COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Pino, 2016 ONCA 389

DATE: 20160524

DOCKET: C56288

Laskin, Tulloch and Pardu JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Eneida Pino

Appellant

Howard L. Krongold, for the appellant

John North, for respondent

Heard: October 29, 2015

On appeal from the conviction entered on June 27, 2012 by Justice David Paciocco of the Ontario Court of Justice.

Laskin J.A.:

A. Overview

[1] The appellant Eneida Pino, a 43-year-old house cleaner with no previous criminal record, was convicted of possessing 50 marijuana plants for the purpose of trafficking. The marijuana was seized from the trunk of her car following a search incident to her arrest on an Ottawa street.

[2] Ms. Pino brought a motion before trial to exclude the marijuana on the ground the police had violated her constitutional rights under the *Canadian Charter of Rights and Freedoms*. The trial judge found three *Charter* violations:

- The manner of the police search was unreasonable, contrary to s. 8 of the *Charter*, because the police carried out Ms. Pino's arrest by a dangerous and unnecessary masked take-down at gunpoint.

- The police misinformed Ms. Pino about her right to counsel, contrary to s. 10(b) of the *Charter*.

- The police denied Ms. Pino her right to consult counsel without delay, contrary to s. 10(b) of the *Charter*, by holding her incommunicado in a jail cell for nearly five and a half hours after her arrest.

[3] The trial judge also found that the two police officers who testified about Ms. Pino's arrest lied to the court.

[4] Nonetheless, the trial judge refused to exclude the marijuana seized from Ms. Pino's car under s. 24(2) of the *Charter*. He concluded this evidence was not "obtained in a manner" that infringed Ms. Pino's right to counsel because both s. 10(b) breaches of the *Charter* occurred after the police discovered the marijuana.

[5] The trial judge then found that the breach of Ms. Pino's s. 8 right was "of more than modest seriousness, but "far from at the extreme end of seriousness"; that the impact of the s. 8 breach on Ms. Pino's interests was "of qualified significance"; and that exclusion of the evidence "would therefore gut the prosecution against her". After balancing these three considerations, the trial judge concluded that admitting the evidence would not bring the administration of justice into disrepute.

[6] Ms. Pino appeals her conviction and raises three main issues:

(1) Did the trial judge err in law by concluding that he could not exclude the evidence because of the two s. 10(b) breaches?

(2) Did the trial judge understate the seriousness of the s. 8 breach by speculating about why the police lied in their testimony?

(3) If the answer to either or both question (1) and question (2) is yes, should the evidence be excluded under s. 24(2) of the *Charter*?

[7] I would answer “yes” to all three questions. I would therefore allow Ms. Pino’s appeal, set aside her conviction, and enter an acquittal.

B. Events Leading to Ms. Pino’s Arrest

(a) 21 St. Claire Avenue, Ottawa

[8] In June 2010, the police received a tip about a suspected marijuana “grow-op” at a house at 24 St. Claire Avenue. In the course of their investigation, the police reviewed hydro records of electricity usage in the neighbourhood. In doing so, the police noticed that a house across the street from the target – at 21 St. Claire Avenue – also had a pattern of high electricity usage. Other signs suggested 21 St. Claire Avenue was being used as a grow-op: unusual heat patterns from the house; an unusual number of vents on the roof; and an odour of marijuana around the house.

[9] On the strength of this information, the police obtained a search warrant for 21 St. Claire Avenue. They intended to execute the warrant along with a warrant to search the original target, 24 St. Claire Avenue, during the afternoon of June 25, 2010.

(b) The arrest of Ms. Pino and the seizure of the marijuana

[10] Before executing the warrants, the police set up surveillance in the area. Just after noon on June 25, 2010, Ms. Pino came out of 21 St. Claire Avenue carrying a box, which she put in the trunk of her car.

[11] Ms. Pino drove away from the house at 12:48 p.m. The police followed her. She drove to Value Village where she met a man named Fernando Martinez. Ms. Pino moved out of the passenger seat of her car and Mr. Martinez took over the driving.

[12] The lead police investigator, Det. Schoorl, then ordered Ms. Pino’s arrest. The police stopped Ms. Pino’s car just before 1:00 p.m. and arrested her and Mr. Martinez. Two officers, Cst. Dinardo and Det. Savory, made the arrest. I will discuss the details of the arrest and their evidence about it in the next section of these reasons.

[13] After the arrest, the two police officers searched Ms. Pino’s car. They seized the box from the trunk, opened the box, and found 50 marijuana “clone” plants.

(c) Execution of the search warrant

[14] At 3:34 p.m. on June 25, 2010, the police executed the search warrant at 21 St. Claire Avenue. Inside the house they found a large marijuana grow operation.

C. The Three *Charter* Breaches and the Police's Dishonesty

[15] As I said in the overview, the trial judge found that the police breached Ms. Pino's *Charter* rights in three ways – a breach of s. 8 and two breaches of s. 10(b) – and that Det. Savory and Cst. Dinardo lied in their testimony to the court. The Crown accepts these findings.

(1) The s. 8 breach

[16] Under s. 8 of the *Charter*, "everyone has the right to be secure against unreasonable search or seizure."

[17] Ms. Pino, Mr. Martinez, and the two police officers testified about the arrest. The trial judge accepted the evidence of Ms. Pino and Mr. Martinez and rejected the evidence of Det. Savory and Cst. Dinardo as not credible. He concluded that the way the police carried out the arrest was unreasonable. Here, in brief, are the details of the evidence and the trial judge's findings.

(a) The evidence of Ms. Pino and Mr. Martinez

[18] Ms. Pino and Mr. Martinez testified that they were pulled over by Cst. Dinardo, who was driving a marked police cruiser. Then, Det. Savory, in an unmarked car, drove across their path, cutting them off. Det. Savory got out of his car. He was dressed in black, his face was covered with a balaclava, and he was armed with a handgun. He wore a standard police issue vest with the word "Police" on it.

[19] Det. Savory took out his gun and pointed it at Ms. Pino and Mr. Martinez. He was aggressive and shouting. Ms. Pino thought he was trying to scare her and she testified that she felt "very scared". She complied with Det. Savory's demands, was arrested, handcuffed, and made to sit on the curb. Det. Savory and Cst. Dinardo then searched Ms. Pino's car, where they found the marijuana in the box in the trunk.

(b) The evidence of the two police officers

[20] Det. Savory denied that he drew his gun. He claimed he had not prepared a “use of force” report, and would have done so if he had used his gun. The trial judge rejected his denial.

[21] Det. Savory also testified that he did not aggressively drive his unmarked car in front of Ms. Pino’s car. He claimed that the arrest was “like a regular traffic stop” – “it looked pretty routine to me”. The trial judge rejected this evidence as “not a credible account of what happened”.

[22] Cst. Dinardo had not drawn his gun, and when asked whether Det. Savory had, he claimed he could not recall. The trial judge found it unlikely Cst. Dinardo would forget whether Det. Savory drew his gun: “his professed memory lapse is almost silent evidence in the affirmative”.

(c) The trial judge’s finding of a s. 8 breach

[23] The trial judge found that the police had reasonable and probable grounds to arrest Ms. Pino and that the arrest itself, as well as the search incident to arrest, were lawful.

[24] But the trial judge found that the masked take-down of Ms. Pino at gunpoint was unreasonable. As the trial judge noted, the police do not have a licence to pull a gun whenever they stop and arrest a suspected drug trafficker. When an accused challenges the “manner” of a search, the Crown must justify the police’s conduct. Here, the police offered no specific justification for an armed take-down, as neither Det. Savory nor Cst. Dinardo admitted that a gun was used.

[25] Moreover, Det. Schoorl, who oversaw the arrest, conceded that he did not expect a high-risk take-down. Nothing about the car or its occupants suggested a risk to the safety of the officers or the public. The trial judge concluded that the police did not have any justification for the way they arrested Ms. Pino or Mr. Martinez, and therefore the manner of her arrest and the subsequent search were unreasonable, contrary to s. 8 of the *Charter*.

(2) The s. 10(b) breaches

[26] Under s. 10(b) of the *Charter*, “everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right”. The trial judge found two s. 10(b) breaches: the police failed to accurately

inform Ms. Pino of her s. 10(b) rights; and the police failed to facilitate her access to counsel without delay.

(a) The s. 10(b) information breach

[27] After arresting Ms. Pino, Det. Savory advised her of her right to counsel. However, he admitted he was not carrying his duty book, which contained a pre-printed "rights to counsel" card. Instead he relied on his memory from his ten years on the police force. Yet, on cross-examination, he had difficulty describing what he told Ms. Pino.

[28] The trial judge found that the information Det. Savory provided to Ms. Pino about her right to counsel was deficient in two ways. First, he failed to advise her of her right to consult counsel without delay; and second, he "probably" failed to advise her of her right to immediate, free legal advice.

(b) The s. 10(b) implementation breach

[29] Det. Schoorl decided to delay Ms. Pino's access to counsel because he did not want her to be able to make a phone call that could compromise the execution of the search warrant at 21 St. Claire Avenue. He had her placed in a jail cell, and he left her there by herself for nearly five and a half hours after her arrest.

[30] The trial judge found that the delay in being able to consult counsel was "appreciable". The following is the timeline:

- 1:02 p.m.: Ms. Pino is given her right to counsel, but given inadequate information
- 1:28 p.m.: She is placed in a cell by herself
- 3:34 – 3:40 p.m.: The police execute the search warrant at 21 St. Claire Avenue
- 6:24 p.m.: The police arrange for Ms. Pino to speak with a lawyer

[31] Ordinarily the police must immediately facilitate a detained person's access to counsel. But the trial judge accepted that a solicitor-client consultation could compromise a pending search. To protect the integrity of their search at 21 St.

Claire Avenue, the police could briefly delay Ms. Pino's access to counsel. Det. Schoorl's initial decision was appropriate.

[32] But the trial judge concluded that the delay was unjustified for two reasons. First, he was not satisfied a delay from 1:28 p.m. to 3:40 p.m. was "minimal and necessary". He was given no explanation why the police did not expedite the search of 21 St. Claire Avenue after Ms. Pino's arrest, so they could minimize the impairment of her right to counsel.

[33] Second, even if a delay to 3:40 p.m. could be justified, there was "absolutely no basis for the delay from 3:40 p.m. until… 6:24 p.m.". Det. Schoorl was quick to suspend Ms. Pino's right to counsel; he was far less focused on ensuring she could exercise that right. The trial judge found that the police disregarded Ms. Pino's right to counsel without delay long after any reasonable period of suspension had passed. Instead, the police left her in a jail cell. This breach was, in the trial judge's words, "a clear and serious breach".

D. Analysis

[34] Once evidence has been obtained in connection with a breach of one or more of the rights guaranteed by the *Charter*, the court must decide whether to admit or exclude the evidence at trial.

[35] To obtain an order excluding the evidence, an accused must satisfy the two requirements of s. 24(2) of the *Charter*:

> Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[36] As the words of s. 24(2) indicate, an accused must show on a balance of probabilities that:

- The evidence sought to be excluded was obtained in a manner that infringed a *Charter* right;

- The admission of the evidence would bring the administration of justice into disrepute.

[37] Ms. Pino contends that the trial judge erred in his findings and conclusions on each of these two requirements.

First Issue: Did the trial judge err in law by concluding that he could not exclude the evidence because of the two s. 10(b) breaches?

(a) Introduction and positions of the parties

[38] The trial judge found that both s. 10(b) breaches occurred after the seizure of the marijuana from Ms. Pino's car. He then concluded: "…as a matter of law, I cannot exclude under s. 24(2) the marijuana seized during the search of the car because of right to counsel breaches that occurred subsequently, no matter how serious they may have been." *Charter* breaches after the discovery of the evidence do not meet the "obtained in a manner" requirement of s. 24(2).

[39] In reaching his conclusion, the trial judge relied on what he considered "clear and binding authority prohibiting courts in Ontario from excluding evidence discovered before a *Charter* breach has occurred." The principal authority he relied on was the decision of this court in *R. v. LaChappelle* (2007), 226 C.C.C. (3d) 518, but he also referred to the Supreme Court of Canada's judgment in *R. v. Strachan*, [1988] 2 S.C.R. 980.

[40] Ms. Pino contends that the trial judge erred in law in his conclusion. She makes two submissions in support of her contention. Her main submission is that it is not essential for a *Charter* breach to have occurred before the discovery of evidence to meet the "obtained in a manner" requirement in s. 24(2). All that is required is that the breach occurs in the course of the same transaction or has a common link. Here, Ms. Pino says that the three *Charter* breaches occurred in the course of her arrest – the common link. And she adds that neither *Strachan* nor *LaChappelle* forecloses taking account of the s. 10(b) breaches.

[41] Ms. Pino's secondary submission, a submission she acknowledges was not made at trial, is that the first s. 10(b) breach occurred before the discovery of the marijuana. She was entitled to be advised of her right to counsel immediately upon her arrest, not, as she was, after the search of her car.

[42] On Ms. Pino's main submission, the Crown argues that the trial judge was correct. The case law, policy, and the wording of s. 24(2) all point to the conclusion that sequence matters – *Charter* breaches after the discovery of the challenged evidence do not satisfy the "obtained in a manner" requirement. The

Crown also makes a “harmless error” argument. Even if the trial judge was wrong about the s. 10(b) breaches, his error was of no consequence as he took account of these breaches when he discussed whether admitting the evidence would bring the administration of justice into disrepute.

[43] Finally the Crown argues we should not entertain Ms. Pino’s secondary submission because the record is incomplete: neither police officer was asked why he did not advise Ms. Pino of her right to counsel before the search of her car.

(b) Did the trial judge err in finding that the first s. 10(b) breach occurred after the discovery of the marijuana?

[44] I will address briefly Ms. Pino’s secondary submission. Her submission has merit. In *R. v. T.G.H.*, 2014 ONCA 460, 120 O.R. (3d) 581, at para. 31, Doherty J.A. wrote that the police’s obligation to advise detained persons of their right to counsel ordinarily is not affected by the police’s intention to conduct a search incident to an arrest. They should be advised immediately. Here, the police officers’ only justification for the delay, albeit short, in advising Ms. Pino of her right to counsel could be their concern for their safety. If that was their concern, objectively it would seem to be unreasonable. Ms. Pino had no previous criminal record, the police had no evidence she was dangerous, and she was handcuffed before the officers opened the trunk of her car.

[45] Still, I would not interfere with the trial judge’s finding that both the information and implementation breaches of s. 10(b) occurred after the discovery of the marijuana. Because the issue was not raised at trial, the two police officers were not given any opportunity to explain why they waited until after the search to advise Ms. Pino of her right to counsel. When an issue has not been raised at trial and the record on that issue is incomplete, this court generally will not entertain the issue on appeal: see, for example, *R. v. Ralph*, 2014 ONCA 3, 313 O.A.C. 384, at para. 21; *R. v. Richards*, 2015 ONCA 348, 335 O.A.C. 26, at para. 49.

[46] Also, even if the police should have advised Ms. Pino of her right to counsel before the search, their failure to do so would have had no impact on Ms. Pino’s interests. The police were legally entitled to search Ms. Pino’s car incident to arrest, and neither she nor a lawyer could interfere with their right to do so. The seriousness of the s. 10(b) breaches only became apparent after the search.

[47] Thus, I prefer to accept the trial judge’s finding that both s. 10(b) breaches occurred after the discovery of the marijuana and focus on Ms. Pino’s main

submission and the main issue on this appeal: can *Charter* breaches that occur after the discovery of the evidence meet the "obtained in a manner" requirement in s. 24(2) of the *Charter*?

(c) Did the trial judge err in law by holding that he could not exclude the marijuana because of the two s. 10(b) breaches?

[48] This is a difficult issue. I have concluded that the trial judge erred in law by holding that *Charter* breaches after the discovery of the challenged evidence cannot meet the "obtained in a manner" requirement in s. 24(2). He considered himself bound by appellate authority. I take a different view of that authority; I do not read it as precluding my conclusion. I think the Supreme Court's generous and increasingly broad approach to the "obtained in a manner" requirement allows the court, in an appropriate case, to exclude the evidence because of a *Charter* breach occurring after the evidence was discovered. I find support for my conclusion in the trial judge's own extra-judicial writing as well as in other academic commentary.

[49] In this case I accept Ms. Pino's submission that all three *Charter* breaches found by the trial judge satisfy the "obtained in a manner" requirement in s. 24(2). They are all "temporally" and "contextually" connected to the evidence sought to be excluded; and they all occurred in the course of the same "transaction": Ms. Pino's arrest. Finally, as I will explain, I would not give effect to the Crown's harmless error argument.

(i) The case law

[50] On a superficial reading of s. 24(2) one might be tempted to conclude that the "obtained in a manner" requirement can only be met by a causal connection between the breach and the discovery of the evidence: "but for" the breach the evidence would not have been discovered. But the Supreme Court has long recognized that a causal connection is unnecessary.

[51] Instead, beginning with *Strachan*, the Supreme Court has taken an increasingly generous and broad approach to the "obtained in a manner" requirement in s. 24(2) – an approach that looks to the overall purpose of the section, whether admission of the evidence would bring the administration of justice into disrepute.

[52] So, in *Strachan* itself, Dickson C.J.C. held that "obtained in a manner" did not require a causal connection between the *Charter* breach and the evidence. A

temporal connection would be enough, so long as it was not too remote and so long as the breach and the discovery of the evidence occur "in the course of a single transaction". The Chief Justice emphasized that the court should look at the "entire chain of events". And there should be no bright line rule; "these situations should be dealt with on a case by case basis."

[53] Two years after *Strachan*, in *R. v. Brydges*, [1990] 1 S.C.R. 190, at p. 210, Lamer J. held that the connection between the *Charter* breach and the evidence should be looked at broadly: "…s. 24(2) is implicated as long as a *Charter* violation occurred in the course of obtaining the evidence."

[54] Then, in 2004, in *R. v. Plaha*, 188 C.C.C. (3d) 289 (Ont. C.A.), at para. 45, Doherty J.A. added "contextual" to the list of connections that could satisfy the "obtained in a manner" requirement, and he succinctly summarized the Supreme Court's approach:

> The jurisprudence establishes a generous approach to the threshold issue. A causal relationship between the breach and the impugned evidence is not necessary. The evidence will be "obtained in a manner" that infringed a Charter right if on a review of the entire course of events, the breach and the obtaining of the evidence can be said to be part of the same transaction or course of conduct. The connection between the breach and the obtaining of the evidence may be temporal, contextual, causal or a combination of the three. The connection must be more than tenuous. [Citations omitted.]

[55] Four years later in *R. v. Wittwer*, 2008 SCC 33, [2008] 2 S.C.R. 235, at para. 21, Fish J., for a unanimous court, adopted Doherty J.A.'s formulation in *Plaha*, and stressed that the court's approach to the "obtained in a manner" requirement should be both "purposive" and "generous":

> In considering whether a statement is tainted by an earlier *Charter* breach, the courts have adopted a purposive and generous approach. It is unnecessary to establish a strict causal relationship between the breach and the subsequent statement. The statement will be tainted if the breach and the impugned statement can be said to be part of the same transaction or course of conduct: *Strachan*, at p. 1005. The required connection between the breach and the subsequent statement may be "temporal, contextual, causal or a combination of the three": *R. v. Plaha* (2004), 189 O.A.C. 376, at para. 45. A connection that

is merely “remote” or “tenuous” will not suffice: *R. v. Goldhart*, [1996] 2 S.C.R. 463, at para. 40; *Plaha*, at para. 45.

[56] A generous approach to the “obtained in a manner” requirement makes good sense because this requirement is just the gateway to the focus of s. 24(2) – whether the admission of the evidence would bring the administration of justice into disrepute. And, as the trial judge in the appeal before us acknowledged, the addition of “contextual” to “causal” and “temporal” as connections, “loosened” the “obtained in a manner” requirement.

[57] Despite the generous approach to “obtained in a manner”, the Supreme Court has never expressly said that the requirement can be met by a *Charter* breach that occurred after the discovery of the evidence sought to be excluded. And several Supreme Court decisions since *Strachan* have presumed the *Charter* breach occurred before the discovery of the evidence: see *R. v. Goldhart*, at para. 35; *R. v. Wittwer*, at para. 21; and *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3, at para. 38.

[58] But the court’s recent decision in *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689, suggests that it may be inclined to take account of *Charter* breaches occurring after the discovery of the evidence in an appropriate case. *Mian* was decided after the trial of the case before us, and therefore the trial judge did not have the benefit of it when he wrote his reasons.

[59] In *R. v. Mian*, 2011 ABQB 290, 516 A.R. 368, the police stopped and detained the accused, a suspected drug trafficker, while he was driving his car. Within minutes of the accused’s detention, the police searched the car and found about a half a kilogram of cocaine. However, they waited 22 minutes from the time the accused was stopped to arrest him and tell him the reason for his arrest, and a further 2 to 5 minutes to advise him of his right to counsel. The trial judge found that the delay breached the accused’s rights under s. 10(a)[1] and 10(b) of the *Charter*, excluded the seized evidence under s. 24(2) and acquitted the accused.

[60] In the Supreme Court, the main focus of the argument was whether the Alberta Court of Appeal was justified in raising a new issue on appeal and overturning the acquittal. Rothstein J. held that it was not justified. When he came to discuss s. 24(2), Rothstein J. did not address the “obtained in a manner” requirement, but he nonetheless upheld the trial judge’s decision to exclude the evidence, and he restored the accused’s acquittal.

[61] In *Mian*, the trial judge found that the s. 10(a) and 10(b) breaches occurred immediately upon the accused’s detention, and therefore before the cocaine was

found in his car. Yet the gravity of the breaches was the extent of the delay in advising the accused of his *Charter* rights, and almost all that delay took place after the seizure of the cocaine. *Mian* then offers, at least implicitly, some support for my conclusion.

[62] What then of the two principal authorities relied on by the trial judge: the Supreme Court's decision in *Strachan* and this court's decision in *LaChappelle*? I do not think either precludes the conclusion I have reached.

[63] In *Strachan*, at p. 1005, Dickson C.J.C. did say:

> So long as a violation of one of these rights precedes the discovery of evidence, for the purposes of the first stage of s. 24(2) it makes little sense to draw distinctions based on the circumstances surrounding the violation or the type of evidence recovered. A better approach, in my view, would be to consider all evidence gathered following a violation of a *Charter* right, including the right to counsel, as within the scope of s. 24(2).

[64] *Strachan* was decided in the early days of the *Charter*. The court's principal concern was to reject the proposition that a causal link was needed to meet the "obtained in a manner" requirement. The Chief Justice did not expressly consider and reject the proposition that evidence obtained before a *Charter* breach could not be excluded under s. 24(2). And since *Strachan*, the Supreme Court has interpreted the "obtained in a manner" requirement even more broadly.

[65] In *LaChappelle*, my late colleague, Rosenberg J.A., relied on *Strachan* in holding that evidence seized by the police before an alleged *Charter* violation could not be excluded under s. 24(2). But *LaChappelle* was a very different case on its facts.

[66] There, the accused had been injured in a car accident and was taken to the hospital. On the orders of a doctor, a nurse drew five vials of his blood. Although the accused had been suspected of drinking, the trial judge found that the vials of blood were taken solely for medical purposes. Soon after the blood samples were taken, the police concluded they had grounds to arrest and charge the accused with impaired driving. While he was still at the hospital an officer read him his rights under s. 10(b) of the *Charter* and made a breath demand. The accused then asked to speak to duty counsel and had a private 15 minute consultation with counsel. Two days later, the police obtained a warrant to seize the vials and the accompanying blood/alcohol analysis.

[67] At trial, the accused sought to exclude the results of the breath test and the analysis of his blood samples on the ground, among others, that his s. 10(b) rights had been breached because he did not receive competent advice from duty counsel. The trial judge found that the advice the accused received was competent. On appeal, Rosenberg J.A. held that even if the advice was incompetent he would not exclude the evidence. At paras. 46-47, he wrote:

> Even if the appellant is right that merely showing that he received incompetent advice resulted in a s. 10(b) violation, on the findings of fact by the trial judge, no evidence was obtained by that violation. Accordingly, there was no basis for invoking s. 24(2) of the *Charter* and possibly excluding the results of the blood test.
>
> …But here the trial judge found that the vials had already been sealed and were no longer within the appellant's control when he finished talking to duty counsel. There was no factual or temporal connection between the alleged breach and the obtaining of the evidence; the evidence had already been obtained before the alleged breach of the appellant's rights because of the incompetent legal advice.

[68] In *LaChappelle*, the alleged *Charter* breach and the obtaining of the evidence were not part of the same transaction. The evidence was lawfully seized before the breach, by persons who were not even state actors. As Rosenberg J.A. held, there was no connection, at least no close connection, between the evidence and the breach. In my view, *LaChappelle* does not stand for the sweeping proposition that a *Charter* breach after the evidence has been discovered can never meet the "obtained in a manner" requirement in s. 24(2). That it may do so in an appropriate case finds support in academic commentary.

(ii) Academic Commentary

[69] The trial judge in *The Law of Evidence*, 7th ed. (Toronto: Irwin Law, 2015), which he co-authored with Professor Lee Stuesser, argues persuasively that as a matter of principle and policy, evidence obtained before a *Charter* breach may still be excluded under s. 24(2). In doing so, the authors rely in part on the French version of the text of s. 24(2)[2]. At p. 397, the authors write:

> The French text of subsection 24(2) appears to contemplate the power in courts to address breaches that are linked to the same event, but occur after the discovery of the evidence. There are also sound reasons of policy for leaving this door open. Assume

> that the police discover marijuana during a lawful and reasonable pat-down search and then publicly and needlessly go on to strip search the suspect. Is a court to be deprived of the power to exclude the evidence because of the sequence of events? To insist on the breach preceding the discovery of evidence as an absolute precondition to exclusion means that *ex hypothesi* evidence can be admitted even where its admission would bring the administration of justice into disrepute, just because of the order in which things happened to occur.

[70] In his text, *Constitutional Remedies in Canada*, loose-leaf, 2d ed. (Toronto: Canada Law Book) at para. 10.880, Professor Kent Roach takes a similar view. He emphasizes that the admission of evidence obtained before a *Charter* breach may still bring the administration of justice into disrepute:

> Does it matter in the temporal connection test whether the evidence is found after or before a Charter violation? Parts of *Strachan* suggest that it is necessary for the evidence to be discovered after a Charter violation, but this may be a hangover of the causation based test. From a regulatory perspective, it should not matter whether the evidence was obtained before or after a serious Charter violation. In both cases, the administration of justice could be brought into disrepute if the courts appear to condone a serious Charter violation. If the court is concerned with responding to serious violations, there is no reason why evidence discovered before a violation should not be considered for exclusion. [Footnotes omitted.]

[71] I turn now to apply the principles from the case law to the appeal before us.

(iii) <u>This case</u>

[72] Based on the case law, the following considerations should guide a court's approach to the "obtained in a manner" requirement in s. 24(2):

- The approach should be generous, consistent with the purpose of s. 24(2)

- The court should consider the entire "chain of events" between the accused and the police

- The requirement may be met where the evidence and the *Charter* breach are part of the same transaction or course of conduct

- The connection between the evidence and the breach may be causal, temporal, or contextual, or any combination of these three connections.

- But the connection cannot be either too tenuous or too remote.

[73] Here, the two s. 10(b) breaches along with the s. 8 breach meet the "obtained in a manner" requirement. The marijuana seized from the trunk of Ms. Pino's car and all three *Charter* breaches are part of the same transaction. That transaction or the common link between the evidence and the breaches is Ms. Pino's arrest.

[74] The connection between the evidence and the breaches is both temporal and contextual, and is neither too tenuous nor too remote. The connection is temporal because the three breaches are relatively close in time and are part of a continuum straddling Ms. Pino's arrest. The connection is also "contextual". I take "contextual" – a word often used by lawyers and judges – to mean pertaining to the surroundings or situation in which something happens. In this case, the something that happened is Ms. Pino's arrest. And the two s. 10(b) breaches and the s. 8 breach surrounded her arrest or arose out of it. Indeed, the trial judge found that the s. 10(b) breaches form "part of the context" in which the s. 8 breach occurred.

[75] The following hypothetical example helps to illustrate my point. Suppose the s. 10(b) breaches had crystallized before the search of Ms. Pino's car. The police advised Ms. Pino of her right to counsel without delay immediately upon her arrest, but gave her incomplete advice and decided to delay her access to counsel to prevent her from compromising the search of 21 St. Claire Avenue.

[76] In this hypothetical example, the "obtained in a manner" requirement would unquestionably be met. Both s. 10(b) breaches occurred before the discovery of the marijuana. But as in *Mian*, the gravity of the s. 10(b) breaches, especially the implementation breach, would occur after the search of the car.

[77] So, should it make a difference whether the s. 10(b) breaches occurred before or after the discovery of the evidence? I do not think so. In either case, the administration of justice could be brought into disrepute if the court condoned serious *Charte*r violations.

[78] On this issue, I therefore conclude that the "evidence", the marijuana, was "obtained in a manner" that breached Ms. Pino's s. 8 and s. 10(b) rights. In concluding otherwise, the trial judge erred in law.

(iv) The Crown's harmless error argument

[79] The Crown argues that even if the trial judge erred in his analysis of the s. 10(b) breaches, his error was harmless because he took these breaches into account when he came to discuss the seriousness of the s. 8 breach. I do not accept the Crown's argument.

[80] The trial judge did say: "I also find that while I cannot exclude the evidence in question based on the right to counsel violations, they do form part of the context in which this breach occurred." And he held that there had been "a pattern of violations, which further enhances the seriousness of the breach." But when he assessed the seriousness of the breach, he referred to "breach" in the singular, the s. 8 breach. He did not assess the seriousness of all three breaches.

[81] The s. 10(b) breaches take on a very different colour when they are viewed not just as part of the context for the s. 8 breach, but as a basis for the exclusion of the evidence. That they would take on a different colour is evident from the way the trial judge framed the issue before him. He asked whether he could exclude the evidence because of these breaches and held that he could not because they did not meet the "obtained in a manner" requirement. Had the s. 10(b) breaches met this requirement, undoubtedly they would have elevated the seriousness of the police's breaches of Ms. Pino's *Charter* rights and had an impact on her *Charter*-protected interests. I will discuss the effects of the s. 10(b) breaches when I discuss the final issue on this appeal, whether the evidence should be excluded. I would not, however, give effect the Crown's harmless error argument.

Second Issue: Did the trial judge understate the seriousness of the s. 8 breach by speculating about why the police lied in their testimony?

(a) Introduction

[82] The second branch of the s. 24(2) inquiry calls on a trial judge to assess whether the admission of the evidence sought to be excluded would bring the administration of justice into disrepute. In making that assessment the trial judge

must take account of and balance the three factors stipulated by the Supreme Court in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353:

- The seriousness of the *Charter*-infringing state conduct;
- The impact of the breach or breaches on the *Charter*-protected interests of the accused; and
- Society's interest in the adjudication of the case on its merits.

[83] On the first *Grant* factor, the seriousness of the *Charter* breach, the trial judge found that:

- There had been a pattern of violations but not a conscious disregard for the *Charter*;
- The use of force in arresting Ms. Pino was the result of misjudgment;
- The defective *Charter* advice she received was nothing more than a failure to recall the complete elements of proper advice;
- The initial decision to delay Ms. Pino's exercise of her right to counsel was appropriate; the further delay was an oversight born of disinterest in her *Charter* rights;
- The testimony of the police officers was misleading.

[84] Overall, the trial judge found that the breach that triggered the s. 24(2) analysis – the s. 8 breach – "is of more than modest seriousness, yet, given that it is probably the product of an error in judgment, is far from at the extreme end of seriousness".

[85] Before dealing with Ms. Pino's submission on the first *Grant* factor, I will briefly summarize the trial judge's findings on the other two *Grant* factors.

[86] On the second *Grant* factor, the impact of the s. 8 breach on Ms. Pino's *Charter*-protected interests, the trial judge held there was no impact on her privacy interests. At most, the breach had an impact on her security and integrity of the person. Nonetheless, in the trial judge's view, three considerations diminished the impact of this breach: Det. Savory acted appropriately in running aggressively at Ms. Pino's car and barking commands; Det. Savory brandished his gun for a very short time, and the two officers were not otherwise abusive;

and no causal connection existed between the manner of the search and the discovery of the marijuana. Overall the trial judge found that the impact of the breach on Ms. Pino arising from the manner in which the search took place was "of only moderate" or "of qualified significance".

[87] On the third *Grant* factor, the trial judge held that the marijuana was real evidence of demonstrable reliability, and its exclusion would have a significant impact on society's interest in the adjudication of the case on its merits.

[88] After balancing the three *Grant* factors, the trial judge concluded that the admission of the marijuana would not bring the administration of justice into disrepute.

[89] Even accepting the trial judge's findings on the three *Grant* factors, in the light of my conclusion on the first issue – the "obtained in a manner" requirement – the first and second *Grant* factors will have to be reassessed. The two s. 8 breaches elevate the seriousness of the breach found by the trial judge, and have an impact on Ms. Pino's *Charter*-protected interests. I will reassess those factors when I discuss the final issue on this appeal.

[90] But even apart from the reassessment required to take the two s. 10(b) breaches into account, Ms. Pino does not accept the trial judge's finding on the seriousness of the s. 8 breach. She submits that the trial judge understated its seriousness by speculating about the police's dishonest testimony concerning her arrest.

(b) Did the trial judge understate the seriousness of the police officers' dishonest testimony?

[91] Ms. Pino submits that the trial judge unreasonably discounted the seriousness of the two police officers' dishonest testimony about her arrest by speculating about their motives for lying. I agree with this submission.

[92] The trial judge did not accept Cst. Dinardo's proffered inability to remember whether his partner Det. Savory pulled his gun out and pointed it at Ms. Pino. In substance, the trial judge found Cst. Dinardo was not being candid with the court.

[93] The trial judge expressly found Det. Savory's denial that he brandished his gun and his claim the arrest was like a "routine traffic stop" were not credible. In other words, the trial judge found that Det. Savory lied to the court.

[94] But then the trial judge ascribed rather innocuous motives for Det. Savory's dishonest testimony. The trial judge suggested that Det. Savory drew his gun for reasons of "officer safety". He speculated that the officer may have lied about doing so not because he knew all along his conduct was unlawful, but because he had not filed a use of force report.

[95] I do not think the trial judge was justified in proffering these explanations for Det. Savory's testimony, explanations that had the effect of understating the seriousness of his dishonesty. No evidence was led at trial to show that the arrest of Ms. Pino posed any risk to either officer's safety. And no evidence was led to explain why Det. Savory pulled his gun or why he lied about doing so. Indeed, neither officer could give any evidence about the gun because one denied and the other claimed not to remember whether Det. Savory had brandished his weapon during the arrest.

[96] It seems to me that if the two police officers were going to justify their conduct, they were obliged to put forward evidence explaining why Det. Savory drew his gun and why he acted aggressively in carrying out the arrest of Ms. Pino. These explanations could only come from the officers. Although Ms. Pino had the ultimate burden under s. 24(2) to show the marijuana should be excluded, on this issue of the police's conduct, the Crown had the burden to put forward a plausible explanation: *R. v. Bartle*, [1994] 3 S.C.R. 173, at 210. It did not and could not do so.

[97] As Mr. Krongold, counsel for Ms. Pino, pointed out, by suggesting fairly innocent explanations for the police officers' testimony, the trial judge allowed them to benefit from their own dishonesty. They were able to shield their true motives for the way they carried out the arrest of Ms. Pino by lying about their own misconduct. For the purpose of assessing the seriousness of the *Charter* breaches and the overall assessment of whether the marijuana should have been excluded from the evidence at trial, the officers' dishonest testimony should not be understated by explanations unsupported in the evidence.

[98] Although a trial judge's findings of fact are entitled to deference from an appellate court, appellate intervention is justified in this case because the trial judge's findings are speculative and do not take account of the onus on the Crown.

<u>Third Issue</u>: Should the evidence be excluded under s. 24(2) of the *Charter*?

[99] In the light of my conclusions on the first two issues, the first two *Grant* factors must be reassessed and the overall balancing of the factors reconsidered.

(a) The seriousness of the *Charter* breaches

[100] The trial judge found that the s. 8 breach, in context, was "of more than modest seriousness", but "far from at the extreme end of seriousness". That finding cannot stand for two reasons.

[101] First, the s. 10(b) breaches now directly affect the overall seriousness of the police's conduct. Instead of looking at the seriousness of the s. 8 breach alone, as the trial judge did, all three breaches must be assessed. Even accepting the trial judge's finding that the first s. 10(b) was "nothing more than a failure to recall", the second s. 10(b) breach was itself far more serious. The trial judge found that the police's failure to facilitate Ms. Pino's right to counsel without delay was a "clear and serious breach" of s. 10(b), reflecting the police's disinterest in her rights. That finding alone elevates the overall seriousness of the *Charter* breaches.

[102] Second, the police's dishonest testimony about the arrest, though not an element of the *Charter* breach itself, is relevant to the first *Grant* factor. In my view, the trial judge understated its impact. The Supreme Court's decision in *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, is directly on point. In that case, at para. 26, the Supreme Court endorsed the observation of my colleague Cronk J.A. in her dissenting reasons in this court:

> The integrity of the judicial system and the truth-seeking function of the courts lie at the heart of the admissibility inquiry envisaged under s. 24(2) of the *Charter*. Few actions more directly undermine both of these goals than misleading testimony in court from persons in authority.

[103] For these reasons, to adopt the trial judge's phrase, the three *Charter* breaches are close to "the extreme end of seriousness." This first *Grant* factor favours exclusion of the evidence. Admission of the evidence in the light of the seriousness of the breaches, and especially the officers' dishonest testimony, may send the message that the justice system condones this kind of conduct.

(b) Impact on the *Charter*-protected interests of the accused

[104] This factor focuses on the extent to which a *Charter* breach undermines the interests protected by the right infringed. The trial judge found that the s. 8 breach only had a "moderate" impact on Ms. Pino's interests, largely and correctly because s. 8 protects a person's privacy interests and Ms. Pino's privacy interests were not affected by the manner of her arrest.

[105] But the s. 10(b) breaches have a much greater impact on Ms. Pino's interests. These breaches were neither technical nor fleeting. Being forced to sit alone in a jail cell for over five hours after her arrest without access to counsel undermined the very interests s. 10(b) seeks to protect: correct information about the right to counsel and the immediate ability to consult with a lawyer. Ms. Pino was vulnerable and she needed counsel, not just for legal advice, but as a lifeline to the outside world. This second *Grant* factor also favours exclusion.

(c) Society's interest in an adjudication on the merits

[106] I accept the trial judge's finding on the third *Grant* factor. The evidence in question, the marijuana, is both real and reliable. Its exclusion would likely end the Crown's case against Ms. Pino. This third *Grant* factor favours admission of the evidence.

(d) Overall balancing

[107] After balancing these three factors, I conclude that the admission of the marijuana would bring the administration of justice into disrepute. As the Supreme Court emphasized in *Grant*, at paras. 71 and 84, s. 24(2) requires the court to consider the longer-term repute of the justice system and society's confidence in our system. This is one of those cases in which the court's need to disassociate itself from the police's conduct is greater than society's interest in prosecuting Ms. Pino for possessing 50 marijuana plants.

E. Conclusion

[108] I would allow Ms. Pino's appeal and set aside her conviction. The Crown did not suggest that if the marijuana were excluded it had other evidence to lead against her. I would therefore enter an acquittal. I thank counsel for their assistance on a difficult case.

Released: May 24, 2016 ("J.L.")

"John Laskin J.A."

“I agree. M. Tulloch J.A.”

“I agree. G. Pardu J.A.”

---

[1] Under s. 10(a) “everyone has the right on arrest or detention to be informed promptly of the reasons therefor”.

[2] Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s’il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l’administration de la justice.