SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Morgan*, 2017 NSSC 206

Date: 2017-07-31
Docket: *Syd*. No. 447409
Registry: Sydney

Between:

Her Majesty the Queen

v.

Carl Henry Morgan

Decision on Voir Dire

Judge:	The Honourable Justice Robin C. Gogan
Heard:	May 2, 2017, in Sydney, Nova Scotia
Final Submissions:	July 27, 2017
Decision:	July 31, 2017
Counsel:	David Iannetti for the Crown Laura McCarthy for the Defence

By the Court:

Introduction

[1] On February 18, 2015, Carl Henry Morgan was driving his vehicle along the Trans Canada Highway towards Sydney. Just after 3:30 pm, Cst. Curtis Kutcha (now Cpl. Kutcha) of Baddeck RCMP observed Morgan's vehicle "swaying" in his lane. Morgan was pulled over, detained, arrested and searched.

[2] The search of Morgan's vehicle resulted in the seizure of significant quantities of both cocaine and marijuana. Morgan was charged with 2 counts of possession for the purpose of trafficking contrary to Section 5(2) of the ***Controlled Drugs and Substances Act***.

[3] Morgan now brings an Application alleging breaches of his ***Charter*** rights under sections 8, 9, 10(a) and (b). On the basis of the alleged breaches, Morgan seeks exclusion of evidence under sections 24(1) and (2) of the ***Charter***.

Issues

[4] The issues to be resolved are discreet. Was there a breach of Morgan's ***Charter*** rights following the traffic stop on February 18, 2015? If so, should the evidence obtained in the subsequent search be excluded?

Position of the Parties

The Crown

[5] The Crown acknowledges a breach of Morgan's section 10(b) right to counsel upon his detention for suspicion of drug possession/trafficking. However, it is the Crown's position that this was the only breach of Morgan's ***Charter*** rights.

[6] In terms of a remedy, the Crown submits that the breach occurred as a result of an oversight during an evolving encounter with Morgan. The breach was not deliberate, did not result in inculpatory statements, nor provide any grounds for Morgan's subsequent arrest.

[7] Finally, the Crown says that the quantities of marijuana and cocaine seized is highly reliable evidence and essential to its case. As a result, the exclusion of this evidence is "contrary to society's interest in seeking the truth and having criminal allegations adjudicated on their merits".

The Defence

[8] The Defence submits that a multitude of ***Charter*** breaches occurred throughout the police interaction with Morgan on February 18, 2015. These breaches began with the initial vehicle stop in the absence of a basis for reasonable

suspicion and continued when Morgan was detained on suspicion of possession of a controlled substance.

[9] The Defence further submits that Morgan's arrest was not objectively reasonable and therefore unlawful. In its written submissions, the Defence argues the point concisely beginning at para. 49:

> [49]… Cst. Kutcha continued to violate Mr. Morgan's *Charter* rights by arresting him based upon the faint smell of marijuana. Prior to the second detention and arrest of Mr. Morgan, Cst. Kutcha went back to his police vehicle multiple times. Upon his third trip to Mr. Morgan's vehicle, he said that he "smelled a faint odour of marijuana". He proceeded to then ask Mr. Morgan is he was smoking any marijuana. This would be indicative of smoked marijuana…He describes in his notes that after returning to Mr. Morgan's vehicle a "faint odour of marijuana"; however, the general report from the disclosure then states it was a faint odour of fresh marijuana".
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> [50] Mr. Morgan asserts that Cst. Kutcha did not have reasonable grounds to make this arrest based upon his previous observations or the "faint odour of marijuana" which was said to have been identified after Mr. Morgan denied Cst. Kutcha the opportunity to search the suitcase located on the back of the truck.
>
> [51] It is equally suspicious that Cst. Kutcha would then suddenly smell this odour after speaking to Mr. Morgan at his vehicle at least three times without smelling anything. While the police officer may have subjectively had that suspicion, the facts do not support an objective finding of reasonable and probable grounds and thus a *Charter* breach is evident.

[10] Flowing from these assertions, it is argued that the subsequent search was incident to an arbitrary arrest and unlawful. It is the Defence submission that the evidence obtained from an unlawful arrest and search should be excluded under section 24(2) of the ***Charter***.

Analysis

The Interaction with Morgan – February 18, 2015

[11] The only witness on the *voir dire* was Cpl. Kutcha who testified about his interaction with Morgan on February 18, 2015.

[12] At the time of the events in question, Cpl. Kutcha was a member of the RCMP stationed in Baddeck. He had been a police officer since 2004 and he testified to a five year period in his career as a federal drug investigator. On February 18, 2015, Cpl. Kutcha was working as a uniformed police officer in a marked police vehicle.

[13] At 15:29, Cpl. Kutcha observed Morgan's vehicle pass by his location at an Ultramar gas station outside of Baddeck. It was headed eastbound toward Baddeck. Based upon information he had, there was a suspicion that Morgan may be a person driving with a suspended driver's licence. A few minutes after the Morgan vehicle passed by, Cpl. Kutcha pulled out and began driving eastbound as well. As he passed the area of exit 9, Cpl. Kutcha saw the Morgan vehicle. It was a black Dodge Ram. Cpl. Kutcha concluded that it was not the vehicle belonging to the suspended driver. Nevertheless, he continued to follow.

[14] As he drove behind the Morgan vehicle, Cpl. Kutcha observed the vehicle to have a "slight sway" in its lane. After observing this for a few minutes, he pulled the vehicle over just west of exit 10. In his words, the purpose of the stop was "checking for impairment". As he approached the vehicle, he observed the box of the truck filled with snow tapering down toward the tailgate. On top of the snow, he could see a black suitcase. When he arrived at the driver's door, Morgan had the window half way down. Cpl. Kutcha asked him for his documents and observed him to be nervous. He was pale, sitting rigid in his seat, avoiding eye contact and fumbling with his license. Cpl. Kutcha asked if he was ok and Morgan replied "All ok here".

[15] As Cpl. Kutcha stood by the driver's door waiting for Morgan to produce his registration and insurance documents, he observed 6-7 air fresheners hanging from the rear view mirror. The two had a conversation. Morgan said that he was from Halifax, that he had just dropped his wife and child in Port Hawkesbury and was going to Sydney to pick up snowmobile parts. Cpl. Kutcha then returned to his vehicle to conduct his normal checks. During this process, he obtained information that Morgan had been the subject of an investigation into cocaine trafficking in 2007. No charges were laid. As he received this information, Cpl.

Kutcha said that he recalled Morgan's name from the time he spent in the drug section.

[16] Cpl. Kutcha prepared 2 summary offence tickets and then went back to Morgan's vehicle for the second time. As he explained the tickets to Morgan, he continued to observe him to be nervous, pale, and rigid. As he made these observations, he noticed 3 cell phones on the truck console. At this point, Cpl. Kutcha believed that he had grounds to detain and he advised Morgan. It is at this point that the Crown acknowledges that Morgan was not advised of his right to counsel.

[17] When Cpl. Kutcha was asked to list his grounds for detention, he referred to his experience and then listed the following things:

> (a) That Morgan was travelling from Halifax to Sydney and that Halifax is a source of larger amounts of controlled substances for Sydney;
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> (b) That Morgan was coming from Halifax to go shopping in Sydney;
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> (c) That Morgan had dropped his family in Port Hawkesbury but still had a suitcase with him and that it was on top of the snow in the box outside of the truck;
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> (d) That Morgan was nervous and the nervousness didn't subside when Cpl. Kutcha engaged in conversation. Cpl Kutcha referred to the number of vehicle stops he had done over the years and his observations of how people react;

> (e) His recollection of Morgan's name associated with drug trafficking from his time working in the drug section out of Port Hawkesbury;
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> (f) The CPIC records check which revealed that Morgan had been the subject of a drug complaint but no charges laid;
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> (g) The 6-7 air fresheners (no evidence of any smell); and
>
> (h) The 3 cell phones.

[18] When advised that he was being detained for possession, Morgan replied, "for what, you have nothing". Cpl. Kutcha testified that he then provided the police caution. Morgan was then asked what was in the suitcase and responded, "clothes". Morgan was asked if he consented to a search and replied, "no, you don't have a warrant". The time was 15:43.

[19] Cpl. Kutcha returned to his vehicle and inquired about whether the police dog was available. He was advised that Police Dog Services would be at least an hour. In his view, an hour was too long to detain Morgan. Cpl. Kutcha then spoke to Cpl. Michael Cashin who provided further information about Morgan as known to police in relation to drug trafficking. Cpl. Kutcha acknowledged that the information provided was not recent. These inquiries took two to three minutes and Cpl. Kutcha returned to Morgan's car once again at 15:53. Morgan's car window was still open. As he approached, Cpl. Kutcha detected a "slight" smell of

marijuana. He asked Morgan if he had smoked marijuana in the car and was told "no". Morgan was then arrested for possession for the purpose of trafficking. Cpl. Kutcha said that he made the arrest based upon all of the detention information plus the odour of fresh marijuana.

[20] Cpl. Kutcha handcuffed Morgan, read him his rights, and put him in the back seat of the police vehicle. The vehicle search started at 16:00. Various containers, crushers with residue, cash, drugs and more cell phones were found and seized.

[21] When cross-examined, Cpl. Kutcha acknowledged that he stopped Morgan for what he described as a consistent slight sway of the vehicle. There was nothing erratic about Morgan's driving. Morgan later explained that he was reading and writing invoices. Cpl. Kutcha further acknowledged that he had never before met Morgan and had no information or experience with his general demeanor, appearance or movement. Cpl. Kutcha said that it was not unusual for people to struggle to get identification from their wallet. He further acknowledged that he didn't have any information about the kind of snow mobile parts Morgan was picking up in Sydney or the reason, if any, why Morgan had to go to Sydney for those parts.

[22] Cpl. Kutcha explained that his decision to detain on the drug investigation was based upon the totality of the factors that were present. He said that it was a fairly fluid situation going from detention to arrest. It was not until detecting the smell of fresh marijuana from the window of the vehicle that he felt he had reasonable grounds to arrest. He didn't ask Morgan about ownership of the cell phones even though Morgan said there had been other family members in the vehicle. A search of Morgan's person did not reveal any security concerns and any possible concerns were disposed of when Morgan was placed in the back of the police vehicle.

[23] Cpl. Kutcha's evidence concluded with his testimony that in his experience, the smell of marijuana is not always detected immediately. As he said, "It happens" that you don't always smell it right away.

[24] In my view, the vehicle stop in relation to the motor vehicle offences was appropriate. I accept that there was legitimate concern about impairment and sufficient reason to stop Morgan's vehicle and conduct that aspect of the investigation.

[25] The contentious aspect of the police interaction with Morgan began with his detention in relation to possession, his subsequent arrest and search. It is this

aspect of the interaction between Cpl. Kutcha and Morgan that I find requires scrutiny. In this sense, I agree with Morgan's written submission that "the primary issue in this case is whether the search was one that was authorized by law". This involves preliminary considerations of whether Cpl. Kutcha had reasonable suspicion to support the detention and reasonable grounds for the arrest.

The Law

[26] The legal principles that apply to the required analysis are well reviewed in the written and oral submissions of the parties. The applicable law is well settled. Morgan alleges that several of his *Charter* rights have been breached and he has the onus to establish such breaches on a balance of probabilities.

[27] In order to properly determine the matter, it is necessary to analyze the interaction with the police on a step by step basis beginning with the initial stop. The question is whether, as the steps were taken, "the police stayed within their authority, having regard to the information lawfully obtained at each stage". As such information emerges, it may entitle the police to proceed further, or it may require them to end the interaction (See: ***R. v. Nolet***, 2010 SCC 24).

[28] A police officer can detain a person on reasonable suspicion that criminal activity is taking place. If challenged, the onus is on the Crown to show that

objective and ascertainable facts rise to the level of reasonable suspicion, such that a reasonable person, standing in the shoes of the police officer, would have a reasonable suspicion of criminal activity (See: ***R. v. Chehil***, 2013 SCC 49, at para. 45).

[29] If there is a reasonable suspicion, the detention is not arbitrary and there is no breach of s. 9 of the *Charter*. The assessment should be based upon the "totality of the circumstances" and be "fact based, flexible, and grounded in common sense and practical everyday experience" (See: ***Chehil***, *supra*, at para. 49).

[30] If the nature of the detention is suspicion of a criminal activity, then the person detained should be advised of the reason for the detention (s. 10(a)) and advised of his right to counsel (s. 10(b)). Such advice must be given immediately subject only to officer safety concerns (See: ***R. v. Suberu***, 2009 SCC 33, at para. 2).

[31] If the interaction moves from detention to arrest, such a step must be lawful based upon both subjective and objective grounds. If such grounds are established, the arrest is lawful, and there is no breach of s. 9. (See: ***R. v. Storrey***, [1990] 1 S.C.R. 241). If a lawful arrest is made, an officer may conduct a search incident to

arrest without warrant and without independent reasonable grounds. There are limits on the power to search incident to arrest (See: ***R. v. Caslake***, [1998] 1 S.C.R. 51). If the search incidental to arrest is within the prescribed limits, then there is no breach of s. 8 of the *Charter*.

Determination

Assessment of the Evidence

[32] As I proceed toward a determination, I begin with an assessment of the evidence. Cpl. Kutcha presented as a respectful and conscientious police officer and a prepared witness. He had significant experience, including specific experience in drug section. Although the submission was made that Cpl. Kutcha had an ulterior motive for the initial vehicle stop which tainted all subsequent interaction, I find that there is no basis in evidence to support that contention.

[33] Further, I accept the officer's observations during the subsequent interaction in all but one respect. I will explain that in a moment. But at this point, I accept the evidence that Morgan appeared nervous, pale and fidgety during the relevant period, that his vehicle contained multiple air fresheners (although there was no evidence of any smell coming from them) and multiple cell phones all in plain view.

[34] Finally, I accept the evidence as to what Morgan told Cpl. Kutcha in response to his questions about where he was coming from, where he was going and the reason for his trip. I accept that Cpl. Kutcha believed that he recognized Morgan's name from his time working in the drug section some years before and that Cpl. Kutcha made inquiries from his vehicle which substantiated those memories but did not provide much in the way of any further significant information.

[35] My concern from an evidentiary perspective relates to Cpl. Kutcha's evidence that on this third trip to Morgan's vehicle, he smelled the "slight odor" of marijuana. It was this evidence that resulted in Morgan's arrest. While I acknowledge the evidence from Cpl. Kutcha that in his experience the smell of marijuana isn't always apparent immediately, I am left in some doubt about the reliability of this evidence. Let me explain.

[36] If there was a smell of marijuana, common sense dictates that it would be coming either from the inside the vehicle or, more likely, from the suitcase where the drugs were later found. The evidence was that the black suitcase contained the drugs and that the marijuana was divided into half pound packages inside the suitcase. The suitcase was not in the cab of Morgan's truck. It was outside, in the box of the truck, sitting on top of snow that had accumulated there. There was no

evidence offered as to weather conditions but it was February and the vehicle was stopped on the side of the highway outside of Baddeck.

[37] Cpl. Kutcha's evidence was that he came and went to Morgan's vehicle two times without detecting any smell. This means of course that he was adjacent to the open driver's window of Morgan's vehicle for 2 significant periods of time and passed by the suitcase four times. During none of these interactions did the officer detect any smell, faint or otherwise.

[38] It was clear to me that Cpl. Kutcha took note of the suitcase and found it suspicious. In my view, Cpl. Kutcha's attention was clearly on the suitcase from early in the series of events. He acknowledged that the suitcase was part of the totality of circumstances that he found suspicious. However, it was only on the fifth pass, after Cpl. Kutcha had developed his suspicions and detained Morgan, and Morgan would not consent to a search, that a smell was detected. It was this evidence which satisfied Cpl. Kutcha that he had reasonable grounds for the arrest.

[39] There are 2 issues flowing from this evidence of a "slight odor" of marijuana. First, Morgan submits that there is a credibility question to be resolved that flows from the slight odor being detected at a critical and convenient juncture in the interaction. Second, if the evidence about the odor is accepted,

consideration must still be given whether this constitutes reasonable grounds in the circumstances.

[40] In assessing this evidence, I found general guidance in the reasoning of Rosenburg, J.A. in ***R. v. Polashek***, [1999] O.J. No 968 (Ont. C.A.) and the more recent decision of Campbell, J. in ***R. v. S.T.P.***, 2008 NSPC 66 (affirmed on appeal at 2009 NSCA 86). As Judge Campbell (as he then was) put it in ***S.T.P.***, supra, at paragraph 45:

> The issue at this point is whether the police, when they approached the vehicle of which they were already suspicious, and knowing without more they did not have grounds to make an arrest or perform a search, alternatively, actually smelled marijuana, smelled something reasonably similar to marijuana, smelled nothing like marijuana but convinced themselves that they smelled marijuana or smelled nothing like marijuana and claimed to have smelled marijuana.

[41] In both ***Polaskek*** and ***S.T.P.***, the critical evidence supporting arrest was a strong smell of marijuana. In the present case, the focus is on Cpl. Kutcha's evidence that he detected a "slight" smell as he approached Morgan's vehicle for the third time. Cpl. Kutcha testified that it was a "fresh" marijuana smell. Notwithstanding, after detecting this smell, he asked Morgan if he had been smoking marijuana in the vehicle.

[42] I consider that Cpl. Kutcha did have some experience in drug work and would have the ability to distinguish between the smell of fresh and burned

marijuana. I infer from this evidence that Cpl. Kutcha was less than sure about the nature of the smell at the time he said he detected it. I am left with a concern that hindsight may have provided some clarity on the nature of the smell used as the basis for the arrest.

[43] Moreover, I have concerns about the fact that the smell was "slight", that its origin was vague, and that its detection came late in Cpl. Kutcha's interaction with Morgan. While I am satisfied that Cpl. Kutcha's experience equipped him to distinguish between fresh and burned marijuana, I am not convinced that a "slight" odor, detected at roadside, more than fifteen minutes into the interaction, is a reliable piece of evidence. While there may have been a subjective belief on Cpl. Kutcha's part that the smell was that of "fresh" marijuana, I don't find his conclusion objectively sustainable (See: ***R. v. Gee***, 2015 BCSC 1013 for a case with somewhat similar facts).

[44] On this basis, I conclude that reasonable grounds did not exist for Morgan's arrest.

Conclusion on Grounds for Detention and Arrest

[45] On the basis of the foregoing, I find the arrest arbitrary and the subsequent search unlawful. Morgan has satisfied the burden on him to establish breaches to

his s. 8 and s. 9 *Charter* rights. To this I add the Crown concession that Morgan's right to counsel (s. 10(b)) was also breached by Cpl. Kutcha.

[46] The remaining question relates to the appropriate remedy in the circumstances. The real question is whether the evidence obtained should be excluded from evidence.

Section 24(2) – Exclusion of Evidence

[47] The required analysis comes from the decision of the Supreme Court of Canada in ***R. v. Grant***, 2009 SCC 32 which mandates consideration of three lines of inquiry in assessing whether or not tainted evidence should be excluded.

[48] More recently, the Ontario Court of Appeal had occasion to refer to and follow the decision in ***Grant*** in the decision of ***R. v. Tsekouras***, 2017 ONCA 290. It concisely set out the principles at paras. 102-106:

> 102 Section 24(2) of the *Charter* requires that the admissibility of constitutionally-tainted evidence be determined on the basis of all the circumstances. The test, broad and imprecise (*Grant*, at para. 60), requires a trial judge to assess and balance the effect of admitting the evidence on societal confidence in the justice system. The focus of s. 24(2) is long-term, prospective and societal: Grant, at paras. 67-71.
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> 103 The admissibility determination under s. 24(2) involves a balancing of assessments under each of the three lines of inquiry:
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> i. the seriousness of the *Charter*-infringing state conduct;

> ii. the impact of the breach on *Charter*-protected interests of the accused; and
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> iii. society's interest in the adjudication of the case on its merits.
>
> See, *Grant*, at para. 71.
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> 104 The first two inquiries operate in tandem. Both pull toward exclusion of constitutionally-tainted evidence. When the state's *Charter*-infringing conduct becomes more serious and the impact of it on the *Charter*-protected interests of the accused becomes greater, the synergistic effect of their combination strengthens the pull for and towards exclusion: *McGuffie*, at para. 62.
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> 105 The third line of inquiry – society's interest in adjudication of the merits – is contraindicative – pulls towards the inclusion or admission of the evidence. This is a pull that reaches its zenith when the evidence tendered for admission is at once reliable and crucial to the case for the Crown: *McGuffie*, at para. 62. See also, *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494 (S.C.C.), at paras. 33-34.
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> 106 These lines of inquiry under *Grant* involve fact-finding and the assignment of weight to various interests often at odds with each other. There is no overarching principle that mandates how this balance is to be achieved: *Grant*, at para. 86; *R. v. Paterson*, 2017 SCC 15 (S.C.C.), at para. 54; *R. v. Cote*, 2011 SCC 46, [2011] 3 S.C.R. 215 (S.C.C.), at para. 48; *R. v. Manchulenko*, 2013 ONCA 543, 301 C.C.C. (3d) 182 (Ont. C.A.) at paras. 89-93.

[49] In the present case, there is no question that the evidence obtained from the unlawful arrest was reliable evidence crucial to the case against the accused. And, there is no question that its discovery resulted solely from multiple breaches of the accused's *Charter* rights.

[50] I conclude that the serious nature of the infringements in this case call for exclusion of the evidence obtained in the search. I am satisfied that admission of the evidence would bring the justice system into disrepute.

Conclusion

[51] Morgan's application is allowed. The evidence seized during Cpl. Kutcha's search of Morgan's vehicle is excluded from evidence at Trial.

Gogan, J.