Date: 20231030
Docket: CR 22-01-39334
(Winnipeg Centre)
Indexed as: R. v. Ali
Cited as: 2023 MBKB 156

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

HIS MAJESTY THE KING,	)	Amy Wood
	)	for the Crown
- and -	)	
	)	
MOHAMMED YOUSUF ALI,	)	Mat Schwartz
	)	for the accused
accused.	)	
	)	
	)	Judgment Delivered:
	)	October 30, 2023

TOEWS J.

Introduction

[1] The accused, Mohammed Yousuf Ali, stands charged with a number of offences in respect of which he has entered pleas of not guilty. These charges include:

a) Possession of a prohibited weapon, a loaded firearm

b) Possession of a prohibited device, a loaded prohibited magazine

c) Possession of a loaded prohibited firearm

d) Possession of a loaded handgun, while an occupant of a motor vehicle

e) Resisting a peace officer in the execution of his duty

f) Possession of a firearm while prohibited from doing so by reason of an order made pursuant the ***Criminal Code***, R.S.C., 1985, c. C-46 (the "***Code***").

[2] These charges are fully set out at counts 4 through 9 of the indictment and it is on those counts which this matter proceeded to trial.

[3] The accused has brought an application pursuant to s. 24(2) of the ***Canadian Charter of Rights and Freedoms***, Part I of the ***Constitution Act***, 1982 (the "***Charter***") for the exclusion of all evidence seized after a police stop, alleging that the stop violated ss. 8 and 9 of the ***Charter***. With the consent of counsel, the trial proceeded in a blended fashion, with the application to exclude the evidence proceeding on a *voir dire*, and the evidence on the *voir dire*, insofar as it is ruled admissible, being applied *mutatis mutandis* to the actual trial.

The Evidence

[4] There were various agreements or admissions made by counsel on behalf of the accused, including:

a) The identity of the accused;

b) Jurisdiction;

c) The date of the offence;

d) The continuity of any exhibits once seized by the police;

e) The order prohibiting the accused from possessing a firearm for a period of 10 years, as set out in Exhibit 1;

f) The contents of the certificate of analysis in respect of the firearm, the handgun magazine and the ammunition cartridges as set out in Exhibit 2.

[5] The Crown produced three witnesses who provided *viva voce* evidence on the *voir dire*. These included two Winnipeg City police officers who made the initial stop of the motor vehicle in which the accused was a passenger and an RCMP officer who assisted in the arrest of the accused near the scene of the motor vehicle stop.

[6] The first witness, Constable Andrew Sullivan (Sullivan) is a Winnipeg City police officer with approximately 13 years of experience. His police experience includes general patrol duty, as well as experience with street gangs in various parts of the city. He has experience with narcotics investigative techniques, undercover work, and street crime. He has been involved in multiple drug investigations.

[7] Sullivan testified that on August 8, 2021, he was working with a partner, Constable Ryan Whitney (Whitney), as the passenger in a marked police vehicle driven by Whitney. Both men were in full uniform. He testified that prior to the impugned motor vehicle stop, the officers had been assigned to assist with a stolen motor vehicle investigation which involved a Hyundai Elantra. Apparently, this model of automobile is a common target of car thieves. They had been subsequently cleared of that investigation and were on their way back to the West District police station, heading south in the right-hand lane of Tuxedo Boulevard.

[8] At the intersection of Corydon Avenue and Tuxedo Boulevard, the police vehicle was stopped at a red light. At that time Sullivan noticed a 2020 Hyundai Elantra travelling west on Corydon through the intersection where they were stopped. The officer testified that he recognized the driver Akok Garang (Garang) as a known gang member and that

he strongly believed that the passenger sitting behind Garang was the accused, a known gang associate. The identity of the front seat passenger was unknown to him.

[9] Sullivan stated he had personal knowledge of Garang as being someone previously involved in a "dial a dealer" drug operation and that he did not believe that Garang had a driver's licence. A check of the licence plate of the Hyundai indicated it was a rental vehicle from a business on Salter Avenue in the North End of Winnipeg. At that time Sullivan indicated the officers decided to initiate a motor vehicle stop to check the driver's licence of the operator of the Hyundai and the rental agreement as well as to check the vehicle itself by ascertaining the vehicle identification number or VIN which is affixed to the dash of the vehicle and observable from the outside of the vehicle.

[10] The stop of the Hyundai commenced at approximately 8:08 p.m. After parking the police vehicle behind the Hyundai, Sullivan approached the Hyundai on the passenger side while Whitney approached the Hyundai from the driver's side of the vehicle. When he approached the vehicle, Sullivan confirmed that the passenger in the Hyundai sitting behind the driver was the accused and noted that he was sweating profusely and staring straight down, making no eye contact. He also noted that there were six cans of Budweiser beer on the passenger seat beside the accused, with two beers of an original eight pack of beer missing from the plastic rings that held the eight beers together. He also noticed that the unknown front passenger was sitting with an open can of beer on the floor between his feet. When he asked the unidentified passenger to produce identification because of the open liquor, this passenger stated that the can was empty. However, as the passenger picked up the can and moved it around, Sullivan noted there

was still liquid in the can and again asked for identification. This passenger, subsequently identified as Ismail Muse (Muse), "landmarked" or touched his front left pocket of his jacket while staring straight ahead. There was no other movement at that time. The officer also noticed that Muse was sitting on a cell phone partially covered by his right pant leg. After initially hesitating to do so, Muse then produced a wallet from his left jacket pocket to produce the identification and as he did so, Sullivan noticed two large bundles of currency in $20 and some $50 denominations. The bundles were substantial and protruded from the top of the wallet. As demonstrated by the photographic evidence, the leather wallet maintained an expanded shape even after the currency was later removed.

[11] This bundling of cash was significant to Sullivan as drug traffickers bundle cash in this fashion, with one bundle indicating the profit made and the other for the next purchase of drugs. The $20 and $50 currency denominations were significant to him as they corresponded to the price of crack cocaine which is usually purchased in $20 or $40 pieces.

[12] Sullivan noted that the driver, Garang, produced a temporary driver's licence at the request of his partner.

[13] Sullivan testified that he came to the conclusion that the occupants of the motor vehicle were in possession of controlled substances for the purpose of trafficking based on the use of a rental vehicle, the cell phone, the bundles of cash and the nervousness that each of the occupants were exhibiting. As he noted in his testimony, rental cars are often used by drug dealers to preserve the anonymity of the occupants as a licence plate

check would only bring up the registered owner of the rental vehicle. He testified that the nervousness and the profuse sweating of the accused was noteworthy in that he was not being questioned by the officers. He stated that through eye contact with his partner Whitney his partner had also arrived at the conclusion that the occupants were involved in the possession of controlled substances for the purpose of trafficking.

[14] Sullivan testified that when Whitney advised the occupants that they were under arrest and as the three were exiting the motor vehicle, the accused almost immediately fled on foot in a southeast direction across the west bound traffic lanes of Corydon Avenue. He stated that Whitney pursued the accused, but that the other two occupants of the Hyundai remained at the scene of the traffic stop. He placed Muse in handcuffs but did not have a pair of handcuffs for Garang. By this time, either because of a transmission on his radio or by shouts from his partner, he became aware that Whitney was involved in a struggle with the accused and that there was a gun involved in this struggle. At this time he went to the assistance of Whitney who was struggling with the accused on the pavement at the break in the boulevard running down the middle of Corydon where Corydon intersects with Boreham Boulevard. He left Muse and Garang at the location of the traffic stop on the gravel shoulder on the north side of Corydon Avenue.

[15] As he approached the scene of the struggle, he noticed that there was an unidentified male assisting his partner and that together the two were gaining control of the situation, placing the accused in handcuffs. This unidentified male was later identified to be an RCMP officer who happened to be passing by the scene of the traffic stop on his

motorcycle and who stopped to assist Whitney. This individual was also called by the Crown as a witness and his evidence will be summarized later in these reasons.

[16] Exhibit 4 is a map on which Sullivan noted the location of the traffic stop (two red hand drawn rectangles depicting the police vehicle and the Hyundai), a red circle indicating the initial location where he saw Whitney struggling with the accused, a green circle where Sullivan saw the three men, including the RCMP officer, struggling and finally a green "x" indicating the general location where a handgun was lying on the street.

[17] Sullivan noted that when he was crossing Corydon Avenue to assist his partner, he turned to notice that Garang, who was not handcuffed, was reaching into Muse's jacket pockets. However, at this point the situation between the accused and Whitney was still quite volatile, with the handgun still lying on the pavement on Corydon Avenue and he did not return to where the other two individuals were standing. After the accused was placed under control, Sullivan took possession of the firearm and eventually turned it over to Whitney who became the exhibit officer in this matter. It was noted that the handgun had nine rounds in the fifteen round capacity magazine, although there was no round in the chamber.

[18] As a search incidental to the arrest, Sullivan patted Muse down and found an additional bundle of currency in his pocket as well as a cell phone. As well, another cell phone was found on the floor in front of the back seat and three separate bags of controlled substances.

[19] In cross-examination, counsel for the accused reviewed the testimony of Sullivan at the preliminary hearing, and in particular transcript pp. T 37 and T 38 insofar as it

related to Sullivan's formulation of his reasonable and probable grounds to make an arrest on the drug related charges. I would just indicate that the testimony of the officer at the preliminary hearing at this point is ambiguous given that the officer was being asked several questions by counsel for the accused before he gave an answer and it is not clear to me from the transcript which question he was answering. As I understand his evidence before me, he testified that he came to the conclusion that there were reasonable and probable grounds to arrest all three accused on the drug related charges and agreed with the opinion of his partner who actually told the accused that they were under arrest and the reason for the arrest.

[20] The next Crown witness was Whitney who testified that he has been a police officer with the Winnipeg City Police for approximately four years and that at the time of this incident he had been on the job for approximately 18 months. He testified that the decision was made to stop the vehicle for a driver's licence check and the production of the rental agreement under the authority of ***The Highway Traffic Act***, C.C.S.M. c. H60 ("***HTA***"). The officers believed that the driver was a known gang member and that information was important in making a traffic stop relative to officer safety.

[21] After stopping the Hyundai on Corydon Avenue, just past the intersection with Boreham Boulevard, Whitney approached the Hyundai from the driver's side and spoke to the driver, asking him to produce a driver's licence. The driver, subsequently identified as Garang, was reluctant to answer any questions and hesitant to produce a driver's licence. When a driver's licence was in fact produced by Garang, it was a temporary licence which did not include a photograph. Furthermore, Whitney recollects that the

name on the temporary driver's licence did not match Garang's identity. Unfortunately, during the events that followed shortly, the driver's licence produced by Garang was apparently lost and the officer, understandably in my opinion, could not recall the name on that temporary driver's licence.

[22] Whitney testified that Garang was shaking, shuffling his feet, hostile and not making eye contact. He was trying to ignore the officer's request for a driver's licence and the rental agreement. Similarly, the accused was also avoiding eye contact, sweating and seemed nervous. Whitney testified that the reaction of the accused to the police stop was unusual given that in most traffic stops, passengers usually take an interest in what is going on in respect of the conversation between the officer and the driver.

[23] It was Whitney's testimony that he formed the opinion that all three accused were involved in the possession of controlled substances for the purpose of trafficking. This opinion was based on a matrix of facts based on his observations, including the driver's use of a third party's temporary licence to attempt conceal his identity, the fact that drug dealers often use rental vehicles to hide their identity while dealing or transporting drugs, the hostility, nervousness and profuse sweating of Garang and the accused, including the unwillingness to make eye contact, and the cash produced by the front seat passenger, including the manner in which the cash was bundled. It was his opinion that the bundling of the cash is consistent with the manner in which drug dealers hold and separate their cash, and that the denominations of the cash were consistent with the selling price of crack cocaine. He testified that crack cocaine is most commonly sold in $20, $40 and

sometimes $100 packages. Whitney testified he was also familiar with the way drug dealers acted together in dealing drugs from a vehicle.

[24] Whitney also testified that prior to arrest he noticed several plastic sandwich bags on the console between the two front seats as well as several more on the floor at Garang's feet. These bags also formed a part of his consideration in coming to the conclusion that the three men were involved in the possession of drugs for the purpose of trafficking. He testified these bags are commonly used by drug dealers in which to hold or sell their drugs. In his testimony he admitted that he had not separated the bags seized in accordance with the specific location from which he stated he seized them. He said that was his mistake as this was the first time he was acting as an exhibit officer and that given the events following the arrest, that he simply failed to make that distinction. His exhibit list lists that 31 sandwich bags were seized from the driver's door pocket, the contents of which would not be visible from where he was standing. Rather than noting those different, although adjacent locations, for the purposes of record keeping he stated in his testimony he put all the bags together and described them in the manner he did, most of the bags seized coming from that driver's door pocket.

[25] Almost immediately upon announcing the three individuals were under arrest, the accused either pushed or kicked the back door driver's side door open and began to run in a southerly direction towards Boreham Boulevard. Whitney gave chase, ordering him to stop and, perhaps redundantly, advising him he was a police officer. As the accused approached the east bound lanes of traffic on Corydon, but on the pavement between the boulevard separating the lanes of east bound and west bound traffic of Corydon, the

accused fell, perhaps as a result of trying to avoid the oncoming traffic. Whitney fell on top of the accused and a struggle commenced between the two men.

[26] Shortly after the struggle commenced, Whitney noticed that the accused was tugging at the waistband of his pants. At that point Whitney saw the butt end of a handgun in the accused's waistband which the accused was pulling at. To bring the accused under control, Whitney hit the accused several times – perhaps five to eight times without success. The accused was able to buck the officer off of him and the officer landed on his back and right shoulder, but facing the accused on the ground, still attempting to control the accused, especially the accused's right arm and the handgun the accused was attempting to pull out of his waistband.

[27] At this time a third individual who identified himself as a police officer joined the struggle and helped Whitney control the accused. After the accused was handcuffed and under control, Whitney noticed the handgun on the ground no more than a few feet from the scene of the struggle and gave the handgun to Sullivan to hold. At this time, he also saw the other two individuals who were in the Hyundai still at the scene of the traffic stop. The individual who was not handcuffed was removing plastic bags from the handcuffed male's jacket and throwing them away.

[28] The search of the Hyundai commenced at approximately 8:17 p.m. and Whitney states a black flip phone in a case, and plastic bags were found in the driver's door pocket as well as on the console between the two front seats and on the floor of the car in front of the driver's seat.

[29] Whitney testified that the two bundles of cash seized from the wallet totalled $2,370 and that later a further $1,580 was seized from Muse. In addition to the handgun, which is identified as a Sig Sauer semi-automatic handgun and the handgun magazine (see Exhibit 2), the police also seized fentanyl, crack cocaine and five different cell phones in various locations in the Hyundai, including one belonging to the accused (see Exhibit 6).

[30] The third witness called by the Crown on the *voir dire* was Constable Raymond Aquin (Aquin), an off-duty RCMP officer who happened to be travelling westbound down Corydon Ave on his motorcycle shortly after 8:00 p.m. on the date of this incident. Aquin testified that he has been a member of the RCMP for approximately 18 years and is presently with the Criminal Intelligence Division.

[31] Aquin stated that he saw the police stop further down Corydon Avenue, with the police car facing west. He then noticed two individuals running across the westbound lanes in a southerly direction towards the centre boulevard. After losing sight of the two individuals for a short because his line of sight was blocked by traffic, he came upon two individuals struggling on the pavement at the Boreham Boulevard intersection, one being Whitney who was in full uniform. He saw the accused with his legs around Whitney's lower body in a scissor hold which resulted in Whitney being thrown over to the side of the accused. He also saw Whitney grasping the accused's lower right arm with both of his hands. After identifying himself as a police officer he was able to assist Whitney in restraining the accused. After the struggle he stated that he noticed the handgun on the

pavement at or near where Whitney and the accused had been struggling. As shown in Exhibit 7, Aquin injured his small or "pinky" finger while restraining the accused.

[32] The accused elected not to call any *viva voce* evidence

Position of the defence in respect of the *Charter* and the admissibility of the evidence, in particular the handgun, the handgun magazine and the ammunition seized by the police at the traffic stop

[33] It is not disputed that the onus is on the accused to establish a ***Charter*** breach on a balance of probabilities.

[34] The accused asserts that the police stop of the Hyundai containing the accused violates ss. 8 and 9 of the ***Charter***. Those sections provide that:

> 8. Everyone has the right to be secure against unreasonable search or seizure.
> 9. Everyone has the right not to be arbitrarily detained or imprisoned.

[35] Counsel for the accused states that while police may detain motor vehicles and their occupants for investigative purposes under the ***HTA***, he submits that the true purpose of the motor vehicle stop was unrelated to the ***HTA***, but rather related to a criminal investigation. He argues that if the investigating officers were performing a highway traffic stop not for a ***HTA*** related purpose, but rather as a tool to investigate criminal behaviour, the officers must meet the test for investigative detention for the traffic stop to be lawful.

[36] Defence counsel argues that at the time of the stop the police knew that the driver was a known associate of a street gang and a suspected "dial-a-dealer". The officers also suspected the accused to be in the backseat and a known associate of the same street gang. He argues that the officers subjectively believed the vehicle may have been

stolen and that the true purpose of the traffic stop was to investigate criminal activity. On the facts here, counsel for the accused argues that the police did not meet the test for an investigative detention. It is his position that the police cannot invalidate an otherwise illegal stop by pursuing highway safety issues once the accused is detained.

[37] Furthermore, counsel for the accused argues that the police did not have reasonable grounds to arrest the accused during the traffic stop as required by s. 495(1)(a) of the ***Code***. Counsel states that the threshold for reasonable grounds to arrest is set out in ***R. v. Luu***, 2019 MBQB 11, [2019] M.J. No. 42 (QL), where the court held at para. 6:

> **6** The threshold for reasonable grounds to arrest is described as "the point where credibly-based probability replaces suspicion" (***Hunter v. Southam Inc.***, [1984] 2 S.C.R. 145 at 167). In determining whether this threshold has been reached, the court must consider the totality of the circumstances known to the police officer at the time, from the point of view of a reasonable person "standing in the shoes of the police officer" (***R. v. Storrey***, [1990] 1 S.C.R. 241 at 250). The officer's training and experience is relevant in this analysis.

[38] Counsel submits that the information the arresting officers had at the time of the arrest falls short of reasonable grounds to believe that the accused had committed an offence. The accused also argues that after he exited the vehicle, his further detention and search was unlawful, stating that if the arrest for possession for purpose of trafficking is found to be unlawful, the subsequent detention and search was also unlawful and should result in the exclusion of the evidence seized as a result of the detention and search.

[39] The accused states that since the search was made without a warrant, the search is presumed to be unreasonable and that the Crown bears the burden of proving that the

search was otherwise authorized by law, the law itself is reasonable and the way the search and seizure takes place is reasonable.

[40] The accused states that an accused is entitled to resist an unlawful arrest and may take flight to avoid an unlawful arrest. Furthermore, the accused argues that in determining whether the threshold for reasonable grounds to believe that an offence has been committed, the court must consider the totality of the circumstances known to the police officer at the time the detention and arrest are made. The flight from the vehicle and any subsequent evidence uncovered by the police cannot be used to establish reasonable grounds for an arrest here as the arrest had already occurred at the time of the flight.

[41] Similarly, it is the position of the accused that if the arrest of the accused is unlawful, then the subsequent warrantless search of the motor vehicle incident to the arrest is also unlawful. Any evidence seized from the vehicle should also be excluded.

[42] In determining whether the evidence seized in this case should be excluded pursuant to s. 24(2) of the ***Charter***, the accused submits that the court should consider three factors which were enunciated by the Supreme Court of Canada in ***R. v. Grant***, 2009 SCC 32, [2009] 2 S.C.R. 353. These three factors are:

a) The seriousness of the ***Charter*** infringing state conduct;

b) The impact on the ***Charter*** protected interests of the accused; and

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

[43] The accused argues that a consideration of these three factors, including, the state conduct, the profoundly intrusive nature of the impact of the breach, and the long-term

negative impact on the administration of justice, favour the exclusion of the evidence despite society's interest in an adjudication on the merits. The accused points out that 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 (see ***R. v. Masjedee***, 2017 ONSC 4920, [2017] O.J. No. 5206).

[44] I would note at this point that although counsel for the accused did raise a s. 10(a) and (b) ***Charter*** breach in his written material because of the police not providing the accused with his rights prior to or at the time of the arrest, this is not a line of argument that was pursued or relied upon at the *voir dire* itself. Accordingly, it is not necessary to address those arguments here other than to state that on the facts there was no opportunity for the police to advise the accused of his s. 10 rights. Given that immediately after he had been informed of the reason for his arrest, the accused kicked or pushed the car door open and ran, it can be reasonably inferred that he understood the basis for the detention and investigation. Up until this point neither officer had spoken with the accused nor had they attempted to elicit evidence from him. After he had been physically restrained following his struggle with one and then two police officers, he was properly afforded those s. 10 rights.

[45] Furthermore, while counsel for the accused also suggested that a "strip search" of the accused conducted by one of the officers in the police station before he was placed into the cells tainted the propriety of the arrest generally, as the Crown pointed out in its argument, it was the accused who had argued that evidence relevant to the discovery of drugs consequent to the search of the motor vehicle was not relevant to this case and

that I ought not to hear any evidence in that respect. As a result of the questionable relevance of that evidence as argued by the accused, the Crown stated that it had been restricted from advancing a more fulsome factual underpinning in that respect which would have been directly relevant to the issue of why a strip search had been conducted.

[46] I agree with the Crown that the additional evidence would have been instructive in respect of this issue, but in my opinion based on the evidence that I did hear, I find nothing improper with the fact that the officer who conducted the search, did so. After consulting with his partner and discussing the matter with his supervisor at the police station, and given the nature of the drug-related allegations, the strip search was justifiably conducted in a place and a manner that was proper. The law does not prohibit strip searches but does require a proper factual foundation before they are carried out and that they be carried out in an appropriate manner. Based on the evidence here, I find it was appropriate to conduct the strip search and that the way it was conducted was also appropriate.

[47] In this respect, had the accused pursued this line of argument, I would have allowed the Crown to recall its witnesses to provide the evidence that it had been prevented from calling on the basis that it was now relevant to a ***Charter*** argument raised by the accused.

Position of the Crown in respect of the *Charter* and the admissibility of the evidence, in particular the handgun, the handgun magazine and the ammunition seized by the police at the traffic stop

[48] It is the position of the Crown that the police conducted the traffic stop based on proper considerations arising from their authority under the ***HTA***. It argues that this is

not a situation where the police improperly used the stop as a ruse to support an otherwise invalid search. It states that Sullivan subjectively believed that the driver of the vehicle did not have a valid driver's licence based on his familiarity with him and that they wanted to ensure the proper registration of this rental vehicle.

[49] It is the Crown's position that simply because the officers were aware of additional information, including officer safety concerns regarding the possible street gang affiliation of at least the driver of the vehicle, does not detract from their legitimate road safety concerns. The Crown states that the officers here limited their inquiries to their authority under the ***HTA*** and having suspicion of addition criminal behaviour does not automatically make the stop arbitrary. It relies on the decision of the Manitoba Court of Appeal in ***R. v. Schrenk***, 2010 MBCA 38, 255 Man.R. (2d) 12 (QL), per Steel J.A. for the court, which holds at paras. 40 and 46:

> 40 I agree with the trial judge that the initial detention arising from the random traffic stop was lawful and justifiable under the *Charter*. The police questions related to driver licencing, vehicle registration and permission to have care and control of the vehicle were lawful since they related to the purpose of the stop. See, for example, *R. v. Mouland*, 2007 SKCA 105, 53 M.V.R. (5th) 11 at para. 15, where the court held that questions related to ownership of the vehicle, checking for sobriety, licences, insurance and mechanical fitness were appropriate, while questions about previous convictions were not.
>
> . . . .
>
> **46** First, the evidence does not support the accused's contentions that the police were not interested in highway safety. … Second, as was stated above, the fact that the questioning may have a secondary purpose does not make the highway stop unlawful so long as the questioning is restricted appropriately. A stop to check a driver's licence is lawful even if there was a secondary purpose of drug investigation. As was stated by the court in *R. v. Madill*, 2005 BCSC 1564, a case with very similar facts (at para. 32):
>
> > … The additional aim of taking advantage of a legitimate traffic stop to take note of any clues of illegal transport of drugs did not in my view constitute the stop as one for the purposes of general investigation or turn it into an "unfounded general inquisition."

[50] The Crown relies on the provisions of the ***HTA*** in arguing that not only did the police officers have the authority to request the information requested from the driver, but also to make observations in respect of any of the passengers in the vehicle. In this regard, the ***HTA*** specifically provides:

> **Peace officer's authority — driver information**
>
> 76.1(4) Without limiting the generality of subsection (1), a peace officer may, at any time when a driver is stopped,
>
> (a) require the driver to give his or her name, date of birth and address to the officer;
> (b) require the driver to produce his or her licence, and the vehicle's insurance certificate and registration card and any other document respecting the vehicle that the peace officer considers necessary;
> (c) inspect any item produced under clause (b);
> (d) request information from the driver about whether and to what extent the driver consumed alcohol or drugs before or while driving;
> (e) require the driver to go through a field sobriety test under section 76.2;
> (f) request information from the driver about whether and to what extent the driver is experiencing a physical or mental condition that may affect his or her driving ability; and
> (g) inspect the vehicle's mechanical condition and request information from the driver about it.
>
> **Peace officer's authority — passenger information**
>
> 76.1(5) For the purpose of enforcing any provision of this Act or the regulations, a peace officer may require a vehicle's passenger to give his or her name, date of birth and address to the officer.
>
> **No right to counsel**
>
> 76.1(6) A peace officer is not required to inform a driver or passenger of his or her right to counsel, or to give the driver or passenger the opportunity to consult counsel, before doing anything subsection (4) or (5) authorizes.
>
> **Peace officer's authority unaffected**
>
> 76.1(7) Nothing in this section limits or negates a peace officer's authority to request information from a driver or passenger or to make any observations of a driver or passenger that are necessary for the purposes of road safety enforcement.

[51] The Crown also points out that the ***HTA*** also prohibits any person in a vehicle from having liquor inside a vehicle in a manner contrary to ***The Liquor Control Act***, R.S.M. 1988, c. L160 (the "***LCA***"). The relevant provisions from the ***HTA*** and the ***LCA*** in that respect provide:

> ***HTA***
> **Limitation as to carrying liquor**
> 213(1) No person shall cause, permit, or suffer any liquor, as defined in *The Liquor Control Act*, to be in a vehicle upon a highway contrary to any provision of that Act.
>
> ***LCA***
> **Liquor in motor vehicles.**
> 117(1) … a person who is in lawful possession of liquor may transport or carry it in a vehicle
>
> (a) if the bottle, vessel, or package containing the liquor has not been opened since it was purchased from the commission, or lawfully brought into the province as provided in section 58; or
> (b) where the bottle, vessel, or package containing the liquor has been opened since it was purchased from the commission, or lawfully brought into the province as provided in section 58, if it is
>
> (i) in the trunk or space designed for the carriage of baggage and parcels; or
> (ii) in some other receptacle on the exterior of the vehicle;
>
> and is not, in any case, in that part of the interior, tonneau, or cab of the vehicle intended for the accommodation of the driver and other persons being carried thereon.

[52] On that basis, the Crown argues that there has been no arbitrary detention here that would engage s. 9 of the ***Charter***. It states that the arrest here is properly based on "credibly-based probability" and not mere suspicion.

[53] In respect of the alleged improper arrest, the Crown states that for an arrest without a warrant to be valid, a police officer must have subjective grounds that are justifiable from an objective point of view. In that regard it argues that the question is

not whether each fact, standing alone, supports or undermines an arrest, but whether the facts as a whole, seen through the eyes of a reasonable person who has the same knowledge, training and experience as the arresting officer, make the arrest objectively reasonable.

[54] The Crown does not dispute that it has the onus of demonstrating that a warrantless arrest is lawful. It is the Crown's position that on the totality of the information known to the arresting officer, when considered cumulatively, amounts to reasonable and probable grounds to arrest. In this case the accused was initially detained because of a traffic stop and following the inquiries under the ***HTA*** and the related inquiry under the ***LCA*** authorized by the ***HTA***, there was no ambiguity as to what was transpiring at that point and why the occupants were being detained. Once the accused was advised that he was under arrest for possession for the purpose of trafficking, he was then required to comply with police instructions.

[55] In respect of the s. 24(2) ***Charter*** inquiry, the Crown submits that if the court holds that there was an infringement of the accused's rights, then the infringement or breach does not warrant the exclusion of any evidence. The Crown states that it is important to remember that s. 24(2) of the ***Charter*** presumes that the evidence is admissible and that the accused bears the persuasive burden of establishing that its admission would bring the administration of justice into disrepute.

[56] Regarding the first of the three individual elements of the test set out in ***Grant*** which the court is required to balance, the Crown submits that the officers properly exercised their authority under the ***HTA*** by only asking questions related to that authority

and consistent with the reason articulated by the officers for initiating the traffic stop. The Crown submits that they did not act negligently or in bad faith in carrying out those responsibilities.

[57] Secondly, the Crown submits that the initial encounter was brief, minimally intrusive and did not seriously compromise the dignity or bodily integrity of the accused. He was not asked to participate in the investigation in a way that would incriminate himself.

[58] In respect of the third consideration under the ***Grant*** test, the Crown submits that the evidence seized in this case is reliable and essential to the Crown's case. It is the Crown's position that the exclusion of this evidence, particularly in view of the societal scourge that illegal loaded handguns present, and which the case law has recognized, strongly favours its admissibility.

[59] Finally, in balancing the three factors identified by the court in ***Grant***, the Crown submits that the accused has not met his onus of demonstrating that the admission of the evidence sought to be excluded would bring the administration of justice into disrepute and therefore the exclusion of the evidence is not warranted.

Decision

[60] In concluding that the evidence sought to be excluded by the accused should be admitted into evidence, I accept the position advanced by the Crown that the detention and arrest of the accused in this case was not arbitrary nor was the evidence sought to be excluded the product of an unreasonable search or seizure. Neither ss. 8 or 9 of the

Charter were violated by the police during the traffic stop generally or specifically upon the arrest of the accused and the other occupants of the vehicle.

[61] I accept the testimony of both officers who stated that they initiated the traffic stop under the authority of the ***HTA***, arising out of the concern that Sullivan had about the fact that the driver, whom he believed to be Garang when he first noticed the vehicle, was an unlicensed driver. The conduct of the officers as presented in their testimony and not shaken by cross-examination demonstrates that both officers acted in a manner consistent with that authority. It was not until the events that unfolded in the course of the traffic stop that led both officers to independently conclude there were reasonable and probable grounds to believe that all three occupants of the Hyundai were engaged in the possession of controlled substances for the purpose of trafficking. At that point the officers shifted their focus from a highway traffic stop and turned their minds to the fact that the accused and the other occupants were involved in criminal activity.

[62] I accept the testimony of the arresting officer, Whitney, who testified as to the grounds upon which he acted in placing all three occupants of the Hyundai under arrest. Counsel for the accused has suggested that Whitney did not accurately recount the basis as to why he decided to arrest the occupants of the motor vehicle, especially in view of the fact that his notes do not reflect the observation that before the arrest he saw some plastic bags of the type used by drug dealers to sell and generally handle their product on the console beside the driver's seat and on the floor at the driver's seat. As Whitney explained, this was his first time acting as an exhibit officer and that given the continuing impact of the very unsettling experience of having to wrestle the accused for the handgun

which the accused was attempting to remove from his waistband, he noted that all 31 empty plastic bags were seized from the driver's door side pocket.

[63] I have no difficulty in accepting the officer's explanation as to why the seizure was recorded as it was as well as his testimony that he initially saw some plastic bags on the console and the floor, prior to making his arrest.

[64] I also note that counsel for the accused questioned Sullivan as to whether he believed he had reasonable and probable grounds to arrest the accused based on what he observed. Despite some suggestion in the preliminary hearing transcript that he did not have reasonable and probable grounds, "at that point in time" (see the transcript of the preliminary inquiry King's Bench document No. 20 at p. T38, lines 16-19), at this *voir dire* he was clear that he had come to the conclusion that he believed he had reasonable and probable grounds to arrest all three occupants.

[65] In my opinion, the suggested ambiguity in respect of this issue, can in no small measure be attributed to the fact that at the preliminary hearing Sullivan had been asked several questions at a time by prior counsel for the accused, before he gave an answer. In my opinion, this less than satisfactory manner of asking questions of the officer is evident not only at the above-noted point in his questioning, but also prior to that point, which was also canvassed by the present counsel for the accused at this *voir dire*. This is set out in the transcript of the preliminary hearing at p. T37 from line 38 to p. T38 at line 14. I am satisfied based on the evidence and his response to the questions asked on the *voir dire* that Sullivan did arrive at the conclusion that there were reasonable and

probable grounds to arrest the accused for the possession of controlled substances for the purpose of trafficking prior to Whitney arresting the accused.

[66] I note that Whitney had significantly less experience than Sullivan did, but that based on his observations, his training and some relevant experience with investigating drug trafficking, I am of the opinion that Whitney had the subjective basis to arrest the accused based on the observations he made. The importance of the opinion of Sullivan in this respect may be instructive in assisting the court to determine whether the objective part of the test has been met. While I conclude that the subjective and objective elements of this test has been demonstrated in the evidence led by the Crown, given that Sullivan was the senior officer at this traffic stop, with a significant amount of gang and drug investigations and related police training and experience to his credit, his observations and opinion offer support about the propriety of the arrest made by Whitney on an objective basis.

[67] Having found that the arrest and the search and seizure of the impugned evidence does not violate ss. 8 and 9 of the ***Charter***, I find that the evidence is admissible for the purposes of the trial. Considering my finding that the accused has not demonstrated that there is a breach of any ***Charter*** right, it is not necessary for me to consider the s. 24(2) ***Charter*** argument. However, as the matter was argued by both counsel, I am prepared to provide my view in respect of the s. 24(2) ***Charter*** analysis had I found a breach of the ***Charter***.

[68] First, in respect of whether a breach in these circumstances is serious, it is important to note that not all ***Charter*** breaches are similarly placed. As the Crown notes

in its brief, there is a spectrum of conduct recognized by the Supreme Court of Canada and in ***R. v. Harrison***, 2009 SCC 34, [2009] 2 S.C.R. 494, at para. 23 (QL), McLachlin, C.J. addresses this issue as follows:

> **23** The trial judge found that the police officer's conduct in this case was "brazen", "flagrant" and "extremely serious". The metaphor of a spectrum used in *R. v. Kitaitchik* (2002), 166 C.C.C. (3d) 14 (Ont. C.A.), per Doherty J.A., may assist in characterizing police conduct for purposes of this s. 24(2) factor:
>
> > Police conduct can run the gamut from blameless conduct, through negligent conduct, to conduct demonstrating a blatant disregard for Charter rights. . . . What is important is the proper placement of the police conduct along that fault line, not the legal label attached to the conduct.[Citation omitted; para. 41.]

[69] In the present case there is no persuasive, if any, evidence to suggest that in initiating the traffic stop and conducting their inquiries once the vehicle was stopped, the officers exercised any authority other than that permitted by the ***HTA***. During those ***HTA*** related inquiries various observations were made by the officers which, based on their training and experience as police officers, led both, and more importantly Whitney, the officer who articulated the reason for the arrest to the three individuals in the vehicle, to conclude that there were reasonable and probable grounds to arrest.

[70] Once the accused was advised of his arrest, he immediately fled the car and the scene of the traffic stop. The police officers did not deliberately or otherwise fail to advise him of his additional rights under s. 10 of the ***Charter***. Given the reaction of this accused to the arrest, there was simply no opportunity for them to do so. Once Whitney was able to restrain the accused and secure the scene, including the handgun and ammunition, the accused was properly advised of his rights. In my view, the actions of the police

were taken in good faith and cannot be viewed as demonstrating a deliberate disregard of the accused's rights.

[71] Secondly, in respect of whether the impact of any assumed breach on the accused was serious, I am of the view that any intrusion on the bodily integrity, privacy and dignity of the accused was proportionate and measured. Both at the initial stop and in pursuing the accused after he attempted to flee the scene, the police exercised their statutory authority and the utilization of physical force appropriately, especially considering that the officer realized during the brief struggle with the accused that the accused was attempting to access a handgun from his clothing. Whether the accused was simply trying to rid himself of potentially incriminating evidence or whether he intended to utilize what later turned out to be a loaded and fully functional firearm is not clear. However, at the time of the struggle, the officer had no way of knowing what the accused's intentions were, but he no doubt assumed the worst as he was naturally entitled to do in these circumstances. He acted in a justified manner in striking the accused several times.

[72] Furthermore, it is important to note that no evidence in the form of admissions or answers to questions were directly elicited from the accused as he was not asked to participate in the investigation at the traffic stop in a way that would incriminate himself.

[73] Finally, in respect of the third element of the ***Grant*** analysis, being society's expectation that the matter be determined on its merits, the nature of the evidence in the specific factual matrix here favours the admission of the exhibits. It is not always the case that relevant and reliable evidence, including a firearm, is admitted into evidence where there has been a ***Charter*** breach. However in this case, where any assumed

breach does not involve a breach of s. 10 ***Charter*** rights, the exclusion of a loaded firearm recovered by the police in an extremely dangerous encounter with the accused – dangerous both to the individual police officers and innocent members of the public utilizing a busy vehicular thoroughfare and a nearby residential neighbourhood or a public park - would undermine the truth-seeking function of the justice system and render the trial unfair from the public perspective, thus bringing the administration of justice into disrepute.

[74] Accordingly, in balancing all three ***Grant*** factors, it is my view that all three factors favour the admission of the evidence, and that the accused has failed to meet his onus of demonstrating that the admission of this evidence would bring the administration of justice into disrepute.

Conclusion

[75] In conclusion, the evidence impugned on the *voir dire* is ruled admissible and is admitted into evidence at the trial.

[76] I would note that counsel for the accused did not challenge the fact that the accused had knowledge and control of the firearm, the magazine and the ammunition and that he was in possession of those exhibits in the Hyundai and subsequently in the course of the struggle with Whitney. The evidence in that respect is overwhelming.

[77] The totality of the evidence here establishes the Crown's case in respect of all essential elements on all counts beyond a reasonable doubt, including that the accused was in possession of a loaded handgun, and a loaded prohibited magazine, along with the ammunition as analyzed and set out in Exhibit 2 (the certificate of analysis defining

the classification of the firearm, the magazine and the ammunition). The evidence establishes beyond a reasonable doubt that the accused was in possession of these exhibits in the Hyundai motor vehicle, during the time he attempted to flee the scene of the traffic stop and during the subsequent struggle with Whitney.

[78] Considering the totality of the evidence and based on the admissions and agreements made by counsel at the onset of this blended hearing, I find that the Crown has proven beyond a reasonable doubt all the firearms related charges set out in the indictment (counts 4 through 7 and count 9), as well as the charge of resisting a peace officer engaged in the execution of his duty (count 8). Accordingly, and subject to any submissions counsel may wish to make in respect of the ***Kienapple*** principle, a conviction is entered against the accused in respect of each of those counts.

_____ J.