unaware of the presence of the cocaine, I conclude I can safely accept his evidence.

[143] Mr. Thompson testified that he was unaware of the presence of the cocaine and that his only personal items in Mr. Carvery's vehicle were his phone, wallet, fishing rod and backpack. The fishing rod and backpack can be seen in the backseat in photos 7 and 8.

[144] The evidence of both Mr. Carvery and Mr. Thompson is that Mr. Thompson was only a passenger in that vehicle on the few occasions that Mr. Carvery picked him up to go to programming at the MacDonald building.

[145] The vehicle was rented for Mr. Carvery, and there is no evidence that anyone else drove the vehicle, including on July 15, 2021.

[146] Only Mr. Carvery was seen operating the vehicle when he was surveilled by police that day.

[147] Mr. Carvery was seen having a quick "meet" with an individual behind the Gordon B. Isnor Building, which Sgt. Stevens, from his experience, indicated is consistent with drug trafficking behaviour.

[148] I am satisfied that Mr. Carvery was unaware of any police presence or surveillance of him at that time.

[149] Sgt. Stevens had received credible evidence from Parole Officer Christine MacKenzie that Mr. Carvery's recent "red flags" behaviour suggested he had become re-involved in drug trafficking.[22]

[150] The vehicle was the responsibility of Mr. Carvery. There was no suggestion in the evidence that he permitted anyone else to have responsibility therefor or operate it during the relevant time periods in issue.

[151] On July 15, 2021, he was driving, and Mr. Thompson was sitting in the front passenger seat.

[152] Mr. Thompson testified that when first arrested, he had no idea why. He was adamant that he had no knowledge of cocaine being in the vehicle.

[153] He agreed in cross-examination that he had been sentenced to two years' imprisonment on September 23, 2020, for: assault with a weapon, use of firearm, pointing a firearm, breach of probation and breach of firearm prohibition order, and mischief. He agreed that in December 2019 he received a conditional discharge for two breaches of probation and two charges of theft; on December 6, 2018, he was sentenced in relation to impaired driving; and he received a conditional discharge at sentencing November 2018 for possession of a restricted weapon contrary to a prohibition order.

[154] He was not shaken on cross-examination regarding the material testimony he gave that he was unaware of the presence of cocaine in the vehicle.

[155] I am satisfied that Mr. Thompson testified truthfully, and specifically that he was unaware of the 49g of crack cocaine on July 15, 2021.

[156] Mr. Thompson's only connection is that he was present in the vehicle where the 49g of crack cocaine were found within the closed centre console.

[157] The police investigation revealed no evidence to suggest Mr. Thompson was trafficking in cocaine at the relevant times, or that he had ever trafficked in cocaine.

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[22] Sgt. Stevens was not specifically presented as an "expert" witness, able to give opinion evidence. While he did indicate his experience permitted him to infer that certain behaviours were consistent with what he had previously observed to be drug trafficking behaviour in Halifax Regional Municipality, I bear in mind that aspect of his testimony was oriented towards whether he had reasonable and probable grounds to arrest Mr. Carvery for (simple) possession of cocaine or for the purpose of trafficking, not for proof that Mr. Carvery was trafficking.

[158] Sgt. Stevens testified Mr. Thompson's backpack was searched by another officer, and I infer nothing of relevance to this matter was found.

[159] There is no evidence that he had handled, or controlled, that cocaine.

[160] There is no evidence that suggests Mr. Thompson was a user of cocaine in the past or at that time.

[161] The definition of "possession" in s. 4(3) *Criminal Code* reads[23]:

> Possession
>
> (3) For the purposes of this Act,
>
> > (a) a person has anything in possession when he has it in his personal possession or knowingly
> >
> > > (i) has it in the actual possession or custody of another person, or
> > >
> > > (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and
> >
> > (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

[162] I am satisfied that Mr. Thompson was not aware of the presence of the 49g of crack at the relevant times on July 15, 2021.

[163] The only material items in the RVR vehicle that were Mr. Thompson's were anything on his person at the time of arrest, and the backpack and fishing rod in the rear seat.

[164] I am satisfied beyond a reasonable doubt that Mr. Carvery did have possession of the 49g of crack cocaine.

[165] The case overall against Mr. Carvery was based both on direct and circumstantial evidence.

[166] Here, the Crown relies on circumstantial evidence (the presence of the 49g of cocaine in the console of Mr. Carvery's rented vehicle) to establish that Mr. Carvery

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[23] This section of the *Criminal Code* is applicable to the *CDSA* per the definition of "possession" at s. 2 *CDSA*; see *inter alia*, the reasons in *R. v. Pham*, [2006] 1 SCR 940 approving of 77 O.R. (3d) 401; [2005] O.J. No. 5127; and *R. v. Wallace*, 2016 NSCA 79 per Beveridge JA; and *R. v. Chui*, 2021 ABCA 137 at paras.68-9 and footnotes.

"possessed" the crack cocaine, therefore I must keep in mind that the drawing of inferences that establish guilt are governed by special considerations.

[167] As Justice Beveridge noted in *R. v. Snow*, 2019 NSCA 76, in the context of an ineffective counsel argument:

> [47] Appellate counsel's criticism that it was patently obvious the appellant had to testify is unfounded. First, the primary defence strategy was to rely on the inconsistencies revealed in the Crown's evidence to argue reasonable doubt. There was no suggestion that in these circumstances the strategy was in any way unsound.
>
> [48] Second, it was not necessary for the appellant to testify to advance the argument that the exposure was not for a sexual purpose, but perhaps to reattach a fallen curtain. As noted earlier, counsel suggested that it is settled law that there must be an evidentiary basis for any inference to be drawn.
>
> [49] As a general proposition, that is accurate. It is certainly so where the inference to be drawn is necessary to establish some element of an offence beyond a reasonable doubt. But in circumstances where an accused suggests an alternate explanation inconsistent with guilt, there is no obligation to call evidence to establish a factual basis for that alternate explanation.
>
> [50] Appellate counsel's argument overlooks the direction from the Supreme Court in *R. v. Villaroman*, 2016 SCC 33 that conclusions, alternative to the guilt of the accused, need not be based on proven facts. Cromwell J., for the Court, explained:
>
> > 35 At one time, it was said that in circumstantial cases, "conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts": see *R. v. McIver*, 1965 CanLII 26 (ON CA), [1965] 2 O.R. 475 (C.A.), at p. 479, aff'd without discussion of this point 1966 CanLII 6 (SCC), [1966] S.C.R. 254. However, that view is no longer accepted. In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts: *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 58; see also *R. v. Defaveri*, 2014 BCCA 370, 361 B.C.A.C. 301, at para. 10; *R. v. Bui*, 2014 ONCA 614, 14 C.R. (7th) 149, at para. 28. **Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence**. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.
> >
> > 36 **I agree with the respondent's position that a reasonable doubt, or theory alternative to guilt, is not rendered "speculative" by the mere**

> **fact that it arises from a lack of evidence**. As stated by this Court in *Lifchus*, a reasonable doubt "is a doubt based on reason and common sense which must be logically based upon the evidence <u>or lack of evidence"</u>: para. 30 (emphasis added). A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.
>
> 37 **When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt**: *R. v. Comba*, 1938 CanLII 14 (ON CA), [1938] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., aff'd 1938 CanLII 7 (SCC), [1938] S.C.R. 396; *R. v. Baigent*, 2013 BCCA 28, 335 B.C.A.C. 11, at para. 20; *R. v. Mitchell*, [2008] QCA 394 (AustLII), at para. 35. **I agree with the appellant that the Crown thus may need to negative these reasonable possibilities**, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused": *R. v. Bagshaw*, 1971 CanLII 13 (SCC), [1972] S.C.R. 2, at p. 8. **"Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation**.
>
> [Emphasis added]

[51] Importantly, Justice Cromwell added, it is not always easy to differentiate between plausible theory and speculation:

> 38 Of course, the line between a "plausible theory" and "speculation" is not always easy to draw. <u>But the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty</u>.
>
> [My underlining added]

[168] Justice Cromwell also stated:

> [22] These paragraphs, quoted with approval in *Griffin*, are consistent with what Charron J. conveyed in her reasons. This reading of the judgment is confirmed by our subsequent decision in Mayuran in which the Court reiterated the statement from *Griffin* that "[w]e have long departed from any legal requirement for a 'special instruction' on circumstantial evidence": per Abella J., writing for a unanimous Court, at para. 38. **There is therefore no particular form of mandatory instruction. However, where proof of one or more elements of the offence depends solely or largely on circumstantial evidence, it may be helpful for the jury to receive instructions that will assist them to understand the nature of circumstantial evidence and the relationship between proof by circumstantial**

> **evidence and the requirement of proof beyond reasonable doubt**. I will touch briefly on both of these aspects.
>
> [My bolding added]

[169] Mr. Carvery's counsel has argued that given the mere presence of Mr. Thompson, there is a plausible alternate conclusion that could be reached regarding the presence of the cocaine in the console of the vehicle - the cocaine is exclusively Mr. Thompson's.

[170] He goes on to argue that as long as the Court has a reasonable doubt, regarding whether Mr. Carvery was in possession of the cocaine, including "other reasonable possibilities, [which] must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation", then I must find him not guilty.

[171] His counsel argues that Mr. Carvery must be found not guilty (as there is a reasonable doubt about whether he "possessed" the cocaine).

[172] Mr. Thompson credibly testified that he was unaware of the crack cocaine in the vehicle console.

[173] Nothing of his, or even suggested to be his, was found in the console or the front seat area.

[174] Mr. Carvery does not dispute that the only times Mr. Thompson was in his vehicle was when they were travelling to/from programming at the MacDonald building.

[175] When Sgt. Stevens arrested Mr. Carvery, he had an operable Alcatel cell phone in his possession (photos 23-25).

[176] When Sgt. Stevens viewed the centre console of the vehicle, a second operable Alcatel cell phone was visible between the two water bottles (photos 16 and 36-38).

[177] Sgt. Stevens characterized these as Mr. Carvery's phones, and his testimony in that regard was not challenged.

[178] Mr. Carvery's driver's license was located in the area just in front of the console (photos 14 and 15).

[179] Mr. Carvery was in possession of $395 in cash and a Visa card. There is no evidence that Mr. Thompson had any cash (although he did have a wallet).

[180] When Sgt. Stevens opened the console of Mr. Carvery's rental vehicle, he found the 49g of crack cocaine in a clear plastic bag.

[181] The cocaine was hidden from view when inside the console of Mr. Carvery's rental vehicle.

[182] Mr. Carvery had the car for no more than eight days at the time he was arrested.

[183] Mr. Carvery had to attend rehabilitative programming three times a week.

[184] I infer that he did so, and therefore drove the vehicle regularly during that week.

[185] Based on the location, purpose, and contents of the console (other than the cocaine) I infer Mr. Carvery would have accessed the console area on a regular basis.

[186] I keep in mind that a reasonable doubt can arise from an examination of the whole of the evidence, including the presence of evidence or the absence of evidence.

[187] Counsel agreed that if Mr. Carvery was guilty of possession of the cocaine, then he is also guilty of the s. 5(2) *CDSA* offence.

[188] I am satisfied beyond a reasonable doubt that, considering the totality of the evidence, including "the circumstantial evidence, viewed logically and in light of human experience, it is [not] reasonably capable of supporting an inference [regarding Mr. Carvery's "possession" of the crack cocaine] other than that [Mr. Carvery] is guilty."

Conclusion

[189] I find Mr. Carvery guilty of possession of cocaine for the purpose of trafficking.

Rosinski, J.