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1. — A trial judge of the Ontario Superior Court finds that police engaged in racial profiling in stopping a car allegedly to check the driver's identity and to check on her safety

Racial profiling has been identified as a pernicious and lamentably widespread practice in Canada. It is also often difficult to prove.

In a recent trial decision, Justice Charney of the Ontario Superior Court found that police engaged in racial profiling and that they breached the rights of a driver and her passenger who were subjected to an arbitrary detention and an unlawful search.

A police officer stopped a vehicle leaving a motel in Whitby, Ontario, which is not far east of Toronto. The stop took place just before 3:30 in the afternoon.

There was nothing wrong with the way the car was being driven; the driver was not speeding or driving erratically in any way.

He stopped the vehicle, he said at the *Charter* application brought to exclude the drugs later found in it, because, as he put it, a "young looking female" was driving and a black man was the passenger. From his past experience, that motel was frequented, as he put it, by "escorts and their pimps" and "some of these women are exploited and

controlled by the pimps, often through violence and intimidation". He said he was concerned for the driver's safety. The officer acknowledged in cross-examination that the majority of the customers of the motel were law abiding and not engaged in prostitution. As the trial judge Justice Charney put it, at para. 6, "the only basis for this suspicion was the fact that the female was young and white, that the male companion was black, and that they were leaving the Canadiana Motel".

That was not the only reason he stopped the car. He queried the licence plate and that neither the driver nor the passenger matched the description of the registered owner of the vehicle. He stopped the vehicle, he said, for two reasons: to confirm the identity of the driver and, as he put it, out of "safety concerns" for the driver who left "an area known for prostitution and drugs".

After stopping the car, the officer approached the driver's side of the car and the driver rolled the window down half way. The officer could immediately smell a strong odour of burnt and green marihuana. He asked the driver for her driver's licence and vehicle documentation and asked who the owner of the car was. She replied that it was her mother's car.

The officer asked her to step from the car and asked her who her passenger was. She said it was her boyfriend. He then asked her if she were an escort and if he would find her photo on a website for escorts. She explained that she was checking out the motel for a party and was looking for rooms for friends.

The officer called for back up and other officers arrived at 3:45 pm. The car was searched and marihuana was found at 3:57 pm at which point officers arrested both the driver and her passenger. Both were then handcuffed and, for the first time, advised of their right to counsel. Prior to their arrest, neither party was advised why they were being detained although the officer who stopped the car said to them that he smelled marihuana.

Officers continued to search the car and found a digital scale with residue they believed to be cocaine, 10 tabs of oxycocet, 4.3 grams of crack cocaine, 7 grams of powder cocaine and a little more than 25 grams of marihuana.

The applicants brought applications alleging breaches of their rights under ss. 8, 9, 10(a) and 10(b) of the *Charter*. The Crown conceded that the applicants' rights under s. 10(a) and s. 10(b) were breached in that the applicants were not informed of the reason for the detention or of their right to retain and instruct counsel until well after they were stopped (and their detention, therefore, commenced).

The Crown, however, argued that there was no breach of their rights under ss. 8 or 9. The officer who stopped the car was entitled to stop the car under s. 216(1) of the *Highway Traffic Act* to confirm the identity of the driver in view of his belief that she appeared much younger than the registered owner. The search of the vehicle, it was asserted, was a lawful search incidental to a valid arrest.

The applicants argued that they were arbitrarily detained contrary to s. 9 of the *Charter*. The officer, they contended, did not have grounds to believe that an offence was being committed and the provisions of the *Highway Traffic Act* did not afford justification to stop the vehicle as he claimed. The reason he gave for stopping the vehicle, the defence argued, was merely a ruse or pretext for a criminal investigation based on racial profiling.

Justice Charney instructed himself that claims of racial profiling are rarely proven by direct evidence and, when proven, are established by inferences drawn from circumstantial evidence: *R. v. Brown* (2003), 64 O.R. (3d) 161 (Ont. C.A.).

He held that the applicants met the onus cast upon them and he was persuaded on a balance of probabilities that the officer did not have lawful authority to stop the car.

The officer's initial concerns for the safety of the driver were, as Justice Charney put it at para. 30, "based on the fact that she was seen in the company of a young black male. There was really nothing more to it than that."

He also found that the officer's desire to identify the driver was a mere "pretext for stopping the car".

To quote from the reasons for judgment at para 32:

> [32] In the first place, there is nothing illegal, unusual or suspicious about a driver not matching the description of the registered owner. Family members frequently share the same car. The registered owner may be a different gender or a different age than the driver. This is commonplace and innocent conduct. Taken on its own this would not justify a stop under s. 216(1) of the *HTA*. There is no section of the *HTA* that is implicated by this behaviour. PC MacKinnon acknowledged that he had no reason to believe that the driver did not have the owner's permission to drive the car.

Therefore, the police infringed the applicants' rights under s. 9 and, because the search incidental to arrest arose from a wrongful detention, they also infringed the applicants' rights under s. 8.

Having regard to the first of the factors set out by the Supreme Court in *R. v. Grant*, [2009] 2 S.C.R. 353, Justice Charney held that the breaches of ss. 8 and 9 were "very serious" because they arose out of racial profiling. When one considers that there were also breaches of s. 10(a) and (b), to quote him at para. 37, "The cumulative effect of all of these *Charter* violations is to place the police conduct at the very serious end of the continuum".

The second, *Grant* factor — the impact of the breach upon the *Charter*-protected interests of the accused — also favoured exclusion of the evidence. To quote Charney J. at para. 38, "The strong causal connection between the *Charter* violations and the discovery of incriminating evidence results in a very serious impact on the applicants' *Charter* rights".

Charney J. quoted with approval, at para. 39, from *R. v. McGuffie*, 2016 ONCA 365 in deciding that the third factor in the *Grant* test was of little weight when the first two factors strongly favoured the exclusion of the oppugned evidence:

> In *McGuffie*, the Court of Appeal held that the third inquiry of the *Grant* analysis becomes important when one, but not both, of the first two inquiries pushes strongly toward the exclusion of the evidence. The court explained (at para. 63):
>
> > If the first and second inquiries make a strong case for exclusion, the third inquiry will seldom, if ever, tip the balance in favour of admissibility . . . Similarly, if both of the first two inquiries provide weaker support for exclusion of the evidence, the third inquiry will almost certainly confirm the admissibility of the evidence: see e.g. *Grant*, at para. 140.

Justice Charney excluded the evidence and acquitted the applicants.

R. v. Ferguson-Cadore, 2016 ONSC 4872, 2016 CarswellOnt 12242

2. — A judge of the Ontario Court of Justice acquits a defendant of "over 80 mgs" where there was an air of reality that he might have engaged in "bolus" drinking

When police take the first breath sample of an accused more than two hours from the time of driving, the Crown does not have the advantage of the "presumption of identity" afforded by s. 258(1)(c) of the *Criminal Code*. In other words, the accused's blood-alcohol concentration is not presumed to be same as the lowest of the results obtained by the breath tests. The accused will be entitled to an acquittal on a charge of over 80 mgs unless the

Crown tenders evidence from a toxicologist — in the form of either *viva voce* evidence or a report filed with the court — "reading back" the breath results to the time of driving.

In order to "read back" the results of the intoxilyzer tests to the time of driving, toxicologists make four assumptions, one of which is that the accused did not engage in "bolus" drinking (i.e., drink a large quantity of alcohol) just before the time when their blood-alcohol concentration was alleged to be over the legal limit.

A driver could be below the legal limit when, say, he was stopped by a police officer and his blood-alcohol concentration could be over the legal limit at the time of the intoxilyzer tests at the police station if he drank a large quantity of alcohol just before being stopped and that alcohol he ingested, or most it, had not yet been absorbed into his blood.

The Ontario Court of Appeal in *R. v. Grosse* (1996), 29 O.R. (3d) 785 called the assumption that the accused did not engage in bolus drinking a "pivotal assumption" and it held that the Crown was required to satisfactorily prove the absence of "bolus" drinking in cases where the first breath test was taken more than two hours from the time of driving. As time went on, however, appellate courts have lowered the bar considerably for the Crown in this regard. In *R. v. Paszckenko*, 2010 ONCA 615, the Ontario Court of Appeal held that triers of fact are entitled to make a "common sense" inference of no "bolus drinking" (because people do not ordinarily drink large amounts of alcohol just before getting into a vehicle to drive or while driving) unless the accused can point to something in the evidence that puts the possibility of "bolus" drinking into play or gives it an air of reality.

A recent case from the Ontario Court of Justice sheds light on the pitfalls of filing an expert report in these cases, and in what circumstances the accused may put the possibility that he engaged in "bolus" drinking into play.

The defendant ordered food from a McDonald's drive-through early one evening and the person he ordered from called police and thought he was "impaired . . . under the influence". He was stopped by police and the police conducted two breath tests, the first of which was more than two hours from the time the defendant was stopped.

The arresting officer found several empty cans of beer "within reach of the driver" and, according to the trial judge, Justice Rose, at para. 11, "thought it possible that he consumed them while driving prior to being stopped".

The Crown did not call a toxicologist to testify at the trial but, with the consent of the defence, filed a report from an expert, Dr Mayers, who opined that the defendant's blood-alcohol concentration at the time he was stopped was in the range of 115 to 170 mgs of alcohol per 100 ml of blood. One of the assumptions that the author relied upon was that the defendant did not drink "large quantities of alcohol" shortly before the incident.

There was evidence at the trial to the effect that the smell of alcohol on the defendant's breath got stronger as time went on.

Justice Rose acquitted the defendant because he had a doubt that the possibility of "bolus drinking" was satisfactorily rebutted.

First, he pointed out that the toxicologist did not explain what he meant by "large quantities" of alcohol. Second, the evidence raised an air of reality that the defendant may have engaged in "bolus" drinking. Empty beer cans or bottles are evidence that courts have suggested are consistent with "bolus" drinking: see *R. v. Calabretta*, 2008 ONCJ 27, and *R. v. Grosse*, *supra*. To quote Justice Rose at para. 19:

> The combination of empty beer cans in the car and Mr Constable's breath smelling stronger as time progressed displaces the common sense inference that persons do not consume alcohol in large quantities in a short period of time. In the result, there is evidence before me which is consistent with consumption of

alcohol prior to being stopped by Constable Luckasavitch. The 3rd assumption in Dr Mayer's report is not made out and I accordingly afford the report no weight in evidence. Mr Constable is acquitted of the offence of over 80.

R. v. Constable, 2016 ONCJ 423, 2016 CarswellOnt 10944

3. — The Ontario Court of Appeal allows an appeal where the trial judge did not adequately relate expert evidence to the applicable legal issues the jury had to consider in assessing an excuse of duress

The Ontario Court of Appeal recently allowed an appeal from a conviction for unlawfully producing marihuana and possession of marihuana for the purpose of trafficking where the factual underpinnings of an excuse of duress were not properly explained to a jury.

At trial, the appellant argued that she was coerced by a Wing Kwan, with whom she had been involved in a romantic relationship, to take part in cultivating marihuna. She testified that she had been physically, emotionally and sexually abused by him and that he had threatened to kill her and her daughter. The appellant's daughter testified that he heard him yell at her mother and saw his hands around her neck. When she told him that she would call the police, he threatened to kill them both.

The appellant also called an expert witness Deborah Sinclair who gave evidence on the dynamics of domestic violence in intimate relationships.

The appellant argued, and the Ontario Court of Appeal found, that the trial judge failed to relate the expert evidence on battered spouse syndrome to the objective elements of the duress. The judge's charge consisted of lengthy summaries of the evidence the defence called to make out the excuse of duress. While the elements of duress were described by the judge and the expert's evidence was summarized for the jury, as the Court of Appeal put it at para. 15, "no effort was made to relate her evidence to the legal issues and principles in a manner that would equip the jury to reach its verdict". The charge, they held, "did not provide the jury with the tools it needed to assess the appellant's evidence". Thus, the convictions were quashed.

Because the appellant had served her sentence and was facing, to quote the Court of Appeal at para. 16, "imminent immigration issues", the Court of Appeal entered acquittals.

R. v. Li, 2016 ONCA 573, 2016 CarswellOnt 11221

4. — The Ontario Court of Appeal holds that the curative proviso does not apply where exculpatory statements of the appellant were improperly excluded

In a recent case, the Ontario Court of Appeal shed light on whether the curative proviso may be invoked by the Crown where exculpatory statements made by an accused are wrongly excluded at trial and the accused appeals his or her conviction.

Police came to the appellant's home after the complainant, his domestic partner, called 911. The first officer on scene spoke to the appellant who, in response to a question posed by the officer "right off the bat" after meeting him, said that no threats or assault had taken place but admitted that they had argued earlier that day. When the police spoke to the complainant she initially did not say that the appellant assaulted her but, after the police concluded there were no grounds to arrest and when they were discussing a safety plan with her, she eventually told them that he assaulted her and they arrested him.

The Crown tendered the appellant's utterances through the officer who spoke to him, with the consent of the defence, and took the position that the court could consider the whole of his statements.

The appellant chose not to testify or to call a defence. Once the evidence was completed and the parties had made their submissions, the trial judge held that the appellant's utterances to the police were inadmissible because they did not meet the requirements of *R. v. Edgar*, 2010 ONCA 529, and she convicted the appellant of assault and of two counts of breaching a probation order.

The Crown conceded on appeal that the trial judge erred in failing to consider the exculpatory statements of the accused but argued that the curative proviso under s. 686(1)(b)(iii) should be applied and the appeal should be dismissed.

Counsel for the appellant pointed to inconsistencies in the complainant's evidence, her delay in reporting the assault and her motive to fabricate in that she may have wanted to use criminal proceedings to extricate herself and her daughter from a relationship with the appellant. It was argued by the appellant that excluding the exculpatory statements of the appellant may well have had a bearing on the outcome of the trial and, thus, the appeal should be allowed.

A majority of the Ontario Court of Appeal held that the judge misapplied *Edgar* and should not have excluded the utterances. Admissibility of the statements had really nothing to do with the ratio in *Edgar*. His statements were adduced by the Crown and were conceded to be voluntary; thus, they were admissible regardless of whether they were inculpatory or exculpatory: *R. v. Lynch* (1988), 30 O.A.C. 49 (Ont. C.A.).

As Justice Roberts, who wrote for the majority, pointed out, the use of the curative proviso under s. 686(1)(b)(iii) is reserved for rare and exceptional cases. It is appropriately invoked *only*

1. where the error is harmless and could not have possibly affected the verdict; or

2. where the evidence is so overwhelming that the trier of fact would inevitably have convicted.

As the Court of Appeal held in *R. v. Sarrazin*, 2010 ONCA 577, assessing the effect of an error on the verdict is, as Roberts J.A. put it at para. 26, "necessarily a somewhat speculative exercise" and any doubt as to the effect of the error must be resolved against the Crown. Roberts J.A. also quoted from *R. v. Van*, [2009] 1 S.C.R. 716 with approval at para. 29: "it is necessary to afford any possible measure of doubt concerning the strength of the Crown's case to the benefit of the accused person".

Thus, the Crown bears a "heavy burden" in persuading an appeal court that the error is so minor it could not have possibly affected the verdict or that where a more serious error has been committed the case against the appellant was so overwhelming that a conviction was inevitable.

Where exculpatory evidence is wrongly excluded, any reasonable effect it might have had should enure to the benefit of the appellant: *R. v. Wildman*, [1984] 2 S.C.R. 311, at p. 329. As the Ontario Court of Appeal held in *R. v. Perlett* (2006), 82 O.R. (3d) 89, "the court must be cautious in applying the proviso in the error of law is the improper exclusion of evidence that might be exculpatory".

Roberts J.A. held, for the majority, that the appeal should be allowed and the convictions should be quashed.

The error was neither minor nor trivial in that the case turned on an acceptance of the credibility of the complainant which was not contradicted by other evidence. The admission of the appellant's utterances might have a bearing on the court's perception of the complainant's credibility. Further, the *manner* in which the statements were excluded — after the defence chose not to call evidence and after the parties made their submissions — compromised the appellant's right to a fair trial.

Moreover, the case against the appellant was not overwhelming. As Justice Roberts put it at para. 39, there were

"serious issues with the complainant's evidence, not the least of which were the numerous inconsistencies in her evidence, even as to how the assault occurred". The exclusion of the exculpatory statements of the appellant resulted in "significant trial unfairness" and, because the appellant had already served his sentence, Roberts J.A. held that it would be unfair to order a new trial. Consequently, the convictions were quashed.

R. v. Perkins, 2016 ONCA 588, 2016 CarswellOnt 12019

5. — The Ontario Court of Appeal holds that a demand made by the breath technician directly after he or she receives grounds from the arresting officer may "cure" the failure to make a timely demand by the arresting officer

Section 254(3) of the *Criminal Code* provides that when an officer forms the belief that a driver has committed the offence of impaired driving or "over 80 mgs", that officer must make the breath demand "as soon as practicable". A breath demand that is not made "as soon as practicable" after the officer forms his or her grounds is not a lawful demand.

In, for example, *R. v. Walmsley*, 2008 BCSC 1625, Madam Justice Kerr, sitting as a judge of the summary conviction appeal court, allowed an appeal and entered an acquittal where an officer formed a belief that the appellant was impaired and delayed making the demand for some seven minutes. She held that the demand was not a valid demand, in that it was not made "forthwith or soon as practicable", as the statute then required, and, therefore, the appellant was not obliged to comply with it.

In *R. v. Singleton*, 2006 CarswellOnt 6680, Madam Justice Ferguson, sitting as a trial judge, acquitted an accused of the offence of "over 80 mgs" because the officer made the breath demand almost thirty minutes after forming the requisite belief that his blood-alcohol concentration was in excess of the legal limit. She found that the demand was not made "forthwith or as soon as practicable", as the statute then required, and that this was a breach of s. 8 of the *Charter* justifying the exclusion of the breath tests.

Is it a breach of s. 8 of the *Charter* if the arresting officer forgets to make the demand but it is made at the police station, long after the arresting officer had formed his or her grounds, by the breath technician? The Ontario Court of Appeal recently held that there was no breach of s. 8 provided that the breath technician made a demand on reasonable grounds, formed within three hours of what was believed to be the time of the commission of the offence, and provided that the demand was made "as soon as practicable" after forming those grounds.

Police attended at the scene of a motor vehicle accident and the arresting officer did not make a breath demand after she arrested the appellant for impaired driving. Nor did she tell him that the police would be taking samples of his breath for analysis at the police station. The arrest took place at 7:36 pm.

She took him to the police station and, after speaking to a qualified breath technician, she read the demand under s. 254(3) of the *Criminal Code* at 8:36 pm, before the appellant spoke to a lawyer.

She testified that she "completely forgot" to read the demand at the scene of the accident because, as the Ontario Court of Appeal put it, at para. 66, the "scene was horrific" and because she was interrupted by paramedics when she was dealing with the appellant at the scene.

The arresting officer related her grounds for arrest to the breath technician and he was satisfied that she had sufficient grounds for the arrest and that he had sufficient grounds to proceed to conduct breath tests. When the appellant was turned over to him for breath tests at just after 9:04 pm, he read a demand to him.

The trial judge held that the demand made by the arresting officer was not made "as soon as practicable" but,

since the breath technician made the demand as soon as practicable as soon as he had formed the requisite grounds, the requirements of s. 254(3) were met and the taking of the breath samples was lawful. He convicted the appellant of three counts of impaired driving causing bodily harm. The accused appealed his convictions and argued, amongst other grounds, that the results of the analysis of his breath should have been excluded because they were not taken pursuant to a lawful demand.

Justice Blair, writing for a unanimous panel, held that the trial judge did not err in his conclusion.

Quoting from *R. v. Duruelle*, [1992] 2 S.C.R. 663 with approval, Blair J.A. held that a breath demand under s. 254(3) is a lawful one — even if the arresting officer did not make a demand "as soon as practicable" — provided that:

> 1. the breath technician made a demand;
>
> 2. that demand was based on reasonable grounds;
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> 3. those grounds were formed within three hours of the time when the offence was believed to have been committed; and
>
> 4. the breath technician's demand was made "as soon as practicable" after he or she formed the grounds for the demand.

To quote Blair J.A. at para. 90:

> . . . the interpretation of s. 254(3) in *Deruelle* would permit the trial judge to find that a demand made by the breathalyzer technician . . . would satisfy the requirements of s. 254(3) provided he had formed the reasonable grounds within the three-hour time limit and made a demand "as soon as practicable" thereafter.

Even if the samples were not taken pursuant to a lawful demand, and there was a breach of s. 8, the samples ought not to have been excluded under s. 24(2) of the *Charter* because failure to read the demand earlier was "inadvertent" and because the breath samples were highly reliable evidence.

It is noteworthy that the arresting officer made a demand, albeit one that was not "as soon as practicable", before the appellant spoke to counsel. As Justice Blair put it at para. 89:

> Given the close relationship between the operation of s. 254(3) and the need for officers to ensure that a detained person can exercise his s. 10(b) rights in a meaningful way, linking the making of the demand to the timing of the detention has a certain practical attractiveness.

Thus, had the police not made a demand at all or told the appellant that he would be required to provide samples of his breath to determine his blood-alcohol concentration *before* the appellant spoke to counsel, this may well have infringed the appellant's s. 10 (b) rights.

R. v. Guenter, 2016 ONCA 572, 2016 CarswellOnt 11393

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