R v. England, 2008 NWT SC 46 Date: 2008 06 30

Docket: S-0001-CR 2007000093

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

-and-

FRANK HAROLD ENGLAND

Respondent

Appeal by the Crown of dismissal of charge.

Heard at Yellowknife, NT on April 8, 2008.
Reasons filed on June 30, 2008.

REASONS FOR JUDGMENT
BY THE HONOURABLE JUSTICE L.A. CHARBONNEAU

Counsel for the Applicant: Christine Gagnon
Counsel for the Respondent: James Brydon

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REASONS FOR JUDGMENT

[1] The Respondent was tried in the Territorial Court on a charge of possession of cocaine. The charge stemmed from the seizure by a police officer of a small amount of cocaine in the pocket of the Respondent's parka. The Respondent argued that the cocaine should not be admitted into evidence because it was obtained as a result of several breaches of his *Charter* rights.

[2] The Trial Judge concluded that the police officer who dealt with the Respondent breached several of his rights. She also concluded that the evidence should be excluded. The Crown appeals from those findings.

A) OVERVIEW OF EVIDENCE

[3] The outcome of this trial was determined by a Ruling made by the Trial Judge after a *voir-dire* into the admissibility of the evidence seized. Constable Mounsey, a member of the Royal Canadian Mounted Police, was the only witness called on that *voir-dire*.

[4] Cst. Mounsey testified that he was on patrol on the night in question and heard a transmission on the police radio that one of his colleagues, Cst. Barrett, was conducting a traffic stop at the graveyard in Yellowknife. He decided to attend that location to be a back-up for his colleague. As he was driving on the road that leads to the graveyard he met Cst. Barrett coming out; she advised him of where the vehicle was parked. Cst. Mounsey decided to make some inquiries of his own. He explained that Cst. Barrett was a junior officer with just a few months' service and he wanted to follow up on the situation, for his own satisfaction.

[5] Cst. Mounsey came upon the vehicle, which was parked off the road. The engine was running, the exterior lights were off, and the interior lights were on. There were many tracks in the snow which suggested to Cst. Mounsey that perhaps the vehicle had been stuck. Cst. Mounsey left his vehicle and approached the truck. He thought it was suspicious that the vehicle would be at that location at that time of night and wanted to inquire as to how it had come to be there. The Respondent was in the driver's seat of he vehicle. There was an adult female person on the passenger side. She seemed to be younger than the Respondent.

[6] Cst. Mounsey started speaking to the Respondent. The Respondent appeared nervous. Cst. Mounsey requested vehicle documentation. The Respondent appeared fidgety; his eyes were glossy, somewhat bloodshot. Cst. Mounsey asked him to step out of the vehicle. The Respondent complied. Cst. Mounsey said he wanted the Respondent to step out of his vehicle because he wanted to separate him from his passenger to see if their stories matched up. He also wanted to have an opportunity to make additional observations to determine whether the Respondent was under the influence of drugs.

[7] After the Respondent stepped out of the vehicle, Cst. Mounsey asked him to step up onto a flatter surface of the road and asked him to walk to the rear of the police vehicle. Cst. Mounsey wanted to observe the Respondent's manner of walking and his balance. The Respondent went to put his hands in his front parka pockets. Cst. Mounsey asked him to keep his hands out of his pockets. Cst. Mounsey had a casual conversation with the Respondent and continued to make observations. Cst. Mounsey did not detect any slurring in the Respondent's speech but he thought that his manner of speaking was "not fluid". Cst. Mounsey also

held his flashlight in a way to shine it across the Respondent's eyes to observe how his pupils reacted to the light. Cst. Mounsey explained he tried to do this in a way that the Respondent would not notice. Cst. Mounsey noted that the Respondent's pupils did not react to the light in the way he would ordinarily expect.

[8] Based on his observations up to that point Cst. Mounsey formed the belief that the Respondent was under the influence of drugs. He advised the Respondent that he was being detained for operating a motor vehicle while under the influence. He advised the Respondent of his *Charter* rights, and of the police warning.

[9] Cst. Mounsey decided to do a cursory search of the outer layer of the Respondent's parka pockets. This search consisted of touching the outside of the waist area of his clothing. Cst. Mounsey said he did this because he wanted to determine if the Respondent had a weapon in his possession. Cst. Mounsey also said that it was his personal policy to always do a pat down search when he detained someone.

[10] Cst. Mounsey felt a solid object in one of the Respondent's parka pocket. He did not know what the object was but wanted to find out if it was a weapon. He shone his flashlight in the pocket to see what the object was. He saw an opened box of baking soda and a large ball of steel wool. He also observed a small yellow substance which, to him, appeared to be crack cocaine.

[11] Cst. Mounsey placed the Respondent under arrest for possession of a controlled substance. He advised him of his *Charter* rights and of the police warning again. He then proceeded to search the inside of the Respondent's pocket and to take out items that were in it. As he was pulling out the steel wool and the box of baking soda, he found two small clear plastic bags white powdery substance in them. The substance in those bags was subsequently analyzed and found to be cocaine.

B) STANDARD OF REVIEW

[12] In any appeal, the first question that the reviewing Court has to address is what standard of review applies to the impugned decisions.

[13] When the matter under review is a question of law, the standard of review is correctness. By contrast, decisions involving questions of fact are generally subject to a standard of review that calls for more deference to be extended to the findings of the trial Court.

[14] The line is often not neatly drawn between questions of law and questions of fact. The analysis of whether a *Charter* right was breached is driven by factual findings, so it generally involves questions of mixed fact and law:

> Decisions about detention, search and reasonable grounds for arrest are highly fact-dependent (..) Invariably each case presents a particular set of facts and circumstances on which the decision is based. Although framed in specifics, the respective legal tests involve a review of the totality of the circumstances. (...)
>
> For that reason, the standard of review for each of these decisions is highly deferential. The trial judge's fact findings deserve defence absence a palpable and overriding error. When credibility is a trial issue and appellate court should show great deference to findings made at trial. It is only when a legal error can be extricated from the analysis that the standard of review is correctness [citations omitted].
>
> *R.* v. *Rajaratam* 2006 ABCA 333, at paras 9-10.

[15] The same is true of the analysis as to whether evidence obtained in breach of a *Charter* right should be excluded evidence pursuant to s.24(2):

> The appreciation of whether the admission of evidence would bring the administration of justice into disrepute is a question of mixed fact and law as it involves the application of a legal standard to a set of facts. In *Housen*, at paragraph 37, Iacobucci and Major JJ., for the majority, held that 'this question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law'
>
> *R.* v. *Buhay*, [2003] 1 S.C.R. 63, at para.45.

[16] On the question of whether the Trial Judge properly identified the legal principles that were engaged in this case, the standard of review is correctness. On the question of the appropriateness of the factual findings that she made and her

application of legal principles to the facts that she found, her decisions are subject to the much more deferential standard of overriding and palpable error; that standard can also be formulated as one of unreasonableness. Kerans, R.P. and Wiley, K.M., *Standards of Review Employed by Appellate Courts*, (Edmonton: Juriliber, 2006), at pp. 48-67.

C) WHETHER THE TRIAL JUDGE ERRED IN FINDING THAT THE RESPONDENT'S *CHARTER* RIGHTS WERE BREACHED

1. Arbitrary Detention

[17] Section 9 of the *Charter* provides that everyone has the right not to be arbitrarily detained or imprisoned.

[18] It is common ground between the parties that there was a point, before the Respondent was placed under arrest, where he was detained. Constable Mounsey considered that he detained the Respondent at some point after the Respondent had stepped out of the vehicle. The Trial Judge found that the Respondent was detained earlier than that. She said:

> I find that Cst. Mounsey did detain Mr. England within the scope of sections 9 and 10 of the *Charter*. Constable Mounsey asked Mr. England to produce his driving documentation. He asked Mr. England to get out of the vehicle. He asked Mr. England to walk to the police vehicle with him. He restricted Mr. England's movements in continuing to instruct Mr. England to keep his hands out of his pockets and he shone a flashlight in Mr. England's eyes. Mr. England was detained.

Ruling, p.8, line 26 to p.9, line 9.

[19] It appears that the Trial Judge found that the Respondent was detained from the point when he was asked to produce his vehicle documentation. That was the position advocated by the Respondent in oral argument of this appeal.

[20] Not every interaction between a citizen and a police officer engages the *Charter.* The Supreme Court of Canada has clarified the type of detention that engages constitutional rights:

> "Detention" has been held to cover, in Canada, a broad range of encounters between police officers and members of the public. Even so, the police cannot be said to "detain", within the meaning of ss. 9 and 10 of the *Charter*, every suspect they stop for the purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed", or "kept waiting". But the constitutional rights recognized by ss. 9 and 10 of the *Charter* are not engaged by delays that involve no significant physical or psychological restraint.
>
> *R.* v. *Mann* [2004] 3 S.C.R. 59, at para. 19.

[21] I am not persuaded that the mere request to produce vehicle documentation involves the type of significant physical or psychological restraint that is required to engage *Charter* rights. In the words of the Alberta Court of Appeal,

> (...) Not every conversation with the police is detention. There must be something more: a deprivation of liberty. The law has not yet reached a point that a compulsion to comply will be inferred whenever a police officer requests information, for that would mean the police could never ask questions. [citations omitted].
>
> *R.* v. *Rajaratam*, *supra*, at para. 13.

[22] I find that the Respondent was detained when Constable Mounsey assumed control of his movements by asking him to step out of the vehicle.

[23] At that point, Cst. Mounsey did not have grounds to arrest the Respondent. The only basis for detaining him was for investigative purposes. The issue is whether the Trial Judge erred in concluding that Cst. Mounsey did not have sufficient grounds to take that step.

[24] In *R.* v. *Mann*, *supra*, the Supreme Court of Canada dealt with the police's power to detain for investigative purposes. In describing those powers, the Court said:

> (...) investigative detentions [must be] premised on reasonable grounds. The detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal

> offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference (...)
>
> *R.* v. *Mann*, *supra*, at para.34.

[25] In describing in what circumstances the power to detain exists, the Trial Judge said:

> The desire to question or otherwise investigate an individual does not, in and of itself, authorize the detention of that individual. There is no general power to detain whenever that detention will assist a police officer in the execution of his or her duty; however, there is no necessity to have grounds to arrest an individual in order to detain the individual, but the detention has to have an investigative purpose. The detention can only be justified if the detaining officer has some articulable cause for the detention.
>
> Ruling, page 9, lines 10-21.

[26] This excerpt shows that the Trial Judge was aware of the legal principles that govern investigative detention, as do references to the *Mann* decision in her Ruling. I note that she used the term "articulable cause", which was not the one adopted by the majority of the Supreme Court in *R.* v. *Mann*. The majority preferred the terminology of "reasonable grounds to detain". It is preferable not to use the term "articulable cause" in this context. *R.* v. *B. (L.)* 2007, 227 C.C.C. (3d) 70 (Ont. C.A.), at para. 56. However, that difference in terminology does not materially affect the guiding principles that are to be applied. The reference by the Trial Judge to "articulable cause" as opposed to "reasonable grounds" does not amount to a reversible error.

[27] The Trial Judge considered whether the evidence established that Constable Mounsey had the grounds to detain the Respondent:

> Constable Mounsey wanted to investigate a situation that he found suspicious - that is, a vehicle in the cemetery late at night with two occupants, a male with a younger looking female. Constable Mounsey was aware that the driver of the

> vehicle was Frank England and Constable Mounsey believed that Frank England was a cocaine user.
>
> I recognize that trained police officers rely on the whole picture, which may well lead to a particularized suspicion, and they may make inferences and deductions that may escape the average person but if that is the case the officer must be able to articulate his suspicion that a particular individual is engaged in wrongdoing, what the wrongdoing is and the officer's reasons for the suspicion. Constable Mounsey could not articulate any wrongdoing that he had suspected Mr. England was involved in. At most, he wanted to investigate whether or not Mr. England may be involved in some unspecified criminal activity and in order to carry out that investigation Constable Mounsey detained Mr. England.
>
> Ruling, p.9 line 21 to p.10, line 19.

[28] The Crown argues that an "articulable cause" should not be interpreted to restrict police activity to the investigation of a specific crime. But the question is not whether Constable Mounsey had the right to investigate the situation at the cemetery. It is whether he had the power to detain the Respondent during the course of that investigation.

[29] The excerpt of *Mann* quoted at Paragraph 24, *supra*, makes it clear that police officers do not have the right to detain people just because they are investigating past, future or ongoing offenses. The detention has to be viewed as *reasonably* necessary on an *objective* view of the totality of the circumstances informing the officer's suspicion that there is a *clear nexus* between the individual and *a recent or ongoing* criminal offence. There is a subjective aspect to the analysis, as well as an objective one. The officer must have reached a conclusion that detention was necessary, but that conclusion must also be reasonable in light of the totality of the circumstances. Because of that subjective element, the evidence of the officer who made the decision to detain, especially the evidence explaining the basis for his or her actions, is crucial.

[30] It is readily apparent from the Ruling that the Trial Judge had great difficulty with Constable Mounsey's evidence:

> Constable Mounsey was a difficult witness on cross-examination. His evidence was somewhat evasive. It appeared to me that Constable Mounsey was attempting to figure out where defence counsel was going with some lines of questioning. I do not find that Constable Mounsey was trying to mislead or be

> dishonest in his evidence but I did find his testimony was, especially in cross-examination, difficult.
>
> (...)
> It is difficult to assess a witness' evidence when the witness is somewhat confrontational or argumentative with counsel during cross-examination, but again I do not find that Constable Mounsey was dishonest or trying to mislead; however, I also cannot say, due mostly to his demeanor and attitude during cross-examination, that I found his evidence forthright.
>
> Ruling, p. 7, lines 4-12; p. 7, line 21 to p.8, line 2.

[31] Findings of credibility and overall assessment of a witness' testimony is something that is not interfered with lightly on appeal. This is because unlike the appellate court, trial courts have the advantage of observing witnesses as they testify. As a result, they assess testimony from a much more advantageous vantage point than what is possible through the review of a transcript. *R.* v. *Buhay*, *supra*, at para. 46.

[32] The Trial Judge was not satisfied that Constable Mounsey had reasonable grounds to detain the Respondent for investigative purposes. She found that he had nothing more than a "hunch". That finding was based on her assessment of the evidence about the totality of the circumstances, as well as on Constable Mounsey's difficulties in articulating the basis for which he believed certain offenses were being committed or about to be committed. That assessment is subject to a very deferential standard of review. I see no basis for interfering with the Trial Judge's conclusions that the Respondent was arbitrarily detained.

2. Rights to Counsel

[33] Paragraph 10(a) of the *Charter* provides that everyone has the right, on arrest or detention, to be promptly informed of the reasons for that detention.

[34] Constable Mounsey did not advise the Respondent of the reason for his detention when he asked him to step out of the vehicle. It was at some point later on that he advised the Respondent that he was being detained. Constable Mounsey's testimony on Cross-Examination was that he did not consider that he was detaining the Respondent when he asked him to step out of the vehicle:

> Q. And you had detained him in effect, correct?
>
> A. I don't believe that I detained him because I'm asking him if he'll follow simple directions.
>
> Ruling, p.34, lines 13-16.

[35] As I have already stated, I have concluded that, in law, the Respondent was detained in a manner that engaged his *Charter* rights when he was asked to step out of the vehicle That is when he should have been informed of the reason for his detention.

[36] The Crown states in its Factum:

> only a few seconds separate the moment at which the Respondent stepped out of the vehicle and the moment at which the police officer advised him of the purpose for which he was being detained.

[37] In my view, that assertion is not supported by the evidence. There was no evidence about how much time elapsed between when the Respondent stepped out of his vehicle and when he was told why he was being detained.

[38] There was evidence that in the intervening period, the Respondent walked towards the police vehicle; that Constable Mounsey attempted, by using his flashlight, to determine whether the Respondent's pupils were reacting normally to light; that Cst. Mounsey had a general conversation with the Respondent, which lasted long enough for Cst. Mounsey to note that the Respondent's speech was not slurred, but was also not "fluid". In addition, there was evidence that during this period of time, on a number of occasions, the Respondent appeared to want to put his hands in his parka pockets and each time Constable Mounsey told him not to do so. This happened a sufficient number of times to generate concerns for Constable Mounsey.

[39] On that evidence, it was open to the Trial Judge to find that there was more than a matter of seconds between the time the Respondent was detained and the time he was advised of why. It was open to her to conclude that Constable

Mounsey controlled the Respondent's movements for a period of time to further his investigation, without telling the Respondent that this is what he was doing. Again, these findings were based on the Trial Judge's assessment of the evidence, and I see no basis for interfering with her conclusions, having regard to the standard of review that applies to that issue.

3. Unreasonable Search

[40] The cocaine seized from the Respondent was the result of a search incident to his arrest for possession of a controlled substance, but that arrest was the result of observations made when Constable Mounsey shone his flashlight in the Respondent's pocket. That, in turn, flowed directly from Constable Mounsey's pat-down search of the Respondent.

[41] The Crown acknowledges that if the detention was arbitrary, Constable Mounsey did not have the power to search the Respondent. As I have concluded that the Trial Judge did not commit a reversible error in concluding that the detention was arbitrary, her finding that the search of the Respondent was in breach of section 8 of the *Charter* cannot be interfered with.

[42] Before I turn to the last issue on this appeal, I want to comment about the officer's testimony that it was his personal policy, at the relevant time, to search every person that he detained.

[43] In *Mann*, the Supreme Court recognized the existence of the power to search as an incident to investigative detention, but also stated unequivocally that it was not as extensive as the power to search incident to arrest. The Court also made it very clear that this power did not exist in every situation where someone is detained for investigative purposes:

> The general duty of officers to protect life may, in some circumstances, give rise to the power to conduct a pat-down search incident to an investigative detention. Such a search power does not exist as a matter of course: the officer must believe on reasonable grounds that his or her own safety, or the safety of others, is at risk. (...) The officer's decision to search must also be reasonably necessary in light of the totality of the circumstances. It cannot be justified on the basis of a vague or non-existent concern for safety, nor can the search be premised on hunches or mere intuition.

R. v. *Mann*, *supra*, at para.40.

[44] The law is clear: police officers do not have an automatic power to search individuals who are detained for investigative purposes. To have the power to search, the officer must have reasonable grounds to believe that a search is warranted for safety considerations. The officer must be able to articulate how he or she formed that belief.

[45] Hence, a blanket policy, such as the one Constable Mounsey testified about in this case, far exceeds the scope of the search powers that the law recognizes to police officers who have detained someone for investigative purposes. From a practical point of view, such a policy will also almost inevistably make it more difficult for the Crown to demonstrate that the search in a specific case was based on the officer's assessment of the particular circumstances of that case.

D) WHETHER THE TRIAL JUDGE ERRED IN EXCLUDING THE EVIDENCE

[46] The last issue for consideration on this appeal is whether the Trial Judge committed a reversible error when she concluded that the evidence obtained as a result of the breach of the Respondent's *Charter* rights should be excluded.

[47] As I alluded to earlier in these Reasons, the standard of review that must be applied when reviewing a decision as to whether evidence should be excluded is one of deference. That was reiterated in *R.* v. *Mann*:

> The trial judge's appreciation of whether the admission of evidence would bring the administration of justice into disrepute in entitled to deference, as it is made on the basis of factors established through testimony. This Court has affirmed the importance of deferring to the findings of lower courts in the context of s. 24(2) on numerous occasions. (...) The decision to exclude evidence must be reasonable. Reviewing courts will not interfere with the trial judge's conclusions on s. 24(2) absent an 'apparent error as to the applicable principles or rules of law' or an 'unreasonable finding' [citations omitted]

R. v. *Mann*, *supra*, at para.59.

[48] The s. 24(2) analysis requires consideration of three factors: the effect of admitting the evidence on trial fairness, the seriousness of the police conduct and

the effect of excluding the evidence on the administration of justice. *R.* v. *Buhay*, *supra*; *R.* v. *Mann*, *supra*, at para. 70.

[49] The Trial Judge took into account that the evidence seized was non conscriptive, something that is relevant to the impact on trial fairness. She took into account the seriousness of the breaches and whether they were committed in good faith. Finally, she considered whether the exclusion of the evidence would bring the administration of justice into disrepute.

[50] I do not understand the Crown to be suggesting that the Trial Judge applied the wrong principles in arriving at her decision. Rather, the Crown argues that appellate intervention is warranted because the Trial Judge misapprehended important aspects of the evidence, and that this led her to erroneous conclusions, in particular about the seriousness of the breaches.

[51] The first alleged misapprehension of evidence relates to the Respondent being advised of the reasons for his detention and his rights to counsel. The Crown relies on an excerpt of the Ruling to suggest that the Trial Judge misapprehended the evidence on that point:

> Cst. Mounsey did not advise Mr. England of any reason for his detention, nor was Mr. England given his right to counsel when he was detained and the subsequent search of Mr. England was consequently unreasonable.
>
> Ruling, p.18, lines 3-8.

[52] Read on its own, this excerpt appears to suggest that the Trial Judge found that the Respondent was never advised of the reasons for his detention, nor of his rights to counsel. That would be a misapprehension of the evidence, as there was a point where Constable Mounsey did advise the Respondents of his rights.

[53] But no portion of a Ruling should ever be read in isolation. When she summarized the evidence earlier on in the Ruling, the Trial Judge said:

> Constable Mounsey came to the conclusion that Mr. England was operating a motor vehicle while under the influence of drugs. Constable Mounsey then gave Mr. England his right to counsel and police warning.

Ruling, p.5, lines 21-25.

[54] The Trial Judge was aware of the evidence that Cst. Mounsey, at one point in his interaction with the Respondent, advised him of the reason for his detention and of his rights to counsel. It is not realistic to suggest that she later forgot about that evidence. I interpret the comments she made later on in her Ruling to refer to Cst. Mounsey's failure to advise the Respondent of these things when he first detained him.

[55] The second alleged misapprehension of evidence is the finding that the Trial Judge made that Cst. Barrett had found nothing untoward at the scene. This finding occurred in the part of the Ruling where the Trial Judge was discussing the seriousness of the breaches and whether they were committed in good faith:

> I cannot find that the breaches of Mr. England's sections 9, 10(a) and 8 rights were committed in good faith. Constable Mounsey testified that he wanted to investigate Mr. England, to investigate the situation; he wanted to determine whether or not any criminal activity may be occurring. He was not investigating any recent or ongoing criminal offence. Constable Mounsey knew that another police officer, although it was a junior police officer, had recently investigated the situation and found nothing untoward.

[56] Cst. Barrett was not called on the *voir-dire*. As a result, there was no evidence about the extent of the investigation that she conducted. There was very limited evidence about what information passed between her and Cst. Mounsey when they crossed paths near the scene. In his Examination-in-Chief, Cst Mounsey said:

> Q. And how far into the cemetery did you go in? Or what happened when you got to the cemetery, let me ask it this way.
>
> A. I think by the time we got alongside like as you're going into the cemetery parallel with the Force One Yamaha fence, we met Constable Barrett coming out. And I think one of the radio transmissions was one of the licence plate numbers that Constable Barrett had run had come back as an incorrect plate and I think Constable Barrett had made a mistake running one of the plates. And she ran the correct plate - there was only one vehicle - and Constable Barrett informed me that there was a vehicle parked at the end of the cemetery.

[57] In Cross-Examination, Constable Mounsey was asked questions about why he decided to investigate the situation, knowing another officer had just been at the scene:

> Q. So you were down there to satisfy your curiosity, weren't you?
> A. I don't know if that is my curiosity but my investigation.
>
> Q. A legitimate police officer had conducted an investigation in respect of Mr. England, yes?
>
> A. A junior member, yes.
>
> Q. Yes, fully sworn with all the powers of a peace officer?
>
> A. Yes.
>
> Q. But you didn't trust her investigation?
>
> A. I believe I had more experience than Constable Barrett in a number of different aspects of investigating.
>
> Q. But you didn't trust her investigation?
>
> A. No, I'm not saying that I did not trust her investigation.
>
> Q. Oh, so you did trust her investigation?
>
> A. Yes, I did.
>
> Q. But you decided you would conduct a second investigation in any event?
>
> A. Yes.
>
> Ruling, p. 25 line 14 to p.26, line 8.

[58] It is true that there was no direct evidence that Cst. Barrett "had found nothing untoward". But triers of facts are entitled to draw inferences from the evidence that they hear. Cst. Barrett was leaving the scene. There was no evidence that she expressed any concerns to Constable Mounsey when they spoke. It was not unreasonable to infer that had Cst. Barrett found anything suggesting a need for police intervention, she would not have left the scene. Constable

Mounsey acknowledged that Constable Barrett had already "investigated the situation" and that he decided to conduct a second investigation because he was more experienced than her.

[59] Given this, I do not find that it was unreasonable for the Trial Judge to infer that Cst. Barrett had found nothing untoward at the scene. It was not an inference that she was obligated to draw, but that does not mean that it was an impermissible or unreasonable one. I do not find the Trial Judge misapprehended the evidence in that regard.

[60] Although the Crown asserts in its Factum that the Trial Judge misapprehended several aspects of the evidence in her analysis as to whether the evidence should be excluded, the two areas I have addressed are the only ones that were referred to and developed in argument.

[61] The Trial Judge's decision to exclude the evidence was in large measure driven by her finding that the breaches were serious and were not committed in good faith, which in turn was driven by the difficulties she had with Constable Mounsey's testimony.

[62] At Paragraph 30, *supra*, I referred to some general comments that the Trial Judge made about Constable Mounsey's evidence. In other parts of her Ruling, the Trial Judge expressed concerns about specific aspects of his testimony. For example, the Trial Judge had great difficulty with Constable Mounsey's testimony about what his beliefs were about what object might be in the Respondent's pocket:

> Constable Mounsey testified that he did not know whether or not the object in Mr. England's pocket, which turned out to be a small open box of baking soda, was a gun. I could accept that Constable Mounsey did not know what the object was but it is difficult to accept that an experienced police officer with over three and a half years of experience could not tell that a small box of baking soda was not a gun.
>
> Ruling, p. 7, lines 13-21.

[63] The Trial Judge was also concerned about Constable Mounsey's policy to do a pat-down search of every person he detains:

> Constable Mounsey testified that he does a cursory pat-down search of every person that he detains. Such a blanket policy, if I can call it that, is completely unacceptable conduct on the part of an experienced officer.
>
> Ruling, p.20, lines 11-16.

[64] The overall impressions that the Trial Judge formed during Constable Mounsey's testimony, as well as other specific areas, such as this "blanket policy" to search, necessarily had an impact on her analysis about the seriousness of the breaches and whether they were committed in good faith. That assessment was central in her ultimate decision to exclude the evidence.

[65] In *R.* v. *Buhay*. *supra*, the Court commented on the advantageous position of the trial judge in dealing with s.24(2) issues, and the particular importance this has when assessing the seriousness of a *Charter* breach:

> The findings of the trial judge which are based on the appreciation of the testimony of witnesses will therefore be shown considerable deference. In s. 24(2) findings, this will be especially true with respect to the assessment of the seriousness of the breach, which depends on factors generally established through testimony, such as good faith and the existence of a situation of necessity or urgency.
>
> *R.* v. *Buhay*, *supra*, at para.47.

[66] It bears repeating that the question on appeal is not whether I would have reached the same conclusion as the Trial Judge did about the seriousness of the breaches, the police officer's good faith, and other factors relevant to the s.24(2) analysis. The question is whether the Trial Judge's conclusions show an overriding and palpable error, or, put another way, whether those findings were unreasonable. I cannot say that they were.

[67] The appeal is dismissed.

L.A. Charbonneau

J.S.C.

Dated at Yellowknife, NT
this 30th day of June, 2008.

Counsel for the Applicant: Christine Gagnon
Counsel for the Respondent: James Brydon

S-001-CR 2007000093

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

-and-

FRANK HAROLD ENGLAND

Respondent

REASONS FOR JUDGMENT
THE HONOURABLE JUSTICE L.A. CHARBONNEAU
