

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

MOOSA MOHAMMAD KHAN

MEMORANDUM OF JUDGMENT

INTRODUCTION

[1] Mr. Khan is charged with possession of property obtained by crime, under s. 354(1)(a) of the *Criminal Code*. The charges were laid following a search conducted at an apartment leased to a third party in Inuvik, Northwest Territories. Mr. Khan and another individual were in the apartment at the time the warrant was executed. The police discovered a gym bag containing, among other things, \$9,250.00 in cash, a scale with white residue which was later confirmed to be cocaine, and a lab requisition with Mr. Khan's name on it.

[2] The search was authorized by a warrant issued under s. 11 of the *Controlled Drugs and Substances Act*, SC 1996 c 19 ("*CDSA*"). Mr. Khan challenges the warrant's validity and the legality of his arrest. His standing to do so is not in issue.

[3] For reasons that follow, Mr. Khan's application is dismissed.

FACTS

[4] The Information to Obtain (ITO) the warrant was prepared and sworn by Cst. Christopher Main. He, along with Cst. Robin Watt and Cst. Blake Chursinoff executed the search. All three gave evidence at the hearing.

[5] Cst. Chursinoff's evidence differed significantly from that of the other two officers in two ways and both Crown and defence have urged that it be rejected. First, Cst. Chursinoff said that Mr. Khan was a suspect who was discussed at a meeting he attended with Cst. Main and Cst. Watt before conducting the search. In their testimony, Cst. Main and Cst. Watt said they had no knowledge of Mr. Khan prior to the search. Cst. Main was asked if he had a conversation with Cst. Chursinoff about Mr. Khan and he stated he did not. I also note that the ITO makes no mention of Mr. Khan, something which supports the conclusion that Cst. Chursinoff's memory about having prior knowledge of Mr. Khan is incorrect.

[6] The second difference is with respect to the manner of entry to the apartment. Cst. Chursinoff testified that when he and the other two officers attended at the apartment to execute the warrant, they knocked on the door and showed the occupant the warrant before entering to conduct the search. In contrast, both Cst. Main and Cst. Watt testified that the police gained entry to the apartment with no prior warning to the occupants, using a breach tool which essentially broke down the door.

[7] Cst. Chursinoff was asked about his memory of the events and he admitted it was vague. This, combined with the stark differences between his recollection of the events and those of Cst. Main and Cst. Watt, leads me to conclude that his evidence is unreliable.

[8] Cst. Main was cross-examined extensively on the ITO. With few exceptions, which are discussed herein, the evidence he provided during the hearing is consistent with what is contained in the ITO.

[9] The events leading to the warrant application are as follows:

- a. On September 17, 2019, the RCMP received a complaint from a third party about a suspicious vehicle. It was referred to Cst. Watt. He reported that the named complainant said a male driving a gray Yukon with license plate number R6677 was following her grandchildren and asking them questions about who their mother is and where they were going. The children told the complainant the license plate number.
- b. On September 20, 2019, the RCMP received a report of a "suspicious male" parked at the recreational centre. There was no name associated with the report, but there was a telephone number. The report was taken down by a civilian employee and the information relayed to Cst. Main. He included this in the ITO, as follows:

- i. A man in a black Suburban with Yukon license plates was selling drugs out of the vehicle;
 - ii. He was making “deals” in the parking lot;
 - iii. There was another male on a red four wheeler who appeared to be working with the “suspicious male”
- c. Cst. Main did not follow up on this particular complaint until September 25. Using the telephone number associated with the complaint, he reached Mr. CD, an employee of the recreation centre. It was CD who had provided the information on September 20.
- d. CD told Cst. Main that he received a complaint from an unnamed member of the public about a suspicious vehicle in the parking lot. The member of the public told CD that the person in the vehicle was a “crack dealer”. CD looked in the parking lot and saw the vehicle. He noted there was a sole occupant and it bore a Yukon license plate with license number RGG77. He told Cst. Main that other employees had seen the vehicle several times parked at the recreation centre. CD had personally seen a red all-terrain vehicle meet the Yukon vehicle in the parking lot at least twice.
- e. During cross-examination Cst. Main said he was aware from CD that there were surveillance cameras to monitor the parking lot at the recreation centre, but he did not follow up to try and obtain footage, nor did he refer to surveillance footage in the ITO.
- f. Later on September 20, Cst. Watt saw a vehicle with Yukon license plate number RGG77 parked outside of a store. In an editorial comment in the ITO, Cst. Main notes that this license plate number was similar to that reported by the first complainant on September 17. Cst. Watt saw the driver emerge from the vehicle and go into the store. Cst. Watt took digital photographs of the male and sent them to Cst. Main.
- g. On September 21, Cst. Watt advised Cst. Main that the vehicle was rented to a Mr. AD, who was from Ontario and that AD could be staying at the Teepee Apartments, located at 195 MacKenzie Road in Inuvik at an apartment leased to Ms. CA. Cst. Watt did not disclose the source of this information to Cst. Main and Cst. Main did not inquire about it.

- h. Cst. Main checked for information on AD and CA on three police data bases on September 22. With respect to AD, he learned, among other things, that AD did not have a criminal record and although there were entries about him on one of the data bases, none of the entries involved suspected offences under the *CDSA*.
- i. With respect to CA, Cst. Main stated in the ITO that he learned she had a dated criminal record, but there were no convictions for offences under the *CDSA*. He confirmed through a data base the information about CA's address that he had received from Cst. Watt the previous day. Cst. Main included an editorial comment about CA in the ITO which said CA had been the subject of a complaint on three police files involving the *CDSA*. The complaints were made in 2018 and 2019. During cross-examination, he clarified that being the subject of a complaint is not the same as being a suspect.
- j. Cst. Main began to conduct surveillance on the vehicle and at Teepee Apartments the same day. He observed AD walk out of the apartment building and enter the suspect vehicle. AD drove to a residence and went inside without knocking. Within a minute, AD exited the residence and was using his cell phone.
- k. In an editorial comment, Cst. Main stated that Mr. DM lives at this residence; that DM has been the subject of complaint on six police files involving the *CDSA*; and that he is a known cocaine user. On cross-examination Cst. Main was asked how he knew the information about DM. He said that he had attended the residence in the past as part of policing duties. He had also spoken with DM on a number of occasions and knew he lived there. He did not actually see DM there that day, nor did he enter the premises. He acknowledged that it was possible that other people lived there and that they could have been present in the residence at the time.
- l. Cst. Main next observed AD drive back to Teepee Apartments and go inside. A half hour later, he came back out and drove to a children's park. Cst. Main observed a male on a bicycle approach the vehicle and make "a hand to hand transaction" with AD through the window. It lasted seconds. Cst. Main noted in the ITO that based on his experience involving numerous hours of surveillance, he believes that "quick hand to hand transactions of this nature, with little to no communication is indicative of drug trafficking". During testimony Cst. Main said he did

not see the object in the palm of the person's hand and he did not see any money being exchanged.

- m. AD then drove to another residence, which Cst. Main knew to be where Mr. WB lived. Cst. Main wrote in an editorial comment in the ITO that WB is a known cocaine user with three dated convictions for possession of a narcotic. During cross-examination, Cst. Main said he did not enter the residence, nor did he see WB there. Again, he acknowledged it was possible that others lived or were present inside the residence.
- n. There are no surveillance activities disclosed in the ITO for September 23, 2019. Cst. Main's evidence on this was that he was on duty and out in the community that day and was keeping his eyes open for the vehicle AD was driving. He saw the vehicle parked, but he did not observe any suspicious activities that day.
- o. On September 24, 2019, Cst. Main saw the vehicle parked at Teepee Apartments. He parked across the street. He noted the vehicle was running. AD came out of the apartment building, got into the vehicle and drove to a baseball diamond where he parked. Next, Cst. Main observed a red all-terrain vehicle approach AD's vehicle and park. A male got off the all-terrain vehicle and walked to the driver's side of AD's vehicle. AD handed the male a shopping bag, which the male folded and placed inside his jacket before driving away. Cst. Main attempted to follow the all-terrain vehicle, but lost sight of it. He then returned to Teepee Apartments, where he saw the vehicle parked.
- p. That evening, Cst. Main saw AD park the vehicle by another apartment complex, the McDonald Apartments, which is close to the Teepee Apartments. AD appeared to be using his cell phone for about 10 minutes, after which he drove the vehicle closer to the McDonald Apartments and went into the building. An unknown male let him in. AD came out several minutes later and drove to a bank where he used an automated teller machine. He then drove to another apartment building, the Nova Apartments. He got out of the vehicle and Cst. Main saw him talking on his cell phone. An unknown female opened the door and waved at AD. He entered the building and went upstairs. He then came out a few minutes later and drove to the Teepee Apartments.

- q. Cst. Main was able to gain entry to the Teepee Apartments with a key obtained from the landlord. He saw AD use a key to enter the unit rented to CA.
- r. In the ITO Cst. Main stated his opinion that that what he had observed was drug trafficking. He also stated:
 - [. . .]Drug traffickers coming to Inuvik from the southern provinces often use the residences of local users as a base of operations. This tactic affords those involved in drug trafficking a lesser likelihood of detection by police and a means to increase profit due to the high costs of local hotel rooms.
- s. On September 25, 2019, Cst. Main learned from a vehicle rental company based in Whitehorse, Yukon, that the vehicle AD was driving in Inuvik was 12 days overdue.

[10] At paragraph 12 of the ITO, Cst. Main stated (as written):

12. Throughout conducting surveillance, I saw [AD] make hand to hand *transactions* and attend locations associated with drug use using the 2018 GMC with Yukon licence plate RGG77. In my experience, drug traffickers will use rental vehicles to transport drugs intended for sales. Drug traffickers will often use rental vehicles as they will not be identified as the registered owner of the vehicle. Further drug traffickers will make use of compartments and other storage areas of the vehicle to hide drugs, cash or other illicit items. [Emphasis added]

[11] Cst. Main was cross-examined on what he considered to be a “hand to hand” transaction. Specifically, he was asked if he considered the exchange of the cloth shopping bag between AD and the male with the all-terrain vehicle to be a hand to hand transaction. He said he did not and that hand to hand transactions involve small, easily concealable items. The items in hand to hand transactions typically associated with drug trafficking are usually currency and drugs and take place quickly.

[12] Cst. Main requested a warrant for a nighttime search in the ITO, to take place between 4:00 p.m. and 11:59 p.m. on September 25, 2019. He provided three grounds for this request, namely: that illegal drugs, including crack cocaine and cocaine, can be disposed of quickly; that drug traffickers actively sell in the evening and thus a large portion of the drugs the police would expect to find could be sold by the morning; and drug traffickers tend to be more active during evening hours.

[13] It was put to Cst. Main during cross-examination that his observations of what he suspected to be AD's drug trafficking were made during the day. He indicated that with the vast majority of drug traffickers, the transactions occur throughout the night. He also stated that the request for a warrant authorizing a search at night was in part driven by operational requirements, specifically the need for sufficient police personnel to execute the warrant and to handle calls for other police services. Cst. Main acknowledged that the ITO did not include this information.

[14] The warrant was issued and the search carried out on September 25.

[15] Cst. Main met with Cst. Watt and Cst. Chursinoff before executing the warrant. The purpose was to develop a plan before entering the building. Cst. Main confirmed in his evidence that part of the plan was to arrest anyone found in the apartment. He said this is part of the general procedure employed when executing search warrants, although Cst. Main's evidence was that this approach could be adapted as circumstances and common sense required.

[16] Cst. Main and Cst. Watt both testified they had no knowledge of Mr. Khan prior to executing the warrant.

[17] The police entered the apartment at approximately 10:00 p.m. They gained entry using a breach tool which broke the door to the apartment down. In his testimony Cst. Main explained that it was general practice to use a breach tool and that in the past he had encountered situations where occupants of a premises subject to a search became aware of police presence at the door and disposed of evidence.

[18] As noted, Mr. Khan and another individual, JD, were in the apartment when the police entered. Neither AD nor CA were present, although CA returned to the apartment while the police were searching it and she was arrested.

[19] Cst. Main immediately told Mr. Khan and JD that they were under arrest for trafficking. From memory, he provided them with the police caution and advised them of their right to counsel. He then turned them over to Cst. Watt and Cst. Chursinoff. Cst. Watt searched Mr. Khan and seized his cell phone. Cst. Chursinoff then escorted him outside to the police truck. There, Cst. Chursinoff re-arrested Mr. Khan for possession for the purpose of trafficking. He provided him with the police caution and advised him of his right to counsel. Subsequently, Mr. Khan was driven to the RCMP detachment and lodged in cells. Cst. Chursinoff said Mr. Khan requested to speak with a lawyer and was provided with an opportunity to do so.

[20] Cst. Main waited for Cst. Watt to return to the apartment and when he did, they searched the entire apartment. The gym bag with the money and other items

was located on a shelf in the room where Mr. Khan and JD were arrested. They found evidence of drug use, but they found no evidence of drug trafficking besides what was in the gym bag.

[21] The following day, at 6:50 p.m., Cst. Main interviewed Mr. Khan. In the intervening period following the search, Cst. Main had interviewed CA and JD and, based on those interviews and what was found in the gym bag, he formed the belief that there were grounds to arrest Mr. Khan. Cst. Main re-arrested Mr. Khan and again provided him with the police warning and advised him of his right to speak with counsel. The interview was audio and video recorded, and a transcript was tendered into evidence.

LEGAL FRAMEWORK

[22] The starting point in the legal framework is the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c 11* (the “*Charter*”). It guarantees, in ss. 8 and 9 respectively, that everyone has the right to be free from unreasonable search and seizure and the right not to be arbitrarily detained or imprisoned.

[23] Section 11 of the *CDSA* provides that a search warrant may be issued by a justice *ex parte* where the justice is satisfied by information provided under oath or affirmation that there are reasonable grounds to believe, *inter alia*, that a controlled substance will be found in the place identified in the ITO. An authorizing judge or justice must have reasonable and probable grounds to issue a search warrant. Mere suspicion does not meet this standard. Rather, what is required is “credibly-based probability”: *Hunter v Southam Inc.*, [1984] 2 SCR 145 at 168; 1984 CanLII 33 at para 43.

[24] A search warrant issued by an authorized justice is presumptively valid. It is for the applicant to establish on a balance of probabilities that it ought not have issued. *Québec (Procureur général) v Laroche*, 2002 SCC 72 at para 68, [2002] 3 SCR 708.

[25] The warrant may be challenged facially and sub-facially and Mr. Khan is challenging it on both bases.

[26] A facial challenge will be successful where the applicant demonstrates that the ITO upon which the justice based the decision to issue the warrant was insufficient. A sub-facial challenge will succeed where the applicant demonstrates that the ITO did not reflect information accurately, omitted information which the

affiant knew or ought to have known and that had the information been known to the justice, the warrant would not have issued.

[27] The applicable legal principles and authorities were set out succinctly by Watt, J. of the Ontario Court of Appeal in *R v Sadikov* 2014 ONCA 72:

37. A facial validity challenge requires the reviewing judge to examine the ITO and to determine whether, on the face of the information disclosed there, the justice *could* have issued the warrant: *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 19. The record examined on a facial review is fixed: it is the ITO, not an amplified or enlarged record: *R. v. Wilson*, 2011 BCCA 252, 272 C.C.C. (3d) 269, at para. 39.

38. Sub-facial challenges go behind the form of the ITO to attack or impeach the reliability of its content: *Araujo*, at para. 50; and *Wilson*, at para. 40. Sub-facial challenges involve an amplified record, but do not expand the scope of review to permit the reviewing judge to substitute his or her view for that of the authorizing judicial officer: *Araujo*, at para. 51; and *R. v. Garofoli*, 1990 CanLII 52 (SCC), [1990] 2 S.C.R. 1421, at p. 1452. The task of the reviewing judge on a sub-facial challenge is to consider whether, on the record before the authorizing justice as amplified on the review, the authorizing justice *could* have issued the warrant: *Araujo*, at para. 51; and *Garofoli*, at p. 1452. The analysis is contextual: *Araujo*, at para. 54. The reviewing judge should carefully consider whether sufficient reliable information remains in the amplified record, in other words, information that might reasonably be believed, on the basis of which the enabling warrant could have issued: *Araujo*, at para. 52.

[28] The reviewing court must exercise deference. It is not for the reviewing court to substitute its own opinion for that of the issuing justice. If, based on the record before it, the reviewing court finds the justice *could* have issued the warrant, that is, that there were reasonable and probable grounds to do so, then it must not interfere with that decision: *R v Garafoli*, [1990] 2 SCR 1421 at 1452, [1990] SCJ No. 115 at para 56; *R v Araujo*, 2000 SCC 65 at para 51, [2000] 2 SCR 992.

[29] In looking for evidence that might reasonably be believed to justify the warrant, the reviewing court must exclude incorrect information; but if the incorrect information was included by the police in good faith, “amplification”, ie. additional evidence adduced at a *voir dire*, may be used to correct it. *R v Araujo*, at para 58. However, amplification may not be used in the case of deliberate attempts to mislead the authorizing justice. *R v Morelli*, 2010 SCC 8 at para 41, [2010] 1 SCR 253. Where it is demonstrated that the affiant knew, or ought to have known, that the information in the ITO was false or inaccurate, that evidence must be excised from the ITO. As with any court application made without notice, there is a requirement,

and the Court expects, that the affiant will fully and frankly disclose information in the ITO. *Araujo*, at para 46.

[30] The reviewing court's analysis must be contextual. As noted by Smallwood, J., in *R v Glasgow-Brownlow & Taliani*, 2020 NWTSC 26 at 15 (citing *R v Green*, 2015 ONCA 579 at para 18):

The ITO must be read as a whole in a common sense manner, having regard to its author. The ultimate question is whether there are reasonable and probable grounds to believe that an offence has been committed and that evidence will be found at the location specified in the warrant.

[31] Turning to the arrest, s. 495(1) of *Criminal Code* provides that a peace officer may arrest a person without a warrant where, *inter alia*, the person has committed an indictable offence, or the peace officer believes on reasonable grounds that the person is about to commit an indictable offence.

[32] The police also have a common law power of investigative detention. Investigative detention allows the police to detain an individual for investigative purposes if, in all of the circumstances, there are reasonable grounds to suspect that the individual is connected to a particular crime and that detention is necessary. Further, where the police have reasonable grounds to believe that there is a safety risk, they may engage in a protective pat-down search of the detainee. The detention and the search must be conducted in a reasonable manner and the period of investigative detention must be brief. *R v Mann*, 2004 SCC 52 at para 45, [2004] 3 SCR 59.

[33] The remedy Mr. Khan seeks is exclusion of the evidence, specifically, the gym bag and its contents, the cellular device seized from him upon his arrest in the apartment and the statement. The legal framework that governs an application to exclude evidence pursuant to s. 24(2) of the *Charter* is well known. It requires the Court to consider three factors: the seriousness of the state-infringing conduct; the impact on the *Charter*-protected interests of the accused; and society's interest in an adjudication of the case on the merits. *R v Grant*, 2009 SCC 32 at paras 72-86, [2009] 2 SCR 253.

[34] The first line of inquiry is aimed at assessing whether admitting the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts condone deviations from *Charter* standards and the rule of law. The point is to preserve public confidence in the Court and its process. It is recognized that state misconduct falls on a continuum ranging from inadvertent, minor violations which minimally impair public confidence, to serious, blatant

violations which are bound to bring the administration of justice into disrepute. *Grant*, at paras 72-74.

[35] The second line of inquiry calls upon the Court to evaluate the extent of the effects on the applicant's rights. As in the case of the first line of inquiry, the effects of a *Charter* breach on an applicant falls along a spectrum which starts with breaches that have only minor, fleeting effects, to those which are significantly intrusive. *Grant*, at para 76.

[36] Finally, the third line of inquiry is concerned with society's interest in the truth-seeking function of the criminal trial process and whether that interest would be better served by either admitting or excluding the evidence. The Court must consider the reliability of the evidence, its importance to the Crown's case and the seriousness of the offence. *Grant*, at paras 79-84.

THE PARTIES' POSITIONS

Mr. Khan

[37] As noted, Mr. Khan challenges the warrant facially and sub-facially. He argues that the ITO did not provide a sufficient basis for the justice to issue the warrant and that it contained misleading information and omissions. Accordingly, the evidence obtained during the search should be excluded under s. 24(2) of the *Charter*.

[38] The specific concerns, some of which apply to a facial review and some of which apply to both a facial and sub-facial review, are summarized below. For convenience, I have combined concerns which are logically related:

- a. Information about the investigation into the complaint of the suspicious vehicle following children on September 17 should not have been included in the ITO because it did not support the conclusion that drug trafficking was taking place at the apartment. Moreover, it was a separate and unrelated investigation.
- b. The information received on September 20 was anonymous and it was "paraphrased" and "mischaracterized" by the civilian employee who received it. It was neither credible nor reliable and should not have been included in the ITO. When he followed up with CD on September 25, Cst. Main received additional unsubstantiated information, which should not have been included in the ITO. Finally, and relatedly, Cst.

Main failed to include in the ITO the fact that there was surveillance footage of the parking lot which could have been obtained from the recreation complex.

- c. Limited and insufficient surveillance was carried out before Cst. Main applied for the warrant. Further, Cst. Main did not specify the number of hours he spent observing AD's activities or the times the activities were observed. He did not include information about his investigative activities on September 23, during which he observed no suspicious activities.
- d. Cst. Main referred to multiple "hand to hand" transactions in the ITO, but his evidence was that he only witnessed one such transaction. Further, he stated during his evidence that he was too far away to see what was being exchanged.
- e. Cst. Main included editorial information regarding two of the residences he observed AD enter and exit. Specifically, he said these were homes where people known to him to be drug users resided. He also stated that he observed AD enter two apartment buildings and emerge a short time later. He did not directly observe any drug transactions.
- f. In justifying a request to authorize a nighttime search, Cst. Main used "boilerplate" language and he failed to advise that all of the suspected drug trafficking activity he observed took place during the daytime.
- g. There was no evidence to support the conclusion that CA was involved in selling drugs with AD, nor could it support a reasonable belief that AD was residing with CA in the apartment. She was not observed at all in the investigation leading up to the ITO. The evidence that she lived in the apartment was unverified. Finally, CA was noted in the ITO as being the subject of complaints, but Cst. Main did not specify that she was not in the police data bases as a "suspect".

[39] Mr. Khan argues the police did not have grounds to arrest him when they entered the apartment. This issue is separate from the validity of the warrant, although it is Mr. Khan's position that if the warrant is unlawful, it is a further aggravating feature. His position is that he was arrested as a result of a "general practice" employed by the police when executing search warrants. Thus, property

taken from him during the search (ie. his cellular device) and the statement he provided to Cst. Main should be excluded as well.

The Crown

[40] The Crown's position is that the search warrant was properly issued and accordingly, it was reasonable. With respect to the arrest, while there may not have been grounds to arrest Mr. Khan initially, as soon as the gym bag was opened and its contents revealed, there were grounds for the arrest. Mr. Khan's arrest at the detachment the following day did not violate his *Charter* rights.

ANALYSIS

The validity of the search warrant

a. Including information from September 17 complaint

[41] As noted, Mr. Khan's position is that this ought not to have been included in the ITO because it does not support a conclusion that drugs were being sold out of the apartment and it was a separate investigation that did not involve drug trafficking. Respectfully, this information was properly included. While this particular piece of information about the vehicle does not, on its own, connect it to the apartment or the suspected drug trafficking, it is nevertheless important to the narrative. It explains how the vehicle and AD first came to the RCMP's attention.

[42] In any event, excising this information from the ITO would not affect the warrant. There remains a significant amount of reliable information about suspected drug trafficking activities and the connection to the apartment to justify issuing it.

b. Including the anonymous complaint from September 20, late follow up and omitting information about surveillance footage

[43] Uncorroborated information from anonymous sources must be viewed with skepticism. The reliability is necessarily questionable and the anonymous source may be wholly unaccountable. Here, however, the tip was not truly anonymous because Cst. Main had followed up with the telephone number provided by the complainant, CD, and spoke to him. All of this is laid out clearly in the ITO.

[44] The information came in and was relayed to Cst. Main through a civilian employee on September 20. Cst. Main followed up on September 25. He spoke with CD, who, as it turned out, was the person who called in the information. What

Cst. Main learned from CD on September 25 was included in the ITO and was consistent with the information received September 20.

[45] That there was a five day gap between the time the information was relayed to him and the time he followed up is immaterial in the circumstances. What is important is that there was follow up on the September 20 complaint, which occurred before Cst. Main prepared the ITO and applied for the warrant.

[46] The September 20th complaint is an important part of the narrative which, like the information from September 17, explains *why* the RCMP became involved: they received a report of a person selling illegal drugs out of a vehicle parked at the recreation complex. Moreover, when viewed along with the information from the September 25 conversation between Cst. Main and CD, it explains why CD went to the parking lot to look at the vehicle, leading him to make observations of what was happening, including the presence of the red all-terrain vehicle. This is what ultimately led him to report it to the police. The information that CD relayed to Cst. Main made it clear that he was told by an unknown member of the public that the person in the vehicle was selling drugs. It was not something that CD himself asserted.

[47] Just as with the case of the September 17 complaint, excising this information from the ITO would not have affected the warrant. Sufficient reliable, first-hand information about AD's suspected drug trafficking and his connection to the apartment, would remain.

[48] Cst. Main did not err by leaving out information about surveillance footage depicting the recreation centre parking lot including that it had not been obtained and reviewed. This is not something which could reasonably be expected to mislead the issuing justice. Further, there is no evidence to suggest CD was unreliable or that the police ought to have verified independently the information he provided before including it in the ITO or continuing the investigation. CD is an ordinary citizen who had told Cst. Main that he was prepared to testify in court as to what he observed. This was an investigative choice that the police made.

[49] With respect to whether or not the civilian employee mischaracterized or misstated the information received and relayed to Cst. Main on September 20, it is not clear that this happened or how. Cst. Main indicated in the ITO that the information was provided to him indirectly. In any event, any mischaracterization or misstatement was clarified during Cst. Main's conversation with CD. Having included the information pertaining to that conversation in the ITO, it cannot be said that the issuing justice would have been misled.

c. Amount of time spent observing AD

[50] In the circumstances, the amount of time Cst. Main spent observing AD is not particularly important. What matters is *what* he observed, namely: activities which, based on his experience and knowledge, he believed were drug trafficking transactions, including a “hand to hand” transaction and seeing AD hand a shopping bag to the person on the all-terrain vehicle; and seeing AD come and go from Teepee Apartments, including entering the apartment that was searched with a key. That information was before the justice and in my view, it was sufficient to allow her to issue the warrant.

[51] The fact that Cst. Main did not include information about his surveillance activities on September 23, in particular that he observed nothing that day, does not amount to a misleading omission. Viewed in light of all of the other observations Cst. Main made, the fact that AD was not observed undertaking suspicious activities on September 23 would not have cast doubt on the reliability of the information about the suspicious activities observed on the other days.

d. More than one “hand to hand” transaction

[52] As noted, Cst. Main stated at paragraph 12 of the ITO that he observed AD make “hand to hand transactions”; however, his evidence was that he observed only one transaction that he would consider “hand to hand”. The other transaction involved the exchange of a suspected item in a shopping bag. He believed both to be drug transactions.

[53] Ideally, Cst. Main would not have pluralized “transaction” and he would have made clear that there was a hand to hand transaction and a shopping bag transaction; however, it is a stretch to say that this misled the justice. Once again, I go back to the context and the importance of reading the ITO as a whole from a common sense perspective. When one does that, it is clear that paragraph 12 is a summary of what Cst. Main observed, upon which he has based his conclusions. Importantly, the particulars of what he observed are specified in the body of the ITO.

e. Suspicious activity at two residences and other apartment buildings

[54] It will be recalled that Cst. Main observed AD enter the residences of two known cocaine users in Inuvik on September 22. Mr. Khan notes that Cst. Main did not include information about others who may have lived at these residences, nor did Cst. Main observe any drug transactions.

[55] Cst. Main also saw AD enter two other apartment buildings in Inuvik and emerge a short time later. Again, he did not see any suspected drug transactions.

[56] It is not clear how the presence of other people at these residences would have made a difference, nor how failing to include the information might have been misleading. The warrant did not pertain to either of these residences and Cst. Main did not state that he observed actual drug sales. He simply stated that he observed AD enter these two places, which he knew were occupied by known cocaine user and that he then saw AD emerge from each a short time later.

[57] The information about what Cst. Main observed at the residences and the two apartment buildings should not be excised. Combined with his own knowledge of the occupants of the two residences and his stated experience as a police officer in drug investigations, this information is relevant and it is reliable.

f. Boilerplate language respecting timing of execution

[58] Mr. Khan argues that Cst. Main used “boilerplate” language about how and when drugs are sold to justify a warrant authorizing a nighttime search. He also points out that certain information which ought to have been included, was omitted.

[59] In summary, Cst. Main stated in the ITO that most drug transactions take place at night and as such, it is best to conduct searches at nighttime so that illegal substances can be seized. He did not disclose that all of his observations of AD’s suspicious activities had been made in the daytime, nor did he advise of the real reason the police wanted to conduct the search between 4:00 p.m. and midnight, this timing being required to accommodate operational requirements.

[60] While the language Cst. Main used may be considered “boilerplate” or standard, Cst. Main’s evidence confirms that he was not using it carelessly, without considering whether it was relevant and actually belonged in the ITO. As noted, Cst. Main’s evidence was that in the vast majority of drug trafficking cases, the key trafficking activities take place at night.

[61] I take Mr. Khan’s point. Ideally, if Cst. Main felt he needed to ask for a warrant authorizing a nighttime search, he should have included *all* of the reasons, including operational requirements and the fact that the observations were limited to daytime. In the end, though, this does not assist Mr. Khan for two reasons. First, search warrants issued under s. 11 of the *CDSA* are not restricted to daytime executions. Parliament has explicitly stated that a justice may issue a warrant authorizing a peace officer to search a place “at any time”. Thus, the issuing justice was not required to satisfy herself that a nighttime search should be authorized. *R v*

Saunders, 2003 NLCA 63, 181 CCC (3d) 268. Second, excising the information about the need to execute at night would not affect the substantive grounds for *issuing* the search warrant itself.

g. No evidence that CA was selling drugs with AD

[62] Mr. Khan submits that there was no evidence linking CA to AD's alleged drug trafficking activities. He points out that she was not seen with AD at any time during the police surveillance activities. He also submits that her address was unverified. Respectfully, I disagree.

[63] In the ITO Cst. Main stated that he received information from Cst. Watt that AD might be staying at the Teepee Apartments in a unit rented to CA. Cst. Main did not question the source of that information and Cst. Watt did not volunteer it; however, Cst. Main followed up by checking a number of data bases for information about CA. One of those data base checks revealed CA's address, including the unit number, at the Teepee Apartments. Subsequently, Cst. Main saw AD's vehicle in the parking lot at the Teepee Apartments on a number of occasions and, importantly, he observed AD use a key to enter the unit which was rented to CA.

[64] Taken together, these pieces of information provide a sufficient and reliable basis upon which to conclude that AD was staying at CA's apartment. Further, when combined with Cst. Main's observations of AD's suspected trafficking activities, there was a reasonable basis upon which the issuing justice could conclude that illegal drugs would be found in the apartment.

[65] Considering the whole of evidence, there was an ample basis for the justice to issue the warrant. This is so even if certain parts of the ITO are excised. Accordingly, I find that the search was authorized by law and there has been no breach of s. 8 of the *Charter*.

The Arrest

[66] When the police entered the apartment, they did not hold Mr. Khan and the other individual under the common law power of investigative detention. Rather, Cst. Main arrested Mr. Khan immediately. Prior to entering the apartment, none of the officers had seen or heard of Mr. Khan and there was nothing immediately evident when the police entered the apartment which would have allowed for the formation of reasonable and probable grounds to arrest Mr. Khan without a warrant. The same problem arises with the second arrest by Cst. Chursinoff in the police truck.

[67] Mr. Khan was arrested primarily as a result of the plan to arrest everyone present in the apartment upon entry. In all of the circumstances, the only reasonable conclusion is that Mr. Khan's arrest inside the apartment was an arbitrary detention, which violated his rights under s. 9 of the *Charter*. Given this, Mr. Khan's cellular device and its contents, which were seized during the first arrest, should be excluded from the evidence. The breach is so obviously serious that it cannot be justified and thus, it is unnecessary to engage in s. 24(2) analysis.

[68] That said, the issue of the invalid arrest, and the consequences which should flow from the *Charter* breach, is entirely separate from the question of whether the search of the apartment was unreasonable under s. 8. The gym bag and its contents were found in the apartment as part of the related, but nevertheless *separate*, process of the search. The first two arrests were not premised on the results of the search. Only the third arrest, which followed the next day at the detachment, arose out of the search. There is no question that when Cst. Main arrested Mr. Khan the following day, he had reasonable and probable grounds to do so. That arrest was lawful and the statement taken following that arrest is not subject to exclusion.

Section 24(2) of the Charter

[69] Had I found that the search warrant was not validly issued and despite my finding that Mr. Khan's right not to be arbitrarily detained was violated, I would nevertheless have concluded that the evidence from the search should not be excluded.

a. Seriousness of the *Charter*-infringing conduct

[70] Even if Mr. Khan's arguments regarding the search warrant were accepted, i.e., that there was an insufficient basis for issuing it and that there were errors and omissions in the ITO which were misleading, I would still consider this to be a lower end of the spectrum of *Charter*-infringing conduct.

[71] The police entered and searched the apartment pursuant to a warrant, which was valid on its face. Using a breach tool to gain entry to the premises, rather than knocking, was abrupt and, doubtless, shocking to Mr. Khan and the other individual in the apartment at the time, but the need to use this manner of entry was explained and justified by Cst. Main in his evidence. As noted in *Grant*, at para 75,

Extenuating circumstances, such as the need to prevent the disappearance of evidence, may attenuate the seriousness of police conduct that results in a *Charter* breach. "Good faith" on the part of the police will also reduce the need for the court to disassociate itself from the police conduct. [citations omitted].

[72] The only remotely erroneous information included in the ITO was the reference to hand to hand “transactions”; however, as noted earlier, the transactions that Cst. Main observed were clearly articulated in the ITO and as such, pluralizing “transaction” did not amount to a misleading statement. Similarly, omitting information respecting the reasons for the request for a nighttime search was, legally, immaterial, and the fact that no illicit activity was observed on September 23, did not result in the justice being misled. With respect to the omission of information about the surveillance footage, Cst. Main had no reason to doubt the veracity of CD’s observations at the recreation centre parking lot. CD was not a questionable source and he had told Cst. Main he was prepared to testify was to what he saw.

[73] Cst. Main provided an account of the steps taken in the investigation, including his own observations, the data bases he consulted and CD’s complaint. The application for the warrant was made with a sufficient basis of information and there was no attempt to hide or misrepresent information, or otherwise mislead the justice.

[74] The approach the police took in planning to arrest everyone in the apartment demonstrates a disturbing willingness to disregard the protection against arbitrary detention promised by our Constitution. It is *Charter*-offending conduct that falls towards the more serious end of the spectrum and it is extremely aggravating. As noted, however, it is an issue that is separate from the validity of the process used to obtain the warrant and the warrant itself. Further, there were, ultimately, reasonable and probable grounds to arrest Mr. Khan which were discovered and formed very close in time after the arbitrary arrests.

[75] On balance, this part of the inquiry favours inclusion.

b. Effect on *Charter*-protected interests

[76] This factor also favours inclusion.

[77] A police search of a residence is inherently intrusive and necessarily engages privacy interests. In this case, however, the subject premises was not Mr. Khan’s residence. The issue is whether he had a reasonable expectation of privacy with respect to the gym bag and its contents. Due to the way things unfolded, I find that he did not have a reasonable expectation of privacy with respect to the gym bag.

[78] The case of *R v Le*, 2013 BCCA 442 presents a useful means of illustrating why, in these particular circumstances, Mr. Khan did not have a reasonable expectation of privacy with respect to the gym bag. In *Le*, the police executed a search warrant at the appellant's sister's residence. The appellant was inside the residence at the time, but she was not a suspect and she was permitted to leave. As she was leaving, she picked up her purse, which had been sitting on a table. A police officer searched the purse and found crack cocaine.

[79] The British Columbia Court of Appeal concluded that while the appellant had a reasonable expectation of privacy with respect to the purse, the search of it by the police was reasonable because at the time the search was executed, the purse was just an object on the premises. *Le*, at para 26. That is on all fours with the situation in this case. The gym bag was a "thing" in the apartment that was the subject of the search warrant.

c. Society's interest in adjudication on the merits

[80] Mr. Khan is charged with being in possession of the proceeds of crime. It is a serious offence, punishable by up to 10 years in prison. *Criminal Code*, s.355(a). The evidence, nearly \$10,000.00 in cash, a scale with cocaine residue on it and a lab requisition with Mr. Khan's name on it, is reliable and of central importance to the Crown's case. It was located in a relatively remote community in the Northwest Territories. This Court has acknowledged countless times the damage that cocaine use and trafficking wreaks upon individuals, their families and our communities. Society has a significant interest in seeing this adjudicated on the merits. This factor favours inclusion.

CONCLUSION

[81] Mr. Khan's application to exclude the gym bag and the statement is dismissed for the foregoing reasons.

K. M. Shaner
J.S.C.

Dated at Yellowknife, NT, this
10th day of February, 2021

Counsel for the Crown:
Counsel for Mr. Khan:

Brendan Green
Jessi Casebeer

**IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES**

BETWEEN

HER MAJESTY THE QUEEN

Respondent

-and-

MOOSA MOHAMMAD KHAN

Applicant

**MEMORANDUM OF JUDGMENT OF
THE HONOURABLE JUSTICE K. M. SHANER**
