R. v. *Whalen*, 2006 NWTSC 26

Date: 2006 05 23
Docket: S-1-CR 2005000112

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

JOHN JOE WHALEN

Applicant

Application to exclude evidence pursuant to s. 24(2) of the *CanadianCharter of Rights and Freedoms* due to an unreasonable search and seizure.

Heard at Yellowknife, NT, on May 15, 2006

Reasons filed: May 23, 2006

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

Counsel for the Respondent (Crown): Shelley Tkatch

Counsel for the Applicant (Accused): James D. Brydon

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REASONS FOR JUDGMENT

[1] These reasons address two issues: (1) the validity of a search conducted, it is said, as an incident to arrest; and, (2) if the search is not valid, whether evidenceseized as a result ought to be excluded from the accused's trial, pursuant to s. 24(2) of the *Canadian Charter of Rights and Freedoms.*

[2] The accused is charged with possessionof cocainefor the purpose of trafficking. Prior to the commencement of his trial, he served notice of an application for an order to exclude all evidence seized by the police as a result of searching the accused and his motor vehicle at the time of his arrest. This evidence consists of drugs, money and drug paraphernalia. The accused asserted that his right to be secure against unreasonable search and seizure was infringed and admission of this evidence at his trial would bring the administration of justice into disrepute. The application was heard in a *voir dire* at the start of his trial. At the conclusion of the *voir dire,* I

informed the parties of my decision from the bench and said that reasons would follow. These are those reasons.

[3] In a nutshell, I held that the search was valid as being incidental to the arrest of the accused. Therefore there was no violation of the accused's rights. If, however, I was wrong in that conclusion, I would nevertheless admit the seized evidence at trial. In my opinion, admission of the evidence would not bring the administrationof justice into disrepute.

Summary of the Evidence:

[4] On July 12, 2005, R.C.M.P. Constables Ferrell and Lang were on patrol duty in the City of Yellowknife in a marked police car. Cst. Ferrell noticed a vehicle going into the drive-through lane of the local Tim Horton's outlet. The vehicle was being driven by the accused. The accused was known to Cst. Ferrell because five days earlier he had arrested him, driving the same vehicle, for driving while disqualified. He therefore knew that the accused was prohibited from driving. Cst. Ferrell ran a vehicle check through the police telecoms operator and learned that the vehicle was registered to someone other than the accused. He then decided to investigate further. The constables parked their vehicle and approached the accused's car. Cst. Ferrell approached the driver's side from behind while Cst. Lang approached the passenger side. They had noted a male passenger also sitting in the vehicle.

[5] Cst. Ferrell testified that, as he approached the vehicle, he could see into the driver's side. He saw the accused fumbling with some money and what appearedto be a crack pipe. He saw the accused put these things into a console between the driver and passenger seats. He also noticed what appeared to be a white substance on the lip of the console.

[6] Cst. Ferrell advised the accused of his presence and asked him to step out of the vehicle. The accused did so. As he did, Cst. Ferrell looked inside the vehicle and saw a small rock-like substance on the lip of the console. He said he suspected it to be crack cocaine.

[7] Cst. Ferrell told the accused that he was arresting him for driving while disqualified. He recited to the accused the standard police cautionsand *Charter* rights. He then said to the accused that he was also investigating him for possession of a

controlled substance. The officer testified that he believed he had grounds to arrest both the accused and the passenger for possession of a controlledsubstance becausehe saw what he suspected to be a controlled substance and drug paraphernalia. At that point he also told Cst. Lang to place the passenger under arrest for possession of a controlled substance.

[8] The accused was handcuffed and taken to the police vehicle. He was then searched and, in his pocket, Cst. Ferrell located $200.00 in $20.00 bills. The officer said his reason for searching the accused was in the interest of officer safety. I think it is fair to say that the defence did not object particularly to the search of the accused's person. The objection was centred on a subsequent search of the accused's vehicle.

[9] After placing the accused in the police vehicle, Cst. Ferrell returned to the accused's vehicle and conducted a search in the front area "within arm's reach", as he said, of the driver's seat. In the centre console he found a plastic bag containing 13 individually wrapped pieces of what he believed to be crack cocaine. Subsequent analysis confirmed that this was in fact cocaine. He also found a crack pipe and a cell phone. In a roof compartment above the windshield he found $100.00 in cash also in $20.00 bills. Cst. Ferrell told the accused that he was under arrest for possession of a controlled substance for the purpose of trafficking. He then again recited the standard police warnings and *Charter* rights to the accused.

[10] On cross-examination, Cst. Ferrell was pressed on why he searched the vehicle when the accused was arrested only for driving while prohibited. The officer pointed to his observations of what he suspected to be a controlled substance. After acknowledging that he was not searching for evidence in relation to the prohibited driving charge, the following exchange occurred between defence counsel and Cst. Ferrell:

> Q But you had suspicions that there might be something in his car?
>
> A Based on what I had observed when I initiallyapproached the vehicle.
>
> Q And those were suspicions?
>
> A What I had observed plus what I suspected to be a controlled substance.
>
> Q And that had nothing to do with driving while prohibited?

> A. No. Which was why I also advised Mr. Whalen that I was investigating him for those other reasons.
>
> Q And you wanted to satisfy those suspicions didn't you?
>
> A. I felt it was appropriate to advise him that I observed what I believed to be a suspected narcotic along with drug paraphernalia and --
>
> Q The question I asked. Did you want to satisfy those suspicions? In other words investigate them?
>
> A. I did pursue an investigation yes sir.
>
> Q But he was not under arrest for possession of a controlled substance then was he?
>
> A At that point no. I felt that he was already under arrest for what I'd observed him committing a criminal offence and advised him of my continuing investigation in regards to the controlled substances matter.

[11] The officer confirmed that he did not consider obtaining a warrant prior to searching the vehicle. He also acknowledged that there was no urgencyin the situation since the vehicle had been secured.

[12] With respect to the facts, I accepted Cst. Ferrell's evidence. Nothing in his cross-examination, nor in the evidence of Cst. Lang, the only other witness, brought it into question. The defence presented no evidence on the *voir dire*.

Issues:

[13] The primary issue for determination is the validity of the search of the accused's vehicle. In particular, and to put it more directly, the question to be answered is: Was the search of the vehicle truly incidental to the arrest of the accused when all that the accused was arrested for at that point was driving while prohibited to do so?

[14] The defence relied on the majority judgment in *R.* v. *Caslake,* [1998] 1 S.C.R. 51, to support its argument that the search was not incidental to the arrest because the purpose of the search (to locate drugs and drug paraphernalia) was not related to the

purpose of the arrest (driving while prohibited). Defence counsel argued that this search was unrelated to the arrest and emphasized the following comments from the majority judgment authored by Lamer C.J. (at para. 22):

> Requiring that the search be truly incidental to the arrest means that if the justification for the search is to find evidence, there must be some reasonable prospect of securing evidence of the offence for which the accused is being arrested. For example, when the arrest is for traffic violations, once the police have ensured their own safety, there is nothing that could properly justify searching any further.

[15] Defence counsel submitted that once the police had secured the vehicle, they should have, and most likely could have, obtained a warrant. There was no urgency. There were no police or public safety concerns. Since the search was not truly incidental to the arrest, and because it was done without a warrant, it was *prima facie* unreasonable.

[16] Crown counsel justified the search by pointing to the evidence of Cst. Ferrell to the effect that he had reasonable grounds to believe that the vehiclecontained evidence of drug possession based on his observations. Futhermore, the officer testified that he believed he had reasonable grounds to arrest the accused for drug possession. The reason he did not do so, prior to the arrest, was because he was already under arrest (albeit for driving while prohibited) and he had informed the accused that he was investigating further for suspected drug possession.

[17] Crown counsel also argued that there was support for what occurred in this instance, i.e., an arrest after the search, in *R.* v. *Debot* (1986), 30 C.C.C. (3d) 207 (Ont. C.A.), affirmed [1989] 2 S.C.R. 1140. In the Court of Appeal judgment, the right to conduct a search incident to arrest, but prior to the actual arrest, was recognized providing that reasonable and probable grounds exist for arresting a person apart altogether from evidence discovered by the search. The fact that the search preceded the arrest does not preclude it from being a search incident to arrest where the arrest immediately follows on the search. In the Supreme Court of Canada, Wilson J. noted this in her judgment but eventually affirmed the lower court decisionwithout having to address this point directly.

[18] With respect to the admission or exclusion of the evidence, defence counsel conceded that the items found in the vehicle were non-conscriptive. They could have

been obtained by lawful means. Nevertheless the circumstances warranted exclusion because the police officer should have known that the search was not authorized by law. Thus he was not acting in good faith. Further, the *Charter* breach here was not merely technical or inadvertent as there was ample opportunity to obtain a warrant. There were no exigent circumstances that required the vehicle to be searched immediately. For these reasons, defence counsel argued, the evidence should be excluded so as not to judicially condone the officer's conduct.

[19] Crown counsel submitted that, even if the search was unreasonable, it was not overly intrusive. It was a search of a vehicle which bears a significantly lower expectation of privacy. The officer acted in good faith because he held a reasonable belief that he could arrest the accused for drug possession prior to the search but did not do so simply because he was already under arrest. The evidence is non-conscriptive and essential to the Crown's case. Thereforeits exclusionwould bring the administration of justice into greater disrepute than would its admission.

Validity of the Search:

[20] The *Canadian Charter of Rights and Freedoms*, section 8, protects an individual's right to be secure against unreasonable search or seizure. The person alleging a violation of this right bears the burden of proving the violation. However, Canadian jurisprudence recognizes that a warrantless search is presumptively unreasonable. Here there was no warrant. Therefore the burden of proof passes to the Crown to show that the search was reasonable. In order to be reasonable, a search must be authorized by law (either a statute or a common law rule), the law itself must be reasonable, and the search must be carried out in a reasonablemanner: *R.* v. *Collins*, [1987] 1 S.C.R. 265.

[21] In this case the Crown relies on the common law power of search incident to arrest. In *R.* v. *Stillman*, [1997] 1 S.C.R. 607, Cory J. wrote (at para. 33), that the "long-standing" power of search incident to arrest is an exception to the general rule that a search without prior authorization is presumptively unreasonable. This right to search draws its authority from the arrest itself. It is not necessary to independently establish reasonable and probable grounds to conduct a search incidental to an arrest.

[22] In *Cloutier* v. *Langlois*, [1990] 1 S.C.R. 158, the history and scope of the common law power of search incident to arrest was examined. That case involved a

"frisk" search of the arrested person. The search was described as a relatively non-intrusive procedure consisting of a pat-down outside the clothing to determine if there is anything on the person of the arrested individual. Pockets may be examined and things may be seized that may be used as evidenceor necessaryto secure officer safety. The case arose when the person arrested and frisked sued the police for assault. The Supreme Court held that the search was incidental to a lawful arrest and therefore justified.

[23] It may be because of this case that the defence here took no real issue with the frisk search of the accused when he was initially arrested and handcuffed. There was a lawful arrest at least for driving while prohibited. And no issue was taken with the lawfulness of that arrest.

[24] In *Cloutier*, the Court recognized that the power to search the person arrested extends to the surroundings of the arrest location. Thus motor vehicles can be objects of a search incident to arrest. They attract no heightened expectation of privacy that would justify an exemption from the common law power: *Caslake (supra)*, at para. 15.

[25] It is important to recognize that, with a search incident to arrest, there is no need to establish a case of urgency or necessity: *Stillman* (at para. 38). Nor does it matter that the officer could have obtained a warrant. The question is whether the search was truly incidental to the arrest.

[26] The Supreme Court in *Cloutier* identified three purposes of a search incident to arrest: (a) ensuring the safety of the police, the public or the accused; (b) to prevent escape; and, (c) the discovery of evidence against the accused. In *Caslake*, Lamer C.J. wrote (at paras. 17-19) that for a search to be truly incidental to the arrest the police must be attempting to achieve some valid purpose connected to the arrest. And that purpose, if it is to discover evidence, must be related to the purpose of the arrest.

[27] The facts of *Caslake* are important. There the accused was stopped in his vehicle and arrested for possession of marihuana. This was based on the accused having been seen earlier in an area where several pounds of marihuana were located. The arresting officer then arranged to have the accused's car impounded. It was towed to a garage. Six hours later, the officer conducted an inventory search of the vehicle during which he located cocaine. The officer had no warrant. The search was conducted pursuant to a police policy that required an inventory be taken of an

impounded vehicle's contents. The accused was convicted of possession of cocaine and appealed.

[28] At the Supreme Court level, the majority held that the search was not one incidental to the arrest. The purpose for the search was not to discover evidence but to conduct an inventory of the contents. However, while the majorityheld that the search violated the accused's s. 8 rights, the evidence was nevertheless admitted and the conviction was upheld. The minority would have held the search to be valid as an incident of the arrest since it was related to the arrest and there was no need to establish that the officer was acting pursuant to a specific purpose. The power to searchdrew its authority from the lawfulness of the arrest.

[29] An example of the application of the majority reasoning from *Caslake* is provided by a case referred to by defence counsel, *R.* v. *Mitchell* (2005), 204 C.C.C. (3d) 289 (N.B.C.A.). There the police had prior informationimplicating the accusedin drug trafficking. When they saw his vehicle, they stopped it and questioned the accused. The accused provided a false name. He was placed under arrest for obstruction of justice. The vehicle was searched some hours later and drugs were found hidden in a cavity of the vehicle. He was charged and convicted of possession of drugs for the purpose of trafficking. On appeal, the conviction was set aside. The majority held that the search was unreasonable and the drugs should be excluded from evidence. In their opinion, applying the law as articulated in *Caslake*, the police did not search the vehicle for purposes of finding evidence related to the reason for his arrest. The police were searching for drugs and that objective was unrelated to the accused's arrest for obstruction of justice. Thus the search was not incidental to the arrest.

[30] In my opinion, the present case is distinguishable from *Mitchell*. Here Cst. Ferrell had seen in plain view what he believed to be evidence of a controlled substance. He informed the accused that he was investigating him for suspected drug possession. In *Mitchell*, the drugs were hidden. And, as noted by the majority(at para. 5), at no time prior to the discovery of the drugs did the police inform the accused that he was suspected of drug possession or that they intended to search the vehicle for drugs. It could be said that in *Mitchell* the arrest was merely a pretext for an opportunity to search. That is a completely different scenario than the one revealedby the evidence in the present case.

[31] In *Caslake,* Lamer C.J. was insistent that the purpose of the search must be related to the reason for the arrest. The police cannot rely on the fact that, objectively, a valid purpose for the search existed when, subjectively, that was not the purpose for which they conducted a search. But, in my opinion, in this case the subjective and objective aspects coincide.

[32] In discussing the "purpose" of a search, Lamer C.J. posited a dual subjective-objective test. The subjective part requires that the officer must have one of the purposes for a valid search incident to arrest in mind and must have a reasonablebelief that this purpose will be served by the search. The objective part is simply a requirement that the officer's belief be reasonable in the circumstances.

[33] Lamer C.J. was careful to draw a distinction between this test and the standard of reasonable and probable grounds. All that is required is a reasonable explanation for conducting the search. He wrote (at paras. 20 & 25):

> . . . this is not a standard of reasonable and probable grounds, the normal threshold that must be surpassed before a search can be conducted. Here, the only requirement is that there be some reasonable basis for doing what the police officer did. To give an example, a reasonable and probable grounds standardwould requirea police officer to demonstrate a reasonable belief that an arrested person was armed with a particular weapon before searching the person. By contrast, under the standard that applies here, the police would be entitled to search an arrested person for a weapon if under the circumstances it seemed reasonable to check whether the person might be armed. Obviously, there is a significant difference in the two standards. The police have considerable leeway in the circumstances of an arrest which they do not have in other situations. At the same time, in keeping with the criteria in Cloutier, there must be a "valid Objective" served by the search. An objective cannot be valid, if it is not reasonable to pursue it in the circumstances of the arrest.
>
> . . .
>
> In summary, searches must be authorized by law. If the law on which the Crown is relying for authorization is the common law doctrine of search incident to arrest, then the limits of this doctrine must be respected. The most important of these limits is that the search must be truly incidental to the arrest. This means that the police must be able to explain, within the purposes articulated in Cloutier, supra

> (protecting the police, protecting the evidence, discoveringevidence), or by reference to some other valid purpose, why they searched. They do not need reasonable and probable grounds. However, they must have had some reason related to the arrest for conducting the search at the time the search was carried out, and that reason must be objectively reasonable. Delay and distance do not automatically preclude a search from being incidental to arrest, but they may cause the court to draw a negative inference. However, that inference may be rebutted by a proper explanation.

[34] In this case, Cst. Ferrell gave an explanation for the search. He believed there may be evidence of drug possession to be found in the vehicle. This was not a whim based on some idle suspicion or curiosity. It was based on what he observed by looking into the vehicle. He saw the accused placing a crack pipe in the centre console. He saw some white substance and a small rock-like substance on the outside of the console. He believed that this may be crack cocaine. His belief, in my opinion, was objectively reasonable in the circumstances.

[35] No complaint was raised about the evidence of the officer's observations as he came up to the driver's door of the vehicle. Nor do I think any complaint can be made. Any member of the public passing by could peer into the interior of the accused's vehicle. There is no reason the officer should be precluded from observing what any member of the public could plainly see. And there is no reason why such observations cannot form the basis of the officer's reasonable belief as to the fact that there may be evidence of a crime inside the vehicle.

[36] When Cst. Farrell placed the accused under arrest he did so for driving while prohibited. But he also told him that he was investigating him for drug possession. The officer said that he believed he had reasonable grounds at that point to arrest the accused for drug possession but he did not do so simply because he was already under arrest on the other charge. If he had arrested the accused for drug possession at that point, prior to the search, I doubt if there would even be an argument available that the search was somehow not properly an incident of arrest.

[37] Furthermore, the search itself was no more intrusive than reasonably necessary. Only those areas of the vehicle within arm's reach of the driver's seat were searched. This was reasonable considering that Cst. Ferrell observed the accused,who was in the driver's seat, with the crack-pipe. No locked area, such as the trunk, was searched.

[38] In my opinion, there was in this case, to quote Lamer C.J., a reasonablebasis for doing what the police officer did. But this is not the only basis on which the Crown sought to justify the search.

[39] In *Debot (supra)*, Martin J.A. of the Ontario Court of Appeal discussed the question as to whether a search conducted prior to the arrest can be justifiedas a search incident to arrest. He held that it can so long as there were already existing probable grounds to arrest prior to the search. He cautioned however that the search preceding the arrest cannot provide the only justification for the arrest. He quoted a wide array of American constitutional law authority to the same effect. As previously noted, this point was referred to in the subsequent judgment of Wilson J. when the case went to the Supreme Court of Canada but without any analysis of it. The majority judgmentin *Caslake* did not address this point.

[40] In *Debot*, the accused was stopped in his vehicle and searched. Following the search, which disclosed drugs, he was arrested for drug possession. He was then cautioned and informed of his rights. The case turned on whether the police had reasonable and probable grounds to believe that the accused had drugs in his possession and whether the accused's right to counsel was respected. At the trial level the accused was acquitted. The trial judge held the search to be unreasonable and excluded the evidence. The Court of Appeal set that aside and directed a new trial. The Supreme Court of Canada dismissed a further appeal by the accused.

[41] In the Court of Appeal, among other issues, Martin J.A. rejectedthe trial judge's conclusion that the search was not incidental to a valid arrest because the search preceded the arrest and the officer stated he would not have arrested the accused if the search failed to produce a prohibited drug. Martin J.A. had concluded, based on the evidence, that the officer had the requisite grounds to search. As to the search being incidental to the arrest, something put forward as an alternativerationale for the search, Martin J.A. wrote (at 223-224):

> Counsel for the appellant also contended that the search of the respondent was also authorized as incident to a valid arrest, even though the respondent was not arrested until after the search. It is axiomatic that a search may not precede an arrest and serve as part of its justification, for example, where prohibited drugs are found on the suspect's person in the course of the antecedent search and constitute the probable cause for the subsequent arrest. On the other hand, it is well established in the United States that where probable grounds

exist for arresting a person, apart altogether from evidencediscovered by a search, the fact that the search preceded the arrest does not preclude it from being a search incident to a valid arrest, where the arrest quickly follows on the search: see People v. Simon (1955), 290 P. 2d 531; United States v. Rogers (1971), 453 F. 2d 860; State of Maine v. LeBlanc (1975), Me., 347 A. 2d 590; In the Matter of John Doe, a Child (1976), 547 P. 2d 566; Rawlings v. Kentucky (1980), 100 S.Ct. 2556 at p. 2564.

Of course, the fruits of a search may not be used to justify an arrest to which it is incident, but this means only that probable cause to arrest must precede the search. If the prosecution shows probable cause to arrest prior to a search of a man's person, it has met its total burden. There is no case in which a defendant may validly say, "Although the officer had a right to arrest me at the moment when he seized me and searched my person, the search is invalid because he did not in fact arrest me until afterwards."

. . .

Mr. Kerekes in his able argument contended, however, that it was not open to the Crown to support the search of the respondent by Constable Birs as a search incident to a valid arrest because the officer stated, in effect, that he would not have arrested the respondent if the search had not disclosed that he was in possession of a prohibited drug. Counsel further contended that the trial judge found as a fact that the search was not incident to arrest. The trial judge appears to have based his finding that the search was not incident to arrest on two facts: one, that the search preceded the arrest and, secondly, that Constable L'Heureux testified that there was to be no arrest unless drugs were found. The judge's holding that the search was not incident to arrest did not depend on findings of credibility. On the contrary, his holding that the search was not incident to arrest was based on the testimony of Constable L'Heureux. What constitutes a search incident to arrest is a question of law. Under the reasoning of Traynor J., I do not think that the fact that the respondent would not have been arrested if drugs had not been found in his possession, precludes the prior search from being incident to the arrest that followed the finding of the drug. This is provided, always, that the officer had reasonable grounds, prior to the search, for arresting the respondent under s. 450 of the Code.

[42] While the issue of search incident to arrest was not first and foremost in *Debot*, numerous cases have nevertheless cited the Court of Appeal decision to support the proposition that a search may occur before or after formal arrest so long as the grounds for the arrest exist prior to the search: see, for example, *R.* v. *McComber* (1988), 44 C.C.C. (3d) 241 (Ont. C.A.); *R.* v. *Arason* (1992), 78 C.C.C. (3d) 1 (B.C.C.A.); *R.* v. *Lam* (2003), 178 C.C.C. (3d) 59 (Alta. C.A.). I know of no authority that has disavowed that proposition.

[43] In the present case, Cst. Ferrell testified that, when he initially arrested the accused for driving while prohibited, he believed there were also grounds to arrest him for drug possession. According to the test developed in *R.* v. *Storrey*, [1990] 1 S.C.R. 241, an arresting officer must subjectively have reasonable and probable grounds to believe that the suspect was engaged in criminal activity and those grounds must be objectively justifiable. Based on the evidence in this case, that test has been met. I am satisfied that if Cst. Farrell had, prior to the search, arrested the accused for drug possession such an arrest would have been a valid one.

[44] In my opinion, reasonable and probable grounds existed for arresting the accused apart from the results of the search. The results of the search were not used to justify the arrest. The grounds for arrest pre-existed the search. The formal arrest immediately followed the search. Thus the requirementsoutlined in *Debot* for a search incident to arrest were met.

[45] For these reasons, I concluded that the search by Cst. Ferrell was a search incident to the arrest of the accused. Therefore there was no s. 8 *Charter* violation.

Exclusion of the Evidence:

[46] I stated, when I delivered my decision at the conclusion of the *voir dire*, that, if I am mistaken in my analysis of the validity of the search in this case, I would nevertheless admit the evidence seized as a result of that search. I can explain my reasons briefly.

[47] Section 24(2) of the *Charter* provides that evidence obtained in violation of a right guaranteed by the *Charter* shall be excluded if, having regard to all the circumstances, admission of the evidencewould bring the administration of justiceinto disrepute. The factors to consider come under three categories: (1) the effect of

admitting the evidence on the fairness of the trial; (2) the seriousness of the police conduct; and, (3) the effects of excluding the evidence on the repute of the administration of justice: *Collins (supra).*

[48] Defence counsel conceded that the items seized were non-conscriptive. This was a reasonable concession. The drugs and other things existed independentlyof any *Charter* breach and the accused was not compelled to participate in their creation or discovery. The admission of non-conscriptive evidence will rarely operate to render the trial unfair: *Stillman* (at para. 75).

[49] The second category relates to the seriousnessof the police conductthat resulted in the *Charter* violation. Some of the factors to consider, as outlined in *R.* v. *Buhay*, [2003] 1 S.C.R. 631, are whether the police acted in good faith, or whether their conduct was deliberate, wilful or flagrant. Was the *Charter* violation the result of inadvertence and of a merely technical nature? Was it motivated by a situation of urgency? Also pertinent are whether the police could have obtained the evidence by other means, the intrusiveness of the search, the accused'sexpectation of privacyin the place searched, and the existence of reasonable and probable grounds.

[50] In this case the search was not particularly intrusive. As noted previously, there is a lesser expectation of privacy in a motor vehicle than in one's person, home or office. Cst. Ferrell, in my opinion, had reasonable and probable grounds to suspect that there would be evidence of illegal drug possession in the vehicle. All of this militates in favour of admission. On the other hand, there was no urgency. There were other investigative techniques, such as a warrant, available. However, in my opinion, the *Charter* violation, if there was one, was not blatant. To borrow the words of Richard J.A. from his dissenting judgment in *Mitchell* (at para. 49), this is neither a case of good faith or bad faith on the part of the officer. The officer believed he had the power to search as an incident to the accused's arrest and it cannot be said that he deliberately disregarded the accused's *Charter* rights.

[51] The third category requires consideration of whether excluding the evidence would have a more serious impact on the repute of the administration of justice than admitting it. The charge is serious, involving as it does the possession of cocaine for the purpose of trafficking. Crack cocaine in particular is treated as a far more serious and dangerous drug than so-called "soft" drugs such as marihuana. The evidence seized is obviously important in order for the Crown to make out its case.

[52] There is no automatic inclusion or exclusion rule under s. 24(2) of the *Charter*. The ultimate question is whether admission of the evidence, notwithstanding the *Charter* violation, would bring the administration of justice into disrepute. In my opinion, in the context of all of the evidence in this case, a reasonable person would conclude that the administration of justice would not be brought into disrepute by the admission of this evidence.

[53] For these reasons, I would not have excluded the evidence even if I had concluded that there was an unreasonable search in this case.

Conclusion:

[54] These are my reasons for dismissing the accused's application to exclude evidence at his trial.

J.Z. Vertes
J.S.C.

Dated this 23rd day of May, 2006.

Counsel for the Respondent (Crown): Shelley Tkatch
Counsel for the Applicant (Accused): James D. Brydon

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